Part 8

Implementing and Regulating New Laws

In this part, we examine how new guardianship laws could be implemented and regulated. In Chapter 20 we look at the functions and powers of the Public Advocate. The Commission proposes a stronger supervisory, regulatory and investigative role for the Public Advocate. These functions could be complemented by more community education and training about guardianship laws. In Chapter 21, we consider the role of the Victorian Civil and Administrative Tribunal (VCAT) and discuss possible changes to enhance its accessibility.

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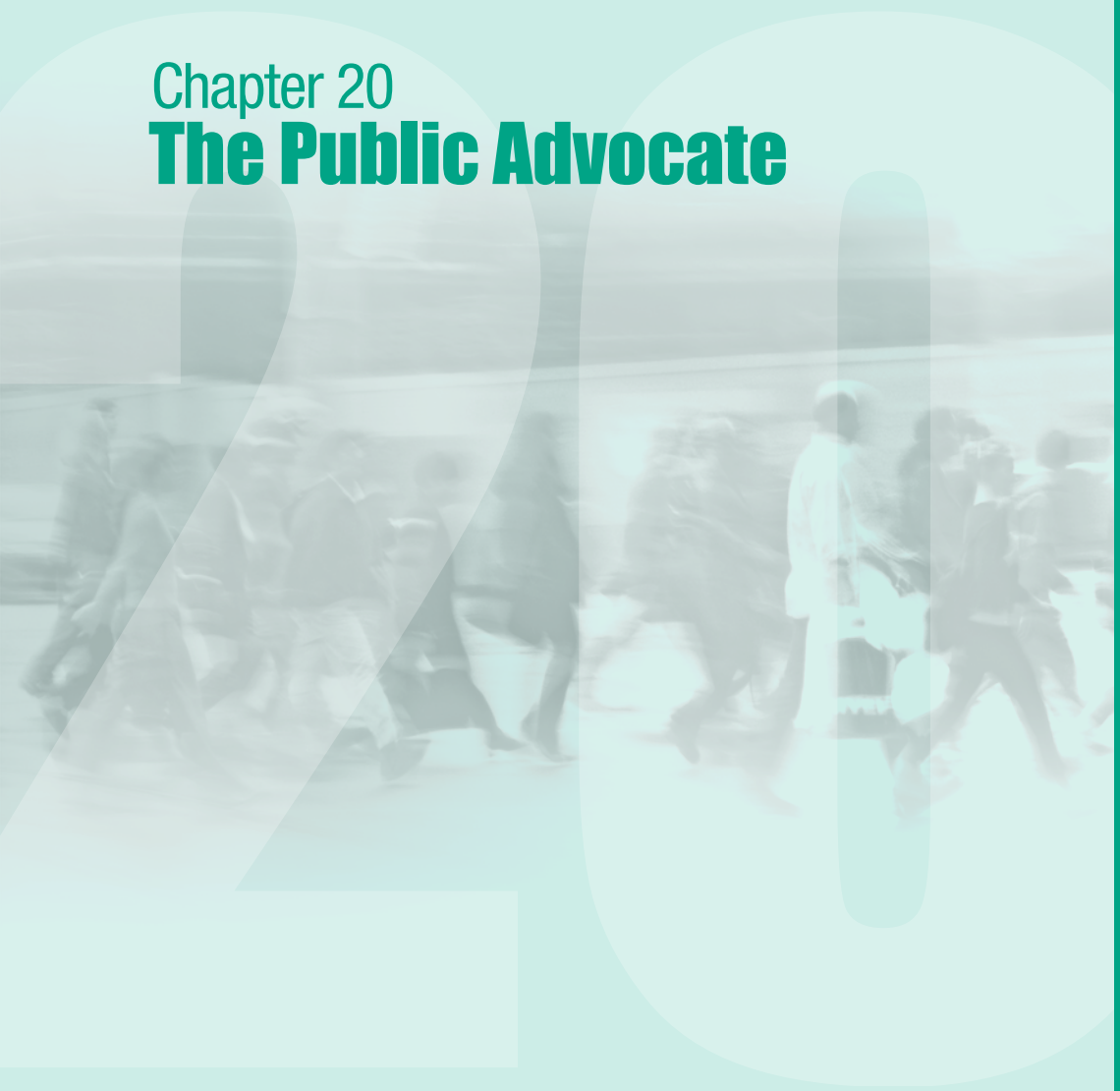

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Chapter 20 The Public Advocate

INTRODUCTION

20.1 The Public Advocate is an independent statutory official with a broad role to promote and safeguard the rights and interests of people with disabilities.

20.2 The position is established under the *Guardianship and Administration Act 1986* (Vic) (G&A Act).[1] Schedule 3 of the Act sets out various provisions relevant to the position of the Public Advocate, including important steps to secure independence.

- The position is appointed by the Governor in Council for a period of seven years.[2]
- The Public Advocate can only be removed from office by resolution of both houses of parliament.[3]

20.3 Colleen Pearce currently holds the position of Public Advocate. Her organisation—usually referred to as the Office of the Public Advocate (OPA)—employed 85 staff at 30 June 2010.[4] The total revenue for the Public Advocate's office in 2009–10 was just over $8.5 million.[5]

20.4 Staff include advocates/guardians, policy and education staff, people responsible for various community-based programs, legal officers and a range of corporate and administrative support staff.[6]

20.5 Our terms of reference ask us to consider the functions, powers and duties of the Public Advocate.[7]

CURRENT LAW

FUNCTIONS, POWERS AND DUTIES

20.6 The current functions, powers and duties of the Public Advocate are set out in part 3 of the G&A Act. In broad terms, these include:

- guardianship
- investigation
- advice
- advocacy
- community education.

Guardianship

20.7 The Public Advocate acts as guardian of last resort when VCAT determines that a person needs a guardian and no other suitable person is available.[8] In practice, the Public Advocate delegates most day-to-day decision-making responsibility to members of her staff or to community volunteers through a community guardianship program.[9]

20.8 In 2009–10, the Public Advocate acted as guardian in 1574 cases. Seventy-nine of these were temporary orders, and 749 were new orders made in that year.[10] In October 2010, the Public Advocate was guardian for 841 people.[11]

Investigations

20.9 The Public Advocate investigates matters at the request of the Victorian Civil and Administrative Tribunal (VCAT)[12] or in response to a complaint that a person is under inappropriate guardianship, is being exploited or abused, or is in need of guardianship.[13]

20.10 In 2009–10, the Public Advocate conducted 554 investigations at the request of VCAT. Fifty-four per cent of these related to people aged 65 and over.[14]

Advice

20.11 The Public Advocate gives advice to any person about the operation of the G&A Act and in relation to applications for guardianship and administration.[15]

20.12 In 2009–10, the Public Advocate's Telephone Advice Service received 13 673 calls. The most common areas in which callers seek advice are guardianship and administration (36 per cent) and enduring powers of attorney (23 per cent).[16]

Advocacy

20.13 The Public Advocate acts as an advocate, and generally supports advocacy, for people with disabilities.[17]

20.14 Advocate Guardians, who each have an average caseload of around 30 cases, carry out the Public Advocate's advocacy role. About five per cent of an Advocate Guardian's time is spent on advocacy, with guardianship being by far the major focus of their work (typically around 80 per cent of an Advocate Guardian's time).[18]

20.15 OPA's Advocate Guardian program is delivered by four teams of eight staff, each with its own team leader, and each focusing on its own geographical region of Victoria.[19]

Community education

20.16 The Public Advocate engages in community education and public awareness activities about the G&A Act and the rights of people with disabilities.[20]

20.17 In 2009–10, OPA delivered 185 community education sessions. Around 10 per cent of the audiences of these sessions were from regional Victoria.[21]

Other

20.18 The Public Advocate is also responsible for coordinating programs that operate outside of the G&A Act, such as the Community Visitors Program[22] and the Independent Third Person Program.[23]

COMMUNITY RESPONSES AND OTHER VIEWS

20.19 There was widespread support for the current functions of the Public Advocate, although this was often qualified by reference to OPA's inability to carry out its role effectively because of limited resources:

> *Action for Community Living supports the current functions and role of the Public Advocate as outlined in the Information Paper. However OPA needs increased resources to carry out their role in a timely and effective manner.*[24]

INDEPENDENCE

20.20 A few people questioned the independence of OPA, seeing it as being too often closely aligned with the Department of Human Services.[25] One submission argued that this is only further exacerbated by the lack of an external complaints-resolution process in relation to grievances against the Public Advocate:

> *There needs to be an opportunity for people who are aggrieved by any decision of the Public Advocate to access an external, independent body to investigate the concerns or complaint and to oversee dispute resolution processes. This is of particular importance in the context of people with a disability, whose vulnerability might be compounded by a lack of family and support networks.*[26]

1 *Guardianship and Administration Act 1986* (Vic) s 14.
2 Ibid sch 3 cl 1(1).
3 Ibid sch 3 cl 1(5).
4 Office of the Public Advocate (Victoria) ('OPA'), *Annual Report 2009–2010* (2010) 35. The 85 staff accounted for 73.8 effective full time equivalent positions.
5 Office of the Public Advocate (Victoria), *Annual Report 2009–2010* (2010) 37.
6 Ibid 38.
7 Victorian Law Reform Commission, *Guardianship Review Terms of Reference* (May 2009) 3(f).
8 *Guardianship and Administration Act 1986* (Vic) ss 16(1)(a), 23(4).
9 Ibid s 18(2) enables delegation of the Public Advocate's powers and duties as guardian to another individual or organisation, with the approval of VCAT.
10 OPA, *Annual Report 2009–2010*, above n 5, 5.
11 Guardianship interstate data provided by the New South Wales Public Guardian, 19 October 2010. The Public Advocate estimates the guardianship case closure for 2009–10 was around 50%: OPA, *Annual Report 2009–2010*, above n 5, 5.
12 *Guardianship and Administration Act 1986* (Vic) s 16(1)(d).
13 Ibid s 16(1)(h).
14 Email from the Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010.
15 *Guardianship and Administration Act 1986* (Vic) s 16(1)(g).
16 Email from the Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010.
17 As noted in the 'Problems with current law and practice' section below, this role of the Public Advocate is not particularly clear in the legislation, but is generally deduced from *Guardianship and Administration Act 1986* (Vic) ss 15(a)–(b), 16(1)(e)–(f): see [20.45]–[20.49]. Some discussion about different understandings of the advocacy role of the Public Advocate, and what this means in practice, is discussed in the 'Community responses and other views' section below: see [20.21]–[20.25].
18 Email from the Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010.
19 OPA, *Annual Report 2009–2010*, above n 5, 4.
20 *Guardianship and Administration Act 1986* (Vic) s 15(c).
21 Email from the Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010.
22 Set up under the *Mental Health Act 1986* (Vic) pt 6 div 5; *Health Services Act 1988* (Vic) pt 5; *Disability Act 2006* (Vic) pt 3 div 6. The Community Visitors Program recruits, trains and coordinates volunteers to regularly visit and inspect various residential services for people with mental illnesses and disabilities. The program reports annually to the Victorian Parliament.
23 Victoria Police, *Victoria Police Manual*, February 2–April 5 2009 VPM Instruction 112–13.The Independent Third Person Program recruits, trains and coordinates volunteers to help people with a cognitive disability or mental illness when they are being interviewed by police, as an alleged offender, victim or witness of a crime.
24 Submission IP 50 (Action for Community Living) 9.
25 See, eg, Submission IP 11 (Tony and Heather Tregale) 3.
26 Submission IP 34 (Anonymous) 4.

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ADVOCACY

20.21 The Public Advocate engages in both individual and systemic advocacy. The Commission acknowledges that these terms tend to be used in different ways throughout the community and that there is no universally agreed definition of advocacy. It can, however, be understood in broad terms as 'essentially the very ordinary process of standing up for the rights of people who are being treated unfairly'.[27] OPA describes its advocacy work as a 'last resort' service that 'focuses on the best interests of the person with a disability who is at risk of abuse, exploitation or neglect'.[28]

20.22 In practice, individual advocacy may involve OPA making phone calls, writing letters, or arranging meetings. In some circumstances, it might help with making formal complaints, mediation or legal cases.[29]

20.23 OPA's systemic advocacy activities often flow from its policy work, which aims to generate research that can be used to improve the lives of people with disabilities.[30]

20.24 The effectiveness of the Public Advocate's advocacy role was frequently raised in community responses to our information paper, with some people arguing that the role needs to be strengthened or carried out more stridently,[31] and others arguing that the advocacy function is neglected in favour of the Public Advocate's responsibilities as guardian of last resort.[32]

20.25 On this issue, the Public Advocate herself submitted that advocacy functions need greater legislative clarity and that:

> *new guardianship legislation should contain the provision of a clear systemic advocacy role for the Public Advocate on behalf of all people with a disability (which is not restricted to the narrower subset of people whose decision-making impairment satisfies one of the criteria for the making of a guardianship or administration order).*[33]

GUARDIAN

20.26 The Commission received a number of responses about the Public Advocate's role as a guardian. This included the view that OPA guardians are knowledgeable, approachable, and act in the best interests of the represented person.[34] Some people, however, expressed frustration and dissatisfaction with the way in which guardians carried out their role, either in relation to communication with family members,[35] or in terms of the actual decisions made.[36] Others noted that the role is often a very difficult one, dealing with conflict-ridden and highly contested cases, for which the Public Advocate is generally well-placed to be an effective and balanced substitute decision maker.[37]

INVESTIGATIONS

20.27 Some people suggested that the Public Advocate's investigatory role should be clarified and strengthened.[38] The Public Advocate's submission argued for particular extensions of its investigative powers, as well as for more matters to be referred to it by VCAT:

> *The Public Advocate's investigative powers should be extended to include situations of neglect (in addition to situations of apparent abuse and exploitation, section 16 (1)(h)). In addition these powers should be cross-referenced with, and applied to, the powers of the Public Advocate under the Disability Act (Part 5, sections 74(4), 76(7), and Part 8, sections 191(4), 194 and 196(2)).*[39]
>
> …

The current VCAT Act states that:

> *'The Tribunal may refer any matter relating to a proceeding under the Guardianship and Administration Act 1986 to a government department, public authority, service provider, the Public Advocate or a guardian or administrator appointed under that Act for investigation and report.'*[40]

OPA would like to see VCAT make greater use of this power, particularly in so far as VCAT has the power to order a service provider to report on its failure to provide a service. This would constitute an important judicial means of ensuring appropriate service provision for people with profound disabilities where services are not being provided. It may also help to address the present inappropriate use of guardianship as a mechanism for obtaining services and dealing with the deficiencies of the service system.[41]

20.28 Victoria Legal Aid expressed concerns about a potential conflict of interest when the Public Advocate investigates the appropriateness of a guardian's conduct in a case where it could itself be appointed as guardian.[42] While Victoria Legal Aid does not elaborate on the nature of this conflict, it presumably relates to a concern that the outcome of an investigation could be influenced by the Public Advocate's interest in being appointed as guardian.

COMMUNITY VISITORS PROGRAM

20.29 The Public Advocate administers the Community Visitors Program, established under various pieces of service legislation such as the *Mental Health Act 1986* (Vic). The Public Advocate recruits, trains and supports the volunteers who participate in the program.

20.30 We received a range of views about this program. Some argued that the program was no longer of any real benefit to people with disabilities,[43] or that community visitors' observations are frequently ignored by government agencies.[44] Others suggested that the program has been useful in raising issues about services and bringing them to public attention.[45]

20.31 The way in which community visitors interact with people was raised in one submission. The submission argued that, where a resident is unable to communicate directly, the community visitor should be obliged to speak with their guardian, as this is the only meaningful way in which the community visitor can gain the resident's perspective of the service in question.[46]

ADVOCATE/GUARDIAN

20.32 The Commission heard a range of views about the Public Advocate's dual role of advocate and guardian. Some saw the guardianship role as getting in the way of the advocacy,[47] while others argued that the future of the advocacy program would become vulnerable if the Public Advocate was not also providing guardianship services, even though the two roles can sometimes conflict.[48] It was also suggested that there may be an inherent conflict between the two roles, especially where the Public Advocate is required to investigate or advocate in relation to matters where it is also the guardian.[49]

20.33 There was relatively little criticism of the way in which OPA guardians carry out their role. Some people referred to problems that seem to be primarily attributable to large caseloads, such as a lack of accessibility to guardians, particularly in regional areas.[50] A few people expressed dissatisfaction with decisions made by OPA guardians.[51]

27 Ian Parsons, *Oliver Twist Has Asked for More* (Villamanta Publishing, 1994) 10.

28 Office of the Public Advocate (Victoria), *Advocacy* (29 November 2011) <http://www.publicadvocate.vic.gov.au/services/103>.

29 Ibid.

30 Office of the Public Advocate (Victoria), *Services* (6 September 2010) <http://www.publicadvocate.vic.gov.au/services>.

31 See, eg, consultations with Fiona Smith (18 March 2010), carers, people with disabilities and service providers in Ballarat (15 April 2010) and Margaret Ryan and Max Jackson (4 May 2010).

32 Consultations with Disability Advocacy Resource Unit (5 May 2010) and metropolitan carers (6 May 2010).

33 Submission IP 8 (Office of the Public Advocate) 27.

34 See, eg, consultation with Aged and Community Care Victoria (12 May 2010).

35 Submission IP 18 (BMC Ministries Inc.) 3–4.

36 See, eg, consultation with Oasis Aged Care Mildura (28 April 2010).

37 Consultation with David Green (21 April 2010).

38 See, eg, Submissions IP 9 (Royal District Nursing Service) 5 and IP 39 (Aged Care Assessment Services of Victoria) 3.

39 Submission IP 8 (Office of the Public Advocate) 27.

40 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 s 35(1).

41 Submission IP 8 (Office of the Public Advocate) 28–9.

42 Submission IP 43 (Victoria Legal Aid) 12.

43 Consultation with Margaret Ryan and Max Jackson (4 May 2010).

44 Consultation with Gippsland Carers Association (25 May 2010).

45 Consultation with disability service providers in Morwell (29 March 2010).

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

47 See, eg, consultation with metropolitan carers (6 May 2010).

48 Consultation with Fiona Smith (18 March 2010).

49 Submission IP 56 (JacksonRyan Partners) 6.

50 Consultation with Oasis Aged Care Mildura (28 April 2010).

51 See, eg, Submission IP 7 (Stephanie Mortimer) 1.

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COMMUNITY EDUCATION

20.34 Many people suggested that the Public Advocate's community education role should be better resourced[52] and expanded so that it is more culturally accessible.[53]

OTHER FUNCTIONS

20.35 Other comments about the Public Advocate's role and functions included:

- concern about the Public Advocate's inability to delegate her appointment as agent under the *Medical Treatment Act 1988* (Vic) and as enduring guardian under the G&A Act[54]
- a need to have more people with disabilities working in OPA[55]
- a need for the Public Advocate to play a stronger role in educating, assessing and supervising guardians[56]
- a need for the Public Advocate to play a stronger role in supporting enduring guardians, attorneys and agents[57]
- concern about the legislation's current requirement for VCAT to approve delegation of guardianship from the Public Advocate to staff within the Public Advocate[58]
- concern about lack of support to carers undertaking a substitute decision-making role[59]
- a lack of regional presence and accessibility of the Public Advocate and her office.[60]

PROBLEMS WITH CURRENT LAW AND PRACTICE

20.36 Many of the issues raised about the operations of the Public Advocate concern resources. Other matters, however, appear to require a range of legislative and organisational responses.

INVESTIGATION

20.37 While community responses to our information paper indicated a widespread expectation that the Public Advocate play an important role in investigations about the rights of people with disabilities—both in the context of guardianship and more broadly—the investigatory powers of the Public Advocate are in fact quite limited.

20.38 The Public Advocate has two distinct investigatory roles under the G&A Act. First, section 16(d) gives OPA the power to report to VCAT on any matter VCAT refers to it. Secondly, section 16(1)(h) gives the Public Advocate the power to 'investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship'.

20.39 While these provisions are expressed broadly, they are limited in their application to circumstances where a guardianship or administration order might be appropriate. Further, the Public Advocate does not have a comprehensive range of powers to carry out these functions.

20.40 While many matters involving allegations of abuse, neglect or exploitation of people with disabilities might involve the possibility of a guardianship application, this will not always be the case. For example, a physically frail older person, who has no impaired capacity at all, might be experiencing physical abuse in a family home, or in a service.

20.41 The Public Advocate's investigative powers[61] are not particularly clear. While the G&A Act allows the Public Advocate to require people and organisations to provide her with information for the purposes of either an investigation carried out under section 16(1)(h) of the Act, or when providing a report to VCAT,[62] the manner in which the information must be provided is not stipulated. It may be helpful to clarify the extent of those powers. For example, the Public Advocate could be empowered to require a person to answer questions or provide documents when she had reasonable grounds for believing that a person may be being abused.[63]

20.42 The current uncertainty about the breadth of these powers to obtain information disadvantages both the Public Advocate and the people she investigates. While section 80 of the G&A Act makes it an offence for any person to contravene any provision of the Act—such as failing to provide the Public Advocate with any information she has requested—the circumstances under which such an offence might be committed remain unclear.

20.43 Section 18A of the G&A Act gives the Public Advocate the power to enter and inspect some premises. At present, this power is limited to inspection of premises where services are provided under the *Disability Act 2006* (Vic), the *Health Services Act 1988* (Vic) and the *Mental Health Act 1986* (Vic).[64] Given the shift of focus in service provision over the past twenty years from institutional and facility based services to the provision of support in people's own homes and other private settings, it may be necessary to extend these powers of entry and inspection to a broader range of premises. It seems desirable that a judicial officer be required to issue a warrant before the Public Advocate is empowered to enter private premises.

20.44 There appears to be a need to establish mechanisms that provide greater scrutiny of personal appointments and automatic appointments. The Public Advocate could be authorised to investigate concerns about how these powers are being exercised.

ADVOCACY

20.45 The Public Advocate's advocacy role—both individual and systemic—could be clarified and strengthened. While the G&A Act[65] gives the Public Advocate various advocate-style functions, the systemic advocacy role is poorly articulated.

20.46 The G&A Act does not provide the Public Advocate with much guidance about the principles or factors that should guide her advocacy role. The Act requires that a guardian should be an advocate for a represented person in order to act in their best interests.[66] This suggests a link between advocacy and the concept of best interests. Alternatively, principles such as those set out in the *Convention on the Rights of Persons with Disabilities*[67] might provide a clearer and more modern basis for the Public Advocate's advocacy work.

20.47 There appears to be a widespread expectation that advocacy should become a more prominent part of the Public Advocate's role.[68] While no one suggested that the G&A Act's lack of clarity about advocacy has actually impeded the Public Advocate from undertaking her advocacy work, the role requires a stronger and clearer legislative base.

20.48 The G&A Act gives the Public Advocate the function of supporting the establishment of community-based advocacy for people with disabilities, including citizen advocacy.[69] We received few comments about this role. The Victorian Government now funds the Disability Advocacy Resource Unit, which supports advocacy agencies throughout Victoria. The Commission understands that the Public Advocate played a significant support and advisory role in the development of this unit.

52 See, eg, Submissions IP 9 (Royal District Nursing Service) 4 and IP 16 (Mark Feigan) 15.

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

54 Consultation with Julian Gardner (26 March 2010).

55 Consultation with VALID Northern Region Client Network (3 March 2010).

56 Submissions IP 16 (Mark Feigan) 15 and IP 27 (Marillac) 4.

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

58 Submission IP 8 (Office of the Public Advocate) 27.

59 Submission IP 1 (Carers Australia (Victoria)) 10.

60 Consultation with Gippsland Carers Association (25 May 2010).

61 Set out in *Guardianship and Administration Act 1986* (Vic) ss 16(1)(ha), 18A.

62 VCAT's own legislation allows it to refer to the Public Advocate any matter relating to a proceeding under the G&A Act, the *Instruments Act 1958* (Vic) or s 5C of the *Medical Treatment Act 1988* (Vic): see *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cls 35, 42, 48.

63 See, eg, the *Child Wellbeing and Safety Act 2005* (Vic) ss 26, 30, 34, which gives the Child Safety Commissioner a clear right of access to particular information about vulnerable children. See also s 23, which places a clear obligation on the Secretary of the Department of Human Services, as well as a person in charge of an out-of-home care service, to provide any reasonable assistance requested by the Commissioner in carrying out their functions.

64 *Guardianship and Administration Act 1986* (Vic) s 18A(5).

65 See ibid ss 15(a)–(b), 16(1)(e)–(f).

66 Ibid s 28(2)(a).

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

68 See, eg, Submission IP 56 (JacksonRyan Partners) 6.

69 *Guardianship and Administration Act 1986* (Vic) ss 15(b)–(i).

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20.49 Unlike most similar statutory officers, the Public Advocate is not required to report annually to Parliament. Her reporting requirements are limited to reporting to the Minister' on any aspect of the operation of this Act referred to the Public Advocate by the Minister'[70]. It would enhance the Public Advocate's accountability and independence if she were required to report to Parliament annually.

GUARDIANSHIP

20.50 The Public Advocate's role as guardian of last resort is a significant and resource-intensive function. The Public Advocate commented upon the growing demands of this role:

> *[S]ervice provision to people with disabilities is increasingly becoming more individualised, and guardianship has increasingly been used as a de facto means by which service provision is negotiated. OPA here makes the point that guardianship was never intended to be a substitute for case management, or a way of dealing with inadequate service provision. OPA is of the view that guardianship is too readily used as a response to service system gaps or when other alternative solutions might be more in the interests of the person concerned.*[71]
>
> *OPA would also point out that guardianship cases are becoming increasingly more complex. In addition to rising rates of dementia, people with profound cognitive disabilities are living for longer. They are also less and less likely to be residing in institutions. As a result, the decisions which guardians are required to make are becoming more complex. Added to this, and consistent with developments in supported decision making, it is expected that guardians will be required to involve represented persons and significant others more and more in determining courses of action, which will add to the complex and time-intensive nature of the role of guardian.*[72] *The Public Advocate's program of support to private guardians, as well as its own community guardianship program, offer opportunities for extending and strengthening guardianship beyond the Public Advocate and her staff. There may be merit in extending these programs.*

20.51 At present, the Public Advocate may only delegate her guardianship responsibilities with the approval of VCAT.[73] This appears to be an unnecessary restriction, especially because the Public Advocate is the guardian for hundreds of people at any time. There are no similar restrictions on the use of delegation powers that apply when the Secretary of the Department of Human Services is appointed as guardian of children.[74]

20.52 The Public Advocate has a role to support private guardians.[75] We discuss means by which this role may be enhanced later in this chapter.

REGIONAL ISSUES

20.53 The Public Advocate's lack of a regional presence both as advocate and as guardian was noted in the community responses section of this chapter. It seems apparent that some of the functions and responsibilities of a guardian are more easily carried out when it is possible to have relatively easy and immediate contact with the represented person.[76]

PROTECTION AGAINST ABUSE

20.54 Community responses to our information paper indicated growing concern about the abuse of vulnerable people, and particularly of older people.[77] While there was little support for dealing with this problem through guardianship, which continues to be seen as a 'last resort' option,[78] there is widespread support for the development of a coordinated adult protection strategy, which, the Public Advocate argues:

> *would need to liaise closely with current elder abuse prevention strategies being pursued in Victoria (through the Department of Planning and Community Development and the Office of Senior Victorians), and would ideally incorporate:*
>
> – *Significant new funding to resource local councils or other local providers to follow up on adult protection alerts;*
>
> – *A community education campaign, geared around the need to actively involve citizens in the lives of vulnerable adults;*
>
> – *A 24-hour call-in line;*
>
> – *A small Office of Adult Protection, whose main role would be to act as the central point for referrals and for overseeing the funding of local councils or other local providers to deliver adult protection services.*[79]

20.55 The Commission has not received any suggestions about the role that the Public Advocate might play in an adult protection strategy. This important matter requires further consideration.

COMMUNITY EDUCATION

20.56 The G&A Act gives the Public Advocate a broad role in relation to community education about guardianship issues.[80] This activity could be extended, as public awareness of guardianship laws appears low.

20.57 Community education can and does happen in a range of ways including through:

- targeted information sessions for people throughout Victoria who have an interest in guardianship issues, including people with disabilities, families and disability service providers
- support to people using the system, including the private guardians and administrators and people holding power of attorney
- information to professionals who are likely to engage with the system as third parties, such as medical practitioners and financial service providers
- information to the broader community
- supporting the development of other community education initiatives delivered by other agencies throughout the community.

20.58 While the Public Advocate has the power to undertake all of these activities under the current legislation, her capacity to do so is restricted by the funds available to her for this purpose. As it is highly desirable that people be encouraged to make their own substitute decision-making arrangements by appointing family members or friends to undertake this significant responsibility, the Public Advocate could play an important role in promoting community awareness of guardianship laws.

70 Ibid s 15(d).

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

72 Ibid 14.

73 *Guardianship and Administration Act 1986* (Vic) s 17(2).

74 *Children, Youth and Families Act 2005* (Vic) s 17.

75 *Guardianship and Administration Act 1986* (Vic) s 16(1)(i).

76 As set out in ibid s 28.

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

78 See Submission IP 43 (Victoria Legal Aid) 8.

79 Submission IP 8 (Office of the Public Advocate) 7

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

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20.59 Some of the areas where a stronger education role for the Public Advocate might be useful include:

- more training of third parties, particularly health professionals, about how the guardianship system operates, including the role of automatic appointees, and the relationship between the medical treatment provisions of the G&A Act and the *Medical Treatment Act 1988* (Vic)
- more education of substitute decision makers, including private guardians, administrators and personal appointees, about the roles and responsibilities of these positions
- more community education for people with disabilities, families and disability service providers, especially in regional Victoria, about the legislation and about how to plan for the future.

The Public Advocate could also play an important educative role about supported decision making if it becomes part of new guardianship laws.

20.60 While it would be inappropriate for the Public Advocate to be a supporter because of the need for an ongoing and close relationship with the supported person, the Public Advocate could play an important role in assisting people with these arrangements. The Public Advocate could provide advice, training and support, and also investigate allegations of inappropriate behaviour by decision-making supporters. This role would be similar to the Public Advocate's role in relation to private guardianship.

20.61 It might also be feasible for the Public Advocate to establish a program that enables people with a disability to meet volunteers or members of community agencies who might accept appointment as a supporter.

NEW FUNCTIONS FOR THE PUBLIC ADVOCATE

20.62 Consultations and submissions have revealed a number of additional functions that could be given to the Public Advocate. Possible new functions include:

- more formal training and support of private guardians and administrators
- a role in establishing a register of all personal appointments
- receiving notifications of the activation of personal appointments
- receiving and investigating allegations of misuse of powers given under personal appointments and, where necessary, seeking VCAT orders in relation to these
- providing training and support for supported decision-making arrangements
- administering a program to assist people with disabilities in need of decision-making support to locate people or organisations available to provide it
- coordinating and/or providing investigations into allegations of abuse of people with disabilities and older people and, where appropriate, referring matters to other agencies, including VCAT or the police, for action.

OTHER JURISDICTIONS AND VIEWS

20.63 All Australian jurisdictions, except the Northern Territory and New South Wales, have a statutory office with powers and functions similar to that of Victoria's Public Advocate. In most jurisdictions, as in Victoria, the same statutory officer has an advocacy role as well as being the guardian of last resort.[81] In Queensland, the roles are separate. There is both a Public Advocate[82] and an Adult Guardian.[83] In New South Wales, there is a Public Guardian[84] but not a Public Advocate. However, a New South Wales parliamentary committee has recommended the establishment of a Public Advocate.[85]

20.64 Victoria's rate of use of public guardianship is broadly similar to that of other Australian jurisdictions. At 30 June 2010, 28.6 of every 100 000 Victorians had a public guardian.[86] New South Wales and Western Australia had slightly lower incidence of public guardianship —27 and 26.1 cases per 100 000 people respectively—while Queensland and South Australia each had 32.6 cases per 100 000. Tasmania had 36.4 and the ACT had 44.1 cases per 100 000. By far the highest per capita user of public guardianship was the Northern Territory, with 169.6 cases of public guardianship per 100 000 people at 30 June 2010.[87]

20.65 It is also interesting to note that while Victoria had 1574 guardianship cases open at some stage during 2009–10, compared to 1545 in Queensland and 2617 in New South Wales, it had 841 people under guardianship at the end of that year compared 1462 and 1943 in the other two jurisdictions respectively.[88] This suggests that public guardianship orders might be narrower and therefore operate for shorter periods than similar orders in those other jurisdictions.

20.66 South Australian legislation gives the Public Advocate a very broad range of functions in relation to both systemic and individual advocacy for people with disabilities[89] and, in addition, for carers.[90] The South Australian legislation limits these functions of the Public Advocate to issues concerning people with a mental incapacity. In Queensland, the advocacy functions are limited to systemic advocacy.[91]

20.67 Both the Tasmanian Public Guardian[92] and the Western Australian Public Advocate have similar functions to those of the Victorian Public Advocate.[93]

20.68 No jurisdiction gives its Public Advocate, or equivalent, any enforcement powers that are stronger or more detailed than those in the Victorian legislation.

20.69 The Queensland Law Reform Commission has recommended stronger powers for the Adult Guardian in her systemic advocacy functions, particularly in relation to the power to require information and access documents. The Commission recommended that the Adult Guardian should have the power to obtain documents or information from an agency or individual, and that there should be civil penalties for non-compliance.[94]

20.70 It is timely to consider whether the Public Advocate should have additional functions and powers.

POSSIBLE OPTIONS FOR REFORM

20.71 The Commission has developed a number of options concerning additional functions and powers for the Public Advocate.

INVESTIGATION

20.72 The Commission proposes that new guardianship legislation could clarify and broaden the Public Advocate's investigatory role, particularly in response to growing community concern about elder abuse, such as abuse by people holding powers of attorney. The Public Advocate could be given appropriate powers to investigate:

- any complaint or allegation of abuse, neglect or exploitation of any person or people with disabilities including, but not limited to, a person under a guardianship or administration order, or for whom a personal appointment has been activated
- circumstances relevant to any application, or potential application, for guardianship or administration as requested by VCAT or as deemed necessary by the Public Advocate
- matters without any complaint having been made.

81 *Guardianship and Administration Act 1990* (WA) s 91; *Guardianship and Management of Property Act 1991* (ACT) s 9; *Guardianship and Administration Act 1993* (SA) s 29; *Guardianship and Administration Act 1995* (Tas) s 14.

82 *Guardianship and Administration Act 2000* (Qld) ch 9.

83 Ibid ch 8.

84 *Guardianship Act 1987* (NSW) pt 7.

85 Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-making for People Lacking Capacity* (2010) 172–7.

86 Guardianship interstate data provided by the New South Wales Public Guardian, 19 October 2010. This percentage is consistent with data included in the Office of the Public Advocate's 2009–10 annual report, basing the number of guardianship cases during the year as a proportion of Victoria's population to arrive at this figure: OPA, *Annual Report 2009–2010*, above n 5, 5.

87 Guardianship interstate data provided by the New South Wales Public Guardian, 19 October 2010.

88 Ibid.

89 *Guardianship and Administration Act 1993* (SA) ss 21(1)(c)–(d).

90 Ibid s 21(1)(e).

91 *Guardianship and Administration Act 2000* (Qld) s 209.

92 *Guardianship and Administration Act 1995* (Tas) s 15.

93 *Guardianship and Administration Act 1990* (WA) s 97(g).

94 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 4, 256–7, 259 [24.5]–[24.7].

The Public Advocate

20.73 The Public Advocate's investigative powers could be strengthened by:

- clarifying the extent of those powers and the corresponding obligations of third parties to answer questions and provide documents
- extending the Public Advocate's powers to permit entry to private premises with a warrant issued by a judicial officer when satisfied that the Public Advocate has reasonable grounds for suspecting that a person with a disability who has been neglected, exploited or abused is on those premises.

20.74 The Public Advocate's existing investigative powers are unclear, especially when compared to those of many other statutory officials. For example, while the Public Advocate can require a person or a public body to provide her with information for various purposes,[95] the G&A Act does not stipulate whether the Public Advocate can require people to provide her with documents or attend her offices for questioning.

Penalties

20.75 The penalty provision in the G&A Act[96] is effectively unworkable because Victoria Police is the only organisation that has the capacity to conduct a prosecution. The Commission is unaware of any prosecutions under the G&A Act. It is unrealistic to expect Victoria Police to become involved in guardianship cases other than those that involve serious physical abuse or misappropriation of considerable sums of money. In these instances, offences other than breach of the G&A Act will usually be available.

20.76 For this reason, it is appropriate to consider whether the general offence provision in the G&A Act should be extended to include civil as well as criminal penalties. The Public Advocate could be given the power to take civil penalty proceedings against people who are alleged to have breached guardianship legislation. The possible advantages in introducing civil penalties include:

- In many instances, the wrong committed may not involve conduct that should be treated as a criminal offence.[97]
- Civil penalty proceedings are usually less costly and less complex than criminal proceedings.[98]
- An increased use of civil penalties would be consistent with trends in other areas of Victorian legislation, including under the *Essential Services Commission Act 2001* (Vic), the *Rail Corporations Act 1996* (Vic), and the *Victorian Renewable Energy Act 2006* (Vic).

Question 118 Do you believe the Public Advocate's investigation function should extend beyond cases concerning guardianship and administration?

Question 119 Do you think the Public Advocate's investigatory powers should be clarified so that she can require people and organisations to provide her with documents and attend her offices to answer questions?

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

Question 121 Do you think it is necessary to protect the anonymity of people who provide the Public Advocate with information about the possible abuse, neglect or exploitation of people with a disability?[99]

Question 122 Should the Public Advocate be able to take civil penalty proceedings against people who have allegedly breached guardianship legislation?

ADVOCACY

20.77 New guardianship legislation could clarify and strengthen the Public Advocate's advocacy role by empowering her to advocate for:

- individuals with a disability who are at risk of abuse, neglect, exploitation or harm, especially where the person's disability has limited their autonomy or their capacity to assert their own rights
- reforms that will help address systemic and social disadvantage for people with disabilities.

20.78 Reforms of this nature would clarify the Public Advocate's advocacy role. It might also be desirable to remove the Public Advocate's current function of supporting the establishment of community advocacy organisations because it appears to be redundant.

Question 123 Do you support clarifying the Public Advocate's individual and systemic advocacy functions in guardianship legislation?

Question 124 Do you think that the legislation should include principles to guide the Public Advocate when undertaking her advocacy functions?

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

PUBLIC GUARDIANSHIP

20.79 The Commission proposes that the Public Advocate should remain the guardian of last resort. Given the size of this task, new guardianship legislation should allow the Public Advocate to delegate any of her powers as a guardian without approval from VCAT.

20.80 At this stage, the Commission does not propose separating the Public Advocate's guardianship and advocacy responsibilities, even though some people suggest that the roles may sometimes come into conflict. The Commission sees few benefits in establishing a separate advocacy program.

Question 126 Do you agree that the Public Advocate should continue to be both the guardian of last resort and an advocate?

PRIVATE GUARDIANSHIP

20.81 'Private guardianship' is a term sometimes used to describe guardians other than the Public Advocate. Various issues relating to the appointment of private guardians and administrators are discussed in Chapter 12.

95 *Guardianship and Administration Act 1986* (Vic) s 16(ha).

96 Ibid s 80.

97 See, eg, Attorney-General's Department (Commonwealth), *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007) 63–4.

98 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia,* Report No 95 (2002) [2.81].

99 Section 41 of the *Children, Youth and Families Act 2005* (Vic) keeps the name of the person who made a referral and any information likely to lead their identification confidential. There is a penalty for disclosure.

Chapter 20 The Public Advocate

20.82 New guardianship legislation could give the Public Advocate responsibility for training and supporting private guardians. The Public Advocate could also be responsible for monitoring the activities of private guardians, either generally or in particular cases. This function could be performed by requiring yearly reports from private guardians, or through yearly meetings with the guardian and the represented person.

Question 127 Should the Public Advocate be responsible for training and supporting private guardians?

Question 128 Should the Public Advocate be responsible for monitoring the activities of all or some private guardians?

Question 129 If so, how should any monitoring activities be performed?

PERSONAL APPOINTMENTS

20.83 'Personal appointments' refer to appointments of a substitute decision maker that are made by a person themselves, rather than by VCAT. Personal appointments are discussed in Chapter 8. The Commission believes that there should be a register of personal appointments.

20.84 New guardianship legislation could give the Public Advocate a role in establishing a register of personal appointments, including those related to financial, medical and other lifestyle matters. While the Commission is not proposing that the Public Advocate host a register of personal appointments, her office has broad-ranging expertise that could be used when designing a register.

20.85 New guardianship legislation could also give the Public Advocate responsibility to monitor the operation of personal appointments by:

- requiring appointees to notify the Public Advocate when the appointment is activated
- requiring appointees to submit regular declarations of compliance to the Public Advocate
- enabling the Public Advocate to undertake random audits of personal appointments that have been activated
- enabling the Public Advocate to investigate any allegations of misuse of powers.

Question 130 Do you think the Public Advocate should play a role in designing a register of personal appointments?

Question 131 Do you think the Public Advocate should be given responsibility for monitoring the activities of personally appointed substitute decision makers?

Question 132 If so, what functions and powers should be given to the Public Advocate to undertake this responsibility?

AUTOMATIC APPOINTMENTS

20.86 'Automatic appointments' refer to the provisions in section 37 of the G&A Act, which permit the person responsible for another person with impaired decision-making capacity to consent to most forms of medical treatment on their behalf. They are discussed in more detail in Chapter 14.

20.87 New guardianship legislation could give the Public Advocate an expanded role in responding to concerns about the conduct of automatic appointees. As discussed in Chapter 14, this could include requiring medical practitioners to report any suspected misuse of authority by an automatic appointee. The Public Advocate could be given responsibility to investigate these allegations and seek appropriate orders from VCAT when necessary.

Question 133 Do you think the Public Advocate should be given any responsibilities to deal with possible misuses of power by a person who is automatically appointed by legislation to make decisions for another person?

SUPPORTED DECISION-MAKING ARRANGEMENTS

20.88 If supported decision-making arrangements are included in new guardianship legislation, the Public Advocate could be given a training, support and monitoring role in relation to these arrangements that is similar to the role proposed in relation to private guardians.

20.89 The Public Advocate could be given responsibility for:

- offering training for people who are either formally or informally supporting people with disabilities in decision making
- administering a program whereby people could be put in touch with possible decision-making supporters, if there is no-one available or appropriate to play that role among their own personal networks
- investigating any allegations of abuse or misuse of the supported decision-making role
- providing advice and guidance to supporters as necessary
- conducting reviews of supported decision-making arrangements.

20.90 Supported decision making is a new concept which will require extensive training and support if it is to be broadly accepted. The Public Advocate is an appropriate agency to perform these functions.

20.91 As indicated earlier, the Commission does not believe that the Public Advocate should accept appointment as a 'supporter', because of the private and possibly labour-intensive nature of the role. However, the Public Advocate could play a role in helping people without an appropriate supporter make contact with volunteers or agencies that are able to provide this assistance.

20.92 The Commission asks questions about the role of the Public Advocate in supported decision making in Chapter 7.

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REPORTING TO PARLIAMENT

20.93 New guardianship legislation could require the Public Advocate to report annually to Parliament about her activities. This step could promote both accountability and independence. It is strongly arguable that statutory officials who have important responsibilities for vulnerable people and who have extensive powers to exercise those responsibilities should report regularly and directly to the legislative branch of government about their activities.

Q **Question 134** Do you think the Public Advocate should be required to report annually to Parliament?

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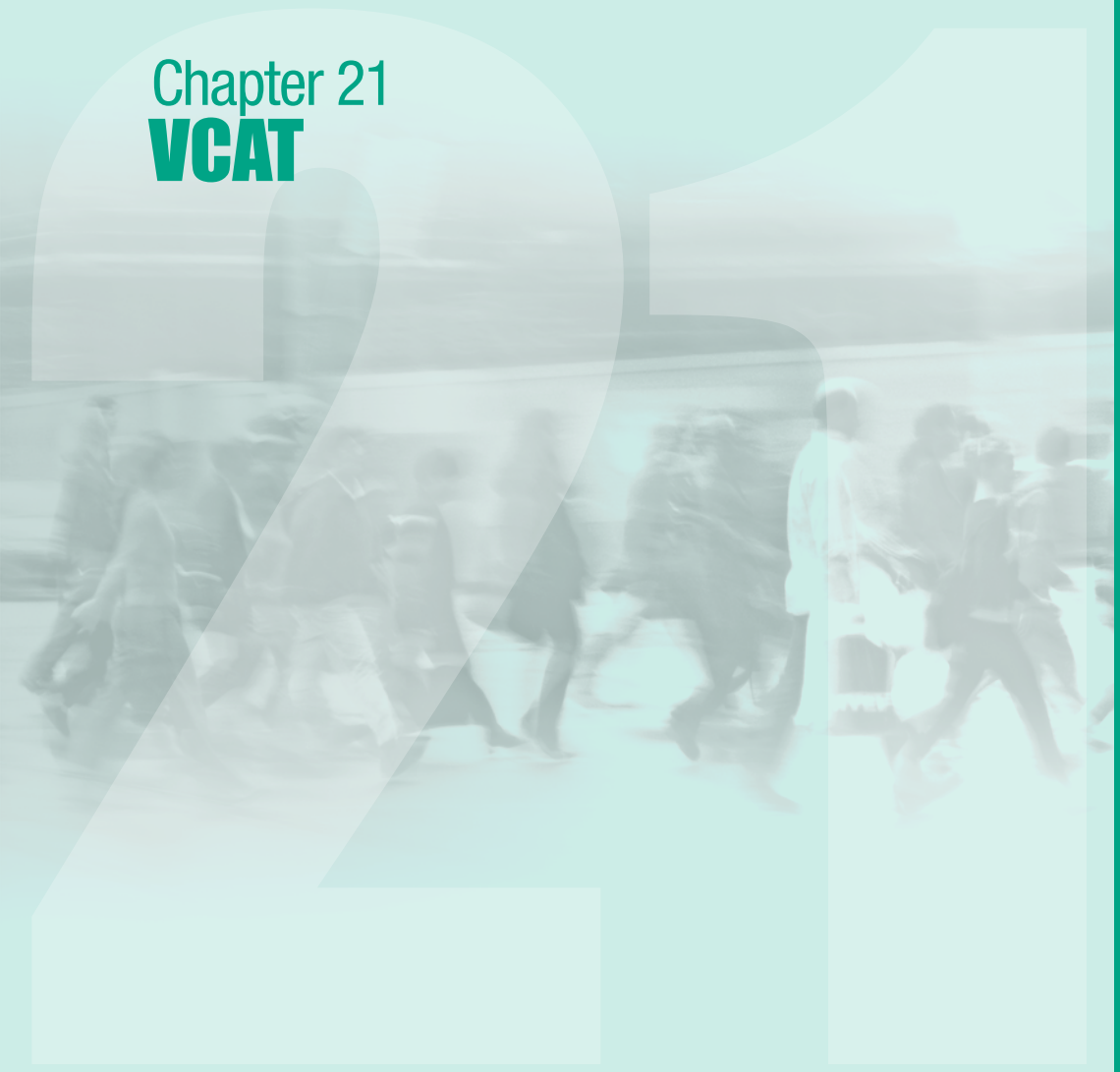
VCAT



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INTRODUCTION

21.1 The Victorian Civil and Administrative Tribunal (VCAT) has a central role in Victorian guardianship law. It decides whether a guardian or administrator should be appointed to make personal or financial decisions for another person.

21.2 VCAT is a large 'super tribunal' that deals with many legal matters ranging from disputes between private individuals and traders to reviewing various decisions made by government agencies. Prior to the establishment of VCAT in 1998, a separate tribunal—the Guardianship and Administration Board—dealt with guardianship and administration matters.[1] Nearly all Victorian tribunals were brought within the VCAT structure in 1998.

21.3 VCAT has three divisions—civil, administrative and human rights. Each division has a number of sections called 'lists' that specialise in hearing particular types of cases. The 'Guardianship List' is part of the Human Rights Division.

21.4 The Commission has been asked to consider:

> *The role and powers of the Victorian Civil and Administrative Tribunal in relation to guardians and administrators and the efficacy of its processes for the appointment of guardians and administrators under the Act and the Victorian Civil and Administrative Tribunal Act 1998 and Rules.*[2]

21.5 VCAT is undergoing internal review and reorganisation. The President's review of VCAT, released in November 2009, contained a range of proposed reforms.[3] Many of these proposed reforms formed the basis of VCAT's recent three-year strategic plan released by VCAT's new President, Justice Iain Ross, in 2010. This strategic plan is known as *Transforming VCAT*.[4]

21.6 The Commission has also been asked to consider whether Victoria's guardianship laws adequately deal with the issue of confidentiality.[5] Striking an appropriate balance between confidentiality and transparency is a matter that sometimes arises at VCAT hearings.

CURRENT LAW

ROLE AND POWERS OF VCAT

21.7 VCAT's general powers and procedures are largely governed by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic)[6] (VCAT Act) and the *Victorian Civil and Administrative Tribunal Rules 2008* (Vic).[7] Its specific powers in relation to guardianship and administration are set out in the *Guardianship and Administration Act1986* (Vic) (G&A Act).

21.8 The main functions of the Guardianship List at VCAT are:

- deciding whether guardians should be appointed, appointing guardians and reassessing guardianship orders
- deciding whether administrators should be appointed, appointing administrators and reassessing administration orders
- providing advice, upon request, to guardians, administrators and the person responsible about how they exercise their powers
- deciding whether to revoke an attorney's appointment, or varying, suspending or making another order in relation to an enduring power of attorney (financial) under the *Instruments Act 1958* (Vic)
- deciding whether to revoke or suspend an enduring power of attorney (medical treatment) under the *Medical Treatment Act 1988* (Vic)

- deciding whether to consent to a 'special procedure' in relation to medical treatment.

21.9 The Guardianship List also has responsibility for hearing applications in relation to various matters governed by the *Disability Act 2006* (Vic).[8] These applications do not directly relate to the Commission's review of the G&A Act, but we consider the relationship between the G&A Act and the *Disability Act 2006* (Vic) in Chapter 22.

21.10 In 2008–09, the Guardianship List finalised 10 779 matters at a cost of $4.95 million, making it one of the busiest lists at VCAT.[9] Of these 10 779 matters:

- 20 per cent were applications for guardianship orders
- 2 per cent were guardianship order reassessments
- 26 per cent were applications for administration orders
- 45 per cent were administration order reassessments
- 2 per cent were applications for advice for administrators
- 4 per cent were applications in relation to enduring powers of attorney
- 1 per cent were for all other applications (for example, applications in relation to medical treatment).[10]

21.11 In 2009–10, 10 771 matters were commenced and 12 493 matters were finalised in the Guardianship List, at a cost of approximately $5.39 million.[11]

21.12 While most Guardianship List hearings occur at 55 King Street, Melbourne, hearings also occur at a number of suburban and regional locations throughout Victoria.[12] Hearings are also sometimes held away from VCAT venues, such as at hospitals. In 2009–10 this occurred 263 times.[13]

21.13 The Guardianship List consists of VCAT members who make decisions in relation to guardianship matters. The Governor in Council appoints members on the Attorney-General's recommendation.[14] Members may be full-time or sessional, and may work in other VCAT lists in addition to the Guardianship List. Although many Guardianship List members are lawyers, this is not essential for most matters.[15] Members receive ongoing training and professional development at VCAT and the Judicial College of Victoria.

1 This Board was established under pt 2 of the *Guardianship and Administration Board Act 1986* (Vic), as repealed by *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act* 1998 (Vic) s 117.

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

3 Justice Kevin Bell, *One VCAT: President's Review of VCAT* (2009).

4 Justice Iain Ross, *Transforming VCAT Three Year Strategic Plan 2010/11–2012/13* (2010).

5 Victorian Law Reform Commission, above n 2, 3(k).

6 *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

7 *Victorian Civil and Administrative Tribunal Rules 2008* (Vic).

8 These matters include applications to VCAT under the *Disability Act 2006* (Vic) to: review decisions by the Secretary to the Department of Human Services to admit a person with an intellectual disability to a residential institution: s 88; review decisions about 'restrictive interventions' (that is, the restraint or seclusion of a person with a disability): s 146; make orders about residential treatment facilities, including a resident's treatment plans and leave of absence: ss 154–7; make orders about 'security residents' (people with an intellectual disability transferred from prison to another facility), including security residents' treatment plans and leave of absence: ss 168–71; make and review supervised treatment orders for people with an intellectual disability if satisfied that, among other things, the person must be detained to prevent serious harm to another person: ss 189, 191–9.

9 Victorian Civil and Administrative Tribunal, *Annual Report 2008/2009* (2009) 7, 25, 69.

10 Ibid 25.

11 Victorian Civil and Administrative Tribunal, *Annual Report 2009/2010* (2010) 46, 59. A detailed breakdown of the types of matters was not published in the 2009–10 annual report.

12 Current VCAT hearing locations in Melbourne are: Cheltenham, Collingwood, Dandenong, Frankston, Heidelberg, Kew, Moorabbin, Ringwood, Sunshine and Werribee. Regional VCAT hearing locations are: Ararat, Bairnsdale, Benalla, Bendigo, Cobram, Colac, Dromana, Echuca, Geelong, Hamilton, Hastings, Horsham, Kerang, Korumburra, Mildura, Moe, Morwell, Mount Eliza, Portland, Sale, Seymour, Shepparton, Stawell, Swan Hill, Traralgon, Wangaratta, Warrnambool, Werribee, Wodonga, Wonthaggi, Yarram. There is significant variation in the frequency of hearings across these different venues.

13 Email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010.

14 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 16(1).

15 Ibid sch 1 cl 31(1).

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21.14 VCAT is a tribunal, not a court. Its members do not have the same tenure as judges and magistrates, and its procedures are less formal than those of most courts. For example, VCAT is not bound by the rules of evidence.[16] The VCAT Act directs that hearings must be conducted with 'as little formality and technicality' and 'as much speed' as the law and a proper consideration of the matter allows.[17] However, VCAT is bound by the rules of natural justice.[18] This means that the parties must be given a fair hearing and have their case determined by an impartial decision maker.[19]

21.15 Unlike most Australian courts, VCAT seeks to operate as an 'inquisitorial' body rather than as one that relies on the 'adversarial' model of justice. In practice, this means that VCAT members often take an active role in determining the facts of a matter before the tribunal, usually by asking many questions and sometimes by directing the Public Advocate to conduct investigations.[20] In 2009–10, the Public Advocate conducted 554 investigations for VCAT.[21]

21.16 Sometimes one of the parties to a hearing will have a lawyer or professional advocate to assist them, but this is not required. There is no automatic right to legal representation in most guardianship matters, and the consent of VCAT or all the parties is technically required for someone to be represented by a professional advocate at a hearing.[22] Prior to the establishment of VCAT, the G&A Act gave the applicant and the person who was the subject of the application the right to be legally represented at hearings before the Guardianship and Administration Board.[23]

21.17 Interpreters are provided free of charge at VCAT hearings upon request.

Guardianship and administration

21.18 Any person can apply to VCAT for a guardianship or administration order in relation to another person.[24] There is no application fee. In practice, most applications are made by a member of the proposed represented person's family, or by a social worker. The Guardianship List Registry screens applications once they are lodged. The Public Advocate's VCAT Duty Officer examines the more complex matters.[25] The VCAT Duty Officer may make further enquiries with the applicant, and in some cases may recommend that the Public Advocate conduct an investigation.[26] Otherwise, matters undergo an administrative process at the registry. The registry confirms whether appropriate medical or other expert reports have been provided and are current, follows up relevant information with the applicant and other relevant persons, and ensures that appropriate arrangements are made for the hearing (for example, ensuring the location is appropriate, translators are arranged where necessary, and that security is arranged if needed).[27]

21.19 VCAT aims to list matters for hearing quickly, as hearings must commence within 30 days from the day the application is received.[28] More urgent matters are given priority. VCAT sends hearing notices to those people who are entitled to notice under the G&A Act.[29]

21.20 One VCAT member sitting alone hears most Guardianship List cases.[30] The Commission understands that while a typical initial guardianship or administration hearing may take approximately 45 to 75 minutes, more complicated matters may take several hours, or in some rare cases, days.

21.21 The people who attend hearings vary from case to case. Members usually prefer that the proposed represented person is present at the hearing, but the G&A Act does not expressly require this and it does not occur in most cases.[31] There are many reasons why; sometimes the person may not want to attend, the person may be physically unable to attend, or attendance may be unduly distressing for the person.

21.22 VCAT sometimes sits at nursing homes or hospitals so that the proposed represented person can attend the hearing. In some cases where the proposed represented person is absent, VCAT obtains information about the person's wishes through other means, such as a report from the Public Advocate.

21.23 VCAT does not have an investigative arm. It relies largely on material presented to it by the applicant, or by the Public Advocate in those cases in which she is involved. Evidence usually consists of reports, which may come from medical professionals, social workers, the Public Advocate and others, as well as oral evidence from people, such as family members, who attend the hearing.

21.24 The G&A Act does not impose any limits on the duration of guardianship and administration orders. It is necessary, however, for VCAT to reassess an order within 12 months of first being made (unless it orders otherwise) and at least once every three years thereafter (unless it orders otherwise).[32] In practice, guardianship orders are usually reassessed annually and administration orders are usually reassessed every three years, but this can vary depending on the circumstances of the case.[33] When an order is reassessed, it can be continued, changed, replaced or revoked as VCAT sees fit.[34] There were 1103 guardianship reassessments and 5865 administration reassessments in 2009–10.[35]

21.25 VCAT may also make a 'self executing order', which expires after a designated period, unless an application is made to extend the order. These are more common for guardianship than administration orders.[36]

16 Ibid s 98(1)(b).

17 Ibid s 98(1)(d).

18 Ibid ss 97, 98(1)(a).

19 See Roger Douglas, *Douglas and Jones's Administrative Law* (The Federation Press, 4th ed, 2002) 590.

20 VCAT may request investigations by the Public Advocate pursuant to *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 35.

21 Office of the Public Advocate (Victoria), *Annual Report 2009/2010* (2010) 9.

22 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62.

23 *Guardianship and Administration Board Act 1986* (Vic) s 12(1), as repealed by *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic) s 117.

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

25 Examples of more complex matters include applications for temporary orders, an investigation by the Public Advocate, a revocation of an enduring power of attorney (financial) and appointment of administrator, 'special procedures', applications that indicate significant concerns about the person's welfare, applications where medical reports as to competence are unclear or inadequate, or matters where the Public Advocate has already been involved: telephone conversation with Public Advocate VCAT Duty Officer (8 September 2010).

26 Ibid.

27 Ibid.

28 *Guardianship and Administration Act 1986* (Vic) ss 21, 45.

29 Ibid ss 20, 44.

30 Originally, the Guardianship and Administration Board sat in 'divisions' of three or five members: see *Guardianship and Administration Board Act 1986* (Vic) sch 2 cl 1, as repealed by *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic) 129(3)(j). Prior to the replacement of the Board with VCAT, the requirement to have either three or five members sitting on each division was replaced in 1989 by a new requirement that divisions of the Board be composed of divisions of one or three members, with the size of the division to be determined by the President: see *Guardianship and Administration Board Act 1986* (Vic) sch 2 cl 1, as amended by *Guardianship and Administration Board (Amendment) Act 1989* (Vic) s 8.

31 VCAT does not collect data in relation to the attendance of represented people at hearings: see email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010. However, the Commission has heard from a number of groups that non-attendance is common: see consultation with Villamanta Disability Rights Legal Service (19 April 2010); Submissions IP 9 (Royal District Nursing Service) 12 and IP 23 (Mental Illness Fellowship Victoria) 3.

32 *Guardianship and Administration Act 1986* (Vic) s 61(1).

33 Anstat, *Victorian Civil and Administrative Tribunal: Guardianship and Administration* (pt 6-6 at September 2008) [61.01]. State Trustees reports that the vast majority of orders appointing it as administrator are made for a three-year period, and the average duration of appointments (including those currently in force) is 6.72 years: email from State Trustees to Victorian Law Reform Commission, 4 November 2010.

34 *Guardianship and Administration Act 1986* (Vic) s 63(1).

35 Email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010.

36 Anstat, *Victorian Civil and Administrative Tribunal: Guardianship and Administration* (September 2008) pt 6-6 [61.01].

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Special powers in relation to a person with a disability

21.26 If a person who is the subject of a guardianship application is being detained unlawfully or is at serious risk of harm, VCAT may empower the Public Advocate or another person to visit the person in the presence of a police officer in order to prepare a report for VCAT.[37] Following this report, VCAT may order that the person be taken to another place until the guardianship application is heard.[38]

Personal appointments

21.27 Personal appointments, such as 'attorneys' appointed under the *Instruments Act 1958* (Vic), 'agents' appointed under the *Medical Treatment Act 1988* (Vic) and enduring guardians appointed under the G&A Act, are not directly supervised by VCAT.

21.28 However, VCAT has the power to hear applications to revoke the appointment of an enduring guardian,[39] and suspend or revoke the authority of an agent.[40] In relation to a financial enduring power of attorney, VCAT may:

- hear applications to revoke, vary or suspend the power
- declare the power invalid
- make recommendations or provide advice in relation to the exercise of the power
- order the lodgement of accounts
- make any other order it considers necessary.[41]

Medical treatment

21.29 In addition to its power to suspend or revoke the authority of a medical agent, VCAT has the power to:

- hear applications in relation to medical and dental treatment decisions for people who are unable to consent to treatment, and make orders about who should make a decision, as well as provide direction, declarations and advice around these decisions[42]
- consent to the carrying out of 'special medical procedures', which are permanent sterilisations, abortions, and donation of tissue to another person[43]
- provide advice or direction to the person responsible, either on request or upon its own motion.[44]

21.30 VCAT's consent is no longer required for medical research procedures where the person is unable to consent, provided other requirements are satisfied. However, VCAT can hear applications and make a range of orders in relation to issues and disputes in connection with medical research procedures.[45]

REASONS

21.31 VCAT must give reasons for its decisions. Usually this is done orally at the hearing but, if requested by a party to the hearing, VCAT must give written reasons for any order it makes (other than an interim order).[46]

REHEARINGS AND APPEALS

21.32 In most cases, a party to a hearing, or a person entitled to notice of a guardianship or administration application, may apply for a rehearing of an application within 28 days of the order being made.[47] At a rehearing, VCAT considers the application for guardianship or administration again, usually before a more senior member of VCAT.[48] VCAT may agree with the original decision, it may change parts of it, or it may make a different decision.[49] There were 59 rehearings in 2009–10.[50]

21.33 A party to a guardianship or administration proceeding may appeal to the Supreme Court of Victoria against any order made by VCAT on the ground that VCAT made an error of law.[51] It is not possible to appeal on the ground that the decision was simply wrong and that another decision should have been made. There were 11 appeals in 2009–10.[52] Though appeals are rare, some Supreme Court judgments have played an important role in the development of guardianship laws.[53]

CONFIDENTIALITY ISSUES AT VCAT

21.34 Two confidentiality issues arise in relation to information acquired by VCAT in Guardianship List matters. They concern access to:

- information disclosed in the course of a hearing
- information about applications and hearings kept on file at VCAT.

Different laws apply to these circumstances.

Information disclosed in the course of a hearing

21.35 While the VCAT Act provides that its hearings must be conducted in public, VCAT may direct that a hearing, or part of a hearing, be held in private.[54]

21.36 The VCAT Act also permits VCAT to order that any information provided at a hearing must not be published, except in a manner specified by the tribunal.[55]

21.37 In deciding whether to prohibit the disclosure or publication of information relevant to a proceeding, VCAT must consider if it is necessary to do so 'in the interest of justice', or in order to avoid:

- endangering the national security or the international security of Australia
- prejudicing the administration of justice
- endangering the physical safety of a person
- offending public decency or morality
- the publication of confidential information or information the subject of a certificate under sections 53 or 54 of the VCAT Act (which pertain to cabinet documents or information subject to Crown privilege).[56]

37 *Guardianship and Administration Act 1986* (Vic) s 27(1).

38 Ibid ss 27(2).

39 Ibid s 35D(1).

40 *Medical Treatment Act 1988* (Vic) s 5C.

41 *Instruments Act 1958* (Vic) ss 125V, 125X–125ZB.

42 *Guardianship and Administration Act 1986* (Vic) s 42N.

43 Ibid ss 3, 42E.

44 Ibid ss 42I, 42W.

45 Ibid s 42V.

46 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 117. A 'party' to a guardianship or administration proceeding includes the person about whom the application is made and the person proposed as guardian or administrator: see *Guardianship and Administration Act 1986* (Vic) ss 19(2), 43(3). It also includes the person who made the application to the tribunal, and any other person joined as a party to the proceeding by VCAT: see *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 59(1)(a).

47 *Guardianship and Administration Act 1986* (Vic) s 60A. It is impossible to apply for a rehearing of an order if it was made by the President of VCAT, an interim or temporary order, or an order for a rehearing or for permission from VCAT to apply for a rehearing. A rehearing is also impossible in relation to some medical and dental treatment applications: at s 60A(1)(6).

48 *Victorian Civil and Administrative Tribunal Act 1998* sch 1 cl 31(3).

49 *Guardianship and Administration Act 1986* (Vic) s 60C.

50 Email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010.

51 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148.

52 Email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010.

53 See, eg, *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006).

54 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 101(1)–(2). Applications for private hearings can be made by a party to the proceeding or by the tribunal itself.

55 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3).

56 Ibid s 101(4).

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21.38 The VCAT Act also prohibits the publication or broadcast of any report of a guardianship hearing that could reasonably lead to the identification of the parties, unless VCAT orders that it is in the public interest for this information to be reported. Even if it makes such an order, VCAT must specify that no pictures be taken of any party.[57]

Information kept on file at VCAT

21.39 VCAT is required to maintain a register of proceedings[58] and keep a file of all documents lodged in a proceeding.[59] Parties to a proceeding may inspect the file or the part of the register that relates to the proceeding without charge.[60] Any other person may inspect or obtain a copy of any part of the file or register for a prescribed fee,[61] but subject to:

- any conditions specified in the rules[62]
- any direction of the tribunal to the contrary[63]
- any order of the tribunal under section 101 of the VCAT Act (which allows VCAT to order material not to be made public, as noted above)[64]
- any certificate under sections 53 and 54 of the VCAT Act (relating to Cabinet documents or matters subject to Crown privilege).[65]

COMMUNITY RESPONSES

21.40 In our information paper we sought responses about the role and functions of VCAT.

21.41 There was widespread support for having a tribunal rather than a court decide guardianship and administration matters. The need for an informal approach was emphasised given the very sensitive, personal nature of substitute decision making.[66]

21.42 The Commission heard a wide range of views about people's experiences at VCAT. Some carers, particularly parents of adult children with disabilities, expressed strong dissatisfaction with VCAT's processes and decisions. Some people suggested that the decisions of different members were inconsistent and believed that some VCAT members conduct hearings and make decisions in a way that indicates an excessive level of suspicion about the family of the proposed represented person.[67]

VCAT PROCESS PRIOR TO HEARINGS

21.43 Some people expressed concern about inadequate notice of hearings. They suggested that the proposed represented person or other important people in their life are not always notified of a hearing.[68]

21.44 The Mental Illness Fellowship of Victoria felt that the notification forms used by VCAT are inaccessible, and have the appearance of a 'fine', suggesting the person has done something wrong.[69] There was also concern that simply sending a letter to some people with impaired capacity was no guarantee that they would be aware of and attend the hearing.[70]

21.45 A number of groups felt that more could be done to prepare for hearings. In particular, there was concern that not enough evidence was collected prior to hearings to ensure VCAT had sufficient evidence on which to make decisions.[71] As VCAT does not have an investigative arm, its capacity to gather evidence is limited to asking the Public Advocate to investigate a matter.[72]

21.46 The Mental Health Legal Centre suggested that people who are the subject of an application should be provided with appropriate information about the hearing, the possible outcomes, and their options.[73]

21.47 The importance of 'triaging' applications to determine urgency was also emphasised in consultations.[74]

21.48 The Aged Care Assessment Service expressed concern that it can take too long to obtain a hearing in some urgent matters, although they also noted that a more common problem was the time it took to allocate a public guardian or administrator following the hearing.[75]

Appropriate dispute resolution

21.49 Some people considered whether VCAT could do more prior to hearings to identify cases that may be suitable for appropriate dispute resolution (ADR) mechanisms such as mediation, conferencing and conciliation. The Public Advocate and others suggested that some matters might be better resolved through mediation rather than a full guardianship hearing.[76] Victoria Legal Aid, while generally supportive of ADR, argued that caution should be exercised in relation to guardianship and administration matters because people with disabilities may find it difficult to participate equally in these processes, and therefore should be provided with independent support.[77]

21.50 The National Alternative Dispute Resolution Advisory Council has identified factors that mediation practitioners should be aware of to ensure the effective participation of parties.[78] They suggest that in some circumstances it may be appropriate to provide a support person, adviser, representative or advocate, or to adjourn or terminate the process.[79]

21.51 Other commentators have emphasised that ADR can be helpful in cases where a person has a disability.[80] Depending on the circumstances, a range of strategies can be adopted to ensure the full and effective participation of a person with impaired capacity in ADR processes. This might include:

- ensuring an appropriate mediation environment
- appropriate use of language
- the provision of independent support and advocacy
- a role for independent mediators to ensure the person is able to participate fairly
- statutory safeguards.[81]

57 Ibid sch 1 cl 37.

58 Ibid s 144. In relation to guardianship proceedings, the register of proceedings contains the following: (a) the number identifying the proceeding; (b) the date of commencement; (c) the names of the parties; (d) if the proceeding is withdrawn, the date of the withdrawal: *Victorian Civil and Administrative Tribunal Rules 2008* (Vic) O 6 pt 5 r 6.16.

59 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146. A file of documents lodged in a proceeding must be kept for five years after the determination.

60 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 144(3), 146(2).

61 Ibid ss 144(4), 146(3).

62 Ibid ss 144(5)(a), 146(4)(a). However, the power granted to the Rules Committee of VCAT to make rules is limited to the regulation of 'practice and procedure': at s 157(1). The Supreme Court has found that rules which deny a statutory right to access files are not rules of 'practice and procedure', and are therefore beyond the power of the Rules Committee: *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* [2005] VR 422, 427 (Bongiorno J). In this case, the Court found that several rules that the VCAT Rules Committee made which limited access to files were made *ultra vires* and were therefore of no effect: at 429.

63 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(4)(b). This provision only applies to gaining access to or copies of a file of documents lodged in a proceeding. In considering this provision, the Victorian Supreme Court of Appeal has upheld VCAT's power to make directions in relation to access to files. However, in doing so, VCAT is obliged to provide natural justice to the party seeking access to the file: *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* [2006] VSCA 7 [35]–[42] (Maxwell P, with whom Nettle JA and Eames JA agreed). The Court of Appeal stated that the content of natural justice cannot be prescribed in advance, and varies with every circumstance, however 'in the ordinary case under s 146(4)(b) … it should be sufficient for the Tribunal to give written notice to the person seeking access that it proposed to give a contrary direction, the effect of which would be to deny access, and to invite the access-seeker to advance argument (in writing) as to why such a direction should not be made': at [41].

64 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 144(5)(b), 146(4)(c).

65 Ibid ss 144(5)(c), 146(4)(d). Section 53 provides that disclosure of information or a matter contained in a document may be certified by the Premier as being contrary to the public interest because it would involve disclosure of Cabinet deliberations. Section 54 makes provision for similar certification by the Attorney-General in relation to Crown privilege. The tribunal must ensure that information to which such a certificate applies is not disclosed to any person other than a tribunal member: at ss 53(2), 54(2).

66 See, eg, consultations with carers, people with disabilities and service providers in Ballarat (15 April 2010), Mallee Family Care Mildura (28 April 2010), Self Advocacy Resource Unit (4 May 2010), metropolitan carers (6 May 2010), Gippsland Carers Association (25 May 2010) and Royal District Nursing Service (20 May 2010); Submissions IP 5 (Southwest Advocacy Association) 7, IP 8 (Office of the Public Advocate) 28, IP 16 (Mark Feigan) 16 and IP 46 (Troy Huggins).

67 Consultations with carers in Hastings (8 April 2010) and Gippsland Carers Association (25 May 2010); Submission IP 1 (Carers Australia (Victoria)) 10–12.

68 Consultations with Villamanta Disability Rights Legal Service (19 April 2010), carers and service providers in Shepparton (22 April 2010), carers, people with disabilities and service providers in Ballarat (15 April 2010) and people with acquired brain injuries (3 May 2010).

69 Consultation with Mental Illness Fellowship Victoria (13 April 2010).

70 Consultations with Mental Illness Fellowship Victoria (13 April 2010) and Villamanta Disability Rights Legal Service (19 April 2010).

71 Consultations with carers, people with disabilities and service providers in Ballarat (15 April 2010) and Alzheimer's Australia (Victoria) (19 April 2010).

72 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cls 35, 42, 48.

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

74 Consultations with Fiona Smith (18 March 2010) and service providers in Mildura (27 April 2010).

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

76 Consultations with Julian Gardner (26 March 2010) and Federation of Community Legal Centres Elder Law Working Group (3 May 2010); Submissions IP 8 (Office of the Public Advocate) 9–10, IP 9 (Royal District Nursing Service) 12 and IP 49b (Seniors Rights Victoria) 7.

77 Submission IP 43 (Victoria Legal Aid) 13.

78 National Alternative Dispute Resolution Advisory Council, *A Framework for ADR standards: Report to the Commonwealth Attorney-General* (2001) 110–11.

79 Ibid 111.

80 Jim Simpson, 'Guarded participation: Alternative dispute resolution and people with disabilities' (2003) 14 *Australian Dispute Resolution Journal* 31, 33.

81 For further details, see ibid.

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21.52 VCAT is currently seeking to enhance and promote ADR as part of its broader reforms. This includes appointing an ADR Member and Principal Mediator, training more accredited mediators, and better recording of ADR data to aid further development of an ADR strategy.[82] An upgraded role for ADR in VCAT legislation is also under consideration.[83]

VCAT HEARINGS

21.53 People's experiences of VCAT hearings varied widely. Some participants, including those who had been the subject of applications, were relatively positive about how the hearings were conducted.[84] Some carers reported differently, believing that VCAT members treated them with suspicion, or did not give their perspective adequate recognition.[85] Many people felt that there is a need for greater consistency in approach by VCAT members.[86]

Formality of hearings

21.54 There was widespread support for informal hearings.[87] The Public Advocate noted that VCAT hearings have become more formal than they were in the past, and shared the broader concern of 'creeping legalism' at VCAT hearings noted in the President's review.[88] Many participants felt that VCAT hearings were more formal than necessary.[89]

21.55 Carers Australia (Victoria) referred to the often traumatic experience of attending a hearing and argued that 'a commitment to therapeutic jurisprudence' should underpin VCAT's operations.[90]

Attendance of a person at hearing

21.56 There was significant concern that the proposed represented person does not attend the hearings sufficiently often.[91] VCAT forms and notifications—particularly reassessment notifications—were criticised for not emphasising the importance of attendance at hearings.[92] VCAT is currently reviewing all Guardianship List notification forms.[93]

21.57 A number of groups felt that VCAT should start from the position that the proposed represented person should attend the hearing, and the Law Institute of Victoria suggested that VCAT should ensure this occurs.[94]

21.58 VCAT members do sometimes attend hospitals and other venues in order to meet and involve the person. This occurred 263 times in 2009–10.[95] It was suggested that more hearings should be held in community settings.[96]

Information available at hearings

21.59 A number of consultations suggested that VCAT sometimes makes decisions and orders without sufficient information.[97] The Commission understands that VCAT sometimes makes capacity determinations based on very limited medical opinions provided in VCAT's pro forma 'Medical/Psychological Report' form, and relies too heavily on medical opinion rather than other evidence.[98] Some participants in our consultation with the Disability Advocacy Resource Unit expressed concern that in the absence of adequate external opinion, some members conduct their own capacity assessments at hearings.[99]

21.60 It was also suggested that there are some cases where it would be preferable for the Public Advocate to conduct an investigation prior to the hearing, but this does not happen because of resource constraints.[100]

Professional advocacy

21.61 Some people suggested that the presence of lawyers representing parties other than the proposed represented person had a negative influence on hearings. Many groups felt that there was a need for more independent advocacy for people who are the subject of applications.

21.62 Victoria Legal Aid argued that:

> *Access to legal advice and representation is a critical and important protective mechanism for people who are the subject of a guardianship or administration application. The right to obtain legal advice should be more broadly promoted and the realisation of this right should be more broadly accessible.*[101]

21.63 Seniors Rights Victoria, Mental Health Legal Centre and Villamanta Disability Rights Legal Service made similar arguments.[102] The Public Interest Law Clearing House argued that legal representation should be a legislatively protected right for people who are the subject of applications.[103]

21.64 Others emphasised the importance of the proposed represented person having access to advocacy of some kind to explain what is happening, to support the person, and to help them to realise their rights.[104]

Recording of hearings

21.65 People who had experienced an acquired brain injury suggested that VCAT hearings should be recorded, and transcripts made available. This step would assist people with memory impairments to understand and review what had happened at the hearing.[105] Concerns about the lack of recording of VCAT hearings were noted in the President's review.[106]

21.66 VCAT is planning to progressively introduce recording of all hearings over the next three years, and give people access to the recording of the hearing for a fee of $55. Transcripts will also be available, but the cost will not be subsidised by VCAT.[107] VCAT would retain the power to hold hearings in private and make suppression orders.[108]

82 Justice Ross, above n 4, 41–4.

83 Ibid 52.

84 Consultations with mental health consumers (7 April 2010), VALID Southern Regional Client Network (20 April 2010) and Advocacy Disability Ethnicity Community (21 April 2010).

85 Consultation with Gippsland Carers Association (25 May 2010); Submission IP 1 (Carers Australia (Victoria)) 11–12.

86 Consultations with service providers in Mildura (27 April 2010) and Disability Advocacy Resource Unit (5 May 2010).

87 See, eg, consultations with carers, people with disabilities and service providers in Ballarat (15 April 2010), Mallee Family Care Mildura (28 April 2010), Self Advocacy Resource Unit (4 May 2010), metropolitan carers (6 May 2010), Royal District Nursing Service (20 May 2010) and Gippsland Carers Association (25 May 2010); Submissions IP 5 (Southwest Advocacy Association) 7, IP 8 (Office of the Public Advocate) 28, IP 16 (Mark Feigan) 16 and IP 46 (Troy Huggins).

88 Submission IP 8 (Office of the Public Advocate) 28. See also Justice Bell, above n 3, 21.

89 Consultations with carers, people with disabilities and service providers in Ballarat (15 April 2010) and Villamanta Disability Legal Service (19 April 2010); Submission IP 46 (Troy Huggins).

90 Submission IP 1 (Carers Australia (Victoria)) 22.

91 See, eg, consultations with Mental Illness Fellowship Victoria (13 April 2010) and Federation of Community Legal Centres Elder Law Working Group (3 May 2010).

92 Consultations with Villamanta Disability Rights Legal Service (19 April 2010) and Federation of Community Legal Centres Elder Law Working Group (3 May 2010).

93 Victorian Civil and Administrative Tribunal, *Transforming VCAT: Report Card September 2010* (2010) ('*Transforming VCAT: Report Card*').

94 Submission IP 47 (Law Institute of Victoria) 29.

95 Email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010.

96 Submission IP 9 (Royal District Nursing Service) 5.

97 See, eg, consultation with Alzheimer's Australia (Victoria) (19 April 2010).

98 See, eg, Submission IP 19 (Scope (Vic) Ltd) 11.

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

100 Telephone conversation with the Public Advocate VCAT Duty Officer (8 September 2010).

101 Submission IP 43 (Victoria Legal Aid) 3.

102 Consultations with seniors groups (26 March 2010) and Villamanta Disability Rights Legal Service (19 April 2010); Submission IP 58 (Mental Health Legal Centre) 18.

103 Submission IP 54 (PILCH Homeless Persons' Legal Clinic) 19.

104 See, eg, consultations with people with disabilities, carers and advocates in Morwell (29 March 2010), Advocacy Disability Ethnicity Community (21 April 2010) and Royal District Nursing Service (10 May 2010); Submission IP 1 (Carers Australia (Victoria)) 18–19.

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

106 Justice Bell, above n 3, 23.

107 Justice Ross, above n 4, 32–3.

108 See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101.

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Venues for hearings

21.67 Some people expressed concerns about the venues for regional hearings. The use of regional courts was seen to contribute to a more intimidating 'court-like atmosphere', and the sharing of these venues with criminal and family violence jurisdictions contributed to the anxiety of parties.[109]

21.68 There was also concern about matters sometimes being scheduled for hearing in Melbourne when they would have been more appropriately heard in a regional venue.[110]

Concerns of Indigenous and culturally and linguistically diverse groups

21.69 The Commission intends to consult further about specific barriers faced by culturally and linguistically diverse (CALD) and Indigenous people in relation to guardianship laws.

21.70 Some broad themes emerged from our initial consultations with members of CALD and Indigenous communities:

- The use of appropriate interpreters is crucial, and VCAT members should receive training in how to work with them.[111]
- Guardianship and administration hearings can be particularly confronting to people from diverse cultural and linguistic backgrounds who are unfamiliar with Australian laws.[112]
- There are aspects of guardianship laws that make them particularly foreign to some Indigenous people.[113]
- Where Indigenous people are involved in a matter, hearings need to be conducted in a culturally appropriate manner.[114]
- There should be consideration of whether a Koori tribunal could be used for guardianship matters involving Indigenous people.[115]

SKILLS AND TRAINING OF GUARDIANSHIP LIST MEMBERS

21.71 The most consistent concern expressed about the qualifications and training of Guardianship List members is a perception that some members have insufficient knowledge of disabilities, the disability community and the service sector.[116] The Public Advocate and the Royal District Nursing Service suggested that members had a greater degree of specialisation in the field prior to the Guardianship and Administration Board's move into VCAT,[117] when multi-member panels were more common, enabling members with complementary skills to sit on a matter.

21.72 A number of submissions and consultations emphasised the importance of adequate training for members about topics such as:

- the various disabilities that affect decision-making capacity[118]
- the experiences of people who appear before VCAT[119]
- 'capacity' and capacity assessment[120]
- the wider service and support networks that assist people with disabilities[121]
- the experience of family and carers of people with disabilities.[122]

21.73 A lack of consistency in decision making[123] and a lack of financial expertise in some cases[124] were other concerns identified in our consultations.

DURATION OF ORDERS

21.74 The Commission received a range of views about the duration of guardianship and administration orders. Some people felt they were reassessed too often, particularly if the order is for plenary guardianship,[125] and others argued that orders continued for too long without reassessment, particularly for three-year administration orders where a person's circumstances might change significantly in that time.[126] It was also argued that shorter orders can give the represented person some hope—a goal to work towards in order to achieve more independence.[127]

21.75 It was also suggested that there could be value in making shorter initial orders so there is an opportunity to see how well the arrangements work in practice:

> *In recognition of the potential difficultly of itemising what a guardian's or an administrator's role will be at the time of making or reassessing an order … the [Homeless Persons' Legal Clinic] endorses the practice of some VCAT members on the Guardianship List of ordering a 'trial period.' This period can be used to assess (a) the need for a guardianship or administration order; and (b) in the event that an order is required, what powers, duties and obligations the guardian or administrator should have under the order and what aspects of the represented person's independence can be expressly preserved.*[128]

REHEARINGS OF ORDERS

21.76 The major concerns the Commission heard about rehearings were:

- tribunal members should inform parties of their right to seek a rehearing[129]
- the 28-day period in which a rehearing can be sought is too short.[130]

21.77 The Public Advocate supported the recommendation in the President's review of VCAT that an appeal jurisdiction be established within VCAT,[131] which could hear appeals against VCAT decisions to appoint guardians and administrators.

109 Consultations with carers, people with disabilities and service providers in Ballarat (15 April 2010) and service providers in Morwell (29 March 2010).

110 Consultation with people with disabilities and carers in Mildura (27 April 2010) and Gippsland Carers Association (25 May 2010).

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

112 Ibid.

113 This was a finding of a review into Western Australian guardianship laws, which, based on what the Commission has heard, seems to also reflect the situation in Victoria: see Colin Penter and Margaret Stockton Metcalf, *Review of the Operations and Effectiveness of the Western Australian Guardianship and Administration Act*, Report of the Section 122 Review (1998).

114 Consultation with Mallee Family Care Mildura (28 April 2010).

115 Ibid. This was also a recommendation of the President's Review of VCAT: see Justice Bell, above n 3, 103.

116 See, eg, consultations with seniors groups (26 March 2010), Mental Health Legal Centre (7 April 2010), carers in Hastings (8 April 2010), Alzheimer's Australia (Victoria) (19 April 2010), people with acquired brain injuries (3 May 2010), Disability Advocacy Resource Unit (5 May 2010) and metropolitan carers (6 May 2010); Submissions IP 1 (Carers Australia (Victoria)) 12 and IP 39 (Aged Care Assessment Services of Victoria) 2, 5.

117 Submissions IP 8 (Office of the Public Advocate) 28 and IP 9 (Royal District Nursing Service) 12.

118 Consultations with Mental Health Legal Centre (7 April 2010), people with acquired brain injuries (3 May 2010) and Disability Advocacy Resource Unit (5 May 2010).

119 Submission IP 47 (Law Institute of Victoria) 7.

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

121 Submissions IP 39 (Aged Care Assessment Services of Victoria) 5 and IP 54 (PILCH Homeless Persons' Legal Clinic) 23–4.

122 Consultation with carers in Hastings (8 April 2010).

123 Consultation with Gippsland Carers Association (25 May 2010); Submission IP 11 (Tony and Heather Tregale) 3.

124 Consultations with trustee organisations (9 April 2010) and Disability Advocacy Resource Unit (5 May 2010).

125 Consultation with Tony and Heather Tregale (7 May 2010).

126 Consultations with Mental Health Legal Centre (7 April 2010), Federation of Community Legal Centres Elder Law Working Group (3 May 2010) and State Trustees client (7 May 2010).

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

128 Submission IP 54 (PILCH Homeless Persons' Legal Clinic) 35.

129 Consultation with people with acquired brain injuries (3 May 2010); Submission IP 47 (Law Institute of Victoria) 7.

130 Consultations with Mental Health Legal Centre (7 April 2010) and Disability Advocacy Resource Unit (5 May 2010).

131 Submission IP 8 (Office of the Public Advocate) 26. See also Justice Bell, above n 3, 55–60.

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REASSESSMENT OF ORDERS

21.78 There was concern that some people are unaware of their right to seek reassessment of a guardianship order,[132] or that they may have difficulty in exercising that right.[133]

21.79 Our consultations revealed concerns about the difficulty of obtaining an unscheduled reassessment hearing,[134] particularly where VCAT requires the represented person to provide new medical evidence which may be expensive or difficult to obtain.[135] The Law Institute of Victoria suggested that VCAT's requirement that parties provide reasons for seeking a reassessment should be removed.[136]

21.80 Victoria Legal Aid argued that once an order had been made it could prove 'disproportionately onerous for a person to establish they no longer require it', and guardianship laws should explicitly state that the onus for proving that an order is needed rests with the applicant.[137]

21.81 There was concern at VCAT's move to an 'opt in' approach to attendance when notifying parties of reassessments, and concern that VCAT has failed to encourage the participation of the represented person in this process.[138]

ENFORCEMENT OF DECISIONS AGAINST THIRD PARTIES

21.82 Some responses to the information paper considered the issue of enforcement of VCAT orders.

21.83 Some guardians argued that their authority under the VCAT order was not adequately recognised by service providers, who also failed to inform them about important issues relating to the represented person's welfare.[139] The Public Advocate also expressed concern about what happens to a guardian's decisions once a guardianship order finishes.[140]

CONFIDENTIALITY ISSUES AT VCAT

Material presented to VCAT in the course of a hearing

21.84 A number of people raised concerns about access to information before, during and after VCAT hearings.

21.85 The Royal District Nursing Service, for example, felt that privacy laws can get in the way of obtaining information necessary for a guardianship application and that the law should allow easier access to information for this purpose.[141]

21.86 Many people noted the difficultly of balancing competing interests. On the one hand, people need access to information so they can provide VCAT with relevant evidence while, on the other hand, people have a right to maintain the confidentiality of some information about them.[142]

21.87 The New South Wales Guardianship Tribunal submitted that 'procedural fairness is a right which should be afforded to all parties before a guardianship tribunal and this should include disclosure of documents being considered by the tribunal'.[143] Others supported this view, arguing that transparency is of 'paramount importance',[144] particularly because the right to a fair hearing includes being able to respond to material presented to VCAT.[145]

21.88 The issue of procedural fairness is complex when information is given to VCAT in confidence and with the expectation that it will not be given to the proposed represented person. This problem is illustrated by a case referred to by the Mental Health Legal Centre in their submission:

At a hearing of an application for a guardianship order, the applicant handed documents to the VCAT Member which were then withheld from our client on the grounds that the information had been provided confidentially by a member of our client's family. The client's lawyer was provided a copy of the information informally, on the condition that its contents not be disclosed to the client.

Ultimately, our client was not given the opportunity to respond to the allegations contained in the documents, yet VCAT relied on these documents in its determination that a guardian should be appointed.[146]

21.89 Cases of this nature are currently governed by the very broad natural justice requirements in section 98(1)(a) of the VCAT Act. It is important to consider whether it is possible to give VCAT and the parties more legislative guidance about how to resolve these difficult issues.

21.90 The Mental Health Legal Centre suggested that the following principles should guide the way VCAT deals with these matters:

the right to procedural fairness for the proposed represented person—ie ensuring the person has adequate opportunity to respond to any allegations against them;

that restrictions on the above right should only be imposed where reasonable, justified, proportionate and necessary, in accordance with article 7 of the Victorian Charter of Human Rights and Responsibilities; and

the need for transparency in the tribunal decision-making process.[147]

21.91 Alfred Health noted that there have been cases in which interested parties have requested at the commencement of a hearing that they be given access to confidential material provided to VCAT by the hospital. Applications of this nature often cause delay because the case is adjourned.[148] Alfred Health raised concerns about the following case in particular:

On one occasion in 2008, material was released to everyone present [at the hearing]—one of whom was a neighbour who had behaved in an aggressive manner towards hospital staff. Not only did he then have possession of confidential and sensitive medical and neuropsychological reports but the fax from the Alfred Health staff member to the Tribunal administration requesting extra security because of concerns about his inappropriate behaviour was also released to him and all other parties present.

21.92 Alfred Health suggested that:

Confidentiality of Hospital records is enshrined in s.141 of the Health Services Act 1988 (Vic), s.120A of the Mental Health Act 1986 (Vic), the Health Records Act 2001 and the Privacy Act 1988 (Cth). Within the Hospital environment, these reports would not be made available to many of the people present at a VCAT Hearing even if they made an application under the Freedom of Information Act 1982 (Vic) … Alfred Health provides a person's private medical information to VCAT to assist VCAT in making a decision in the best interests of the person. Given the sensitive nature of the information, it may be unnecessary and, in some cases, contrary to the person's best interests to release the information more widely at the VCAT Hearing. Alfred Health believes that VCAT Members should be more circumspect about the release of private medical information and when there is a decision to release the information, the VCAT Member should require the return of the reports at the conclusion of the Hearing.[149]

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

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

134 Consultations with people with acquired brain injuries (3 May 2010) and State Trustees client (7 May 2010); Submission IP 5 (Southwest Advocacy Association) 2.

135 Consultation with Federation of Community Legal Centres Elder Law Working Group (3 May 2010); Submission IP 54 (PILCH Homeless Persons' Legal Clinic) 27–9.

136 Submission IP 47 (Law Institute of Victoria) 7.

137 Submission IP 43 (Victoria Legal Aid) 3.

138 Consultations with Villamanta Disability Rights Legal Service (19 April 2010) and Federation of Community Legal Centres Elder Law Working Group (3 May 2010).

139 Consultation with metropolitan carers (6 May 2010).

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

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

142 Consultation with Fiona Smith (18 March 2010); Submissions IP 5 (Southwest Advocacy Association) 7, IP 32 (NSW Guardianship Tribunal) 5, IP 43 (Victoria Legal Aid) 14 and IP 50 (Action for Community Living) 10.

143 Submission IP 32 (NSW Guardianship Tribunal) 5.

144 Submission IP 43 (Victoria Legal Aid) 14.

145 Ibid. See also Submissions IP 5 (Southwest Advocacy Association) 7 and IP 47 (Law Institute of Victoria) 30. The right to a fair hearing is outlined in s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

146 Submission IP 58 (Mental Health Legal Centre) 36.

147 Ibid.

148 Submission IP 26 (The Alfred) 3.

149 Ibid 3–4.

21.93 Similar concerns about the way private information might be exposed at a hearing were also raised by members of the Disability Advocacy Resource Unit, who noted that it was sometimes important for advocates to be able to provide information to VCAT on a confidential basis, and that this information should not be read aloud during the hearing.[150]

21.94 Both the Law Institute of Victoria and the Public Advocate recognised the difficulty associated with providing information to VCAT 'in confidence'.[151] The Law Institute of Victoria acknowledged that while people are usually entitled to have access to material presented to VCAT in order to respond to it, there are cases in which a person could fear reprisals if the information they give to VCAT is disclosed.[152] They suggested that the protection of procedural fairness should be the primary consideration, and the party seeking to provide information in confidence should bear the onus of demonstrating why this information should be withheld from other interested parties.[153]

21.95 The Public Advocate noted that she is obliged by section 16(1)(d) of the G&A Act to provide VCAT with reports that often contain highly sensitive information. VCAT must decide, after weighing considerations of transparency and privacy, who should receive copies of these reports.[154] The Public Advocate suggested that the difficult balancing exercise could be assisted by including the following considerations in the legislation:

- *the need for transparency in tribunal hearings,*
- *the need for fairness in allowing individuals to rebut allegations against them,*
- *the need to protect reputations and to protect information relating to personal affairs,*
- *the need to protect the confidentiality under which information may originally have been supplied,*
- *the need not to cause serious harm to any person's safety or health,*
- *the need not to damage the personal relationships of represented persons/proposed represented persons.*[155]

Inspection of VCAT files

21.96 As noted in our overview of the current law, any member of the public is able to request access to and inspect VCAT files. In practice, VCAT exercises discretion in allowing or restricting access and, in doing so, considers whether the contents of the requested documents will adversely affect people's interests.[156] VCAT members also noted, however, that any restriction of access to files needs to be ordered by VCAT prior to a request for access being made, but the Commission understands this rarely happens in practice.

21.97 The New South Wales Guardianship Tribunal suggested that the current rules allowing VCAT to limit inspection of documents could be expanded and clarified.[157]

PROBLEMS WITH CURRENT LAW AND PRACTICE

21.98 Submissions and consultations disclosed a range of comments and suggestions about VCAT. Community responses revealed concerns that:

- VCAT has inadequate procedures prior to hearings, particularly in relation to investigation of matters, notification of parties, and informing parties of what to expect at the hearing.

- Inadequate evidence is sometimes used at VCAT hearings.
- 'Less restrictive' alternatives to guardianship and administration are rarely adopted.
- Guardianship List hearings are increasingly formal and legalistic.
- There is inadequate attendance and a lack of representation for people who are the subject of applications.
- VCAT sometimes relies upon information that is given to it in confidence, which means that the person about whom a guardianship or administration application is made, or other interested people, are unable to respond to this information.

21.99 In submissions and consultations, it was suggested that VCAT should:

- improve accessibility for regional communities, Indigenous communities, and CALD communities
- have members with a strong background in disability, who receive targeted ongoing training and professional development
- use ADR more regularly to resolve disputes
- have more accessible rehearing and reassessment procedures
- have the capacity to review decisions of guardians and administrators
- have broader powers to deal with abuse of people with disabilities.

21.100 Although some people and organisations criticised VCAT, the Commission does not believe that Victoria's tribunal-based approach to guardianship and administration should be reconsidered. The Public Advocate observed that the 'independent, cheap, relatively informal and expeditious nature of tribunal hearings' is one of the main strengths of Victoria's guardianship laws.[158] While the Commission has no reason to doubt this assessment, there are aspects of VCAT's work in Guardianship List matters that would benefit from development and reform.

21.101 In other comparable international jurisdictions, such as New Zealand, the United Kingdom, Canada and the United States, guardianship and administration matters are heard in courts, which are invariably more formal and costly than Australian guardianship tribunals. In a major study of Australia's tribunal approach to adult guardianship, Terry Carney and David Tait found that guardianship tribunals were:

- more cautious in intervening in the lives of people with disabilities
- more likely to seek further evidence when required
- more likely to involve the person who is the subject of the hearing
- more likely to pay attention to non-professional evidence than court equivalents.[159]

It is important to note, however, that this research was conducted in the 1990s, when the Guardianship and Administration Board (which, together with the New South Wales Guardianship Board, was the subject of the study) had jurisdiction to hear guardianship matters in Victoria. The Board's work was taken over by the Guardianship List at VCAT when the 'super tribunal' was created in 1998.

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

151 Submissions IP 8 (Office of the Public Advocate) 30 and IP 47 (Law Institute of Victoria) 31.

152 Submission IP 47 (Law Institute of Victoria) 31.

153 Ibid.

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

155 Ibid 30–1.

156 Consultation with VCAT members (2 June 2010).

157 Submission IP 32 (NSW Guardianship Tribunal) 5.

158 Submission IP 8 (Office of the Public Advocate) 4.

159 Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (The Federation Press, 1997) 191–7.

Chapter 21 VCAT

Transforming VCAT

21.102 In 2010, VCAT's President published a three-year strategic plan, *Transforming VCAT*.[160] It outlined developments to the Guardianship List, including:

- an ongoing review of all forms and notices in the Guardianship List, and the development of an information sheet to accompany hearing notices
- the development of 'VCAT in a Box' to assist members to conduct hearings in the community
- consultations specifically related to the Guardianship List.[161]

21.103 To improve VCAT's accessibility to the Victorian community, reforms outlined in *Transforming VCAT* included:

- developing and improving procedures and practices for members when dealing with self-represented parties
- working with pro bono legal services to improve the delivery of these services
- regionalisation of VCAT through the establishment of metropolitan hubs, increased VCAT staffing in regional areas, and the allocation of members to key regional areas.
- upgrading the VCAT website and improving the material VCAT provides to the community
- the use of twilight hearings, and hearings in non-traditional settings such as shopping centres and community centres
- further consultation with CALD and Koori communities about barriers that face them at VCAT
- recording all hearings, and providing access to transcripts for a small fee
- a more responsive and effective complaints mechanism.[162]

21.104 VCAT is currently considering legislative reforms, including:

- introducing 'objects' into the VCAT Act, such as community legal education, access to justice, and applying therapeutic approaches to the administration of justice
- allowing members to refer questions of law to VCAT's President, and allowing VCAT to deliver guideline judgments
- the introduction of an internal appeals tribunal
- rules requiring VCAT to ensure that all parties to a matter (including unrepresented parties) understand what is going on and are provided with assistance
- allowing VCAT orders to be enforced without being filed in a court
- an upgraded role for ADR in VCAT legislation.[163]

OTHER JURISDICTIONS AND VIEWS

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

21.105 Article 12(4) of the *Convention on the Rights of Persons with Disabilities* (the Convention) requires that measures designed to support people to exercise their legal capacity provide appropriate safeguards against abuse. The Convention further requires that these safeguards:

- 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 or judicial body.[164]

21.106 While VCAT appears to satisfy the Convention requirement of a 'competent, independent and impartial authority or judicial body',[165] it could be argued that the length and content of some VCAT orders might need re-examination in light of article 12(4) of the Convention.

THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006* (VIC)

21.107 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) requires that public authorities act compatibly with human rights contained in the Charter, and give proper consideration to relevant human rights when making decisions. VCAT has been determined to be a public authority in some contexts, but not in others.[166]

Right to a fair hearing

21.108 Section 24 of the Charter provides that parties to civil proceedings (such as guardianship matters) have the right to have the proceeding decided by a 'competent, independent and impartial court or tribunal after a fair and public hearing'.[167] The Charter's fair hearing right is similar to VCAT's natural justice (or procedural fairness) obligations under section 98(1)(a) of the VCAT Act and at common law.

VCAT Fair Hearing Practice Note

21.109 VCAT has recently released a Practice Note,[168] providing procedural guidance in relation to its fair hearing obligation under the Charter[169] and the VCAT Act.[170] This Practice Note outlines the obligations of members to:

- identify the difficulties experienced by any party, whether due to a lack of representation, literacy difficulties, ethnic origin, religion, disability or any other cause and find ways to overcome those difficulties
- in some cases intervene in proceedings to clarify uncertainty, identify relevant issues, ensure hearings are conducted efficiently and cost-effectively, ask questions to elicit relevant information and deal with inappropriate behaviour
- depending on the circumstances, assist parties to ensure they are provided with a fair hearing—including through explaining the relevant law, identifying key issues, asking questions to elicit relevant information, and drawing attention to the difference between unsworn and sworn evidence—and adjourn hearings in circumstances where it would be unfair to proceed
- take particular responsibility when dealing with self-represented litigants to ensure they receive a fair hearing, especially in matters such as those in the Guardianship List, where a person's freedom and autonomy is at stake.[171]

21.110 The Practice Note makes it clear that when dealing with self-represented parties, the member cannot become an advocate for the party, and must balance the need to enable parties to participate fully with the need to preserve VCAT's impartiality.[172]

160 Justice Ross, above n 4.

161 *Transforming VCAT: Report Card*, above n 93.

162 Justice Ross, above n 4, 22–33.

163 Ibid 50–2.

164 *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).

165 VCAT was found to be a 'competent independent and impartial tribunal' for the purposes of the Victorian Charter: see *Kracke v Mental Health Review Board* [2009] VCAT 646, [447].

166 Ibid [282].

167 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1). This right has been found to apply to civil matters that are both 'judicial' and 'administrative' in character, and VCAT has been found to be a 'competent independent and impartial tribunal': see *Kracke v Mental Health Review Board* [2009] VCAT 646, [418], [447].

168 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT 3 (Fair Hearing Obligation)* (1 October 2010).

169 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

170 See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 97–8, 100–2.

171 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT 3*, above n 168, 3–4.

172 Ibid 4.

VCAT

21.111 The Practice Note also outlines the obligations of parties and their representatives in hearings, including requirements to act courteously, honestly, cooperatively and promptly, minimise costs, and to use reasonable endeavours to resolve disputes where engaged in ADR.[173]

OTHER STATES AND TERRITORIES

21.112 Victoria was the first Australian state to create a 'super tribunal', amalgamating a range of administrative and civil tribunals into the one tribunal. Since this time, Western Australia, the Australian Capital Territory and Queensland have also established 'super tribunals' that have jurisdiction in guardianship and administration matters.[174] South Australia, New South Wales and Tasmania still have specialist guardianship tribunals.[175] In the Northern Territory, guardianship matters are heard in the local court, which is advised by a guardianship panel.[176]

New South Wales Guardianship Tribunal

21.113 The New South Wales Guardianship Tribunal differs from the VCAT Guardianship List in a number of important ways. Some of these differences include:

- an investigative arm known as the 'Coordination and Investigation Unit'
- multi-member panels for initial hearings
- tribunal appointment of 'separate representatives' for some people
- a different approach to venues for hearings.

Coordination and Investigation Unit

21.114 The Coordination and Investigation Unit comprises approximately 30 'coordination and investigation officers' (CIOs) who liaise with the applicant and other parties prior to the hearing, explain tribunal processes, determine the urgency of the matter, gather information relevant to the hearing, and prepare a report for the tribunal.[177] In some cases, CIOs may also assist with the informal resolution of matters prior to hearings.[178] CIO staff come from a range of backgrounds, including disability advocates, lawyers, psychiatrists and social workers.[179]

Multi-member panels

21.115 All initial guardianship and financial management applications are heard before a three-member panel.[180] The panel comprises one legally qualified member, one professional (such as a doctor, psychologist or social worker with experience in disability) and one community member with personal or professional experience in disability.[181] While most reviews of orders are heard before a single member, more complex reviews may be referred to a multi-member panel.[182]

Separate representative

21.116 As there is no general entitlement to legal representation at the Guardianship Tribunal, the leave of the tribunal is required before lawyers may appear.[183] However, the New South Wales Guardianship Tribunal may order the appointment of a 'separate representative' for someone who is the subject of the application or review if 'it appears to the Tribunal that the person ought to be separately represented'.[184] This includes circumstances where:

- the person is unable to provide legal instructions, but seeks or clearly needs independent representation
- there is an intense level of conflict between the parties about what is in the person's best interests

- the person is vulnerable to or has been subject to duress or intimidation by others involved in the proceedings, or there are serious allegations about exploitation, neglect or abuse of the person
- other parties to the proceeding have been granted leave to be legally represented
- the proceedings involve serious issues likely to have a profound impact on the interests and welfare of the person with a disability.[185]

21.117 Separate representatives are usually lawyers. Their role is not to act on the instructions of the person, but rather to seek and present the views of the person, and make representations that are in the person's best interests.[186]

Hearing venues

21.118 Like VCAT, the New South Wales Guardianship Tribunal holds some hearings in suburban and regional areas outside of its main tribunal building in Sydney. However, unlike Victoria, where hearings sometimes occur in regional court venues, the New South Wales Guardianship Tribunal does not hear cases in courtrooms. This has been the result of a very deliberate attempt by the tribunal to avoid association with court processes and courtroom environments.[187] At times, the tribunal uses video-link technology to conduct hearings in some regional areas.

Review jurisdiction of New South Wales Administrative Decisions Tribunal

21.119 The New South Wales Administrative Decisions Tribunal (ADT) hears some guardianship cases. The ADT hears appeals from decisions made by the Guardianship Tribunal.[188] It also reviews decisions made by the New South Wales Public Guardian (similar to the Victorian Public Advocate) and the New South Wales Trustee and Guardian (which has a broadly similar role to State Trustees in relation to administration). We discuss this jurisdiction in more detail in Chapter 19.[189]

Appeal from decisions made by the New South Wales Guardianship Tribunal

21.120 Many decisions of the Guardianship Tribunal may be appealed to the ADT. These include the making of guardianship or financial management orders, and the review of these orders.[190] In 2009–10, there were 20 appeals lodged at the ADT from decisions of the New South Wales Guardianship Tribunal.[191] Decisions of the Guardianship Tribunal may also be appealed to the Supreme Court of New South Wales on questions of law as of right, and appealed on any other grounds with the leave of the Supreme Court.[192]

NEW ZEALAND—COMPULSORY LEGAL REPRESENTATION

21.121 Guardianship matters in New Zealand are heard in the Family Court of New Zealand. The *Protection of Personal and Property Rights Act 1988* (NZ) (PPPR Act) provides that in relation to these matters, the Court:

> *must appoint a barrister or solicitor to represent the person in respect of whom the application is made, unless the Court or the Registrar is satisfied that the person has retained or will retain a barrister or solicitor.*[193]

21.122 The PPPR Act also directs the conduct of appointed barristers and solicitors, stating that, as far as possible, they have a duty to:

> *(a) contact the person in respect of whom the application is made, explain to that person the nature and purpose of the application, and ascertain and give effect to that person's wishes in respect of the application; and*

173 Ibid 5.

174 These are the State Administrative Tribunal in Western Australia, established by the *State Administrative Tribunal Act 2004* (WA); the ACT Civil and Administrative Tribunal, established by the *ACT Civil and Administrative Tribunal Act 2008* (ACT); the Queensland Civil and Administrative Tribunal, established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

175 These are the Guardianship Board of South Australia, established under the *Guardianship and Administration Act 1993* (SA) pt 2 div 1–2; the New South Wales Guardianship Tribunal, established under the *Guardianship Act 1987* (NSW) pt 6; the Guardianship and Administration Board in Tasmania, established under the *Guardianship and Administration Act 1995* (Tas) pt 6.

176 *Adult Guardianship Act 1988* (NT) ss 9, 11–12.

177 Consultation with New South Wales Guardianship Tribunal (24 August 2010).

178 New South Wales Guardianship Tribunal, *Annual Report 2009–2010* (2010) 12.

179 Consultation with New South Wales Guardianship Tribunal (24 August 2010).

180 *Guardianship Act 1987* (NSW) s 51(1). Reviews of orders and matters relating to consent to medical treatment may be heard before one or two members: at s 51A(1).

181 Ibid s 51(1).

182 Consultation with New South Wales Guardianship Tribunal (24 August 2010).

183 *Guardianship Act 1987* (NSW) s 58(1).

184 Ibid s 58(3). Separate Representation may also be ordered in guardianship proceedings in Queensland: see *Guardianship and Administration Act* (Qld) s 125.

185 New South Wales Guardianship Tribunal, *Practice Note No 1 of 2009—Legal Practitioners and Guardianship Proceedings* (2009) 6.

186 Ibid.

187 Consultation with New South Wales Guardianship Tribunal (24 August 2010).

188 *Guardianship Act 1987* (NSW) s 67A.

189 *Ibid* s 80A, *NSW Trustee and Guardian Act 1997* (NSW) s 62.

190 For a full list of reviewable decisions, see *Guardianship Act 1987* (NSW) s 67A.

191 Administrative Decisions Tribunal, *Annual Report 2009/2010* (2010) 18.

192 *Guardianship Act 1987* (NSW) s 67. However, appeal to the New South Wales Supreme Court is not available if an appeal regarding the same decision has already been made to the Administrative Decisions Tribunal: at s 67(1)(a).

193 *Protection of Personal and Property Rights Act 1988* (NZ) s 65(1).

(b) evaluate the solutions for the problem for which an order is sought submitted by other parties to the proceedings, taking account of the need to find a solution that—

(i) makes the least restrictive intervention possible in the life of the person in respect of whom the application is made, having regard to the degree of incapacity or incompetence of that person; and

(ii) enables or encourages the person in respect of whom the application is made to develop and exercise such capacity or competence that the person may have to the greatest extent possible.[194]

21.123 Lawyers appointed to this role are drawn from a panel known as the 'Counsel for Subject Person List'. To be a member of this list, lawyers must have specialised skills and expertise, including:

- demonstrated knowledge and experience in the relevant laws
- an understanding of disability and an ability to communicate with people with disabilities
- other appropriate litigation and legal experience
- an awareness of the community and service sectors in relation to people with disabilities
- appropriate cultural awareness or experience.[195]

21.124 The Counsel's legal fees and reasonable expenses are paid out of public funds.[196] However, the Court must consider the means of the parties, and has the discretion to recoup the fees or expenses paid, or any part of them, from the estate of the represented person or from any party.[197] In 2006–07, the total public cost of judge-ordered services in relation to matters under the PPPR Act was NZ$1.057 million, and the main component of these costs was court appointed lawyers.[198]

CONFIDENTIALITY MATTERS

21.125 All Australian states and territories have legislation that restricts access to or publication of information concerning guardianship matters. For example, Western Australian guardianship legislation prohibits other parties and their representatives in a proceeding from inspecting documents lodged with the tribunal if a document contains a medical opinion not concerning that party.[199] Queensland guardianship law limits the right to inspect documents based on the identity of the person requesting access to such documents.[200]

21.126 In 2007, the Queensland Law Reform Commission was asked to consider the issue of confidentiality in the guardianship system, and matters relating to access to information presented at hearings.[201]

21.127 The Queensland Parliament implemented most of the Queensland Law Reform Commission's recommendations for legislative change, which aim to provide greater accountability and transparency in the guardianship system, in the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld). This included replacing the earlier system of 'confidentiality orders' with a new system of 'limitation orders', which provide more rigour and procedural safeguards around various limitations of access to confidential information.[202]

POSSIBLE OPTIONS FOR REFORM

21.128 The Commission is considering reform proposals in relation to the following VCAT matters:

- pre-hearing processes
- supported decision making orders
- hearing duration
- confidentiality
- rehearings and reassessments
- enforcement against third parties
- skills and training of guardianship list members.

PRE-HEARING PROCESSES

21.129 Concerns raised in our consultations about the pre-hearing processes of VCAT included that:

- People who should be notified are not always notified of hearings.
- Not enough effort is made to ensure the proposed represented person is aware of a hearing and is able to attend.
- VCAT notification letters are inaccessible.
- There is sometimes insufficient evidence available at hearings.
- Many people do not know what to expect at hearings and do not know their rights.
- Matters that might be resolved informally or through alternative dispute resolution measures are insufficiently identified at present.

21.130 VCAT is currently reviewing all forms and notifications in the Guardianship List in consultation with stakeholders, and is also developing an information sheet to accompany hearing notices.[203]

Preparation for hearings

More active coordination and investigation of matters prior to hearings

21.131 To ensure parties and the tribunal are as prepared as possible for hearings, the Guardianship List could adopt the New South Wales Guardianship Tribunal model of a coordination and investigation unit. This would involve making VCAT:

- engage with parties more directly prior to hearings
- explain processes
- ensure sufficient evidence is available for hearings
- identify matters that might be resolved by means other than a hearing.

21.132 This proposal has a number of advantages. It should assist the person to whom the application relates and other parties to understand more about the hearing. It should also provide VCAT with greater capacity to encourage people to attend the hearing and obtain assistance.

21.133 It should also enable VCAT to receive much more information about an application than it does at present. In addition, greater contact with the parties prior to the hearing should enhance VCAT's ability to encourage the parties to participate in ADR when this is appropriate.

194 Ibid s 65(2). Guidelines for the conduct of lawyers in this role have also been published: Family Court of New Zealand, *Guidelines for Counsel for Subject Person appointed under Protection of Personal and Property Rights Act 1988* (8 December 2009) Practice Notes <http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes>.

195 See Family Court of New Zealand, *Practice Note—Protection of Personal and Property Rights Act* (16 March 2005) <http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes>.

196 *Protection of Personal and Property Rights Act 1988* (NZ) s 65(5)(b).

197 Ibid s 65(8).

198 Ministry of Justice (New Zealand), *Family Court Statistics 2006/2007* (2009) 81–2 <http://www.justice.govt.nz/publications/global-publications/f/family-court-statistics-in-new-zealand-in-2006-and-2007-april-2009>.

199 *Guardianship and Administration Act 1990* (WA) s 112(2).

200 *Guardianship and Administration Act 2000* (Qld) s 103. A person must be an 'active party' or a person the tribunal considers to have 'a sufficient interest in the proceeding' to access documents before the tribunal.

201 Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* Report No 62 (2007) vols 1, 2.

202 See *Guardianship and Administration Act 2000* (Qld) ss 106–9; ibid vol 1,182–8.

203 *Transforming VCAT: Report Card*, above n 93.

21.134 The main disadvantage of this proposal is the added cost of hiring additional staff to perform this role.

21.135 An alternative approach would be to fund the Public Advocate to undertake this role. This step would complement the Public Advocate's existing role to investigate and provide reports to VCAT when directed to do so.[204]

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

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

Representation of the person to whom the application relates

21.136 Some groups—particularly lawyers and advocates—expressed concern that proposed represented people receive insufficient independent legal assistance and advocacy support.

21.137 Victoria Legal Aid, Villamanta Disability Rights Legal Service, Seniors Rights Victoria, Mental Health Legal Centre, and other community legal centres currently provide legal advice and representation, while a range of community-based organisations also provides advocacy. The Public Advocate VCAT Duty Officer may also provide advice, but does not represent parties at a hearing.

21.138 The difficulties experienced by unrepresented litigants are being considered in the current VCAT review process. The needs of many of the people involved in Guardianship List matters are particularly great because VCAT does not have an investigative arm to gather relevant information and assist people to prepare for a hearing. Many people who are the subject of Guardianship List applications and reassessments are likely to require a significant degree of support and advocacy at hearings.

Option A: Provide all proposed represented people with information and referrals around advocacy services prior to hearings

21.139 This option would aim to ensure that people who are the subject of Guardianship List applications are aware that legal assistance is available through Victoria Legal Aid, specialist community legal centres and other organisations. This step would reflect the current requirements of the *Mental Health Act 1986* (Vic), which mandates the provision of a statement of rights and the availability of relevant information, including the right to obtain legal representation.[205] The Mental Health Review Board provides patients with the contact details of Victoria Legal Aid, the Mental Health Legal Centre, the Federation of Community Legal Centres and Community Visitors.[206]

Option B: Amend section 62 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) to give a represented person or a proposed represented person a right to legal representation in all Guardianship List matters

21.140 This option would establish a right to legal representation without the need for VCAT approval. Although the Commission is unaware of any cases in which a person who is the subject of a Guardianship List application has been denied the right to legal representation, it is most unusual to require a person to seek leave to be legally represented when matters as important as their right to make their own decisions about accommodation, health care and financial management are in issue.[207]

Option C: Create a statutory power for VCAT to order that a person be provided with representation when VCAT believes this step is necessary

21.141 This option would allow VCAT to appoint an independent representative for a person in circumstances where VCAT considers it necessary. This would be similar to the approach in New South Wales and Queensland, where the tribunal may order that a person be separately represented if they believe it is necessary.[208] At present, the Commission understands that VCAT does adjourn hearings in some cases and recommends the person see the VCAT Duty Officer, but this is not prescribed in legislation.

Option D: Establish a network of community volunteers to provide assistance at VCAT hearings

21.142 This option would involve establishing a network of volunteer or pro bono advocates to increase the level of representation available to people at Guardianship List hearings. One model for this might be the Mental Health Legal Centre's Pro Bono Justice Project, which trains and supervises lawyers (with expertise in other areas) to provide pro bono advocacy to clients at hearings before the Mental Health Review Board.[209] This expands the centre's capacity to provide advocacy services. The project also seeks to create greater awareness of mental health law issues in the legal community. [210]

21.143 Another model would be to engage and train law students or other community members to provide voluntary advocacy at Guardianship List hearings. A scheme of this type previously existed for Mental Health Review Board Hearings in Victoria, and is used by the Mental Health Tribunal Representation Scheme run by Advocacy Tasmania.[211]

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

REQUIREMENT TO CONSIDER ALTERNATIVES TO GUARDIANSHIP AND ADMINISTRATION

21.144 In Part 3, the Commission proposed two new VCAT supported decision-making orders:

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

21.145 Appointing a supporter would provide a clear alternative to the appointment of a guardian or administrator in some cases. This option explores how VCAT might be required to consider the option of appointing a supporter before it can appoint a substitute decision maker.

Option A: No change

21.146 VCAT is currently required to consider whether there are less restrictive alternatives to guardianship and administration before it can make either of these appointments.[212] The G&A Act does not specify any 'less restrictive alternatives'. In practice, however, VCAT might determine that appointing an administrator is unnecessary because financial counselling or a Centrelink nominee arrangement is sufficient to meet the needs of the person concerned.

204 See *Guardianship and Administration Act 1986* (Vic) s 16(d); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cls 35, 42, 48.

205 *Mental Health Act 1986* (Vic) ss 18, 19.

206 See Mental Health Review Board of Victoria, *Information about your hearing before the Mental Health Review Board* (April 2003) <http://www.mhrb.vic.gov.au/Patient_Information/Invol1.pdf>.

207 See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62.

208 *Guardianship Act 1987* (NSW) s 58(3); *Guardianship and Administration Act* (Qld) s 125.

209 See Mental Health Legal Centre, *Mental Health Review Board Pro Bono Advocacy* (2011) <http://www.communitylaw.org.au/mentalhealth/cb_pages/MHRB_pro_bono.php>.

210 See ibid.

211 For further details, see Advocacy Tasmania Inc, *MHT Representation Scheme* http://www.advocacytasmania.org.au/mhtrs.htm; Diane Sharman and Valerie Williams, 'Mental Health Tribunal Representation Scheme' (Paper presented at Rights, Responsibilities and Rhetoric: Unpacking Policy and Practice Issues in Mental Health Law, Guardianship & Trusteeship, Adelaide, 8–9 October 2009) available at <http://www.advocacytasmania.org.au/publications/ATI_conference_MHTRS.doc>. In the first six and a half years since the scheme began in 2003, representation was offered to more than 1500 people. In 2009–10, representation was offered to 599 people and services were provided to 290 people: see Advocacy Tasmania Inc, *Annual Report 2009/2010* (2010) 47.

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

Option B: Require VCAT to consider whether supported or co-decision-making orders are sufficient to meet the person's needs before appointing a substitute decision maker

21.147 This option would specify a 'less restrictive alternative' by requiring VCAT to consider whether a supported or co-decision-making order would be appropriate and sufficient to meet the needs of the person before it could appoint a substitute decision maker. Supported decision-making arrangements are considered in detail in Chapter 7.

21.148 As supporters and co-decision makers would be limited to the person's existing support network, this requirement would be effectively limited to cases where a person has an appropriate person to undertake this role.

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

DURATION OF ORDERS

21.149 The G&A Act does not impose any limits on the duration of guardianship and administration orders. The statutory requirement that these orders be reassessed at regular intervals acts as a de facto time-limiting device.

21.150 In other jurisdictions, it is unusual to allow orders of unlimited duration. Many allow a degree of flexibility, however, in the way a tribunal or court might determine the duration of the order. In New Zealand, for example, an order must be of fixed duration. If no end date is specified, the order ceases to operate either a year after it is made or when all things provided for in the order have been completed.[213]

21.151 The Commission has identified two possible approaches to this issue.

Option A: No change

21.152 This option allows VCAT to continue to make orders of unlimited duration. The G&A Act provides, however, that initial orders should be reviewed within twelve months and continuing orders at least once every three years, unless VCAT orders otherwise.

21.153 The advantage of this option is that while it provides maximum flexibility, it ensures that continuing orders are reassessed at regular intervals.

21.154 The disadvantage of this option is that it does not encourage VCAT to design orders for each particular case and limit the duration of those orders.

Option B: Restrict the duration of Guardianship List orders

21.155 This option would involve placing a limit on the duration of orders. That limit could be three years. Orders could be renewed if required, perhaps without any need for the parties to attend if they consented to this course.

21.156 The advantage of this option is that it would encourage 'purpose built' orders in each case. When a further order was required and not disputed, people could avoid the stress of a hearing by consenting to VCAT dealing with the matter in their absence.

21.157 The disadvantage of this option is that it might increase VCAT's workload by requiring it to make a new order (if needed) after a fixed period rather than allowing it to reassess orders of indefinite duration at regular intervals.

Question 139 Do you think that new guardianship legislation should specify a maximum period for all guardianship and administration orders?

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

Question 141 Following the expiry of an order, should it be possible for VCAT to reassess or make a new guardianship or administration order in the absence of the parties, with their consent?

CONFIDENTIALITY ISSUES

Providing information to VCAT to determine the need for a substitute decision maker

21.158 The following options concern access to information provided to VCAT for use when determining whether a person needs a guardian or administrator.

21.159 The options aim to facilitate the provision of information to VCAT, while also protecting the privacy of the proposed represented person. These options are not mutually exclusive. Any or all of them could be included in new laws.

Option A: Require VCAT and the Public Advocate to advise people that the information they provide to assist VCAT may be disclosed to others and made available on VCAT's file

21.160 This option would require VCAT and the Public Advocate to advise an individual or organisation holding information about a person of the implications of producing that information. This advice could be given at the time the information is requested and could include details of:

- to whom the information can be disclosed
- that the information may be made available on VCAT's files
- the procedure to follow if the holder of the information seeks to maintain the confidentiality of the information (see also Option B below).

21.161 This arrangement would inform those individuals and organisations holding personal information about people who are the subject of applications of VCAT's obligation to provide information to other parties to the proceeding, in compliance with the rules of procedural fairness.

Option B: Onus is on the person providing confidential information to VCAT to justify why it should not be available to the parties

21.162 This option reflects the Law Institute of Victoria's position that the onus should rest with an individual or organisation providing confidential information about a person to justify why the information should remain confidential and not be disclosed to other parties to the proceeding.[214]

21.163 The advantage of this option is that it provides some flexibility to allow for the protection of the privacy of the represented person and other relevant people in circumstances where it is necessary. For example, there may be situations where disclosure of certain information would cause unnecessary distress to the proposed represented person, or damage important relationships in their lives. The proposal also reflects the position of the Southwest Advocacy Association, which suggested that VCAT should decide to withhold information on a case-by-case basis, and only where there is a valid reason to keep the information private.[215] This approach would also ensure that Public Advocate reports containing sensitive information can be kept confidential, if the Public Advocate can persuade VCAT that this is appropriate and necessary.

213 *Protection of Personal and Property Rights Act 1988* (NZ) s 17.

214 See submission IP 47 (Law Institute of Victoria) 31.

215 Submission IP 5 (Southwest Advocacy Association) 7.

21.164 However, a significant problem with this proposal is that while VCAT has the power to require evidence be produced, the tribunal cannot exercise this power if it is unaware that such confidential information exists. Further, in some circumstances the withholding of confidential information may be to the detriment of the represented person, if it means that important information relating to the circumstances and wellbeing of the person is unavailable to VCAT. So while there is a strong need to protect the privacy of an adult with impaired capacity, the Commission recognises that confidential information may need to be provided to VCAT in order for VCAT to make an informed and accurate decision.

Question 142 Should VCAT advise a person who provides them with confidential information that the information may be made available to the proposed represented person and other parties?

Question 143 Should a person who provides VCAT with confidential information be responsible for requesting and justifying the need to keep the information confidential?

Access to VCAT files

21.165 These options respond to concerns about the ability to access VCAT files. In particular, they deal with the need to strike a balance between ensuring transparency of VCAT decision making, and competing concerns about the protection of information provided in confidence.

Option A: No change—maintain open VCAT files (with restrictions)

21.166 This option would require no changes to the current provisions in the VCAT Act, which allow *any* person to inspect or obtain copies of the register of proceedings or files of documents lodged in a proceeding, subject to the restrictions outlined earlier in this chapter.[216]

21.167 The advantage of this option is that it promotes transparency by allowing public access to VCAT's register of proceedings and files of documents lodged in proceedings. Indeed, VCAT members noted that VCAT already considers whether the contents of the requested documents will affect people's interests before the information is released.[217]

21.168 The disadvantage of this option is that allowing public access to VCAT files arguably does not reflect the sensitive nature of guardianship proceedings. It also fails to address concerns raised during consultations and in submissions in relation to the need for increased privacy in VCAT's handling of confidential information.

Option B: Close VCAT Guardianship List files to the public (with exceptions)

21.169 VCAT files in Guardianship List matters could be closed to the public unless VCAT determines otherwise. The right to inspect or obtain copies of files could be limited to the parties to any proceedings in the Guardianship List. VCAT could also be permitted to limit a party's access to materials in exceptional circumstances.

21.170 The advantage of this option is that it acknowledges the fact that guardianship files are likely to contain sensitive information, and that providing such information to other parties may be to the detriment of the represented person. It also reflects the argument that the care and protection of the represented person is a core duty of a tribunal in guardianship proceedings.[218]

21.171 Closing VCAT Guardianship List files to people other than parties responds to the Public Advocate's request for greater legislative clarity around the circumstances in which its reports may be made publicly available.[219]

Question 144 Should VCAT Guardianship List files remain open to the public, with some restrictions about who can gain access, or should the files be closed to the public, with only the parties having a right of access?

REHEARINGS

21.172 During consultations, some concern was expressed about the relatively short period—28 days—within which it is possible to apply for a rehearing of a Guardianship List matter, particularly because it appears that many people are not aware of their right to do so. The distinction between 'rehearings' and 'reassessments' also seems to be a source of some confusion.

21.173 The President's review of VCAT found that while there are very few applications for rehearings, the capacity for rehearings is important.[220] The President's review recommended the establishment of an appeal tribunal within VCAT, similar to that which exists within the New South Wales Administrative Decisions Tribunal and the Queensland Civil and Administrative Tribunal.[221]

21.174 The Commission has identified three options that merit consideration.

Option A: No change

Option B: Extend the period in which an application for a rehearing can be sought

21.175 Extending the review period would address concerns that a 28-day time limit to seek a rehearing is too short. Alternatively, it might be argued that beyond this period it is more appropriate to seek a reassessment of the order as it would have been in place for some time (if a guardianship or administration order has been made) or make a fresh application (if no order was made at the hearing).

Option C: Require VCAT to inform parties of the right to seek a rehearing

21.176 A specific legislative requirement for VCAT to inform parties of the right to a rehearing may overcome concerns that few people are aware of this right.

Question 145 Should the period in which an application for a rehearing can be made be extended beyond the current 28-day limit?

Question 146 Should VCAT be required to inform parties of the right to seek a rehearing?

REASSESSMENTS

21.177 Section 61 of the G&A Act requires VCAT to reassess guardianship and administration orders that extend beyond 12 months unless VCAT orders otherwise. Some represented people raised concerns about the accessibility of reassessments, particularly the fact that they are required to 'opt in' if they wish to have a reassessment hearing.

21.178 The Commission has identified two possible options for reform.

216 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 144, 146.

217 Consultation with VCAT members (2 June 2010).

218 Queensland Law Reform Commission, above n 201, 49 citing *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane).

219 Submission IP 8 (Office of the Public Advocate) 30–1.

220 Justice Bell, above n 3, 55.

221 Ibid 55–60.

Option A: Reassessment hearings are always an 'opt out' rather than 'opt in' process

21.179 The advantage of this option is that it would reduce the perception that the reassessment process is unimportant for the represented person, which would probably increase levels of represented people's participation in these reassessments. The disadvantages are that historically, levels of participation in reassessments have been low, VCAT reassesses over 4000 administration applications per year, and there are resource implications in scheduling hearings that are unattended.

Option B: The represented person has a right to at least one reassessment hearing during the period of the order

21.180 This option is intended to provide easier access for the represented person to reassessment of their order, even if they are unable to provide the tribunal with new evidence such as medical reports prior to the hearing. An advantage of this approach is that it would ensure that the difficulty and cost of obtaining new medical evidence is not a barrier to accessing a reassessment, while a disadvantage is that in the absence of new medical evidence it may be difficult for VCAT to justify any change to the order. This option would not be intended to limit the number of reassessment hearings a person could obtain during the period of an order.

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

Question 148 Should a represented person be entitled to at least one unscheduled reassessment of the order during the period of the order?

ENFORCEMENT OF DECISIONS AGAINST THIRD PARTIES

21.181 Some people expressed concerns that guardians sometimes experience difficulty in having third parties accept their decision-making authority.[222] To the extent that they are acting within the terms of a guardianship order, decisions of guardians have the same legal effect as if made by the represented person themselves had they capacity to do so.[223]

21.182 The Public Advocate is also concerned that decisions made by guardians might be overturned once the guardianship order lapses.[224]

21.183 Some jurisdictions have sought to deal with these issues. In Scotland, for example, the Court (or sheriff) can make an order 'ordaining the person named in the order to implement the decision of the guardian' where a third party refuses to comply with the guardian's decision.[225]

21.184 Two options merit consideration.

Option A: No change

21.185 This option would maintain the status quo, which does not provide any direct enforcement mechanisms against third parties. Guardians or administrators whose authority is not recognised by third parties must rely on existing legal remedies open to the represented person. For example, if an institution refuses to discharge a represented person at the direction of a guardian (with appropriate powers), proceedings for false imprisonment would be possible.

21.186 The advantage of this option is that it deals with compliance issues through legal remedies that are available to any person when a third party fails to comply with their decisions. It might also shift the emphasis to more community education about guardianship, which could be a more effective means of encouraging third parties to act upon decisions of guardians.

Option B: Allow VCAT to order third parties to comply with decisions of guardians and administrators, with penalties for failure to comply with these orders

21.187 This option would involve introducing new provisions into the legislation that would allow a guardian or administrator to apply to VCAT for an order that a third party comply with the guardian's or administrator's decision. For example, this might relate to those situations where a guardian makes a request for access to information, or a decision for a represented person to be discharged from a residential facility, and the decision is not recognised by a third party. It would be necessary to give the third party notice of the enforcement application so that they have an opportunity to be heard before VCAT makes any order.

21.188 In these situations, the third party could be liable for civil penalties if they fail to comply with the order. Orders would be available only for circumstances of non-compliance with any decision of a guardian or administrator that the represented person would have been able to enforce themselves. They would not be available to compel conduct of a third party that the person themselves would not have been able to compel. For example, a guardian would be able to obtain a VCAT order to compel access to relevant personal information that the represented person is entitled to access under information privacy legislation. In most cases, the VCAT order alone would probably ensure third party compliance with the guardian's or administrator's decision. Civil penalties are an appropriate response if a third party refuses to comply with a guardian's or administrator's decision after being ordered by VCAT to do so.

21.189 The primary advantage of this option is that it would enhance the capacity of guardians and administrators to enforce their decisions.

21.190 A disadvantage is that it could encourage unnecessary levels of confrontational behaviour by some guardians and administrators.

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

SKILLS AND TRAINING OF GUARDIANSHIP LIST MEMBERS

21.191 Although the skills and training of members was a matter raised in some submissions and consultations, the Commission believes that this matter is best left to VCAT and the Judicial College.

21.192 Reforms already proposed or recently implemented in the VCAT review process include:

- key competencies and performance indicators for all VCAT members
- a code of conduct for members and a customer service charter
- formal performance appraisal during members' terms of office
- a more strategic approach to professional development of members
- a fairer and more transparent approach to reappointment of members
- the introduction of an oath/affirmation of office for members.[226]

222 See, eg, consultation with metropolitan carers (6 May 2010).

223 *Guardianship and Administration Act 1986* (Vic) ss 24(4), 25(3).

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

225 *Adults with Incapacity (Scotland) Act 2000* (Scot) s 70(2).

226 Justice Ross, above n 4, 19–21, 34.

21.193 *Transforming VCAT* has proposed a professional development program that would allow more members to sit across multiple lists, enhancing VCAT's flexibility and responsiveness to changing demands.[227] Although there are obvious administrative and efficiency benefits to this approach, it is important that the Guardianship List is comprised of specialist members with appropriate knowledge and skills.

Multi-member hearings

21.194 It is challenging for one person to acquire all of the knowledge and skills necessary to deal with many of the complex issues that arise in Guardianship List cases. One option would be the reintroduction of multi-member panels, as was the case in the early days of the Guardianship and Administration Board.

21.195 Multi-member panels are used for all initial guardianship and administration applications in New South Wales[228] and South Australia.[229] Three member panels are also used in Queensland.[230]

21.196 Two options merit consideration.

Option A: No change—single member hearings used for initial applications

Option B: Initial hearings to consist of multi-member panels drawn from a range of backgrounds

21.197 The main advantage of multi-member panels is that they allow people with a range of relevant attributes to participate in the complex decision making often required in guardianship and administration matters. The New South Wales model—which involves a combination of legal, professional and community-based experience—could be an effective response to concerns that some legally trained members have an insufficient understanding of disability, and the community and service sector that supports people with disabilities.

21.198 Multi-member panels would substantially increase the cost of the Guardianship List.

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

OTHER IMPORTANT CONSIDERATIONS

HEARINGS

Formality of hearings

21.199 Responses to our information paper from people involved in Guardianship List matters indicated a strong preference for informal hearings.[231] The way in which rooms are set up and the places where people sit often affect the level of formality in hearings. Some people, for example, expressed concern about some VCAT members choosing to sit behind the bench in 'court-style' rooms rather than with the parties at the bar table.[232]

21.200 The Commission notes that the VCAT Act requires hearings to be conducted with as little formality and technicality as is allowable in the circumstances.[233] VCAT's President is currently investigating whether legislative reform to the VCAT Act might further guide the conduct of hearings, including a proposal to make 'applying therapeutic approaches to the administration of justice' an object in the VCAT Act.[234]

21.201 The way in which Guardianship List matters are conducted is an important issue that requires further consideration.

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

Attendance of the proposed represented person at hearings

21.202 Our consultations revealed significant concern that proposed represented people rarely attend hearings. There is no available data about the level of attendance.

21.203 Because of the significance of a guardianship or administration order, it is important that VCAT members have the opportunity to meet the proposed represented person whenever possible. In circumstances where attendance at VCAT would place undue stress on the represented person, VCAT should be encouraged to consider alternative means of enabling the member to speak directly to the person concerned whenever possible. This occurs in some cases at present, and investigations by the Public Advocate are also sometimes used as an alternative means of obtaining the person's views and preferences. Nonetheless, there appears to be scope for VCAT to do more to enable the proposed represented person to participate in Guardianship List matters.

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

ACCESSIBILITY FOR THE INDIGENOUS COMMUNITY

21.204 The Commission's initial consultations with Indigenous Victorians suggest a low level of involvement with guardianship laws. Similar issues were identified in the President's review of VCAT, which made two recommendations about VCAT's accessibility to Indigenous Victorians, including the introduction of a VCAT Koori liaison officer and a feasibility study on establishing a 'Koori Tribunal' within VCAT for guardianship matters.[235]

21.205 As part of *Transforming VCAT*, VCAT is conducting further consultations with Indigenous groups around access to justice issues.[236] The Commission seeks further responses about this important accessibility issue.

Question 153 Do you have any ideas about how to make the Guardianship List more accessible to Indigenous people?

ACCESSIBILITY FOR CULTURALLY AND LINGUISTIC DIVERSE GROUPS

21.206 Representatives of CALD communities raised the following concerns about Guardianship List matters:

- Information needs to be not only translated into community languages, but explained to people in a way they can understand.
- It is crucial that interpreters are easily accessible at Guardianship List hearings, and that VCAT members are trained in how to work with them.[237]

227 Ibid 40.

228 *Guardianship Act 1987* (NSW) s 51(1).

229 *Guardianship and Administration Act 1993* (SA) s 6(2).

230 *Guardianship and Administration Act 2000* (Qld) s 102. In 2008–09, the majority of hearings in Queensland were before one member, though the (former) Queensland Guardianship and Administration Tribunal reported that a significant number of these single-member hearings are 'non-contentious reviews of existing appointments': see Queensland Guardianship and Administration Tribunal, *Annual Report 2008/2009* (2009) 38–9.

231 See, eg, consultations with carers, people with disabilities and service providers in Ballarat (15 April 2010), Mallee Family Care Mildura (28 April 2010), Self Advocacy Resource Unit (4 May 2010), metropolitan carers (6 May 2010), Royal District Nursing Service (20 May 2010) and Gippsland Carers Association (25 May 2010); Submissions IP 5 (Southwest Advocacy Association) 7 and IP 46 (Troy Huggins).

232 See, eg, consultation with Villamanta Disability Rights Legal Centre (19 April 2010).

233 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(d).

234 Justice Ross, above n 4, 50. See also Justice Bell, above n 3, 82.

235 Justice Bell, above n 3, 25.

236 Justice Ross, above n 4, 24.

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

21.207 The Commission seeks further responses about this important accessibility issue.

Question 154 What can be done to make the Guardianship List more accessible to users who come from culturally and linguistically diverse backgrounds?

ACCESSIBILITY OF VCAT FOR REGIONAL VICTORIANS

21.208 A primary concern of some regional Victorians was the venues that are currently used by VCAT in Guardianship List matters. In particular, the use of courtrooms was criticised as creating an overly formal, court-like atmosphere. There was also concern that there are often significant delays in obtaining hearings in regional areas.

21.209 The Commission sees merit in the approach of the New South Wales Guardianship Tribunal, which uses meeting rooms rather than courts for regional hearings.

21.210 The Commission notes that VCAT is considering a regionalisation process involving:

- the establishment of 'hubs' in metropolitan Melbourne, beginning with Berwick
- increased VCAT staffing in regional areas including Geelong, Ballarat, Bendigo, Shepparton, Morwell, Mildura, Warrnambool and Wangaratta
- the allocation of a member to each of the regional areas identified above.[238]

Question 155 What can be done to make the Guardianship List more accessible to users in regional areas?

238 Justice Ross, above n 4, 25–30.