Victorian
Law Reform
Commission

GUARDIANSHIP

Consultation Paper 10

Victorian Law Reform Commission

GPO Box 4637
Melbourne Victoria 3001 Australia
DX 144, Melbourne

Level 3, 333 Queen Street
Melbourne Victoria 3000 Australia

Telephone: + 61 3 8608 7800
Freecall: 1300 666 555 (within Victoria)
Facsimile: + 61 3 8608 7888
Email: law.reform@lawreform.vic.gov.au
Web: www.lawreform.vic.gov.au

Contents

Contents

Contents

Contents

VICTORIAN LAW REFORM COMMISSION

Chairperson
Professor Neil Rees*

Commissioners
Magistrate Mandy Chambers*
Justice Karin Emerton*
Judge Felicity Hampel
Lynne Haultain*
Hugh de Kretser*

Reference Team
Emma Cashen (Team Leader)
Tess McCarthy
Dr Kirsten McKillop
Ian Parsons
Martin Wimpole

Chief Executive Officer
Merrin Mason

Operations Manager
Kathy Karlevski

Communications Manager
Nicola Edwards

Team Leaders
Emma Cashen
Lindy Smith

Community Law Reform Manager
Myra White

Policy and Research Officers
Dr Kirsten McKillop
Ian Parsons
Martin Wimpole

Research Assistant
Tess McCarthy

Publications Officer
Carlie Jennings

Research and Executive Assistant
Mia Hollick

Project Officer and Executive Assistant
Jessica Saunders

Librarian
Julie Bransden

Assistant Operations Manager
Vicki Christou

Administrative Officer
Sara Yekenkurul

* Commissioners involved in this reference.

Preface

Guardianship laws will probably affect most Victorians at some time in their lives. They might be appointed by VCAT as the guardian or administrator for a relative or friend, or they might decide, as they grow older, to appoint a partner or adult child as their enduring guardian or attorney to make decisions for them if they become unable to do so in the future.

Victoria has been an Australian and world leader in the field of guardianship. Legislation passed by the Victorian Parliament 25 years ago has been the model for guardianship laws in other states and territories, as well as other countries.

It is time to reconsider these laws because much has changed over the past quarter of a century. Views about people with a disability that affects their capacity to make decisions are now very different. The use of informal substitute decision making is declining as people and institutions pay greater attention to risk management. Victorians are also likely to make much greater use of guardianship laws than ever before as we age as a community.

New guardianship laws should reflect contemporary thinking about people with impaired decision-making capacity. They should also be designed to cater for increased usage and modern conditions.

The Victorian Attorney-General has asked the Commission to review guardianship laws and to report on what changes are needed. This consultation paper contains proposals for change.

This is the second paper released in this review. The Commission published an information paper in February 2010. That paper sought responses from the community about those areas of the law requiring reform. Those responses have greatly influenced the options presented in this paper.

The paper contains the Commission's preliminary ideas about the content of new guardianship laws. We ask a series of questions about our proposals and reform options, some of which might involve significant change. The responses to the questions in this paper will inform the recommendations in the Commission's final report to the Attorney-General, due later in the year.

The Victorian Parliament Law Reform Committee released the final report of its *Inquiry into Powers of Attorney* in August 2010. The recommendations of that Committee have been integrated with the Commission's proposals for reform.

The team working on this project—Emma Cashen (team leader), Tess McCarthy, Dr Kirsten McKillop, Ian Parsons and Martin Wimpole—have worked hard to understand how Victorian guardianship laws operate and how they could be improved. They have consistently produced high quality work. Amanda Kite provided valuable assistance with consultations and research. I thank the guardianship team for their commitment to this project and for producing a document that contains exciting proposals for change.

Carlie Jennings has done an excellent job in the production of this consultation paper. The Commission's chief executive officer, Merrin Mason, and communications manager, Nicola Edwards, have provided invaluable assistance.

The Division of the Commission that has worked with me on this reference—Magistrate Mandy Chambers, Justice Karin Emerton, Lynne Haultain, and Hugh de Kretser—have provided wise guidance.

I also wish to thank the many people who have contributed to this review so far by serving on committees, providing information, attending consultations and writing submissions. I encourage everyone with an interest in guardianship laws to consider the proposals for change in this paper and make a submission to the Commission by 20 May 2011.

Professor Neil Rees

Chairperson

14 February 2011

Call for Submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

WHAT IS A SUBMISSION?

Submissions are your ideas or opinions about the law being reviewed. Submissions can be anything from a personal story about how the law has affected you, to a research paper complete with footnotes and bibliography. The Commission wants to hear from anyone who has experience with the law under review. It does not matter if you only have one or two points to make—we still want to hear from you.

WHAT IS MY SUBMISSION USED FOR?

Submissions help the Commission understand different views and experiences about the law it is researching. We use information in submissions, and from consultations, along with other research to write our reports and develop recommendations.

HOW DO I MAKE A SUBMISSION?

Submissions can be made in writing or in the case of those requiring assistance, verbally to one of the Commission staff. There is no particular format you need to follow, however, it would help us if you addressed the questions listed at the end of the paper. **You are invited to respond to as many or as few of the questions as you like.**

Submissions can be made by:

- Online form: www.lawreform.vic.gov.au
- Email: law.reform@lawreform.vic.gov.au
- Mail: PO Box 4637, GPO Melbourne Vic 3001
- Fax: (03) 8608 7888
- Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

ASSISTANCE

If you require an interpreter, need assistance to have your views heard or would like a copy of this paper in an accessible format please contact the Commission.

PUBLICATION OF SUBMISSIONS

The Commission is committed to open access to information and we publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, these views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the final report is tabled in Parliament. Hardcopies of submissions will be archived and sent to the Public Records Office Victoria.

The Commission also accepts submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. Any request for access to a confidential submission will be determined in accordance with the *Freedom of Information Act 1982* (Vic), which has provisions designed to protect personal information and information given in confidence. Further information can be found at **www.foi.vic.gov.au**.

Please note that submissions that do not have an author or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

CONFIDENTIALITY

When you make a submission you must decide how you want your submission to be treated. Submissions are either public or confidential.

- **Public** submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public.
- **Confidential** submissions are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us you want your submission treated as confidential we will treat it as public.

ANONYMOUS SUBMISSIONS

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: **www.lawreform.vic.gov.au**.

SUBMISSION DEADLINE: 20 MAY 2011

Terms of Reference

1. The Victorian Law Reform Commission is to review and report on the desirability of changes to the *Guardianship and Administration Act 1986* (the Act), having regard to:
   a) the principle of respect for the inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons, and the other General Principles and provisions of the United Nations Convention on the Rights of Persons with Disabilities (the United Nations Conventions);
   b) the introduction of the Victorian Charter of Human Rights and Responsibilities;
   c) developments in policy and practice in respect of persons with impaired decision making capacity since the Act commenced;
   d) the increase in Victoria's ageing population and the changing demographic nature of the clients of the Office of the Public Advocate.
2. The purpose of the review is to ensure that guardianship and administration law in Victoria is responsive to the needs of people with an impaired decision making capacity, and advances, promotes and protects the rights of people with an impaired decision making capacity.
3. In particular, the Commission is to have regard to:
   a) the role of guardians and administrators in advancing the represented person's rights and interests and in assisting them to make decisions;
   b) the need to balance the protection of the interests of an adult with impaired capacity by a guardian or an administrator with the person's exercise and enjoyment of the human rights, such as the right to freedom of choice, association and movement, including consideration of whether the Act strikes the right balance between facilitating action in the best interests of an adult with impaired capacity and the person's rights as expressed in the United Nations Convention;
   c) the alignment of guardianship and administration law with other relevant statutory regimes, including consideration of the appropriateness and feasibility of extending guardianship and administration law to individuals who are 17 years of age and have impaired decision making capacity;
   d) the validity and efficacy of informal decision-making for an adult with impaired capacity;
   e) the need to ensure that the powers and duties of guardians and administrators established by the legislation are effective, appropriate and consistent with Australia's human rights obligations and the Victorian Charter;
   f) the functions, powers and duties of the Public Advocate;
   g) the role and powers of the Victorian Civil and Administrative Tribunal in relation to guardians and administrator and the efficacy of its processes for the appointment of guardians and administrators in the Act and the *Victorian Civil and Administrative Tribunal Act 1998* and Rules;
   h) the feasibility of introducing additional mechanisms for review of decisions made by guardians and administrators under the Act, including the scope of these review powers and the meaning of 'decision' for this purpose and whether there should be a mechanism to address unconscionable conduct of a guardian or administrator;
   i) the appropriateness of the current requirements for and criteria pertaining to, the treatment of a represented person under the Act, including a consideration of the existing provisions dealing with medical research, non-medical research, medical and other treatment, the appropriateness of the existing 'person responsible' model in the Part 4 of the Act and a consideration of any area of overlap between the operation of the Act and the Medical Treatment Act 1988;

j) whether the language of 'disability' is the appropriate conceptual language for the guardianship and administration regime and to what extent concepts such as capacity and vulnerability would be appropriate;

k) whether confidentiality requirements under the Act are sufficient to adequately balance the protection of the privacy of persons providing information or who are affected by or involved in a decision made pursuant to the Act, and the promotion of the principle of transparency.

In making its report, the Commission should consider the relationship and the appropriate boundaries between the Act and any other relevant Victorian or Commonwealth legislation, including the *Instruments Act 1958*, the *Mental Health Act 1986*, the *Disability Act 2006*, the *Children, Youth and Families Act 2005*, and the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* and take into account the results of any other relevant, contemporaneous reviews or policies in these fields. Issues associated with end of life decisions, beyond those currently dealt with by the *Medical Treatment Act 1988*, are not within the scope of the review.

The Commission is to report by 30 June 2011.*

* The Attorney-General has extended the date for reporting to 23 December 2011: letter from the Attorney-General to the Commission, 9 February 2011.

Glossary

This glossary is a list of terms used throughout this paper. It does not contain technical definitions of these terms, but simply describes how we use them in this consultation paper.

ademption When a person gives an item to someone in their will, but they no longer own the item when they die, the item is *adeemed* and the gift fails. For example, when a painting left to someone in a will is sold before the will is executed, the person would receive nothing.

administrator A person appointed under the *Guardianship and Administration Act 1986* (Vic) to make financial and some legal decisions for a person who has a disability. VCAT determines the extent of the administrator's decision-making authority when making an appointment.

advance directive A statement (usually written) in which a person sets out what they want to happen to them in particular circumstances in the future if they are unable to make a decision themselves. Advance directives are most commonly associated with medical decision making, but can be used in other contexts.

advocate A person who speaks or acts on behalf of someone else. There are many different types of advocates, including people working in formal advocacy organisations, lawyers, family members and friends.

agent A person who has been given medical power of attorney under the *Medical Treatment Act 1988* (Vic).

appointor A person who appoints an enduring guardian under the *Guardianship and Administration Act 1986* (Vic).

attorney A person appointed to make decisions for or on behalf of someone else. There are different types of attorneys, but all are appointed using a document called 'Power of Attorney'. The different types of attorneys are explained throughout the information paper.

best interests A term often used to guide substitute decision making in guardianship laws. There is no simple definition of 'best interests'; it is a term used differently by different people in different contexts. It is usually linked to the idea of promoting a person's health, welfare and safety, but sometimes also includes respecting the person's wishes.

capacity A person's ability to make their own decisions. It is used as a broad measure of cognitive ability. The term 'competence' is sometimes used with a similar meaning.

Charter The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic). It aims to ensure that all Victorian public authorities act in ways that are consistent with human rights, and that all new laws are consistent with those rights.

Convention The United Nations' *Convention on the Rights of Persons with Disabilities*. Australia is a signatory to this Convention, which seeks to promote and protect the rights and dignity of people with disabilities and to ensure their equality under the law.

CALD	Culturally and linguistically diverse.
common law	Law that derives its authority from the decisions of the courts, rather than from Acts of Parliament.
co-decision making	A proposed new legal arrangement for authorising decisions. It involves appointing a person, known as a 'co-decision maker', to make decisions jointly with a person with impaired capacity.
disability	Used in the same sense as it is in the *Guardianship and Administration Act 1986* (Vic), where it is defined to mean that a person has an 'intellectual impairment, mental disorder, brain injury, physical disability or dementia'.
donor	A person who gives a power of attorney to someone else (an attorney) to make decisions on their behalf.
enduring power of attorney	A power of attorney made by a person with capacity, which continues to operate, or endures, when that person loses capacity.
estate	A generic term to describe a person's assets (property and money) and liabilities (debts and regular financial commitments). An administrator or attorney can be authorised to manage all or some of a person's estate.
fiduciary	A relationship of trust and confidence between two people, such as that of trustee and beneficiary, in which one person has a duty to act in good faith for the benefit of the other.
guardian	A person appointed under the *Guardianship and Administration Act 1986* (Vic) to make lifestyle or personal decisions for a person who has impaired decision-making capacity due to a disability. This can include things such as where the person will live, their medical treatment, the services they receive, and the people with whom they associate. We refer to different types of guardians. These include: • **Private guardian** Usually used to describe a guardian who is appointed by VCAT but who is not the Public Advocate. • **Public guardian** The Public Advocate and her staff, who are employed to perform this role. • **Community guardian** A volunteer who is part of the Public Advocate's Community Guardian Program and who acts as a guardian for someone as a delegate of the Public Advocate. • **Enduring guardian** A guardian (often a family member or friend) appointed by a person to be their guardian if they lose capacity to make their own decisions. • **Plenary guardian** A guardian who has full guardianship powers.

Glossary

guardianship laws	The *Guardianship and Administration Act 1986* (Vic) and other laws that enable a substitute decision maker to be appointed when a person is unable to make their own decisions. The term includes laws concerning guardianship, administration and personal appointment of a substitute decision maker under the *Guardianship and Administration Act 1986* (Vic), the *Instruments Act 1958* (Vic) and the *Medical Treatment Act 1988* (Vic).
Guardianship List	A part of VCAT, which hears and decides upon applications made under the *Guardianship and Administration Act 1986* (Vic) and other related Acts.
informal decision making	Describes arrangements where someone makes decisions with or for another person without any formal legal authority to do so.
impaired decision-making capacity	Refers to situations where a person has difficulty making a decision due to a disability.
lifestyle decision	Describes decisions about a person that do not directly relate to financial matters. These are the kinds of decisions that guardians and enduring guardians currently make, and include decisions such as where a person should live, who they should spend time with, what type of work they should do (if any), what type of services they should access and what type of health care or medical treatment they should receive. The term 'personal decision' is used with the same meaning.
medical treatment	Used differently in different contexts. For example, the *Guardianship and Administration Act 1986* (Vic) has a narrower definition of medical treatment than that in the *Medical Treatment Act 1988* (Vic). Both Acts refer to treatment administered by a medical practitioner, but each refers to different procedures that are included in, or excluded from, their respective definitions.
merits review	Refers to reviewing a decision of a person (usually a public official) on the ground that it was wrong.
order	A direction by a court or tribunal that is final and binding unless overturned on appeal.
person responsible	A person who has authority under the *Guardianship and Administration Act 1986* (Vic) to consent to most medical treatment on behalf of an adult.
personal appointment	Refers to when a person with capacity nominates another person to make decisions for them when they are unable to do so. Victorian law provides for the personal appointment of an enduring guardian, an attorney with enduring powers and a medical agent.
personal decision	Used with the same meaning as 'lifestyle decision'.
power of attorney	A legal device by which a person with capacity appoints another person to make nominated decisions for them.

proposed represented person	A person for whom an application for a guardianship or administration order has been made under the *Guardianship and Administration Act 1986* (Vic).
Public Advocate	A statutory officer with a range of roles and functions under the *Guardianship and Administration Act 1986* (Vic). These roles and functions include acting as guardian of 'last resort' and promoting the rights of people with disabilities.
reassessment	The process by which VCAT decides whether a guardianship or administration order should continue and, if so, in what form.
rehearing	The process by which VCAT reviews whether a guardianship and administration order should have been made.
represented person	A person who has a substitute decision maker.
State Trustees	State Trustees Limited is a state-owned company with a number of functions that is often appointed as the administrator for people who are unable to manage their own financial affairs due to a disability.
substitute decision maker	A person who has legal authority to make decisions on behalf of someone else. Usually the law treats the decisions of a substitute decision maker as if they were made by the represented person if they had capacity to do so. Guardians, administrators and attorneys are substitute decision makers.
substituted judgment	The principle of substituted judgment guides a substitute decision maker to make the decision they believe the person they represent would have made themselves if they were able to. It asks the decision maker to 'stand in the shoes' of the represented person, and seek to make that person's decision. It involves considering the represented person's expressed wishes, history, views, beliefs and values in the context of the decision that needs to be made.
supported decision making	An approach to decision making that involves providing a person with impaired capacity the support they need to make their own decision. It is often contrasted with substitute decision making, where a decision is made on behalf of a person who is unable to make that decision.
supporter	A person appointed to assist a person with impaired capacity to make their own decisions. The supporter has no decision-making authority, but may have authority to do things necessary to assist the person to make the decision, and ensure it is carried out.
tribunal appointments	Appointments of substitute decision makers—guardians and administrators—by VCAT.
VCAT	The Victorian Civil and Administrative Tribunal. It is a legal decision-making body, which is similar to a court but less formal. There are a number of different sections of VCAT, called 'lists', including the Guardianship List, which hears and decides upon applications made under the *Guardianship and Administration Act 1986* (Vic) and other related Acts.

Glossary

ABBREVIATIONS

G&A Act	*Guardianship and Administration Act 1986* (Vic)
CALD	culturally and linguistically diverse
Convention	United Nations' *Convention on the Rights of Persons with Disabilities*
Charter	*Charter of Human Rights and Responsibilities Act 2006* (Vic)
CMIUT Act	*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)
CYF Act	*Children, Youth and Families Act 2005* (Vic)
DHS	Deparment of Human Services
IDPS Act	*Intellectually Disabled Persons' Services Act 1986* (Vic)
OPA	Office of the Public Advocate
PPPR Act	*Protection of Personal and Property Rights Act 1988* (NZ)
VCAT	Victorian Civil and Administrative Tribunal

Executive Summary

OVERVIEW

This consultation paper contains suggestions for reforming Victoria's guardianship laws. These laws—found in the *Guardianship and Administration Act 1986* (Vic) (G&A Act) and a number of other statutes—deal with the formal arrangements that are available when a person is unable to make their own decisions about important matters because of a disability.

The Commission's review includes consideration of appointments of substitute decision makers by a tribunal, as well as personal appointments of substitute decision makers, such as when a person uses an enduring power of attorney.

This is the second of three planned papers in the Commission's review of guardianship laws. The information paper, released in February 2010, sought community responses about those areas of guardianship law that require reform. This consultation paper is a response to the many suggestions made by a broad range of people with experience of guardianship laws. It contains proposals for new guardianship laws. The third and final paper—a report to the Attorney-General—is due on 23 December 2011. The final report will become a public document when tabled in Parliament.

The Commission seeks responses to the reform options and questions in this paper.

SCOPE OF THE REVIEW

The primary purpose of the Commission's review is to ensure that Victorian guardianship laws respond to the current and future needs of people with impaired decision-making capacity and promote their rights. The terms of reference direct the Commission to consider changes to the law that:

- promote respect for human dignity, individual autonomy and other important human rights principles
- reflect developments in policies and practices for people with impaired decision-making capacity since the current G&A Act was passed in 1986
- respond to the needs of an ageing population.

The terms of reference also ask the Commission to give particular attention to some parts of the G&A Act, including:

- the role of guardians and administrators in advancing the rights of the people they represent and in assisting them to make decisions
- whether the right balance is struck between the best interests of a represented person and their rights set out in the United Nations' *Convention on the Rights of People with Disabilities* (the Convention)[1]
- whether the powers and duties of guardians are effective, appropriate and consistent with Australia's obligations under the Convention and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter)[2]
- the validity and feasibility of informal decision making
- whether the G&A Act should be extended to apply to people who are 17 years of age
- the functions, powers and duties of the Public Advocate
- the role and powers of the Victorian Civil and Administrative Tribunal (VCAT) and whether the tribunal process for appointing guardians and administrators works well
- whether there should be additional ways to review decisions made by guardians and administrators and whether there should be new ways of dealing with inappropriate conduct by guardians and administrators
- whether existing laws concerning substitute consent for medical treatment and participation in research trials, including the 'person responsible' model, are appropriate, and whether the G&A Act interacts effectively with the *Medical Treatment Act 1988* (Vic).

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

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

Executive Summary

- whether 'disability' should continue to be a threshold requirement for the appointment of a guardian or administrator, or whether it should be replaced by other concepts such as 'capacity' or 'vulnerability'
- whether the confidentiality provisions in the G&A Act adequately balance protection of private information and the need for transparency of decisions.

The Commission must also consider how the G&A Act interacts with other relevant laws that deal with substitute decision making, or responds to circumstances in which substitute decision making might be needed. Other relevant laws include:

- *Instruments Act 1958* (Vic)
- *Mental Health Act 1986* (Vic)
- *Disability Act 2006* (Vic)
- *Children, Youth and Families Act 2005* (Vic)
- *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)
- *Medical Treatment Act 1988* (Vic).

The Commission has also been asked to consider other relevant reviews of guardianship laws. Recent important reviews include the *Inquiry into Powers of Attorney* by the Victorian Parliament Law Reform Committee, the Queensland Law Reform Commission's *Review of Queensland's Guardianship Laws* and the report on *Substitute Decision-making for People Lacking Capacity* by the New South Wales Legislative Council Standing Committee on Social Issues.

The terms of reference specifically exclude consideration of end-of-life decisions beyond those currently dealt with by the *Medical Treatment Act 1988* (Vic).

CURRENT LAW

Victorian law allows an adult with capacity to appoint one or more substitute decision makers. It also provides for appointments by a tribunal and by the operation of an automatic legislative appointment scheme when a person has not appointed their own substitute decision maker. These schemes do not always operate well together because they evolved separately.

STATE APPOINTMENTS

The central focus of the G&A Act is appointment of guardians and administrators by VCAT. The scheme was designed in the 1980s for people with intellectual disabilities who were moving from institutions into the community. Since then, the scheme has been adapted to the needs of other user groups, such as people with age-related impairments, people with an acquired brain injury and people with mental illness.

The current law draws a sharp line between capacity and incapacity to make decisions. It provides only one mechanism—substitute decision making—to assist people with impaired decision-making capacity. The law was not designed to respond to the needs of those people whose capacity fluctuates over time, or who can make their own decisions with some assistance.

The G&A Act allows VCAT to appoint a guardian or an administrator for a person who is unable to make reasonable judgments about important aspects of their personal life or financial affairs due to a disability and who needs another person to make decisions for them.

The G&A Act also automatically appoints people to undertake many medical decision-making responsibilities for others if they wish to do so. The Act identifies a 'person responsible' for making most medical treatment decisions for a person who is unable to consent to their own medical treatment, without the need for a tribunal appointment. In many instances, the person responsible for making these decisions is a close family member of the person who is unable to make their own decisions.

The G&A Act establishes the position of Public Advocate. The Public Advocate's functions include investigating matters related to guardianship hearings, acting as guardian of last resort and advocating for people with disabilities.

PERSONAL APPOINTMENTS

Victorian law provides for three separate personal appointments of substitute decision makers in three separate Acts.

The three personal appointments are:

- enduring power of attorney for financial decisions, appointed under the *Instruments Act 1958* (Vic)
- enduring medical treatment agent for medical treatment decisions, appointed under the *Medical Treatment Act 1988* (Vic)
- enduring guardian for personal decisions, appointed under the G&A Act.

OTHER STATUTES

Other statutes that allow for substitute decision making are:

- the *Mental Health Act 1986* (Vic), in relation to the involuntary detention and treatment of people with mental illness
- the *Disability Act 2006*, in relation to compulsory treatment of people with intellectual disabilities who are a serious and dangerous risk to others.

REASONS TO MODERNISE THE LAW

There are many reasons for modernising Victorian guardianship laws.

MAXIMISING PARTICIPATION IN DECISION MAKING

Community attitudes and government policies about people with disabilities have changed dramatically over the 25 years since the policy for the G&A Act was developed. While protecting vulnerable people remains an important part of public policy, there is now much greater emphasis on promoting the autonomy of and participation by people with disabilities. This change is exemplified by the United Nations' Convention, which focuses upon the equal participation of people with disabilities in all aspects of life.

A MORE REALISTIC VIEW OF CAPACITY

The law has traditionally drawn a sharp line between capacity and incapacity, largely for reasons of convenience. In view of increased awareness of how the capacity of many people often fluctuates over time and circumstance, it is important to consider whether that strict distinction should be maintained in guardianship laws. The Commission proposes a continuum of responses—a range of legal mechanisms—for use when a person's decision-making capacity is impaired.

These mechanisms must meet the needs of very different user groups. Some people will have a long history of independent decision making before their capacity declines, while others will only experience episodic incapacity. Some people may regain capacity over time, while others may never experience independent decision-making capacity.

CHANGING ATTITUDES TO INFORMAL ARRANGEMENTS

The G&A Act has strongly encouraged the use of informal decision-making arrangements. In practice, a guardian or administrator is usually appointed only when there is evidence of a demonstrated need for a formal substitute decision maker. It has been widely accepted that many day-to-day decisions are best left to informal arrangements—often involving family members and carers—because this practice gives the person concerned greater freedom to participate in those decisions.

Executive Summary

Some of the important changes in the way our community functions, coupled with the lessons of 25 years of modern guardianship law, make it necessary to reconsider the extent of our reliance upon informal decision-making arrangements. Many people and organisations that provide services to others are far more concerned about managing risk than they were when the G&A Act was developed in the 1980s—they wish to deal with a person who has the formal authority to make a decision. Some informal arrangements can also be highly restrictive because they allow service providers to become de facto guardians, without having to comply with any of the accountability requirements in guardianship laws.

MORE ACCESSIBLE LAWS AND MORE EFFICIENT LEGAL PROCESSES

Victoria's guardianship laws are unnecessarily complex. The G&A Act is difficult to understand, in part because it has been amended on 28 separate occasions since 1986. The Act should be rewritten so that it is clearer and more accessible to those people who use it.

Victoria's guardianship laws are poorly integrated. Because the various substitute decision-making regimes have been developed at different times and for different reasons, there is little cohesion between them. These various laws should be better integrated so that they operate together effectively and efficiently.

The need for reform is pressing because many more Victorians will use substitute decision-making laws over the next few decades as the population ages. Guardianship laws must be capable of responding to the needs of the next generation of users.

Two central features of Victoria's guardianship laws—the Public Advocate and decision making by a tribunal—are innovations that have been followed throughout Australia. It is time, however, to reconsider the roles and responsibilities of both VCAT and the Public Advocate.

Our understanding of the functions and operations of tribunals has developed considerably since the 1980s. VCAT should have functions and powers that reflect modern approaches to tribunals. The Public Advocate has performed a very important role in advancing the interests of people with disabilities. The responsibilities of the Public Advocate could be expanded.

Victoria's guardianship laws need rebuilding. It is important when doing so to retain, but modernise, many features of the current system that have operated successfully and should continue to form part of 21st century guardianship legislation.

ASPECTS OF THE CURRENT LAW TO RETAIN

GUARDIANSHIP AND ADMINISTRATION

The G&A Act provides for the appointment of two separate substitute decision makers by VCAT—a guardian and an administrator. There is widespread support for the current distinction between the personal decision-making responsibilities of a guardian and the financial decision-making responsibilities of an administrator. The Commission recognises the fundamentally different skills needed to undertake these two roles and proposes that the distinction between a guardian and an administrator be retained.

TRIBUNAL APPOINTMENTS

Tribunal appointments have been a relatively inexpensive and accessible part of Victoria's guardianship laws. While VCAT's processes and practices should be modernised, the Commission proposes that the system of tribunal appointments be retained.

The Commission proposes that VCAT should continue to be required to tailor substitute decision-making appointments to the needs of the person concerned and that it should review those needs on a regular basis.

THE LINK BETWEEN IMPAIRED DECISION-MAKING CAPACITY AND DISABILITY

At present, a guardian or an administrator may be appointed only when a person has impaired decision-making capacity because of a 'disability'. That term is broadly defined in the G&A Act to mean intellectual impairment, mental disorder, brain injury, physical disability or dementia.

While responses to our information paper revealed a range of views about the need for a causal link between a person's disability and their impaired decision-making capacity, the Commission proposes that the link be retained because of the objective element it adds to the process of assessing incapacity. It is an important way of ensuring that guardianship laws are not used to manage people simply because they engage in harmful behaviour such as excessive gambling or drinking.

THE PUBLIC ADVOCATE

The Commission proposes that the Public Advocate should continue to perform most of her existing functions and that she be given a range of additional responsibilities.

AUTOMATIC APPOINTMENTS FOR MEDICAL TREATMENT

The Commission proposes that the current system of automatically appointing a person to make most medical treatment decisions for an adult who is unable to make their own decisions should be retained. The existing body of law concerning substitute decision making for medical treatment is unnecessarily complex. It should be simplified and made more cohesive.

NEW LEGISLATION

The Commission proposes new guardianship laws for Victoria rather than further amendments to the G&A Act.

The greatest challenge in designing new guardianship laws is to develop a coherent body of legal rules that responds to the needs of all people with impaired decision-making capacity because of disability, and does so in a way that respects their dignity and encourages them to be as autonomous as possible.

A FOCUS FOR THE NEW LAWS

New guardianship laws must continue to provide a protective safety net when required. However, two new themes—participation and integration—could also shape the content of these laws.

New guardianship laws could seek to promote the **participation** of people with impaired capacity in making decisions for themselves and in the life of the community. Substitute decision making could be viewed primarily as an enabling function, rather than as a restrictive one. One way of doing this is to encourage substitute decision makers to make the decision that the person themselves would have made if they were able to do so.

New guardianship laws could also aim to **integrate** the many different statutory substitute decision-making regimes involving both personal and state appointments, such as by including all of the relevant laws in one Act. There should be more consistency in the responsibilities of substitute decision makers, regardless of how and by whom they are appointed. Their decisions could also be monitored and reviewed consistently.

New guardianship laws could integrate existing provisions for appointing:

- an enduring attorney—currently in the *Instruments Act 1958* (Vic)
- a medical agent—currently in the *Medical Treatment Act 1988* (Vic)
- an enduring guardian—currently in the G&A Act
- a guardian or administrator by VCAT—currently in the G&A Act
- a 'person responsible' for making certain medical treatment decisions—currently in the G&A Act.

Executive Summary

IMPORTANT CHANGES

Important changes proposed by the Commission are:

- new supported decision-making mechanisms
- a new decision-making continuum
- modern principles to guide decision makers
- improved safeguards and accountability
- an expanded role for the Public Advocate
- a more accessible and effective tribunal
- lowering the age limit for some appointments
- expanded use of automatic appointments
- interaction with other laws
- more user-friendly laws.

New supported decision-making mechanisms

The Commission proposes new formal supported decision-making mechanisms that would allow people with some decision-making capacity to make decisions with support from another person or together with another trusted person.

As these mechanisms have not been used before in Australia, the Commission is keen to explore how they could operate in practice, especially whether they can provide third parties with sufficient certainty when used in commercial and professional transactions.

A new decision-making continuum

The Commission proposes a comprehensive decision-making continuum that favours the use of supported decision making when a person needs some assistance because of impaired capacity. It comprises:

- new supported decision-making agreements, where one person authorises another to access information on their behalf in order to assist them to make decisions
- new co-decision-making agreements, where one person authorises another to make decisions with them, and where the decision requires the agreement of both people for it to be valid
- existing enduring powers of attorney and enduring guardianship, where a person appoints their own substitute decision maker to make decisions on their behalf if and when, and to the extent that, they lose capacity in the future
- clearer provisions for a person to indicate by way of an advance directive, when they are capable of doing so, what decisions they would want made in particular circumstances in the future
- new supported decision-making orders made by VCAT
- new co-decision-making orders made by VCAT
- existing and new arrangements for automatic appointments, where the law identifies and authorises a person to make specific decisions for someone with impaired capacity, without the need for a VCAT appointment
- existing substitute decision-making orders, where VCAT appoints a guardian or an administrator.

Modern principles

The Commission also proposes new decision-making principles that emphasise the significance of participation. The existing concept of 'best interests' decision making could be replaced by a 'substituted judgment' approach. This approach requires a substitute decision maker to make the decision that the person themselves would have made if they had the capacity to do so. If a substituted judgment approach would probably cause the represented person serious harm, or if it is not reasonably possible to identify the decision that the person would have made, the substitute decision maker could be required to make a decision that promotes the person's personal and social wellbeing.

Improved safeguards and accountability

The Commission proposes a number of reforms to provide greater accountability and more scrutiny of decision-making arrangements. Some of the measures proposed are:

- giving personally appointed substitute decision makers—enduring guardians and attorneys—the same responsibilities and accountabilities as VCAT appointed guardians and administrators
- training for substitute decision makers, supporters and co-decision makers so that they understand their responsibilities
- clear descriptions of the authority and responsibilities of substitute decision makers, and third parties, in relation to confidential information
- new reporting requirements for private guardians and attorneys
- a registration scheme for personal appointments and notification of their activation
- an oath or declaration for substitute decision makers upon undertaking their responsibilities
- random investigation and auditing of appointees
- merits review of individual decisions made by some guardians and administrators
- a civil penalty regime for substitute decision makers who abuse their power
- a regulatory role for the Public Advocate
- new powers for VCAT to order repayment of misused funds.

A greater role for the Public Advocate

The Commission proposes that the Public Advocate have an expanded role in supervising and promoting a range of matters concerning substituted and supported decision making. The Public Advocate could be given broader investigatory functions and powers for use in cases where there is an allegation of abuse, neglect or exploitation of a person with impaired decision-making capacity.

The Public Advocate's individual and systemic advocacy responsibilities could be extended and clarified.

The Commission also proposes that the Public Advocate have the power to investigate possible breaches of new guardianship laws and to take civil penalty proceedings in response to any breaches when it is appropriate to do so.

A more accessible and effective tribunal

The Commission proposes changes to the way in which VCAT deals with guardianship matters in order to make it more accessible. A range of issues concerning pre-hearing processes, confidentiality issues, procedural fairness, the attendance of represented people at hearings, legal representation, multi-member panels and training for members are considered.

Executive Summary

Lowering the age limit for guardianship laws

The Commission proposes that VCAT should be able to appoint a guardian or administrator for people who are aged 16 years or older. This change would close the current gap between child protection and adult guardianship laws, as well as allowing some overlap between these two systems to allow for greater flexibility when responding to the needs of a particularly vulnerable group of people.

More automatic appointments

The Commission also proposes legislative changes to deal with the complex issues that arise when a person with impaired decision-making capacity is admitted to, or detained in, a residential facility without consent but with their compliance. This practice is likely to occur more often in the future, particularly as the population ages.

The European Court of Human Rights has highlighted the important legal challenges that arise when there is no lawful process for making these decisions, and no reasonable means of reviewing them. The Commission proposes that the current automatic appointment system could be extended, with additional safeguards, to cover these place of residence decisions.

Interaction with other laws

The G&A Act interacts with a number of other legislative substitute decision-making regimes, most notably those found in the *Disability Act 2006* (Vic) and the *Mental Health Act 1986* (Vic). The Commission proposes changes to the way in which these legislative schemes interact.

The Disability Act provides for the use of restrictive interventions—chemical restraint, mechanical restraint and seclusion—and compulsory treatment in some circumstances. These provisions, which are overseen by both the Senior Practitioner and VCAT, apply only to people with an intellectual disability.

Because of the limited operation of the restrictive intervention and compulsory treatment provisions in the Disability Act, guardianship has become the only means of authorising restraint or treatment for other people, such as those with an acquired brain injury. The Commission questions whether this use of guardianship law should continue and asks whether the compulsory treatment provisions in the Disability Act should extend to people with a cognitive impairment other than intellectual disability.

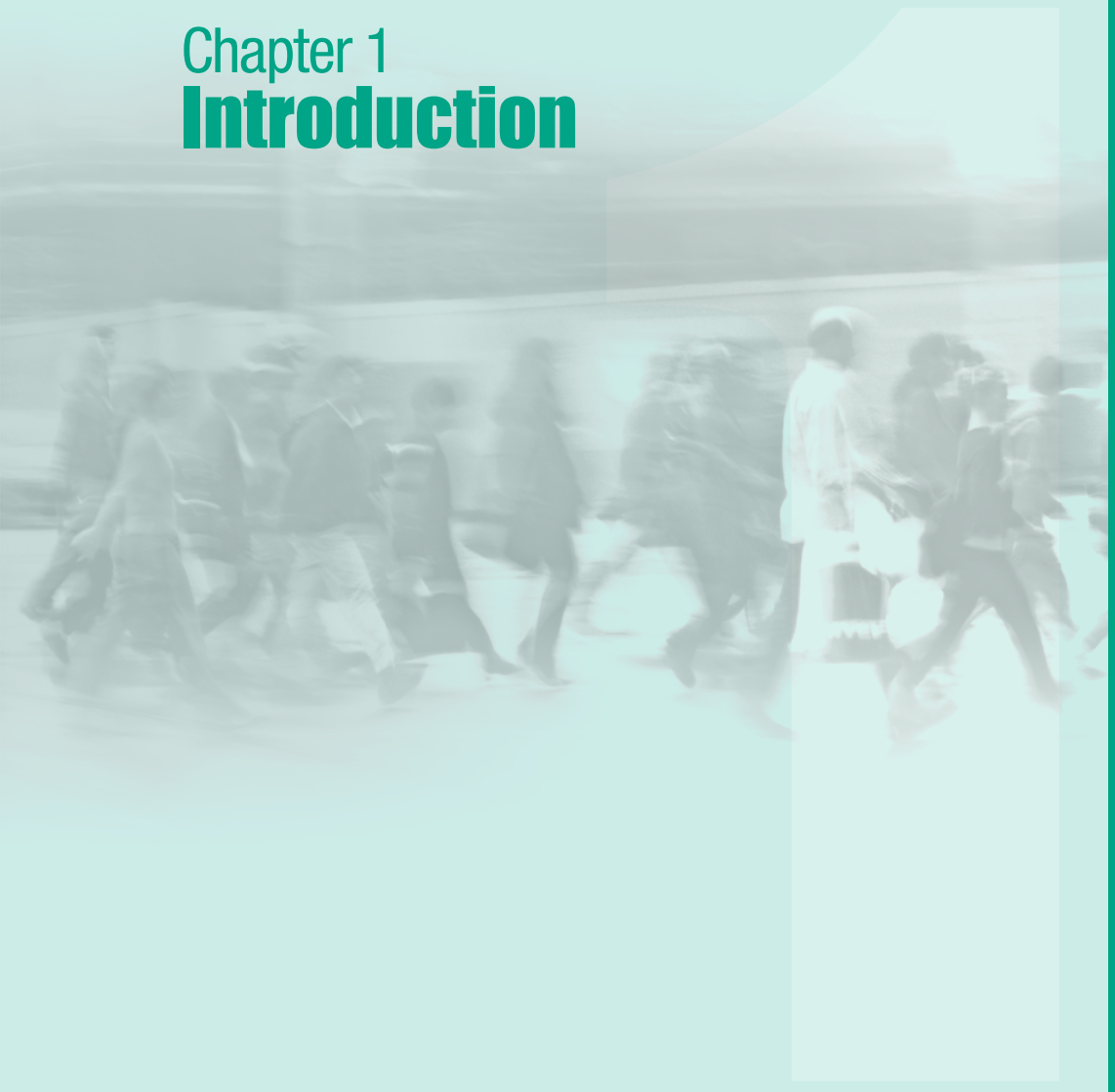
The Mental Health Act authorises health professionals to detain and treat some people with a mental illness in defined circumstances. It establishes a form of clinical guardianship. While it is possible to appoint an attorney or an administrator to manage the financial affairs of a person with impaired decision-making capacity due to mental illness, it has been assumed that guardianship laws should not be used as a means of authorising psychiatric treatment for, or restrictions upon the residence of, a person with a mental illness because these matters must be dealt with under the Mental Health Act.

The Commission questions this assumption and proposes that it should be possible to use guardianship—both personal and tribunal appointments—as a means of authorising psychiatric treatment and place of residence decisions for a person with a mental illness in some circumstances.

User-friendly laws

Finally, the Commission proposes a number of ways of making guardianship laws easier to understand and use, such as targeted community education and the use of clearer terms to describe appointments.

Chapter 1
Introduction



CONTENTS

Chapter 1 Introduction

INTRODUCTION

REVIEW OF GUARDIANSHIP LAWS

1.1 The Victorian Attorney-General has asked the Victorian Law Reform Commission to review the *Guardianship and Administration Act 1986* (Vic) (G&A Act) and to report on what changes are needed.

1.2 The G&A Act assists people with disabilities who are unable to make, or who have difficulty making, important decisions. The Act allows for the appointment of another person to make personal, financial and medical decisions when a formal decision maker is needed. This is often referred to as substitute decision making.

1.3 The Commission has been asked to review Victoria's guardianship laws[1] to see if they need to be changed to ensure that they respond to the needs of people with impaired decision-making capacity while protecting and advancing their rights.

1.4 While the G&A Act was groundbreaking legislation when first enacted, the social conditions it deals with are now are very different to those that existed when the Act commenced operation 24 years ago.

1.5 This review is an exciting opportunity to design guardianship laws for Victoria's future. In this paper, we explore how to improve the current law and describe what new guardianship laws could look like.

TERMS OF REFERENCE

1.6 The complete terms of reference for this review can be found at the front of this paper on page 14.

1.7 The Commission's review is very broad. We must consider what changes are needed to the law so it:

- complies with human rights principles
- reflects developments in policies and practices since the Act started
- responds to an ageing population.

1.8 The terms of reference direct the Commission to look at particular aspects of the G&A Act including:

- the role of guardians and administrators in advancing the rights of the people they represent and in assisting them to make decisions
- whether the right balance is struck between the best interests of a represented person and their rights as set out in the *Convention on the Rights of People with Disabilities* (the Convention)[2]
- whether the powers and duties of guardians are effective, appropriate and consistent with Australia's obligations under the Convention and the *Victorian Charter of Human Rights and Responsibilities*[3]
- the feasibility of different, less formal, decision-making models
- whether the G&A Act should be extended to apply to people who are 17 years of age
- the functions, powers and duties of the Public Advocate
- the role and powers of the Victorian Civil and Administrative Tribunal (VCAT) and whether the tribunal process for appointing guardians and administrators works well

- whether there should be additional ways to review decisions made by guardians and administrators and whether there should be a means to address inappropriate conduct by guardians and administrators
- whether laws regarding medical treatment and participation in research trials, including the 'person responsible' model, are appropriate, and how the G&A Act interacts with the *Medical Treatment Act 1988* (Vic)
- whether 'disability' should continue to be a threshold requirement for the G&A Act or whether it should be replaced by other concepts such as 'capacity' or 'vulnerability'
- whether the confidentiality provisions in the G&A Act adequately balance protection of private information and the need for transparency of decisions.

1.9 The Commission must also consider how the G&A Act interacts with other relevant laws that deal with substituted decision making, or circumstances in which substituted decision making might be needed, including the:

- *Instruments Act 1958* (Vic)
- *Mental Health Act 1986* (Vic)
- *Disability Act 2006* (Vic)
- *Children, Youth and Families Act 2005* (Vic)
- *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)
- *Medical Treatment Act 1988* (Vic).

1.10 We have also been asked to consider other relevant reviews of guardianship laws throughout Australia.

1.11 The terms of reference specifically exclude consideration of end-of-life decisions beyond those currently dealt with by the *Medical Treatment Act 1988* (Vic).

OUR PROCESS

INFORMATION PAPER

1.12 This consultation paper is the second paper the Commission has released for community comment in its review of guardianship laws. In March 2010, we released an information paper. That paper explained existing law and practice as simply as possible to generate public discussion about what areas of the law might need reform.

1.13 The Commission received 60 submissions from a wide variety of organisations and individuals in response to its information paper. Submissions are listed in Appendix 1. Most submissions have been published on our website.

COMMUNITY CONSULTATIONS

1.14 In March, April and May 2010, the Commission also consulted a broad range of people with disabilities and their carers and friends who have experience both with Victoria's guardianship system and with other issues relating to people whose disability affects their ability to make decisions. We also met with advocate groups, health professionals, service-delivery groups, trustee organisations, the Public Advocate and VCAT. We conducted consultations in both metropolitan Melbourne and regional Victoria.

1 In the glossary, we explain how we use the term 'guardianship laws' in this paper.

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

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

Chapter 1 Introduction

CONSULTATIVE COMMITTEES

1.15 At the start of this review, the Commission established two consultative groups to provide ongoing assistance and input into the law reform process. Over the course of the year, these groups have helped the Commission draw upon the experience of people who:

- work in the field
- represent the interests of people who use guardianship laws
- have researched and written about the operation of guardianship laws.

1.16 Submissions and consultations, as well as discussions with our consultative committees, have provided the Commission with valuable information about current practice. From this information, we have identified a number of areas in need of reform.

PURPOSE OF THIS CONSULTATION PAPER

1.17 This consultation paper explores how the law can be improved to better assist people with disabilities who have difficulty making important life decisions. We indicate some of the Commission's preliminary views about new laws and propose a range of possible reform options for community discussion.

1.18 We seek your comments and views about these proposals. We would like to hear which proposals you do and do not support and how they might be improved. We encourage you to provide a written submission.

1.19 Information about how to provide us with a submission is on page 12. To allow the Commission time to consider your views before deciding on final recommendations, submissions are due by **20 May 2011**.

1.20 After completing our second round of consultations early in 2011, we will produce a final report with final recommendations to the Attorney-General by 23 December 2011.

STRUCTURE OF THIS PAPER

1.21 The first part of the paper provides a background to our review. In Chapters 2 and 3, we look at the history of guardianship laws in Victoria as well as changes to the landscape in which the laws operate. We consider the effect of an ageing population, changing community attitudes to people with disabilities and developments in policies and practices for people with disabilities. We also consider the new human rights environment.

1.22 Part 2 explores the Commission's ideas for the future direction of guardianship laws. Chapter 4 outlines the Commission's proposed new structure for guardianship laws. We consider what parts of the existing law should be retained and outline the Commission's preliminary ideas for reform. Chapter 5 considers changes to the overarching principles applying to guardianship laws. In Chapter 6, we explore ways to make the law more user-friendly and to improve community understanding of guardianship laws and processes.

1.23 In Part 3, we discuss the need for additional mechanisms to support people with decision-making disabilities and examine the concept of supported decision making. We look at supported decision-making models in other jurisdictions and explore options for implementation in Victoria in Chapter 7.

1.24 The next three parts of the paper consider how to improve existing legal mechanisms that assist people with impaired capacity.

1.25 Traditionally, guardianship laws have sought to protect people with impaired decision-making capacity from abuse. While this need for protection persists, changing social attitudes towards people with a disability mean that new guardianship laws should also seek to promote their participation in community life. These changing social attitudes reflect respect for the autonomy and human dignity of all people.

1.26 Two major issues arise when seeking to design a body of law that responds to people with impaired decision-making capacity in ways that promote autonomy and human dignity.

1.27 The first issue concerns the amount of control a person has over the choice of who will make, or assist them to make, important decisions for their future. Personal appointments—such as an enduring power of attorney and an enduring guardian—clearly provide greater autonomy than both tribunal appointments and automatic statutory appointments.

1.28 The second issue concerns the degree of control a person exercises over the decisions made about them. Mechanisms that promote participation by the person concerned—such as supported decision making and advance directives—clearly provide greater autonomy than substitute decision making.

1.29 The structure of this paper reflects the first issue—the types of appointments available to assist with decision making. We discuss, first, the different mechanisms for personal appointments, then the mechanisms for tribunal appointments and, finally, the mechanisms for statutory appointments.

1.30 In Part 4 we explore personal appointments. In Chapter 8, we consider personal appointments of supporters and substitute decision makers. Personal appointments allow people to determine who will make decisions for them if they lose capacity in the future. A person can also direct future decision making by outlining their wishes for particular decisions in planning documents or advance statements of wishes. In Chapter 9, we consider the legal status of those planning documents.

1.31 In Part 5 we look at supporters and decision makers appointed by VCAT. In Chapter 10 we consider VCAT appointments of supporters and the continuing need for guardians and administrators. We also look at the criteria by which a person is assessed as being in need of guardianship. In Chapter 11 we consider how old a person needs to be before guardianship laws can apply to them. We examine the interaction with the provisions of the *Children, Youth and Families Act 2005* (Vic) and consider whether the age requirement of guardianship laws should be lowered to people under the age of 18 years. In Chapter 12 we look at whether the existing distinction between guardians and administrators is appropriate and how it might be better managed. Part 5 concludes with an examination of the powers of guardians and administrators in Chapter 13.

1.32 In Part 6 we explore statutory appointments of substitute decision makers. The 'person responsible' provisions in the G&A Act provide for the automatic appointment of a substitute decision maker in some circumstances. The Act enables a decision maker to be identified and appointed, without requiring VCAT involvement, to consent to medical and dental treatment for people who cannot consent themselves. We examine this automatic appointment process in Chapter 14.

Chapter 1 Introduction

1.33 Chapter 15 discusses informal decision-making assistance for people with disabilities. We explore whether the decision to admit vulnerable people to care facilities needs additional safeguards in light of a recent decision by the European Court of Human Rights.

1.34 In Chapter 16, we take a closer look at statutory appointments relating to refusal of medical treatment. We consider the interaction between the *Medical Treatment Act 1988* (Vic) and the laws relating to consent to medical treatment in the G&A Act.

1.35 In Part 7 we explore the responsibilities of supporters and substitute decision makers. In Chapter 17 we consider what decision-making principles should apply to decision makers and supporters. In Chapter 18 we explore specific responsibilities relating to confidentiality. In Chapter 19 we consider ways to improve the accountability of decision makers and whether decisions of guardians and administrators should be reviewable.

1.36 In Part 8 we examine how guardianship laws can be better implemented and regulated. Chapters 20 and 21 explore the functions and powers of the Public Advocate and VCAT.

1.37 Part 9 looks at the interaction between the G&A Act and other laws that deal with substituted decision making. In Chapters 22, 23 and 24 we examine the *Disability Act 2006* (Vic), the *Mental Health Act 1986* (Vic) and the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

1.38 Terms and concepts commonly used in guardianship laws and throughout this paper are explained in the glossary on page 16.

OTHER PUBLICATION FORMATS

1.39 An Easy English version of this paper is available on the Commission's website. A summary of this paper is also available in English, Chinese, Vietnamese, Greek, Italian, Macedonian, Arabic, Polish, Serbian, Turkish, Russian and Croatian. The Commission can post or email you a copy of our information paper in any of these formats, free of charge. You can also request another format if we do not have one that you need.