Victorian
Law Reform
Commission

GUARDIANSHIP

Information Paper

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Call for submissions

The Victorian Law Reform Commission invites your comments on this Information 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 a 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. Information in submissions, along with other research and comments from meetings, is used to help develop recommendations.

Once the commission has assessed your submission it will be made available on our website and stored at the commission where it will be publicly available.

PUBLICATION OF SUBMISSIONS

The commission publishes public submissions it receives on our website to encourage discussion and to keep the community informed about our projects.

We attempt to try to publish as many submissions as possible. Please keep in mind that submissions containing offensive or defamatory content or that do not relate to the project will not be published and that private information of other people will be de-identified.

The views expressed in the submissions are those of the individuals or organisations who submit them and are not the views of the commission.

ASSISTANCE IN MAKING A SUBMISSION

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.

HOW DO I MAKE A SUBMISSION?

Submissions can be made in writing or verbally. There is no particular format you need to follow, however, it would assist us if you address the questions listed at the end of the paper.

Submissions can be made by:

- Online form: www.lawreform.vic.gov.au
- Mail: PO Box 4637, GPO Melbourne Vic 3001
- Email: law.reform@lawreform.vic.gov.au
- Fax: (03) 8619 8600
- Phone: (03) 8619 8619, 1300 666 557 (TTY) or 1300 666 555 (freecall)
- Face-to-face: please contact us to make an appointment with one of our researchers.

WHAT HAPPENS ONCE I MAKE A SUBMISSION?

Shortly after you make your submission you will receive a letter or email confirming it has been received. You are then asked to confirm your details by replying within seven days.

CONFIDENTIALITY

When you make a submission you must decide how you want your submission to be treated. Submissions are either public, anonymous 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. Addresses and contact details are removed from submissions put on our website.
- Anonymous submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices but the identity of the author will not be revealed.
- Confidential submissions cannot be referred to in our report or made available to the public.

Please let us know your preference along with your submission. If you do not tell us you want your submission treated confidentially we will treat it as public. More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au.

SUBMISSION DEADLINE
14 MAY 2010

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;

Terms of reference

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.

Glossary

This glossary is a list of terms that are used relatively frequently throughout this paper. Sometimes they are used in quite specific ways that might be different to other uses of the term. This glossary does not provide technical definitions of these terms, but instead simply describes how we use them in this Information Paper.

Administrator – a person appointed under the *Guardianship and Administration Act 1986* 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 the appointment is made.

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 and friends and family.

Agent – this term is often used to refer to someone who has been given medical power of attorney under the *Medical Treatment Act 1988.*

Attorney – a person who someone appoints to make decisions for them. 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 – is a term often used as a guide to 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, and looking out for their happiness. Throughout this paper we use the term in the same way that the G&A Act defines it, which encompasses these concepts in different ways in different parts of the Act.

Capacity – capacity is used in slightly different ways, depending on the context. Usually it is used to describe a person's ability to make their own decisions, sometimes with support. This is sometimes referred to as 'decision-making capacity' or 'cognitive capacity'. Sometimes the word is used to refer to a person's legal authority to do something. The term 'competence' is used by some people instead of capacity.

Charter – the Victorian Charter of Human Rights and Responsibilities. This was enacted by the Victorian Parliament in 2006 and aims to ensure 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. The Convention requires states, including Australia, to promote and protect the rights and dignity of people with disabilities and to ensure their equality under the law.

Donor – a person who gives a power of attorney to someone else to make decisions on their behalf. The different types of power of attorney are explained throughout the Information Paper.

Estate – throughout this paper 'estate' is used to describe the money and property a person owns, as well as their debts and living expenses. An administrator or attorney might be responsible for managing some or all of a person's estate. The term is not defined in the *Guardianship and Administration Act 1986*.

Guardian – a person appointed under the *Guardianship and Administration Act 1986* to make lifestyle decisions for a person who has a disability. This can include such things as where the person will live, their medical treatment, the services they receive, their employment and the people with whom they associate.

Throughout this paper we refer to different types of guardians. These include:

- *Private guardian:* this is usually used to describe a guardian who is appointed by VCAT but who is not the Public Advocate
- *Community guardian*: this means a volunteer from the community who is part of the Public Advocate's Community Guardian Program and who, as a delegate of the Public Advocate, acts as a guardian for someone
- *Enduring guardian*: this means a guardian appointed by a person, when they have capacity to act as their guardian when they lose capacity to make their own decisions

Glossary

Guardianship laws – throughout this paper, we use the term 'guardianship laws' to refer to the G&A Act 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*, the *Instruments Act 1958* and the *Medical Treatment Act 1988*.

Informal decision-making – throughout this paper, the term 'informal decision-making' is generally used to describe arrangements where someone makes decisions with, or even for, another person without any formal legal authority. Examples of informal decision-making are when friends, family or neighbours assist a person to make their own decisions, or even make decisions on their behalf, even though they might not have been given formal legal authority to do so.

Medical treatment – the term medical treatment is used differently in different contexts. For example, the *Guardianship and Administration Act 1986* has a narrower definition of medical treatment than the one in the *Medical Treatment Act 1988*. Both Acts refer to treatment that is administered by a medical practitioner, but each goes into different detail about what sorts of procedures are meant to be included in, or excluded from, their respective definitions. In most cases we use the term in the context of either one of those two Acts.

Merits review – a merits review occurs when a decision of a government official is reviewed because of a claim that the original decision was a poor or wrong decision, as opposed to reviewing a decision because of a claim of an error in law.

Order – a directive made by a court or tribunal. Usually it involves a directive that someone must do something, or comply with some rules. There are many different types of orders discussed throughout the Information Paper.

Person responsible – a person who has authority under the *Guardianship and Administration Act 1986* to consent to medical treatment on behalf of someone with a disability. Sometimes this will be a guardian or attorney, but it might also be a spouse, family member or carer, depending on the situation. The way that guardianship law determines who is the 'person responsible' is explained in the Information Paper.

Public Advocate – the Public Advocate is a Victorian independent statutory authority with a range of roles and functions under the *Guardianship and Administration Act 1986*. These roles and functions include acting as guardian of 'last resort', as well as various roles related to promoting the rights of people with disabilities.

Represented person – this term refers to a person who is subject to a guardianship or administration order under the *Guardianship and Administration Act 1986* (Vic).

State Trustees – State Trustees is a state owned company which, amongst other roles, is often appointed as administrator under the *Guardianship and Administration Act 1986* for people with disabilities.

Substitute decision-maker – a substitute decision-maker is a person who has legal authority to make decisions on behalf of someone else. Usually the law treats decisions of a substitute decision-maker as if they were made by the person themself. Throughout this Information Paper the sorts of substitute decision-makers discussed are guardians, administrators and attorneys.

VCAT – the Victorian Civil and Administrative Tribunal. This 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' and these include the Guardianship List, which hears and decides upon applications made under the *Guardianship and Administration Act 1986*.

Chapter One
The Commission's Guardianship Review

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Chapter 1 The Commission's Guardianship Review

INTRODUCTION

1.1 The Attorney-General has asked the commission to review the Guardianship and Administration Act 1986 (Vic) (G&A Act) and report on whether changes are needed.

1.2 The G&A Act assists people with disabilities who are unable to make, or 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 We have been asked to review Victoria's guardianship laws to ensure they respond to the needs of people with impaired decision-making ability while protecting and advancing their rights.[1]

TERMS OF REFERENCE

1.4 The complete terms of reference for this review can be found at the front of this paper on pages 5–6.

1.5 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
- is responsive to an ageing population.

1.6 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 (the Charter)[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 research decisions, including the 'person responsible' model, are appropriate and how the G&A Act interacts with the *Medical Treatment Act 1988* (Vic) (MT Act).
- whether 'disability' should continue to be a threshold requirement for the G&A Act or should the law focus on other concepts such as 'capacity' or 'vulnerability'
- whether the confidentiality provisions in the G&A Act adequately balance privacy protections and the need for transparency of decisions

1.7 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)
- MT Act.[4]

1.8 We have also been asked to consider other relevant reviews of guardianship laws throughout Australia.[5]

1.9 The terms of reference specifically exclude consideration of end-of-life decisions beyond those currently dealt with by the MT Act.

OUR PROCESS

1.10 The aims of this Information Paper are to explain the current law as simply as possible and to generate discussion about areas that need reform. This is the first time there has been a complete review of Victoria's guardianship laws since they commenced in the 1980s.

1.11 We ask a number of questions at the end of this paper. Your responses will assist the commission to understand experiences of guardianship laws. We would like to hear your views about what works well, what is not working well and why, as well as your ideas for improving the law.

1.12 Community consultations will take place in early 2010. We will then prepare a Consultation Paper that will contain some proposals for law reform. We will seek submissions and conduct further consultations about our draft reform ideas to see how people respond and to learn how our ideas can be improved.

1.13 The commission will then conduct further research and prepare a Final Report containing recommendations for law reform. This report must be delivered to the Attorney-General by 30 June 2011 who will table it in parliament shortly after that date. Once it is tabled in parliament it will be publicly available.

CONSULTATION

1.14 Because guardianship laws affect many different people, the commission will undertake broad ranging consultation throughout Victoria about the issues raised by this review.

1.15 We will meet people with disabilities, carers, advocates, families, health professionals, service-delivery groups, the Public Advocate, State Trustees Limited (State Trustees), VCAT, government departments and others to hear their views about Victoria's guardianship laws. We will conduct forums, roundtable discussions, private meetings and on-site visits to services throughout Victoria.

1.16 Two consultative groups have already been set up to provide us ongoing assistance and input into the law reform process. These groups will help the commission draw upon the experience of people who have worked in the field, researched, and written about the operation of the law, as well as those who use the system and the people who represent their interests. An additional group comprising government agencies will be set up in 2010.

1 The way we use the term 'guardianship laws' is described in the glossary.

2 *Convention on the Rights of Persons with Disabilities*, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006). The Convention opened for signature on 30 March 2007 and entered into force 3 May 2008.

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

4 These laws are discussed in Chapter 3.

5 These reviews are discussed in Chapter 4.

Chapter 1 The Commission's Guardianship Review

STRUCTURE OF THIS PAPER

1.17 Chapter 1 briefly explains the guardianship review and the commission's processes.

1.18 Chapter 2 provides an overview of Victoria's substitute decision-making laws. We then examine the G&A Act in detail. We look at the role of guardians and administrators and the functions of the Public Advocate and State Trustees. We also explore the medical treatment provisions in the G&A Act.

1.19 Chapter 3 examines the way the G&A Act interacts with other laws. This Chapter also looks at the other relevant law reform projects underway in Australia.

1.20 Chapter 4 describes changes to the landscape in which guardianship and administration laws operate. It identifies some of the specific policy issues our Terms of Reference ask us to consider.

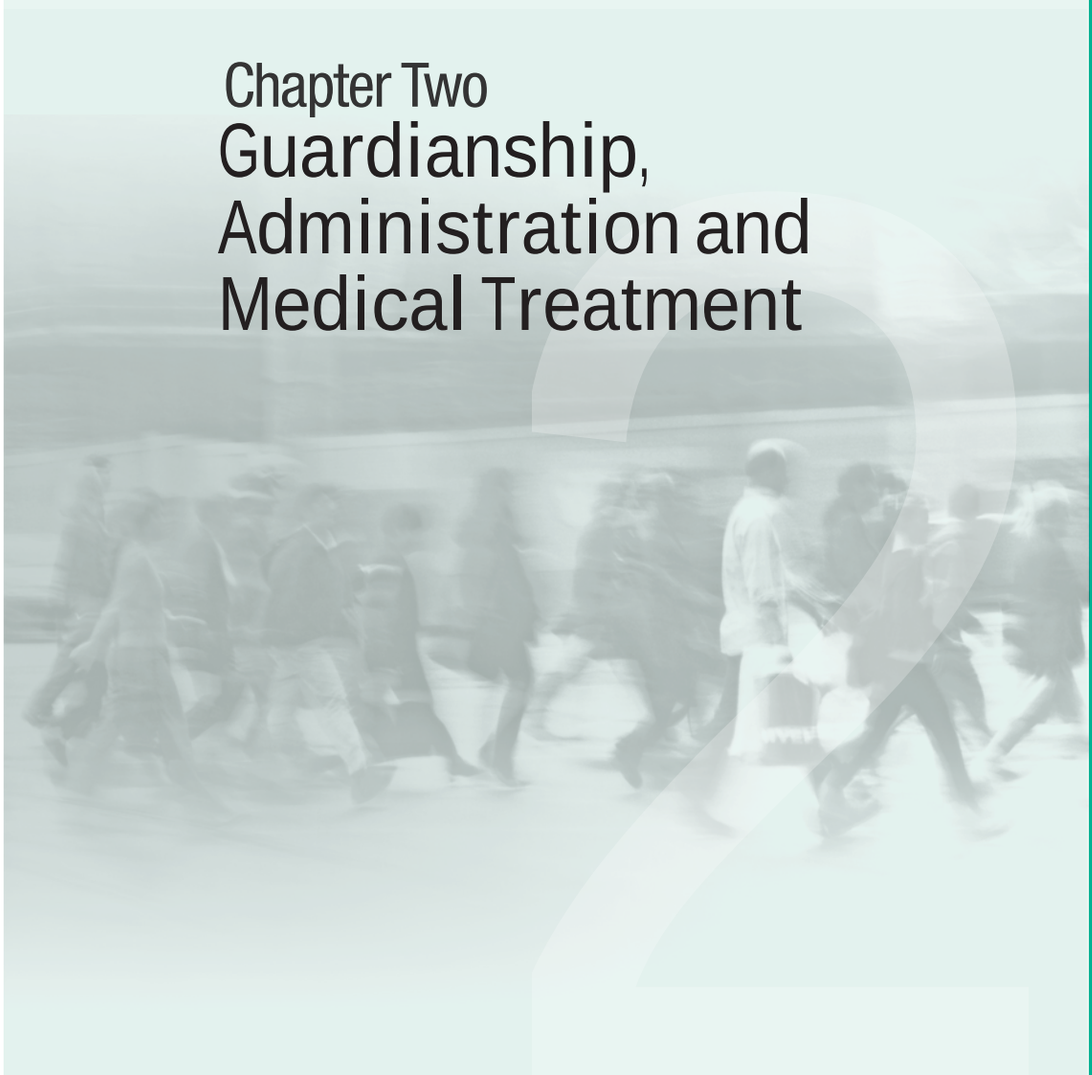
1.21 Chapter 5 asks a number of questions designed to explore your views about the laws and issues we have discussed in this paper.

OTHER PUBLICATION FORMATS

1.22 Audio and Easy English versions of this paper are 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 and Croatian. The commission can post or email you a copy of our Information Paper in any of these formats. This is done free of charge. You can also request another format if we do not have one you need.

Chapter Two

Guardianship, Administration and Medical Treatment



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Chapter 2

Guardianship, Administration and Medical Treatment

POLICY OVERVIEW

2.1 The *Guardianship and Administration Act 1986* (Vic) (G&A Act) creates a detailed and complex substitute decision-making regime for people with a disability who are unable to make their own decisions about important matters. This regime is necessary because of the important common law principle that all adults are autonomous beings. No one has the authority to make a legally binding decision on behalf of another adult person unless given the power by law to do so.

2.2 A 'substitute decision-maker' is someone who has the lawful authority to make decisions for another person who is not able to make decisions about some, or all, aspects of their life.

2.3 Guardianship laws were originally designed to assist and protect people with an intellectual disability in their interactions with the rest of the community at a time when institutions were closing in the 1980s.[1] Since that time, the original scheme established by the G&A Act has been adapted to assist a much broader range of people with impaired decision-making capacity.[2] Other laws have been introduced to allow a person to appoint their own substitute decision-maker who makes decisions on their behalf when they are no longer able to do so.[3] People who may use guardianship laws include those with acquired brain injuries, intellectual disabilities, dementia and mental illnesses.

2.4 In broad terms, Victoria's current guardianship laws create three different means by which one adult person may be given the legal power to make an important decision for another adult.

- First, a tribunal, the Victorian Civil and Administrative Tribunal (VCAT), may appoint a person to make decisions for someone who is unable to make their own decisions. That person can be appointed as either a guardian or an administrator. A guardian has the power to make personal decisions whereas an administrator makes financial decisions.
- Secondly, a person may appoint another person to make decisions on their behalf to prepare for circumstances when they are no longer able to do so.[4] A person may appoint another adult to be a guardian or an attorney. An attorney makes financial decisions. A person can also appoint another adult to make medical decisions on their behalf.[5]
- Thirdly, the law gives people in close relationships to others the power to consent to most forms of medical treatment when that other person is unable to give consent.[6] Because the law nominates a hierarchy of people who can consent to most medical interventions, individual appointment of a substitute decision-maker is usually not required.[7] This 'automatic appointment' scheme means most medical decisions concerning people with impaired capacity can now be made without the need for either VCAT, or the person themself, to appoint a substitute decision-maker.

2.5 At the end of this paper is a table that describes the different types of substitute decision-makers in Victoria.

2.6 A policy which underpins our current guardianship laws is that, wherever possible, people with capacity should make their own arrangements for the future by appointing another person to act as their substituted decision-maker during periods of incapacity. The state will intervene to appoint a guardian or administrator when a personal appointment has not been made and there is a demonstrated need for a substitute decision-maker, or there is a demonstrated abuse of that power. Common law rules concerning capacity are used to determine when a person is unable to make decisions for themself. The scheme established by the G&A Act also recognises, the widespread use of informal arrangements when people are unable to make their own decisions. An example of an informal arrangement is a friend, family member or neighbour requesting services on behalf of an elderly person who cannot request the services for themself.[8] The scheme treats financial decisions (for example, the sale of a home) and personal decisions (for example, where to live) differently and separate appointments are needed for these respective decisions.

2.7 Since 1999, medical treatment decisions have been dealt with differently, probably because these decisions must frequently be made quickly and are often not contentious. This means in most circumstances it is unnecessary for VCAT to appoint a substitute decision-maker.

Consequently, the law now reflects what often happens in practice, with close family members automatically having most decision-making responsibilities when a person is unable to consent to their own medical treatment.

RETHINKING POLICY

2.8 As Australian society has changed quite markedly since the last comprehensive review of our guardianship laws, we must consider whether the policies reflected in those laws are still current or whether they should be modernised. For example, human rights principles now play an important role in the development of many laws. It is timely to consider whether the *Convention on the Rights of People with Disabilities* (the Convention) and the Victorian Charter of Human Rights and Responsibilities (the Charter) may cause us to rethink aspects of our guardianship laws.

2.9 Governmental policies and community attitudes towards people with a disability have progressed over the past 25 years. We are now just as interested in promoting maximum participation in all aspects of life as we are in protecting people against possible abuse. The make-up of our community is also changing dramatically. As our community ages we are likely to rely more upon laws dealing with supported and substituted decision-making. Any new guardianship laws must take account of important developments like these.

2.10 In the paragraphs that follow we describe the current operation of our guardianship laws. As those laws are complex, this description is sometimes dense. One matter that we are already considering is whether this body of law can be simplified without sacrificing the flexibility that is required to respond to a broad range of circumstances and without compromising proper protection for people who need assistance when making important decisions.

THE GUARDIANSHIP ACT

BRIEF HISTORY

2.11 A Victorian Ministerial Committee, the Cocks Committee, developed the policy for the original G&A Act in 1982.[9]

2.12 The Cocks Committee prepared its report at the time when there was an increasing need for substitute decision-making for people with intellectual disabilities who were moving from institutional care into the community. The existing legal mechanisms were limited. People with an intellectual disability still fell within the scope of mental health laws, which centred on hospital care. Old Supreme Court general law powers to appoint substitute decision-makers were rarely used because of the time and expense involved in seeking orders from that court.

2.13 The Cocks Committee recommended an entirely new system which permitted a tribunal to deal with both personal and property matters.[10] It recommended a 'light touch' substituted decision-making system for people with an intellectual disability that was to be used only when there was a demonstrated need for a substitute decision.[11] The aim was for guardianship to operate as a 'last resort' which, when used, would promote autonomy and self-sufficiency. The system would promote respect for a person's wishes and preferences, and encourage family appointments over government decision-makers.[12]

2.14 The G&A Act was enacted in 1986 as part of a trio of bills also comprised of the *Intellectually Disabled Persons Services Act 1986* and the *Mental Health Act 1986*, all of which replaced the *Mental Health Act 1959*.

2.15 Innovative features of the G&A Act included:

- the creation of an informal tribunal, the Guardianship and Administration Board, to appoint guardians and administrators[13]
- the establishment of the Public Advocate to advocate on behalf of people with disabilities, to assist the tribunal, to investigate abuse and to educate the public.[14] The Public Advocate was also available to act as a guardian of last resort when the tribunal decided a guardian was needed and no other suitable person was available.

1 Cocks Committee, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons*, (Melbourne, Vic Gov Pr, 1982), 11-13.

2 The meaning of 'capacity' is outlined in the glossary.

3 For example a person may appoint an 'agent' to make medical decisions on their behalf under the *Medical Treatment Act 1988* (Vic) or appoint someone as an 'attorney' to make financial and legal decisions on their behalf under the *Instruments Act 1958* (Vic).

4 To do this the donor must have capacity.

5 See the discussion of the *Medical Treatment Act 1988* (Vic) in Chapter 3.

6 See the discussion in Chapter 2 concerning medical treatment provisions in the *Guardianship and Administration Act 1986* (Vic).

7 A formal appointment may be necessary in a situation of conflict.

8 The meaning of 'informal arrangements' is outlined in the glossary.

9 Cocks Committee, above n 1, 11.

10 Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 19.

11 Ibid.

12 Ibid, 17-18.

13 Ibid, 19.

14 Ibid.

Chapter 2

Guardianship, Administration and Medical Treatment

Amendments

2.16 The G&A Act has been amended on numerous occasions since 1986. Some of the most important changes were:

1998

- the Guardianship and Administration Board became part of the newly established Victorian Civil and Administrative Tribunal[15]

1999

- the introduction of privately appointed substitute decision-makers called 'enduring guardians'[16]
- new arrangements for consent to medical and dental treatment[17]
- new provisions to allow for the registration of interstate guardianship and administration orders[18]

2002

- expanding the group of people to whom the medical treatment provisions apply[19]

2006

- establishing a new detailed system for including people with impaired capacity in medical research procedures.[20]

OVERVIEW OF THE CURRENT ACT

2.17 The G&A Act now does the following things. It:

- establishes the office of the Public Advocate[21]
- gives a tribunal, VCAT, the power to make guardianship and administration orders[22]
- allows a person to appoint another adult as their enduring guardian[23]
- establishes an 'automatic' substituted consent regime for most forms of medical treatment [24]
- establishes procedures for re-hearings and reassessment of VCAT orders[25]
- permits relevant interstate orders to be registered in Victoria.[26]

Principles

2.18 The G&A Act attempts to balance the principles of protection from abuse and neglect with the right to autonomy and self-determination. The Act contains three broad principles:

- the means that are the least restrictive of a person's freedom of decision and action should be adopted
- the best interests of a person with a disability must be promoted
- the wishes of a person with a disability should be followed wherever possible.[27]

2.19 The Act contains some guidance about implementing these principles. A guardian is required to advocate for a person with a disability and both guardians and administrators are required to assist people, as far as possible, to make decisions for themselves.[28] The Public Advocate has suggested that promoting the best interests of a person with a disability means attempting to work out how that person's 'interests and values are affected by their situation and weighing the relative importance of their different interests in the particular decision that must be made'.[29]

2.20 For VCAT, making the least restrictive decision involves resorting to substitute decision-making as a last resort and limiting the scope of the powers of a substitute decision-maker and the length of time those powers can be used. [30] For guardians and administrators it means making a decision that is the least restrictive of a person's freedom to act and make decisions for themself.

GUARDIANSHIP

WHAT IS A GUARDIAN?

2.21 A **guardian** is an adult appointed to makes decisions for another adult who is unable to make 'reasonable judgments' about any matters relating to themself or their circumstances because of a disability.[31] A person who has a guardian is often called a 'represented person'. When a person is unable to make decisions because of their disability that person is often referred to as someone who lacks capacity, or a person who has an impaired decision-making capacity.[32]

2.22 Guardians make decisions about personal and lifestyle matters, such as where the represented person lives, who they spend time with and how they access services like health care.[33] This role is different to that of an 'administrator' or an 'attorney (financial)' who make decisions about financial matters for a represented person.[34]

HOW IS A GUARDIAN APPOINTED?

2.23 A guardian can be appointed in one of two ways under the G&A Act:

1. VCAT may appoint a guardian. Any person may apply for a guardianship order in respect of a person who is aged 18 years or over.[35] The Public Advocate can also make applications to VCAT to appoint a guardian.[36]
2. A person can appoint their own guardian by completing a document known as an 'Enduring Power of Guardianship'.[37] This process allows a person, when they have capacity,[38] to nominate a substitute decision-maker to make decisions for them if they lose capacity in the future. This type of guardian is an '*enduring* guardian' because the guardian's appointment endures beyond the time the represented person loses capacity. In fact, the enduring guardian's powers only become available when the represented person is unable to make their own decisions and only apply to those areas where the represented person cannot make decisions.

WHAT IS VCAT?

2.24 VCAT is the Victorian Civil and Administrative Tribunal. It makes decisions under many different laws. VCAT has a number of sections called 'lists' that specialise in hearing particular types of cases. The 'guardianship list' deals with guardianship, administration, powers of attorney and related matters. The guardianship list is part of the Human Rights Division of VCAT.[39]

2.25 After receiving an application for a guardianship order, VCAT has a hearing to decide if a guardian should be appointed. While these hearings are generally held in public, all or part can be held in private and there are restrictions on publishing information about particular people.[40] VCAT is less formal than a court. It is not bound

15 See *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic) Part 8 and *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

16 *Guardianship and Administration (Amendment) Act 1999* (Vic) s 12 and *Guardianship and Administration Act 1986* (Vic) Division 5A.

17 *Guardianship and Administration (Amendment) Act 1999* (Vic) s 14 and *Guardianship and Administration Act 1986* (Vic) ss 36-42O.

18 *Guardianship and Administration (Amendment) Act 1999* (Vic) s 20 and *Guardianship and Administration Act 1986* (Vic) pt 6A.

19 *Guardianship and Administration (Amendment) Act 2002* (Vic) s 11 and *Guardianship and Administration Act 1986* (Vic) s 36(1).

20 *Guardianship and Administration (Further Amendment) Act 2006* (Vic) pt 2 and *Guardianship and Administration Act 1986* ss 3, 4(1)(f), 16(1)(ja), 36, 37(6), 40, 41, 42(a), 42A, 42(e), 42(g), 42N(6), div 6.

21 *Guardianship and Administration Act 1986* (Vic) pt 3.

22 *Guardianship and Administration Act 1986* (Vic) pt 4 and 5.

23 *Guardianship and Administration Act 1986* (Vic) pt 4 div 5A.

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

25 *Guardianship and Administration Act 1986* (Vic) pt 6.

26 *Guardianship and Administration Act 1986* (Vic) pt 6A.

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

28 *Guardianship and Administration Act 1986* (Vic) ss 28(2), 49(2).

29 Office of the Public Advocate (Victoria), *Adult Guardianship in Victoria* [2] <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG00_Adult_Guardianship_in_Victoria_09.pdf> at 30 November, 2009.

30 Ibid.

31 The term 'reasonable judgments' is used in section 22(1)(b) of the Guardianship and Administration Act 1986 (Vic).

32 The terms 'capacity' and 'competence' are generally used interchangeably throughout the law.

33 See *Guardianship and Administration Act 1986* (Vic) ss 24(2), 25.

34 See the discussion about administrators in this Chapter and powers of attorney in Chapter 3.

35 *Guardianship and Administration Act 1986* (Vic) s 19 (1).

36 *Guardianship and Administration Act 1986* (Vic) s 16 (1)(a)(b).

37 *Guardianship and Administration Act 1986* (Vic) s 35A.

38 The meaning of 'capacity' is outlined in the glossary.

39 The Guardianship List of VCAT operates under the provisions of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

40 See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101 and sch 1, cl 37.

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by the rules of evidence and does not have to use formal legal processes. For example, it may hear a matter over the phone if a person cannot travel to the tribunal for a hearing. However, VCAT hearings must comply with principles of procedural fairness. This means that hearings must be fair and that someone who is impartial must make decisions.[41]

WHEN IS A GUARDIAN APPOINTED?

2.26 VCAT can make an order for guardianship only if it is satisfied that:

- a person has a disability, and
- because of that disability the person cannot make 'reasonable judgments' in respect of all or any of their personal matters, and
- the person needs a guardian.[42]

2.27 The G&A Act defines '**disability**' broadly. It means 'intellectual impairment, mental disorder, brain injury, physical disability or dementia'.[43]

2.28 When deciding if a person has a disability and cannot make reasonable judgements, VCAT usually considers medical or other expert reports and evidence from important people in the person's life. VCAT also usually talks to the person concerned if that is possible.

2.29 In practice, a guardian is appointed only if a decision needs to be made on behalf of a person with a disability at the time of the hearing, or if there is a reasonable likelihood that a decision will be required to be made in the foreseeable future.[44] As the Public Advocate points out, 'VCAT will not appoint a guardian to "look after" someone in case something goes wrong'.[45]

2.30 When deciding if there is a need for a guardian VCAT must also consider the wishes of the person with a disability as well as the views of relatives and the importance of maintaining family relationships.[46]

2.31 A guardianship order will not be made if there is another way to meet the person's needs which would interfere less with their freedom of decision and action, for example, meeting the needs of the represented person through advocacy.[47] It must be in the person's best interests to appoint a guardian.[48]

2.32 Generally, guardians are appointed as a last resort. If there is no disagreement among family members and carers about decisions, guardianship is usually not needed. A guardian is often appointed only when clear legal authority to make decisions is required or when there is a disagreement among those involved.[49]

WHO CAN BE A GUARDIAN?

2.33 A guardian must be aged 18 years or over and consent to being a guardian.[50] A guardian can be:

- an individual appointed by VCAT
- the Public Advocate
- a person appointed through the enduring guardianship process.

2.34 The Act is cast in a way that encourages VCAT to consider a family member or friend first as a guardian and only to consider the Public Advocate if there is no suitable family member or friend able and willing to act. VCAT must find that a person will be a suitable guardian. It must also be satisfied that the person will act in the best interests of the represented person and that they do not have interests that may be in conflict with those of the represented person.[51]

2.35 When determining whether a person will be a suitable guardian VCAT must take into account:

- the wishes of the person with a disability
- the desirability of preserving existing family relationships
- the compatibility of the proposed guardian with the person with a disability
- whether the proposed guardian will be available and accessible to help the represented person.[52]

Joint and alternative guardians

2.36 VCAT can appoint more than one guardian for a represented person if it believes this is appropriate.[53] Joint guardians must agree for a decision to be legally binding.

2.37 VCAT may also appoint an 'alternative guardian'. An alternative guardian automatically takes over guardianship for a represented person if the original guardian dies, is absent, or is otherwise unable to act as the guardian.[54]

POWERS OF A GUARDIAN

2.38 The powers of a guardian should suit the circumstances of each case. VCAT determines the powers of a guardian and specifies them in its orders. When deciding what powers to give a guardian VCAT must make an order that is the least restrictive of the person's freedom of decision and action in the circumstances.[55]

2.39 A guardian's powers can be '**limited**' to specific decisions, or they can be '**plenary**'. If the powers are limited, the guardian can make decisions only in relation to those issues that are listed in the order.[56] Most guardianship orders are limited.

2.40 A 'plenary guardian' has much wider powers. Those powers extend to many aspects of the represented person's life. The powers of a 'plenary guardian' are described in the Act as 'all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child.'[57] This form of words is an outdated and unclear shorthand way of describing all of the powers that one person could possess in relation to another.

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

- where the represented person will live and who they will live with
- whether the represented person should work
- consent to health care
- restricting or preventing access to the represented person.[58]

2.42 Plenary orders should be made only if a more limited order will not meet the needs of the represented person.[59] These orders are rarely made.

2.43 VCAT can give a guardian it appoints the power to require a represented person to comply with a decision made by the guardian with the use of some limited force if necessary.[60]

RESPONSIBILITIES OF A GUARDIAN

2.44 A guardian must always act in the best interests of the represented person when making decisions on their behalf.[61] The G&A Act contains some details of how this can be done. A guardian must act as far as possible as an advocate for the person with a disability, encourage the person to participate as much as possible in community life, and encourage and help the person to care for themself and make their own decisions. A guardian must also protect the represented person from harm, abuse, neglect or exploitation.[62]

2.45 Guardians must consult a represented person and take account of their wishes as far as possible. A guardian must also act in a way that is the least restrictive of the person's freedoms.

2.46 Decisions of a guardian have the same legal effect as if the represented person had made the decision themself when they had the legal capacity to do so.[63]

41 Office of the Public Advocate (Victoria), *Fact Sheet: Guardianship, Making personal and lifestyle decisions for an adult with a decision-making disability, (08/09),* [2], <http://www.publicadvocate.vic.gov.au/file/file/Guardianship/Guardianship%20290909.pdf > at 2 December 2009.

42 *Guardianship and Administration Act 1986* (Vic) s 22(1). In determining whether someone is 'in need of a guardian' VCAT has suggested that need can be established if there is a reasonable possibility that a decision that only a guardian is empowered to make will be required in the foreseeable future. See *Public Advocate v RCS* (2004) VCAT 1880 (unreported, Morris P), 27 September 2004 [10].

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

44 See *Re BWV* [2003] VCAT 121.

45 Office of the Public Advocate (Victoria), *Community Guardianship Manual* [11] <http://www.publicadvocate.vic.gov.au/file/file/Volunteers/Community_Guardianship_Manual.pdf> at 26 November 2009.

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

47 *Guardianship and Administration Act 1986* (Vic) ss 22(4)-(5), 4(2).

48 *Guardianship and Administration Act 1986* (Vic) s 22(3).

49 Office of the Public Advocate (Victoria), above n 45.

50 *Guardianship and Administration Act 1986* (Vic) s 23(1)

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

52 *Guardianship and Administration Act 1986* (Vic) s 23(1).

53 *Guardianship and Administration Act 1986* (Vic) s 23(5).

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

55 *Guardianship and Administration Act 1986* (Vic) ss 22(4)-(5).

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

57 *Guardianship and Administration Act 1986* (Vic) s 24 (1).

58 *Guardianship and Administration Act 1986* (Vic) s 24(2).

59 *Guardianship and Administration Act 1986* (Vic) s 22(5).

60 *Guardianship and Administration Act 1986* (Vic) s 26. If an enduring guardian is unable to encourage a represented person to comply with a decision the enduring guardian will need to apply to VCAT to be appointed a guardian in order to make use of s 26.

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

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

63 *Guardianship and Administration Act 1986* (Vic) s 24(4).

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2.47 A guardian may seek advice from VCAT about the scope of a guardianship order and about the exercise of their powers.[64] Although the final decision remains the responsibility of the guardian, if the guardian acts in accordance with the advice provided by VCAT they will not be held liable legally for this decision.[65]

THE PUBLIC ADVOCATE'S ROLE

2.48 The Public Advocate is an independent statutory official whose office was established to protect and promote the rights of people with disabilities. The G&A Act gives the Public Advocate a range of specific functions.

GUARDIAN OF LAST RESORT

2.49 VCAT may appoint the Public Advocate as the guardian of last resort when no other more suitable person is available.[66] The Public Advocate has the power to delegate his or her duties. In practice the Public Advocate employs staff, known as 'Advocate/Guardians', who act as the guardian for a number of represented people.

2.50 VCAT appoints the Public Advocate as guardian in approximately 60 per cent of all guardianship orders.[67] In 2008/2009 the Public Advocate provided guardianship services to 1,394 people.[68]

2.51 The Public Advocate has developed a set of guardianship standards for public guardians in Victoria.[69] These standards conform to the National Standards of Public Guardianship established by the Australian Guardianship and Administration Council.[70] In brief, these standards require guardians to:

- provide information about the guardian's role and authority to the represented person, and other relevant persons
- seek the views of the represented person to the greatest extent possible, and consult with family members, health professionals and other relevant persons before taking action
- make decisions in accordance with the requirements of the G&A Act and the VCAT order, and provide reasons for these decisions on request
- record all the relevant information leading to a decision, and the reasons for that decision
- participate in the reassessment of guardianship, including seeking reassessment where appropriate, and providing a report to VCAT
- protect the privacy and confidentiality of represented persons.[71]

COMMUNITY GUARDIANS

2.52 The Public Advocate has the power to delegate his or her [72] duties to a community guardian.[73] Community guardians are volunteer members of the community. In addition to providing assistance to the Advocate/Guardian program, one of the main aims of the Public Advocate's 'Community Guardianship Program' is to involve members of the community in the ongoing welfare of people with disabilities. There are currently 54 community guardians, and these volunteers were involved in 90 guardianship cases in 2008/2009.[74]

INVESTIGATION

2.53 The Public Advocate has the power to carry out investigations when asked to do so by VCAT,[75] or in response to a complaint that a person is under inappropriate guardianship or is being abused and needs a guardian.[76]

2.54 For the purposes of an investigation, the Public Advocate may require a person, government department, public authority, service provider, institution or welfare organisation to provide information.[77] However, a person may refuse to provide this information if providing it would tend to incriminate them.[78]

2.55 In cases of suspected unlawful detention or abuse of a person with a disability, VCAT can give the Public Advocate and the police the power to enter the premises of the person for the purpose of investigating and reporting to VCAT.[79]

2.56 In 2008/2009 the Public Advocate conducted 680 investigations.[80] Some of the main issues that arose in these investigations concerned accommodation (204 investigations), conflict between individuals (76 investigations) and enduring powers of attorney (financial) (53 investigations).[81]

SUPPORT FOR GUARDIANS

2.57 The Public Advocate has the power to give advice to guardians about the operation of the G&A Act. The Private Guardian Support Program is designed to assist guardians to understand their role and to provide practical advice about working with people with disabilities and service providers.[82]

OTHER FUNCTIONS

2.58 The Public Advocate has a number of other important roles. They are to:

- provide advocacy for people with disabilities
- investigate, report, and make recommendations to the Attorney-General about matters concerning the G&A Act
- educate the community and promote public awareness of the role of guardianship and administration, the role of the Public Advocate and VCAT and the need to protect persons with a disability from abuse
- facilitate, promote and encourage government and community organisations that support and provide advocacy for people with disabilities.[83]

Community visitors program and independent third persons program

2.59 The Public Advocate also manages the Community Visitors Program and the Independent Third Person Program. The Community Visitors Program coordinates a network of volunteer Community Visitors who visit community residential units, supported residential services and mental health facilities and report on the standard of care and support provided to residents.[84] The Independent Third Person program[85] trains and coordinates a network of volunteers who assist people with a cognitive disability or mental illness during police interviews or when making formal statements to Victoria Police.[86]

Advocacy

2.60 An advocate is someone who tries to make sure that the rights of a person with a disability are respected and enforced. Advocacy is a part of the role of a guardian,[87]

64 *Guardianship and Administration Act 1986* (Vic) s 30.

65 *Guardianship and Administration Act 1986* (Vic) s 30(4). This immunity does not apply if in representing the facts to VCAT, the guardian has been guilty of fraud, wilful concealment or misrepresentation.

66 *Guardianship and Administration Act 1986* (Vic) s 23(4). See also s 16(1)(b).

67 Office of the Public Advocate (Victoria), above n 45, 12.

68 Office of the Public Advocate (Victoria), *Annual Report 2008/2009,* 9.

69 Office of the Public Advocate (Victoria), *Guardianship Standards* <http://www.publicadvocate.vic.gov.au/about-us/199/> at 30 November 2009.

70 Australian Guardianship and Administration Council, *National Standards of Public Guardianship* <http://www.agac.org.au/images/stories/national_stands_public_guardianship.pdf> at 30 November 2009.

71 Office of the Public Advocate (Victoria), above n 69.

72 The current Public Advocate is Colleen Pearce.

73 The Public Advocate may delegate her duties to a paid guardian within her office or to another individual or organisation. *Guardianship and Administration Act 1986* (Vic) s 18(1) & (2). This must be approved by VCAT.

74 Office of the Public Advocate (Victoria), *Annual Report 2008/2009*, 51.

75 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), sch 1, s 35. VCAT may also refer matters to the Public Advocate for investigation under the *Instruments Act 1958* (Vic) and the *Medical Treatment Act 1988* (Vic) pursuant to ss42 and 48(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic).

76 *Guardianship and Administration Act 1986* (Vic) s 16(h).

77 *Guardianship and Administration Act 1986* (Vic) s 16(1)(ha).

78 *Guardianship and Administration Act 1986* (Vic) s 16(1A).

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

80 Office of the Public Advocate, above n 74,16.

81 Ibid.

82 *Guardianship and Administration Act 1986* (Vic) s 16 (1)(g). More information about the Private Guardian Support Program is available on the Public Advocate's website <http://www.publicadvocate.vic.gov.au/services/104/> at 2 December 2009.

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

84 *Disability Act 2006* (Vic) s 28, *Mental Health Act 1986* (Vic) s 108, *Health Services Act 1988* (Vic) s 116.

85 Victoria Police, Victoria Police Manual February 2–April 5 2009 VPM Instruction 112-3.

86 More information about the Community Visitors Program is available on the Public Advocate's website <http://www.publicadvocate.vic.gov.au/services/107/> at 2 December 2009. In relation to Independent Third Persons see <http://www.publicadvocate.vic.gov.au/services/108/> at 2 December 2009.

87 *Guardianship and Administration Act 1986* (Vic) s 28(2)(a).

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but an advocate does not have to be a guardian or an administrator. A family member, friend, or advocacy group may act as an advocate for a person with a disability, or support the person to advocate for themself. Where no one else is available, the Public Advocate may act as advocate of last resort for a person with a disability.[88]

2.61 The Public Advocate is empowered to make representations on behalf of a person with a disability and to seek assistance in their best interests from government departments, service providers, institutions, and welfare organisations.[89] Advocacy is sometimes used instead of formal guardianship to ensure a person's needs are met. In 2008/2009 Advocate/Guardians employed by the Public Advocate dealt with 237 individual advocacy cases.[90]

2.62 The Public Advocate also undertakes some systemic advocacy, that is, addressing matters in ways that aim to promote or safeguard the rights and interests of people with disabilities generally, rather than on behalf of individuals.

2.63 The Public Advocate also manages a Community Education Program which provides public training and information sessions, as well as a Policy and Research Unit, which undertakes research and policy analysis on a range of matters relevant to the work of the Public Advocate.[91]

2.64 The Public Advocate's community information and advice service provides public information on a diverse range of topics including guardianship, administration, powers of attorney, consent and refusal of medical treatment, and financial and physical abuse of people with disabilities.[92]

Litigation guardian

2.65 A litigation guardian is an adult through whom a person under 18 years of age or a person with a disability acts in court.[93] A litigation guardian stands in the shoes of the represented party in a proceeding. A person with a disability may need a litigation guardian if they cannot instruct their solicitor or manage their affairs in relation to the proceeding.[94] The court appoints a litigation guardian who may be liable for the costs of proceedings. A litigation guardian usually has to employ a lawyer.[95]

2.66 The Public Advocate rarely acts as a litigation guardian in civil proceedings. Section 16(f) of the G&A Act says the Public Advocate may 'make representations on behalf of or act for a person with a disability'. Therefore, the Public Advocate notes that it is 'both possible and reasonable for the Public Advocate to act as a litigation guardian in appropriate circumstances.'[96]

2.67 Section 58B(2)(l) of the G&A Act allows an administrator to bring and defend legal proceedings in the name of the represented person. Therefore, a person who has an administrator appointed does not generally need a litigation guardian although it is possible for an administrator to be a litigation guardian.[97] An advantage of an administrator initiating or defending a represented person's interests is that the administrator is not personally liable for costs.[98]

2.68 The Public Advocate considers that the 'administration powers under section 58B(2)(l) are limited to matters relating to a person's finances and estate and do not extend to litigation about personal or lifestyle issues'.[99] By way of example, the Public Advocate suggests that matters relating to finances and estate would include compensation for injury and family law property settlements. Matters relating to lifestyle would include family law issues such as the residence of and contact arrangements for children and discrimination cases where the remedy sought is an apology or a change in policy and practice.[100] If both a litigation guardian and administrator are appointed the litigation guardian will liaise with the administrator to determine whether the represented person has the financial capacity to be involved in the litigation.[101]

2.69 The Public Advocate has indicated that it 'will not agree to be a litigation guardian for a child (under 18) unless the child is a person with a disability'.[102]

PERSONALLY APPOINTED GUARDIANS

ENDURING GUARDIAN

2.70 People can appoint their own guardian through the enduring guardianship process. The enduring guardianship provisions were added to the G&A Act in 1999.

2.71 Any adult person with capacity may appoint another person to become their guardian if they lose the ability to make decisions at some time in the future.[103] The appointed person is called an 'enduring guardian', and the document which appoints them is called an 'enduring power of guardianship'.

2.72 The term 'enduring' is used because the appointment continues (or endures) beyond the point when the person who gave the power (the donor) loses the ability to make reasonable judgments due to a disability.[104] The appointment only comes into effect when the donor loses capacity to make decisions. Before then, the enduring guardian has no power to make personal decision on the person's behalf.

APPOINTMENT OF AN ENDURING GUARDIAN

2.73 An enduring guardian must be appointed in writing. The document must be in a particular form that is signed and witnessed in a certain way.[105] It does not have to be registered or filed anywhere.

IDENTITY OF AN ENDURING GUARDIAN

2.74 An enduring guardian must be aged 18 years or over and must not be professionally involved in the care of the represented person.[106]

POWERS OF AN ENDURING GUARDIAN

2.75 The powers of an enduring guardian can be described and limited in the document which appoints them.[107] If the powers are not limited in the appointment document, the enduring guardian has the broad powers of a plenary guardian.[108]

2.76 When appointing an enduring guardian, a person might indicate in the document specific decisions they want the guardian to make, such as not to agree to living in a particular residential service. Because Victoria does not have legislation regarding advance directives, these instructions are not legally binding, although the guardian should use them as a guide when their powers come into effect.

2.77 The powers of an enduring guardian come into existence only when, and to the extent that, the represented person is unable to make decisions for themself.[109] There is no formal tribunal or court process that determines when the represented person no longer has the capacity to make their own decisions.

88 Office of the Public Advocate (Victoria), *Advocacy* <http://www.publicadvocate.vic.gov.au/services/103/> at 30 November 2009.

89 *Guardianship and Administration Act 1986* (Vic) ss 16(1)(e)-(f).

90 Office of the Public Advocate, above n 74,16.

91 Ibid, 40; Office of the Public Advocate, *Annual Report 2007/2008*, 26. See also *Guardianship and Administration Act 1986* (Vic) s 15(c).

92 More information about the Public Advocate's education and training roles can be found on the Public Advocate's website <http://www.publicadvocate.vic.gov.au/services/109/> at 2 December 2009.

93 See *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 15; *County Court Civil Procedure Rules 2008* (Vic) O 15; *Magistrates Court Civil Procedure Rules 2009* (Vic) O 32. In the Supreme Court and County Court, a person under a disability is defined as a minor or 'a person who is incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to the proceeding'. In the Magistrates Court, a person with a disability is defined as a person having a disability within the meaning of the Guardianship *and Administration Act 1986* (Vic). This definition includes people with intellectual impairment, mental disorder, brain injury, physical disability or dementia.

94 Office of the Public Advocate (Victoria), *Litigation Guardian* <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG15_Litigation_Guardian_09.pdf?phpMyAdmin=fe8bb73b8ddef429ba268102bddcf16c> at 10 January 2010.

95 See *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 15.02(3); *County Court Civil Procedure Rules 2008* (Vic) O 15.02(3); see also Ibid.

96 Ibid.

97 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 15.03(2), *County Court Civil Procedure Rules 2008* (Vic) r 15.03(2); *Magistrates Court Civil Procedure Rules 2009* (Vic) r 32.02(2).

98 See also 47B of the *Guardianship and Administration Act 1986* (Vic) which provides that an administrator's costs and expenses can be recovered from the estate of the represented person.

99 Ibid.

100 Ibid.

101 Ibid.

102 Ibid.

103 *Guardianship and Administration Act 1986* (Vic) s 35A(1).

104 *Guardianship and Administration Act 1986* (Vic) s 35B(1).

105 *Guardianship and Administration Act 1986* (Vic) s 35A(2).

106 *Guardianship and Administration Act 1986* (Vic) ss 35A(3), (4).

107 *Guardianship and Administration Act 1986* (Vic) s 35B(1).

108 *Guardianship and Administration Act 1986* (Vic) ss 35B(2), 24.

109 *Guardianship and Administration Act 1986* (Vic) s 35B(1).

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RESPONSIBILITIES OF AN ENDURING GUARDIAN

2.78 The responsibilities of an enduring guardian are the same as those of a VCAT appointed guardian. An enduring guardian must act in the 'best interests' of the represented person and consider that person's wishes as far as possible.[110]

2.79 An enduring guardian may apply to VCAT for advice or directions about the scope or exercise of their powers.[111] VCAT may give an advisory opinion and can vary the enduring guardian's powers.[112] VCAT may also independently decide to advise or direct an enduring guardian, even if the enduring guardian has not applied for advice or direction.[113]

DISCONTINUING AN ENDURING GUARDIANSHIP

2.80 A person with capacity can discontinue the appointment of an enduring guardian at any time in writing.[114]

2.81 An application can be made to VCAT to cancel an enduring power of guardianship.[115] VCAT may cancel the appointment if it is satisfied that the enduring guardian:

- no longer wants the role
- is no longer willing or able to fulfil the role
- has not acted in the best interests of the person
- has acted negligently or incompetently.[116]

ADMINISTRATION

OVERVIEW

2.82 An administrator is a person appointed by VCAT to make financial and some legal[117] decisions for a person who is aged 18 years or over. Administration is the second type of substitute decision-making dealt with by the G&A Act.

2.83 A person with capacity may also personally appoint another person, known as an attorney, to make decisions about their legal and financial affairs. Unless otherwise indicated in the appointment document, the decision-making powers of the attorney come into effect immediately, and if appointed as an enduring power of attorney (financial) under the *Instruments Act 1958* (Vic), they continue when the donor loses capacity. We discuss powers of attorney in Chapter 3.

2.84 A person may also request the Secretary of the Australian Department of Human Services to appoint a nominee, who may have various powers in relation to that person's social security payments, including receiving payments on the person's behalf, or entering into correspondence with Centrelink on the person's behalf.[118]

2.85 Administration orders are made in similar circumstances to guardianship orders. A guardian is usually appointed to make a relatively small number of decisions or to make decisions within a relatively short timeframe. Administrators are often appointed to make a multitude of decisions over a longer period of time.

2.86 Any person may apply to VCAT for an order appointing an administrator in respect of the estate of someone with a disability who is aged 18 years or over.[119] The Public Advocate can also make an application to VCAT to appoint an administrator.[120]

2.87 It is possible for the powers of a guardian and an administrator to overlap. The G&A Act does not say whose powers should prevail if there is conflict. Usually the practicalities of the situation will determine which decision prevails and often the consent of both the guardian and the administrator will be necessary before any decision can be acted upon. For example, if a guardian with decision-making authority in relation to a person's accommodation consented to an admission to a nursing home for which the person's administrator was not prepared to release funds, the guardian's decision would not be able to be put into effect. Conversely, the

administrator's consent to the release of the funds would be ineffectual if the guardian did not consent to the admission. In such circumstances, either the guardian[121] or the administrator[122] could seek advice from VCAT.

APPOINTMENT OF AN ADMINISTRATOR BY VCAT

2.88 VCAT has the power to appoint an administrator in similar circumstances to that of a guardianship appointment. It must be satisfied that:

- a person has a disability, and
- because of that disability the person cannot make reasonable judgments in respect of all or any part of their estate, and
- the person needs an administrator.[123]

2.89 VCAT must consider a number of matters when deciding whether a person needs an administrator. It must consider whether there is an alternative means available to meet the needs of the person that would be less restrictive of their rights and freedoms. VCAT must also consider the wishes of the person. Further, VCAT cannot make an order unless it is satisfied that the order is in the person's best interests. Any order must be the least restrictive of the person's rights feasible in the circumstances.[124]

IDENTITY OF AN ADMINISTRATOR

2.90 An administrator must be aged 18 years or over and consent to the appointment. VCAT must be satisfied that the proposed administrator will act in the best interests of the represented person and:

- is not in a position where their own interests may conflict with the interests of the represented person
- is suitable to act as administrator
- has the expertise required for the role, or there is some other special reason to justify their appointment.[125]

2.91 VCAT must also consider the wishes of the person with a disability and the compatibility of the proposed administrator and represented person.[126]

2.92 Unlike guardianship there is no formal administrator of last resort. Family members, friends, trustee companies, solicitors or accountants and the State Trustees Limited (State Trustees) can be appointed as administrators.[127]

2.93 A small number of private companies provide administration services to clients under VCAT administration. Professional administrators are able to charge a fee for their services. The fee is set by VCAT and detailed in the administration order.[128]

2.94 A private administrator, such as a relative, cannot receive payment from an estate of a represented person unless VCAT specifically deals with the matter in its order.[129] VCAT can order that the actual costs incurred by an administrator be paid from the estate of the represented person.[130]

STATE TRUSTEES AS ADMINISTRATOR

2.95 State Trustees is the administrator VCAT usually appoints when it considers that there is no other appropriate person to take on this role. It is a state owned company and its profits are returned to the Victorian government. It provides a range of services for people who cannot manage their own financial and legal affairs because of disability. The *State Trustees (State Owned Company) Act 1994* (Vic) says the Victorian government is responsible for ensuring Victorians have access to administration services if they are not able to obtain them with their own resources.[131]

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

111 *Guardianship and Administration Act 1986* (Vic) s 35E(1).

112 *Guardianship and Administration Act 1986* (Vic) s 35E(2).

113 *Guardianship and Administration Act 1986* (Vic) s 35E(3).

114 *Guardianship and Administration Act 1986* (Vic) s 35C. For a revocation to be effective it must be in the prescribed form and witnessed in accordance with s 35C(3)(b).

115 An application for revocation can be made by a person who the Tribunal is satisfied has an interest in the person or in the estate of the person in respect of whom the application is made. See *Guardianship and Administration Act 1986* (Vic) s 35C(2).

116 *Guardianship and Administration Act 1986* (Vic) s 35D(1).

117 Section 58B(2)(l) of the Act allows an administrator to bring and defend legal proceedings in the name of the represented person. The Act does not specify the type of legal proceedings that this section refers to. Generally an administrator would only bring or defend legal proceedings which relate to the administration of the estate.

118 *Social Security (Administration) Act 1999* (Cth) ss 123A-123S.

119 *Guardianship and Administration Act 1986* (Vic) s 43(1). The term 'estate' is explained in the glossary.

120 *Guardianship and Administration Act 1986* (Vic) s 16(1)(b).

121 *Guardianship and Administration Act 1986* (Vic) s 30.

122 *Guardianship and Administration Act 1986* (Vic) s 55.

123 *Guardianship and Administration Act 1986* (Vic) s 46.

124 *Guardianship and Administration Act 1986* (Vic) ss 46(2)-(4).

125 *Guardianship and Administration Act 1986* (Vic) s 47(1)(c).

126 *Guardianship and Administration Act 1986* (Vic) s 47(1)&(2).

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

128 *Guardianship and Administration Act 1986* (Vic) s 47A(2).

129 *Guardianship and Administration Act 1986* (Vic) s 47A(1).

130 *Guardianship and Administration Act 1986* (Vic) s 47B(3).

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

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2.96 During 2008/09 State Trustees provided administration services to approximately 9, 000 people in Victoria, managing assets worth more than $700 million.[132] State Trustees charges their clients by taking a percentage of up to 6.6 per cent of their income, or 3.3 per cent for pensions and allowances, as well as once off charge of up to 4.4 per cent of the value of any assets they own.[133]

POWERS OF AN ADMINISTRATOR

2.97 An administrator must ensure that the financial affairs of a represented person are managed responsibly. Administrators can be given broad powers to perform this function. Unless otherwise indicated in an order, administration generally deprives a represented person of their right to deal with their property and make decisions about it. Decisions of an administrator have the same legal effect as if the represented person had made the decision themself when they had the legal capacity to do so.[134]

2.98 Unlike guardianship, the G&A Act does not formally provide for 'plenary' and 'limited' administration orders. It is possible, however, for VCAT to limit an administration order to certain functions, or to order that an administrator have the full range of powers available.[135]

2.99 The powers an administrator may have[136] include:

- to collect income and invest any of the represented person's money
- to mange, rent out, mortgage or sell any property
- to manage all of a represented person's financial affairs in general
- to conduct litigation on behalf of a represented person
- to exercise all of the rights that relate to the estate which the represented person might have exercised had they possessed legal capacity.[137]

2.100 The G&A Act restricts the ability of represented people to enter into contracts. To the extent that a person's estate is under an administration order, the represented person cannot deal with their property in any way or create any obligations under a contract in relation to that estate without a further order of VCAT or the written consent of the administrator.[138] If that happens, the transfer will have no legal effect.[139]

2.101 The Act provides protection for an innocent third party when dealing with a represented person about that person's property. If the dealing occurs in good faith with the payment of money or other consideration and without knowledge that the represented person has an administrator, the innocent third party may retain the interest they acquire through that dealing.[140]

2.102 The extent to which an administrator may give money to the represented person for their personal use will depend upon the circumstances of the case and the amount of money in the represented person's estate.[141]

RESPONSIBILITIES OF AN ADMINISTRATOR

2.103 An administrator must always act in the best interests of the represented person. The G&A Act specifies that 'best interests' include as far as possible:

- encouraging and assisting the represented person to become capable of administering their estate
- acting in consultation with the represented person taking into account the wishes of the represented person[142]

2.104 An administrator must also exercise their power in a way that is the least restrictive of the represented person's freedom to act and decide things for themself.[143] For example, an administrator may give a represented person written consent to make certain dealings in respect of their estate if the administrator considers this is appropriate.[144] The G&A Act requires the administrator to consider the wishes of the represented person. An administrator may only give or donate the represented person's property if, among other things, the represented person made, or was likely to make, such gifts when they had capacity.[145]

SAFEGUARDS

2.105 The G&A Act contains a number of safeguards to protect the interests of a person who has an administrator:

- An administrator may ask VCAT for advice at any time about the scope of an administration order or the exercise of powers.[146] VCAT may approve or disapprove of any proposed action, give advice, or make any order it thinks necessary in the circumstances.[147]
- An administrator must lodge annual accounts with VCAT who may appoint someone (usually the State Trustees) to examine the accounts.[148] When unacceptable spending is identified, VCAT may hold the administrator liable to repay the estate. However, an administrator will only be liable if they failed to exercise their powers in good faith and with reasonable care.[149]

DURATION AND REVIEW OF GUARDIANSHIP AND ADMINISTRATION ORDERS

DURATION

2.106 Guardianship or administration orders can be made for a period of up to three years.[150] VCAT commonly makes 'self-executing orders' which are orders which automatically expire on a specified date unless a party applies for a reassessment hearing.

Temporary orders

2.107 VCAT can appoint a temporary guardian or administrator if a matter is urgent. Any person can apply to VCAT for a temporary order. A temporary order can be made for up to 21 days and can be extended by an additional 21 days if necessary.[151]

REASSESSMENT OF ORDERS

2.108 VCAT conducts regular reviews of guardianship and administration orders, called reassessments, to see if the order is still required or needs to be varied.[152]

2.109 Guardianship and administration orders usually specify when they must be reassessed. Normally VCAT will reassess a guardianship order within one year and reassess an administration order within three years, but this may vary depending on the circumstances of the case.[153] VCAT can conduct a reassessment of an order at any time of its own motion or upon the application of any person.[154]

132 State Trustees, *Annual Report 2008/2009*, 43.

133 'State Trustees Fees and Charges', *Victorian Government Gazette* G26 (25 June 2009), 1638.

134 *Guardianship and Administration Act 1986* (Vic), s48(3).

135 *Guardianship and Administration Act 1986* (Vic) s 48(1).

136 An administrator may have the powers and duties conferred by Part 5 Division 3 and Division 3A of the *Guardianship and Administration Act 1986* (Vic).

137 See *Guardianship and Administration Act 1986* (Vic) s50A (power to make gifts), s51 (powers of investment), s 58B (additional powers and duties of administrators) and 58B (powers and duties in relation to represented persons).

138 *Guardianship and Administration Act 1986* (Vic) s 52(1).

139 *Guardianship and Administration Act 1986* (Vic) s 52.

140 *Guardianship and Administration Act 1986* (Vic) s 52(3).

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

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

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

144 *Guardianship and Administration Act 1986* (Vic) s 52(1).

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

146 *Guardianship and Administration Act 1986* (Vic) s 55.

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

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

149 *Guardianship and Administration Act 1986* (Vic) ss 582B, 582C, 58(3).

150 Reassessments must be conducted within 12 months of the initial order and within 3 years of the making of any subsequent order; however, VCAT retains the discretion to extend these periods. See *Guardianship and Administration Act 1986* (Vic) s 61(1).

151 *Guardianship and Administration Act 1986* (Vic) ss 32, 33, 59, 60.

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

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

154 *Guardianship and Administration Act 1986* (Vic) ss 61(3)-(4).

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2.110 At a reassessment hearing, VCAT may cancel, extend or amend an order.[155] An order is cancelled if all of the decisions in the order have been made and a guardian is no longer needed. VCAT may also cancel the order if it believes that nothing further can be achieved by keeping the order in place or if the person has regained capacity.[156]

REHEARINGS AND APPEALS

2.111 The review mechanisms for guardianship and administration orders are the same.

2.112 VCAT must give reasons for its decisions. Usually this is done orally at the hearing but, if requested to do so by a party to the hearing, VCAT must give reasons in writing for any order it makes (other than an interim order).[157]

2.113 Appeal rights from VCAT are limited. It is not possible to appeal on the grounds that the decision was wrong and another decision should have been made. A party to a guardianship or administration proceeding may appeal to the Supreme Court of Victoria against any order made by VCAT only on the ground that VCAT made an error of law.[158]

2.114 In most cases, a party to a hearing, or a person entitled to notice of a guardianship or administration application, may apply for a re-hearing of an application within 28 days of the order being made.[159] At a re-hearing VCAT considers the application for guardianship or administration again. A re-hearing is often conducted before a more senior member of VCAT. VCAT may agree with the original decision, it may change parts of it, or it may make a different decision in its place.[160] Consequently, the effect of a re-hearing is similar to an appeal.

2.115 Not all decisions can be re-heard, however. It is not possible to apply for a re-hearing of an order if it was:

- made by the President of VCAT
- an interim or temporary order
- an order for a re-hearing or for permission from VCAT to apply for a re-hearing.[161]

2.116 A re-hearing is also not possible for some medical and dental treatment orders.[162]

REVIEW OF GUARDIANS' AND ADMINISTRATORS' DECISIONS

2.117 Individual decisions made by guardians and administrators cannot be formally reviewed. If a person is unhappy with a decision made by a guardian or administrator they can complain directly to that person, or apply to VCAT to have the appointment reassessed. If a person is unhappy with a decision by a Public Advocate guardian they can complain under the Public Advocate's Complaints Policy.

LEGAL LIABILITY

2.118 Guardians and administrators may be legally liable for some decisions. The Victorian Government is immune, however, from any compensation claims concerning the activities of guardians and administrators.[163]

GUARDIANSHIP AND ADMINISTRATION ORDERS MADE INTERSTATE

2.119 Victoria's G&A Act was one of the earliest modern guardianship laws. Every Australian state and territory now has guardianship and administration laws similar to the Victorian G&A Act.[164]

RECOGNITION OF INTERSTATE ORDERS

2.120 A guardianship or administration order made in any other Australian state or territory may be recognised and enforced in Victoria[165] if it is registered with VCAT.[166] Most other Australian states and territories also allow guardianship and administration orders made in other states and territories to be recognised in certain circumstances.[167]

2.121 There is no similar scheme of formal recognition of enduring powers of guardianship made in other Australian states and territories. However, VCAT will consider an interstate appointment in any decision to appoint a guardian in Victoria.[168]

REGISTRATION OF INTERSTATE ORDERS WITH VCAT

2.122 An application to register an interstate order may be made by either the interstate guardian or administrator, or the Public Advocate.[169] VCAT determines whether the interstate order should be registered in Victoria. [170]

2.123 Registration of an interstate order is only possible when the person under guardianship or administration lives in Victoria, plans to enter Victoria, or has property in Victoria.[171]

THE EFFECT OF REGISTERING AN INTERSTATE ORDER IN VICTORIA

2.124 Once registered in Victoria, an interstate guardianship or administration order operates as if it were a Victorian order.[172] VCAT can reassess and vary the order in the same way as other guardianship and administration orders.[173] If the original order is altered in the 'home' state or territory, this does not automatically change the order registered in Victoria.[174]

INTERSTATE PUBLIC GUARDIANS AND TRUSTEES

2.125 If the interstate guardian is a public guardian, the Victorian Public Advocate may be appointed as the guardian in Victoria if there is no suitable alternative.[175]

2.126 If an interstate administrator is the public trustee and the represented person has property in Victoria, reciprocal arrangements for the administration of this property may also be made between the interstate administrator and State Trustees without the need for registering the interstate order.[176]

MEDICAL TREATMENT AND RESEARCH

2.127 The G&A Act establishes a separate substitute decision-making regime for medical treatment and for participation in medical research trials. The medical treatment provisions were added to the Act in 1999. Prior to this time it was necessary to appoint a guardian to make medical treatment decisions for a person who was unable to make their own decisions. These provisions are just as important for health professionals as they are for people who lack capacity to consent to treatment because of the common law rule that it is unlawful to give medical treatment, other than emergency treatment, without consent.[177]

2.128 The Act creates a complex 'automatic' substitute consent-giving regime for most types of medical and dental treatment and medical research. This scheme removes the need for the appointment of a guardian in most circumstances. Different rules apply depending on the nature of the treatment or research, and some forms of treatment require VCAT's consent if a person is unable to consent themself.

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

156 Office of the Public Advocate (Victoria), above n 45, 12.

157 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 117. A 'party' to a guardianship or administration proceeding includes the person in respect of 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).

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

159 *Guardianship and Administration Act 1986* (Vic) s 60A.

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

161 *Guardianship and Administration Act 1986* (Vic) s 60A(6).

162 *Guardianship and Administration Act 1986* (Vic) s 60A(6)(c).

163 *Guardianship and Administration Act 1986* (Vic) s 70(2). Section 70 says that a person is not entitled to compensation from the Victorian Government for loss sustained by an act of a guardian or an administrator under the Act ('Guardian' is defined to include the Public Advocate, an alternative guardian and an enduring guardian).

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

165 S 63C of the *Guardianship and Administration Act 1986* (Vic) says the Governor in Council may declare any law of another state to be a corresponding law Victoria. This has been done in the Government Gazette, 'Guardianship and Administration Act 1986: Declaration of Corresponding Laws and Orders', No G 32, 10 August 2000, 2031-2.

166 *Guardianship and Administration Act 1986* (Vic) s 63E.

167 The process and effect of recognition varies depending on the state or territory. South Australia and Northern Territory do not currently recognise interstate guardianship and administration orders.

168 This is because VCAT is required to consider the wishes of a person in deciding who to appoint as a guardian: *Guardianship and Administration Act 1986* (Vic) s 23(2)(a).

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

170 Generally this decision is made without the need for a tribunal hearing.

171 *Guardianship and Administration Act 1986* (Vic) s 63A and s 63E(1).

172 *Guardianship and Administration Act 1986* (Vic) s 63E(4).

173 *Guardianship and Administration Act 1986* (Vic) ss 63F(1)-(2).

174 *Guardianship and Administration Act 1986* (Vic) s 63F(5).

175 *Guardianship and Administration Act 1986* (Vic) s 63E(2).

176 *Guardianship and Administration Act 1986* (Vic) s 63G; *State Trustees (State Owned Company) Act 1994* (Vic) s 12.

177 See *Rogers v Whitaker* (1992) 175 CLR 479. The provision of medical treatment without consent may violate the law of trespass and amount to a crime of assault or battery, see Loane Skene, *Law and Medical Practice: Rights Duties, Claims and Defences* (3rd ed, 2008) 84-86.

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2.129 In 2006, new provisions concerning medical research trials were included in the G&A Act. Previously, VCAT approval was needed when a person was unable to consent to involvement in a medical research trial. VCAT approval is no longer required in most instances because of the new authorisation procedures in the Act.[178]

2.130 The G&A Act uses the term '**patient**' to refer to a person aged 18 years or over who is 'incapable of giving consent' to medical treatment or a research procedure.[179] A person is 'incapable of giving consent' if they are:

- incapable of understanding the general nature and effect of the proposed treatment or procedure, or
- cannot indicate whether they do or do not consent.[180]

MEDICAL AND DENTAL TREATMENT

2.131 The Act establishes different substitute decision-making requirements for **consent to medical and dental treatment** depending upon the nature of that treatment. In most instances a person who is close to the patient is automatically appointed to make treatment decisions when the patient is incapable of giving consent. The G&A Act contains a list of people, known as the **person responsible**, who can automatically fulfil the role of substitute decision-maker. If none of these people are available or willing to make a decision, a medical practitioner or a dentist can perform most forms of treatment without consent if they believe it is in the patient's best interests and if the Public Advocate is informed of the treatment.[181]

2.132 Medical and dental treatment are defined in section 3 of the G&A Act.

- **medical treatment** means any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care that is normally carried out by or under the care or supervision of a registered practitioner.
- **dental treatment** means a dental procedure, operation or examination that is normally carried out by or under the care or supervision of a registered practitioner.[182]

2.133 The G&A Act goes on to specifically exclude some treatments from its definition of medical and dental treatment, namely:

- a non-intrusive examination of a person for a diagnosis
- first aid treatment
- giving someone a pharmaceutical drug in accordance with the proper dosage level if the drug requires a prescription or is self-administered in accordance with a manufacturers instructions
- a special procedure
- a medical research procedure.[183]

2.134 We discuss special procedures and medical research procedures below.

PERSON RESPONSIBLE

2.135 The G&A Act establishes a hierarchy of people, the **person responsible,** who may consent to most forms of treatment on behalf of a patient who cannot consent to their own treatment.

2.136 The Act specifies the people, in order of priority, who become the person responsible if they are willing and able to act when a patient is incapable of giving consent to a proposed medical or dental procedure:

1. an agent appointed under the *Medical Treatment Act 1988* (Vic) (MT Act)
2. a person appointed by VCAT to make decisions in relation to the proposed treatment
3. a guardian appointed under the G&A Act with health care powers
4. an enduring guardian with health care powers

5. a person appointed in writing by the patient to make medical and dental decisions
6. the patient's spouse or domestic partner
7. the patient's primary carer
8. the patient's nearest relative.[184]

POWERS OF A PERSON RESPONSIBLE

2.137 The person responsible can consent to medical, dental and medical research procedures other than 'special procedures'.[185]

2.138 Consent given by the person responsible has the same effect as if the patient was able to give consent to the procedure and did so.[186]

2.139 There are some limits on when the person responsible can consent to treatment. If the patient is likely to be able to consent to treatment within a reasonable time, the person responsible can consent to treatment (and the practitioner can carry out that treatment) only if:

- a failure to treat the patient would result in a significant deterioration of their condition and
- the treatment is not against the wishes of the patient.[187]

These limitations do not apply to emergency treatment.

2.140 If the registered practitioner or the person responsible has reason to believe that the treatment may be against the wishes of the patient, he or she may apply to VCAT to approve the treatment.[188] VCAT may order that the medical or dental treatment can be carried out if it is satisfied that:

- the patient is incapable of consenting
- further delay would mean a deterioration of the patient's condition
- treatment would be in the best interests of the patient having regard to evidence about a patient's wishes (if there are any).[189]

2.141 The person responsible can seek advice from VCAT about the scope or exercise of their authority. VCAT can give directions or make orders. VCAT may also decide to direct a person responsible of its own motion.[190] The person responsible can also contact the Public Advocate for assistance.

RESPONSIBILITIES OF THE PERSON RESPONSIBLE

2.142 The person responsible must act in the patient's best interests. In the medical treatment context, '**best interests**' means the person responsible must try to find out the patient's wishes (if known) and the wishes of the patient's family. The person responsible must also take into account:

- the consequences to the patient if treatment is not carried out
- any alternative treatment that may be available
- the nature and degree of any significant risks associated with the treatment or any alternative treatment
- the likely outcome of the treatment and whether it will promote and maintain the wellbeing of a patient
- any other matters prescribed by law.[191]

REFUSAL OF CONSENT BY THE PERSON RESPONSIBLE

2.143 Unless the person responsible is an agent under the MT Act, or a guardian with medical powers, they cannot refuse treatment on the patient's behalf. The MT Act (discussed in Chapter 3) deals with refusal of medical treatment by one person for another adult. The relationship between the G&A Act and the MT Act is complex.

178 See *Guardianship and Administration Act 1986* (Vic) pt 4A div 6.

179 *Guardianship and Administration Act 1986* (Vic) s 36(1).

180 *Guardianship and Administration Act 1986* (Vic) s 36(2).

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

182 Additional procedures that may be considered medical and treatment can be specified in the Regulations to the G&A Act. See the definition in s 3 of the *Medical Treatment Act 1988* (Vic).

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

184 *Guardianship and Administration Act 1986* (Vic) s37. The definition of nearest relative in section 3 further prioritises family members. If two relatives are in the same position the law considers the older relative to have priority.

185 *Guardianship and Administration Act 1986* (Vic) ss 39, 42H.

186 *Guardianship and Administration Act 1986* (Vic) s 40.

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

188 *Guardianship and Administration Act 1986* (Vic) s 42HA(3). Section 42HA(4) contains notice requirements that VCAT must be comply with, which include notifying the Public Advocate, the person responsible, the practitioner and anyone with a special interest in the matter.

189 *Guardianship and Administration Act 1986* (Vic) s 42HA(6).

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

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

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2.144 Refusal by the person responsible to consent to treatment on the patient's behalf triggers a rather complex process that permits doctors and dentists, and ultimately VCAT, to be the final decision-makers. If the person responsible refuses to give consent to any proposed treatment a doctor[192] may still perform that treatment if the doctor believes it to be in the best interests of the patient and informs[193] the person responsible (and the Public Advocate) that the doctor plans to proceed with the treatment.

2.145 The person responsible and the Public Advocate then have seven days to apply to VCAT to prevent the treatment. If an application is not made within this time the doctor may perform the treatment in question.

INABILITY TO FIND A PERSON RESPONSIBLE

2.146 If a doctor believes that treatment is in the best interests of the patient and there is no person responsible, or the person responsible cannot be contacted, the doctor can treat the patient without consent if the doctor informs the Public Advocate about the proposed treatment before actually performing it.[194]

EMERGENCY SITUATIONS

2.147 It is not necessary for a doctor or dentist to obtain consent to perform emergency treatment.[195] 'Emergency treatment' means treatment that is necessary as a matter of urgency to:

- save a patient's life
- prevent serious damage to a person's health
- prevent significant pain, distress or suffering.[196]

2.148 A doctor or dentist who performs emergency treatment in good faith avoids most forms of potential legal liability, other than an action for negligence.[197] Any person (including a doctor or dentist) who provides emergency assistance, advice or care in good faith is also not liable in an action for negligence if he or she was acting as a 'good Samaritan' at the time and expected no money or financial reward.[198]

SPECIAL PROCEDURES

2.149 Different laws also apply to special procedures. A **special procedure** is a procedure intended to, or reasonably likely to, cause permanent infertility, termination of pregnancy, or involve any removal of human tissue for a transplant to another person.[199]

2.150 Only VCAT may give consent to perform a special procedure upon an adult person who is incapable of giving consent. It is a criminal offence for a medical practitioner to perform a special procedure without the appropriate consent of VCAT.[200]

MEDICAL RESEARCH

2.151 Different laws apply to medical research. **Medical research** includes procedures that are part of clinical trials, or research involving the administration of medication, or the use of equipment. It does not include a non-intrusive examination (for example, a visual examination of the throat), observing a person's actions, undertaking a survey or collecting or using personal information or health information.[201]

2.152 The Act sets out a four-step process by which a person who is unable to consent may participate in medical research procedures. The steps are:

- First, the relevant human research ethics committee must approve the research project and the medical research procedure must be within the scope of that approval.[202]
- Secondly, the researchers must decide whether the patient will be able to give consent to the research procedure within a reasonable time. If the patient is not likely to be able to consent to the research procedure within a reasonable time, the person responsible may be asked to give consent, or if there is no person responsible (or that person cannot be located), the doctor or dentist supervising the research project is authorised to proceed without consent in some circumstances.[203]

- Thirdly, the person responsible may consent only if satisfied that the research procedure is not contrary to the patient's best interests and complies with the requirements of the relevant human research ethics committee approval.[204]
- Fourthly, the doctor or dentist supervising or conducting the research project may proceed without consent if there is no person responsible, or that person cannot be contacted and if a number of requirements are met. They are:
  - the practitioner must detail the steps he or she took to identify the person responsible and obtain consent[205]
  - research must be conducted only if it is in the patient's best interests and the practitioner does not believe that it would be contrary to the patient's wishes [206]
  - the practitioner must be satisfied that the research ethics committee has approved the research knowing that prior consent may not be obtained [207]
  - the procedure must be no more risky than the patient's condition or any alternative treatment[208]
  - the research must be underpinned by a valid scientific hypothesis and offer reasonable possibility of benefit [209]
  - documentation must be regularly provided to the Public Advocate if a research procedure continues for longer than one month[210]
  - the person responsible (if located) or the patient (if they regain capacity) must be told of the patient's inclusion in a research project and be given the option to refuse consent or to withdraw consent without any reduction in the standard of care of the patient [211]
  - various certificates about steps in the process must be given to the Public Advocate.

2.153 Medical research procedures must in the best interests of the patient. The G&A Act says it is necessary to consider the following matters when deciding whether a medical research procedure is in someone's best interests:

- the wishes (if known) of the patient
- the wishes of family
- the nature and extent of the benefits, discomforts and risks of having or not having the procedure
- the consequences to the patient if the procedure is not carried out.[212]

192 While these provisions apply to dentists as well as doctors, they are more likely to be used in the area of medical treatment by a doctor.

193 This notice (a s 42K certificate) must be given within three days of the 'person responsible informing the doctor or dentist that they do not consent to the proposed treatment.

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

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

196 *Guardianship and Administration Act 1986* (Vic) s 42A(1).

197 *Guardianship and Administration Act 1986* (Vic) s 42A. Sub section (3) specifies that nothing in the Emergency Treatment Division affects any duty of care owed by a registered practitioner to a patient.

198 *Wrongs Act 1958* (Vic) pt VIA.

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

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

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

202 For further detail see section 42Q *Guardianship and Administration Act 1986* (Vic).

203 For further detail see s 42R *Guardianship and Administration Act 1986* (Vic).

204 For further detail see s 42S *Guardianship and Administration Act 1986* (Vic).

205 *Guardianship and Administration Act 1986* (Vic) s 42T(a)-(b) and see also s 42T(6)(8).

206 *Guardianship and Administration Act 1986* (Vic) s 42T(2)(c).

207 *Guardianship and Administration Act 1986* (Vic) s 42T(2)(e).

208 *Guardianship and Administration Act 1986* (Vic) s 42T(2)(f).

209 *Guardianship and Administration Act 1986* (Vic) s 42T(2)(g).

210 *Guardianship and Administration Act 1986* (Vic) s 42T(6).

211 *Guardianship and Administration Act 1986* (Vic) s 42T(4).

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

Chapter 2

Guardianship, Administration and Medical Treatment

Chapter Three
Other Relevant Laws

CONTENTS

Chapter 3 Other Relevant Laws

3.1 Many other Victorian laws deal with substituted decision-making. Some of these laws are relevant to this review of the *Guardianship and Administration Act 1986* (Vic) (G&A Act) because they concern circumstances that could fall within the powers of a guardian, an administrator or a 'person responsible' under the medical treatment provisions of the Act.

3.2 In some cases, the boundary between the G&A Act and another law is clear, while in others it is not. In this Chapter, we consider:

- agents under the *Medical Treatment Act 1988* (Vic) (MT Act)
- powers of attorneys under the *Instruments Act 1958* (Vic)
- the role of an authorised psychiatrist under the *Mental Health Act 1986* (Vic) (MH Act).
- Supervised Treatment Orders under the *Disability Act 2006* (Vic) (Disability Act).
- the overlap with the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIUT Act) and the *Children, Youth and Families Act 2005* (Vic) (Children, Youth and Families Act) is also considered.

MEDICAL TREATMENT ACT 1988 (VIC)

BACKGROUND

3.3 The MT Act establishes a substitute decision-making process for medical treatment. Although it was enacted primarily to deal with end-of-life situations, it also deals with medical treatment at other times. Unlike the G&A Act, the MT Act permits a substitute decision-maker to refuse medical treatment in certain circumstances.

3.4 The interaction between the powers granted to an agent under the MT Act and those given to guardians appointed under the G&A Act with medical treatment powers, or to the 'person responsible' under the G&A Act, is complex.

3.5 The MT Act implements the recommendations in the Social Development Committee's 'Inquiry into Options for Dying with Dignity' 1987 Report[1] concerned with clarifying the common law right to refuse treatment.

3.6 The purposes of the MT Act are to:

- clarify the law relating to the right of patients to refuse medical treatment
- establish a procedure for clearly indicating a decision to refuse medical treatment
- enable an **agent** to make decisions about medical treatment on behalf of a person who is not competent to make those decisions for themself.[2]

3.7 While the MT Act is largely a restatement of common law rights, it expands on the common law in three ways:

- First, it introduces a formal process by which a person can refuse some or all forms of medical treatment.[3] When a **refusal of treatment certificate (certificate)** is properly signed and witnessed it constitutes proof of a patient's refusal of medical treatment.[4]
- Secondly, it introduces a formal process by which a person can appoint an agent to make medical treatment decisions on their behalf when they are no longer able to do so themselves.[5] When an enduring power of attorney (medical treatment) is properly signed and witnessed, the attorney (or agent) may act 'when the person giving the power becomes incompetent'[6] and may sign a refusal of treatment certificate in some circumstances.[7]
- Thirdly, it makes it an offence for a medical practitioner, who knows that there is a refusal of treatment certificate concerning a person, to perform any medical treatment covered by the certificate.[8]

MEDICAL TREATMENT

3.8 Medical treatment is defined in the MT Act as an operation, the administration of a drug or any other medical procedure that is not palliative care.[9] Because palliative care is excluded from the definition of medical treatment, the Act does not give a patient (or an agent) the right to refuse palliative care. Palliative care is the reasonable provision of pain relief, or of food and water.[10] The courts have interpreted 'medical treatment' broadly, while palliative care has been given a limited meaning.[11]

3.9 The MT Act deals with refusal and withdrawal of treatment only. It does not allow the administration of drugs or other procedures for the express purpose of bringing about a person's death.

REFUSAL OF TREATMENT CERTIFICATE

3.10 A medical practitioner and another person may witness a refusal of medical treatment certificate if they are both satisfied that:

- a patient has clearly expressed an intention to refuse medical treatment generally, or a particular type of medical treatment for a current condition
- the decision has been made voluntarily and the patient has not been coerced
- the patient was informed about their medical condition to such an extent as to enable them to make a decision to refuse treatment. The patient must also appear to understand this information
- the patient is aged 18 years or over and is of sound mind.[12]

3.11 A refusal of treatment certificate specifies the type of treatment that is refused. The treating doctor can only provide treatment in accordance with the certificate.

3.12 A patient and a patient's agent may cancel a refusal of treatment certificate by indicating a wish to cancel it.[13] This can be done in writing or orally or in any way that the person can communicate their wishes.[14]A certificate will no longer apply if the person's condition has changed to such an extent that the certificate is no longer current.[15]

MAKING MEDICAL TREATMENT DECISIONS ON SOMEONE'S BEHALF

3.13 Like other enduring powers, an **enduring power of attorney (medical treatment)** can be made only when a person has the capacity to make the appointment. It comes into effect only when the person loses the capacity to make decisions.

3.14 An enduring power of attorney (medical treatment) does not have to be prepared by a lawyer or registered with any organisation. Witnesses to the document must be satisfied that a person has capacity to make the enduring power of attorney (medical treatment) at the time.[16]

3.15 If the patient has made an enduring power of attorney (medical treatment) the agent appointed by that document is the first person who can be a 'person responsible' under the G&A Act for making decisions about medical and dental treatment and medical research procedures.[17]

3.16 An agent can refuse medical treatment on behalf of a patient only if the treatment would cause unreasonable distress to the patient, or if there are reasonable grounds for believing that the patient would consider the treatment unwarranted if they were able to make decisions for themselves.[18]

3.17 As we mentioned in Chapter 2, Victoria does not have legislation concerning advance directives. The agent, however, should use these instructions (for example a request to refuse a particular type of treatment, or to withdraw treatment in particular circumstances) as a guide when their powers come into effect.

1 Victorian Parliament Social Development Committee, Inquiry into Options for Dying with Dignity, Parliamentary Paper No 19, Melbourne, 1987.
2 *Medical Treatment Act 1988* (Vic) s 1.
3 *Medical Treatment Act 1988* (Vic) pt 2.
4 Section 41 of the *Guardianship and Administration Act 1986* (Vic) provides that a practitioner must not carry out any medical, dental, medical research or special procedure if a certificate is in force.
5 *Medical Treatment Act 1988* (Vic) ss 5A, 5AA, sch 1.
6 *Medical Treatment Act 1988* (Vic) s 5A(2)(b).
7 *Medical Treatment Act 1988* (Vic) s 5B.
8 *Medical Treatment Act 1988* (Vic) s 6.
9 *Medical Treatment Act 1988* (Vic) s 3.
10 *Medical Treatment Act 1988* (Vic) s 3.
11 *Re BWV; Ex Parte Gardner* (2003) 7 VR 487. In this case the provision of artificial nutrition and hydration via a percutaneous endoscopic gastronomy (PEG) was found by Morris J to be 'unquestionably' a medical procedure. Morris J also found PEG could not be considered ‚palliative care' within the natural meaning of these words, as this kind of artificial nutrition and hydration could not be considered a procedure to manage the dying process (at 504-5).
12 *Medical Treatment Act 1988* (Vic) s 5.
13 *Medical Treatment Act 1988* (Vic) s 7.
14 *Medical Treatment Act 1988* (Vic) s 7(2).
15 *Medical Treatment Act 1988* (Vic) s 7(3).
16 *Medical Treatment Act 1988* (Vic) Schedule 2.
17 *Guardianship and Administration Act 1986* (Vic) s 37(1).
18 *Medical Treatment Act 1988* (Vic) s 5B.

Chapter 3 Other Relevant Laws

VCAT'S ROLE

3.18 Any person with a special interest in the welfare of a person can ask the Victorian Civil and Administrative Tribunal (VCAT) to consider the actions of an agent (or guardian).[19] VCAT can suspend or cancel an enduring power of attorney (medical treatment) if the agent is not acting in the best interests of the person.[20] If the agency is revoked, any refusal of treatment certificate will also be cancelled.[21]

RELATIONSHIP WITH THE G&A ACT

3.19 The relationship between the roles of an agent appointed by an enduring power of attorney (medical treatment) and a guardian appointed under the G&A Act is complex. In order to understand all of the relevant law in relation to medical treatment decisions, particularly where a person has both a guardian and an agent, the G&A Act and the MT Act need to be read together. This overlap creates confusion amongst medical practitioners and the community. Further confusion arises because of the distinction drawn between withdrawal of consent to medical treatment and refusal of treatment in the two Acts.

POWERS OF ATTORNEY AND THE INSTRUMENTS ACT 1958 (VIC)

3.20 The *Instruments Act 1958* (Vic) (Instruments Act) establishes a substitute decision-making process for financial matters. An adult can appoint another person, known as an **attorney**, to make decisions about their finances.

3.21 Two types of appointment, known as powers of attorney, are established by the Act: **general powers of attorney** and **enduring powers of attorney**. To avoid confusion we refer to the appointment of an enduring power of attorney (financial) in this paper. The legislative scheme for enduring powers of attorney (financial) is similar to, but not the same as, the G&A Act enduring powers of guardianship. A person appointed as an attorney by an enduring power of attorney (financial) has a similar function to an administrator appointed under the G&A Act by VCAT. Both are financial substitute decision-makers for a person who is unable to manage their own financial affairs.

3.22 In some circumstances the powers of an attorney and a guardian may overlap. If a decision made by a guardian or an enduring guardian under the G&A Act conflicts with a decision made by an enduring power of attorney, the decision of the guardian or enduring guardian prevails.[22] If VCAT makes an administration order under the G&A Act, an enduring power of attorney may exercise power only to the extent authorised by VCAT.[23]

GENERAL POWER OF ATTORNEY

3.23 A general power of attorney is most often used for a specific purpose and for a fixed time. For instance, a donor[24] may use a general power of attorney to give a family member the power to run their business while they are on holiday. A general power of attorney is not designed for use in circumstances covered by the G&A Act because the appointment ceases if the donor loses capacity and is unable to make their own decisions.[25]

ENDURING POWER OF ATTORNEY (FINANCIAL)

3.24 An enduring power of attorney (financial) allows a person aged 18 years or over to give another person, known as an attorney, the power to make financial and legal decisions for them in the future.[26] The person who makes the appointment can decide when the powers come into effect. That could be when the person loses capacity to make decisions for themself.[27]

3.25 If the document does not specify when the attorney's powers commence, the power begins immediately and the attorney can act even if the donor still has capacity.[28]

3.26 An enduring attorney (financial) can be appointed jointly with another attorney. This means the attorneys must act together and sign documents together. The attorneys can also be appointed jointly and severally, which means they can act individually.[29]Alternative attorneys may also be appointed. This allows for a second attorney to act if the first attorney dies or cannot perform their role. [30]

CAPACITY TO MAKE AN ENDURING POWER OF ATTORNEY (FINANCIAL)

3.27 In order for the appointment of an enduring attorney (financial) to be valid, the donor must have legal capacity to make the appointment.

3.28 The Instruments Act includes a definition of 'capacity' for the purposes of an enduring power of attorney (financial). Under the Instruments Act a person has capacity to make an enduring power of attorney only if they understand the 'nature and effect' of the enduring power of attorney at the time the document is drawn up and signed.[31] This includes understanding the following matters:

- that the donor may specify conditions or limitations on the power they give
- when the power is exercisable
- that once exercisable the attorney has the same powers that the donor had when they had capacity
- that the power may be revoked at any time
- that the power continues after incapacity
- that if the donor is unable to revoke the power they are likely not to be able to oversee the use of the power.[32]

PRESCRIBED FORM

3.29 An enduring power of attorney must reflect the form prescribed in the legislation[33] and the donor and two other adult witnesses must sign it.[34]

3.30 The two witnesses must be satisfied that the donor has capacity to appoint an attorney.[35] One witness must be a person who can witness statutory declarations such as a lawyer, a justice of the peace or a pharmacist, and only one of the witnesses can be related to the person.[36] The witnesses must certify that the donor signed the document freely and voluntarily in the presence of the witness and the donor appeared to have the capacity to make the enduring power of attorney.[37]

3.31 The attorney must also accept the appointment by signing and dating a statement of acceptance.[38]

POWERS

3.32 An attorney can be authorised to make any financial and legal decisions that the donor can make. The Instruments Act does not provide any further detail about the attorney's powers. The donor can provide instructions and limit the way the attorney should carry out their responsibilities.[39]

3.33 Anything done by the attorney within the scope of his or her powers has the same legal effect as if the donor did it.[40]

RESPONSIBILITIES OF AN ATTORNEY

3.34 An attorney has a number of legal responsibilities[41] summarised by the Public Advocate as follows:

- to act in the donor's best interests
- wherever possible, to make the same decision the donor would have made
- to keep accurate records of dealings and transactions made under the power
- to avoid situations where there is a conflict of interest
- to keep the donor's property and money separate from their own.[42]

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

20 *Medical Treatment Act 1988* (Vic) s 5C(4).

21 *Medical Treatment Act 1988* (Vic) s 5D.

22 *Instruments Act 1958* (Vic) s 125F.

23 *Instruments Act 1958* (Vic) s 125G.

24 We explain the term, 'donor' in the glossary.

25 *Instruments Act 1958* (Vic) Part XI.

26 *Instruments Act 1958* (Vic) Part XIA.

27 *Instruments Act 1958* (Vic) s 115.

28 *Instruments Act 1958* (Vic) s 117.

29 *Instruments Act 1958* (Vic) s 120.

30 *Instruments Act 1958* (Vic) s 119.

31 *Instruments Act 1958* (Vic) s 118.

32 *Instruments Act 1958* (Vic) s 118.

33 *Instruments Act 1958* (Vic) s 107, sch 12.

34 *Instruments Act 1958* (Vic) s 124.

35 *Instruments Act 1958* (Vic) ss 106(2), 123.

36 *Instruments Act 1958* (Vic) s 125.

37 *Instruments Act 1958* (Vic) s 125A.

38 *Instruments Act 1958* (Vic) s 125B.

39 *Instruments Act 1958* (Vic) s 115.

40 *Instruments Act 1958* (Vic) s 125E. See also ss 108 and 109 in relation to an attorney's execution of instruments and powers of attorney given as security.

41 An attorney's responsibilities are outlined both in the *Instruments Act 1958* (Vic) and in common law. Upon accepting an appointment, an attorney must sign an undertaking to exercise their powers with due diligence, protect the interests of the donor, avoid acting when there is a conflict of interest between their interests and the donor's, keep accurate records of dealings and transactions and not exceed their powers, *Instruments Act 1958* (Vic) ss 125B(5) and 125D. The attorney–donor relationship is also generally considered to be fiduciary in nature (see Rodney Lewis, *Elder Law in Australia* (2004) 303-305), which imposes an obligation on the attorney not to profit from their position, or place themself in a position where their interests conflict with those of the donor. For a more detailed discussion on fiduciary duties see R Meagher, D Gummow and M Leeming, *Equity Doctrines and Remedies* (4th ed, 2002), 157-218.

42 Office of the Public Advocate (Victoria), *Fact Sheet: Enduring Power of Attorney Financial: Planning ahead for future financial and legal decisions* (2009) <http://www.publicadvocate.vic.gov.au/file/file/Powerofattorney/Enduring%20Power%20of%20Attorney%20(Financial)%20061009.pdf> at 2 December 2009.

Chapter 3 Other Relevant Laws

FEES

3.35 If the donor wishes to pay their attorney, this should be documented. An attorney is able to claim from the donor's estate any out-of-pocket expense they have incurred in carrying out their role. If the attorney wishes to charge a fee and the donor is no longer competent and left no direction, the attorney can seek advice from VCAT.

DURATION

3.36 An enduring power of attorney (financial) can end:

- when the appointment is cancelled in writing by the donor
- when there is a later appointment of a different attorney
- in accordance with the terms of the enduring power of attorney document
- by resignation, death or insolvency or incapacity of the attorney[43]
- by a decision of VCAT.[44]

VCAT'S ROLE

3.37 If a person does not appoint an enduring power of attorney (financial) when they have capacity, VCAT can appoint an administrator if a person needs financial and legal decisions made for them.[45]

3.38 If the enduring attorney (financial) is not acting in the donor's best interests VCAT may intervene.[46] The donor, the attorney, the Public Advocate and any other person with a special interest in the affairs of the donor can apply to VCAT if they are concerned about the actions of the attorney.[47]

3.39 VCAT can make orders and recommendations about the scope of the attorney's powers and the way in which the attorney has exercised those powers or revoke the powers.[48]

3.40 Where there is concern that the attorney is not acting in the best interests of the donor, VCAT may order that the attorney lodge accounts relating to the exercise of their power or that accounts be examined or audited.[49]

MENTAL HEALTH ACT 1986 (VIC)

3.41 The MH Act deals with the involuntary treatment of people with a mental illness. The Act authorises many actions that may ultimately result in a person's compulsory treatment and loss of liberty once various clinical assessments have been made. It permits emergency intervention by the police and first instance clinical decision-making. The MH Act creates processes for apprehending people in the community, transporting them to hospital, undertaking medical examinations, and deciding whether to authorise involuntary treatment and detention.

3.42 An involuntary patient loses their right to make decisions about what psychiatric treatment they will receive and this may include decisions about where they will live. The Act authorises the use of some force to ensure that a person receives treatment and remains in hospital.

3.43 The G&A Act and the MH Act deal very differently with the appointment of substitute decision-makers for people with a disability. The G&A Act provides for the individual appointment of a relative, friend or public official as the substitute decision-maker, whereas the MH Act gives many substitute decision-making powers to the authorised psychiatrist responsible for treating an involuntary patient. Where the Acts do overlap, the MH Act generally prevails.

3.44 Unlike the provisions of the other Acts we have considered in this paper, the trigger for the operation of the MH Act is not a person's lack of capacity to make a decision. In this case it is the risk of harm a person poses to themself or others because of mental illness that triggers the operation of the Act.

WHAT IS CONSIDERED TO BE A MENTAL ILLNESS UNDER THE MENTAL HEALTH ACT?

3.45 A mental illness is defined in the MH Act as 'a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory'.[50]

GUIDING PRINCIPLES

3.46 Section 4(2) of the MH Act says the Act must be interpreted so people with a mental illness are given the best possible care and treatment appropriate to their needs in the least restrictive environment possible and in the least intrusive way possible.

CHIEF PSYCHIATRIST

3.47 The MH Act also establishes the position of Chief Psychiatrist[51] who has responsibility for the medical care and welfare of persons receiving treatment or care for a mental illness.[52] Some of the key functions of the Chief Psychiatrist include investigations, reviews of approved mental health services, managing complaints and enquiries and developing clinical guidelines.[53] The Chief Psychiatrist also has the power to make directions in relation to treatment[54] and to admit an involuntary patient.[55]

INVOLUNTARY PATIENTS

3.48 Involuntary treatment is possible only if:

- the person appears to be mentally ill and requires immediate treatment which can be obtained through an involuntary treatment order, and
- the treatment is necessary for the person's health and safety or to protect members of the public, and
- the person has refused treatment or is unable to consent to the treatment, and
- there is no alternative treatment which is less restrictive to the persons freedom of decision and action.[56]

3.49 Involuntary treatment may be provided in a hospital through an 'Involuntary Treatment Order',[57] or in the community through a 'Community Treatment Order'.[58]

SECURITY AND FORENSIC PATIENTS

3.50 The MH Act makes specific provision for two types of involuntary patients who have been involved with the criminal justice system. They are known as security and forensic patients. A security patient is a person who has previously been lawfully detained in prison or other confinement and is transferred to a mental health facility for treatment of a mental illness.[59] A forensic patient is a person who has been found unfit to stand trial or not guilty of a crime under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (CMIUT Act) and is detained at a mental health facility for treatment of a mental illness.[60]

MENTAL HEALTH REVIEW BOARD

3.51 The MH Act establishes the Mental Health Review Board, which has the primary function of regularly reviewing orders made for involuntary and security patients, and hearing appeals made by patients who are subject to these orders.[61] Like VCAT, the Mental Health Review Board is a tribunal which holds hearings in a less formal setting than a court, usually at a mental health service.

TREATMENT FOR AN INVOLUNTARY PATIENT

Psychiatric treatment

3.52 The MH Act says an involuntary patient must receive treatment for their mental illness. If an involuntary patient refuses to consent to necessary treatment or cannot give consent, the 'authorised psychiatrist'[62] of a mental health service may give consent.[63]

3.53 A guardian and an agent cannot consent to psychiatric treatment of involuntary patients in hospitals or in the community (on community orders). A guardian and an agent are also not able to consent to psychiatric treatment of forensic patients or security patients.[64]

43 *Instruments Act 1958* (Vic) ss 125I-P.

44 *Instruments Act 1958* (Vic) s 125 Q.

45 We discuss the role of administrators in Chapter 2.

46 *Instruments Act 1958* (Vic) s 125X.

47 *Instruments Act 1958* (Vic) s 125V.

48 *Instruments Act 1958* (Vic) ss 125V, 125X.

49 *Instruments Act 1958* (Vic) s 125 ZB.

50 *Mental Health Act 1986* (Vic) s 8(1A).

51 See *Mental Health Act 1986* (Vic) pt 6 div 4.

52 *Mental Health Act 1986* (Vic) s 105(2)(a).

53 See Chief Psychiatrist (Victoria), *Chief Psychiatrist's Annual Report 2007/2008*, 4-5.

54 *Mental Health Act 1986* (Vic) s 106AA.

55 *Mental Health Act 1986* (Vic) s 106AB.

56 *Mental Health Act 1986* (Vic) s 8(1).

57 *Mental Health Act 1986* (Vic) s 8.

58 *Mental Health Act 1986* (Vic) s 14.

59 *Mental Health Act 1986* (Vic), s 16(2). Unlike an involuntary patient, it is not a requirement to consider whether a security patient has refused or is unable to consent to treatment, or if there is a less restrictive alternative to the treatment.

60 *Mental Health Act 1986* (Vic) s 17(2). The criteria for treatment of a forensic patient are similar to security patients, however for forensic patients it is not necessary that treatment be immediately required.

61 *Mental Health Act 1986* (Vic) s 22. Some of the other main functions of the Board include to review and hear appeals surrounding orders for the interstate transfer of patients, reviewing treatment plans, and hearing appeals against the refusal of the chief psychiatrist to grant special leave of absence to security patients.

62 The 'authorised psychiatrist' is a qualified psychiatrist who is appointed to this role at the mental health service. The appointment must be made by the Secretary of the Department of Health for mental health services operated by the Victorian government. See *Mental Health Act 1986* (Vic) ss 3, 96.

63 *Mental Health Act 1986* (Vic) s 3A.

64 See *Mental Health Act 1986* (Vic) ss 12AB, 12AD, 16B, 17A, 53B, 57, 73, 83.

Chapter 3 Other Relevant Laws

Other treatment

3.54 The law does not presume that an involuntary patient is unable to consent to all other types of medical treatment. However, the law concerning consent to non-psychiatric medical treatment for involuntary patients differs from the provisions in the G&A Act concerning substitute decision-making for medical treatment.

3.55 For major medical procedures such as surgery, procedures involving anaesthetics, radiotherapy and chemotherapy, an involuntary patient must have the procedure and its risks explained in detail and provide written consent.[65] For other non-psychiatric treatment, consent must be provided after the involuntary patient has received a clear explanation of the treatment and why it is necessary.[66]

3.56 If an involuntary patient is unable to consent to non-psychiatric treatment, the MH Act contains a list of people who are able to consent to the treatment. These people are (in order of priority):

1. an agent appointed under the MT Act
2. a person appointed by VCAT to make decisions about the proposed treatment
3. a guardian appointed under the G&A Act with relevant health care powers
4. an enduring guardian appointed under the G&A Act by the patient with relevant health care powers
5. the 'authorised psychiatrist' under the MH Act.[67]

REVIEW

3.57 The MH Act is currently being reviewed by the Department of Health.

DISABILITY ACT 2006 (VIC)

3.58 The Disability Act describes the rights of people with certain disabilities and provides a framework for the provision of services to them. It also promotes a whole-of-government approach to the support of those people. [68]

3.59 For the purposes of the Disability Act 'disability' is defined to include a sensory, physical or neurological impairment or acquired brain injury which is likely to be permanent and causes a substantially reduced capacity in self-care, self- management, mobility or communication and requires significant ongoing or long-term support or an intellectual disability or a developmental delay.[69] The Act excludes disability related to ageing.[70]

3.60 The Disability Act establishes the position of Senior Practitioner. The Senior Practitioner is generally responsible for ensuring the rights of people who are subject to restrictive interventions and compulsory treatment are protected, and that appropriate standards are complied with. The Senior Practitioner has extensive powers to set standards and guidelines, and to monitor direct disability service providers in relation to the use of restrictive interventions and compulsory treatment.[71]

3.61 There are two major ways the Disability Act and G&A Act interact:

- A guardian or administrator appointed under the G&A Act may be required to consent to, or authorise payment for, services provided under the Disability Act where a person with a disability is unable to do so themselves.
- The Disability Act includes provisions for compulsory treatment which, prior to the commencement of the Act, required the consent of a guardian.[72]

VOLUNTARY SERVICES AND PLANNING

3.62 The services provided under the Disability Act are, in the main, voluntary services. Service providers are required to assist people with disabilities in planning their support, including their access to services.[73] The Act outlines a number of key principles to guide the planning process. These principles promote a 'person centred' approach to support. Emphasis is placed on the individuality of the person, their right to exercise control over their life and maximise independence, the inclusion and participation of the person within community life, and respect for the role of the person's family and any other important people in their life.[74]

3.63 A guardian appointed under the G&A Act may consent to the provision of services on behalf of a person with a disability who is unable to do so themselves. Various provisions in the Disability Act require consultation with a guardian appointed for a person with a disability.[75]

RESTRICTIVE INTERVENTIONS

3.64 The Disability Act provides for restrictive intervention in some circumstances. This means action to restrict the rights or freedom of movement of a person with a disability.[76] Registered service providers and residential treatment facilities exercise the restrictive intervention powers under the Act.

3.65 In order to engage in a restrictive intervention, a behaviour management plan must be developed in consultation with the person with a disability and with a guardian (if the person has one) and other key people.[77] The guardian must also be consulted in the review of the management plan.[78] The Public Advocate is given powers, generally of a watchdog nature, in relation to the use of restrictive interventions (in addition to those provided in the G&A Act).[79]

COMPULSORY DETENTION AND TREATMENT

3.66 The Disability Act includes a number of provisions for the treatment and care of people with intellectual disabilities without their consent and without the consent of their guardian in some instances. The Disability Act permits compulsory treatment with the approval of VCAT in some circumstances. Compulsory treatment and detention occurs in forensic facilities and other residential services.

3.67 There are a number of different types of compulsory care arrangements under the Disability Act:

- Residential Treatment Orders are an order made by a court where a person has been convicted of an offence and is ordered to reside in a residential treatment facility, under the supervision of the Secretary of the Department of Human Services[80]
- Security Residents are prisoners with an intellectual disability, transferred from the prison system, at the request of the Secretary of the Department of Justice, into a residential treatment facility or residential institution, and who serve out their sentence under the supervision of the Secretary of the Department of Human Services[81]
- Forensic Residents are those who have been found by a court to be unfit to stand trial under the CMIUT Act and are held in a residential treatment or residential institution facility under the supervision of the Secretary of the Department of Human Services[82]
- Supervised Treatment Orders are an order issued by VCAT requiring a person with an intellectual disability who is a serious risk to themselves, or to the community, to be detained in a residential facility and to undergo treatment under the supervision of the Secretary of the Department of Human Services.[83] Unlike the other three compulsory care arrangements, Supervised Treatment Orders are made following an assessment of the likelihood of future harm rather than in response to a person's involvement with the criminal justice system.[84]A Supervised Treatment Order prevails over a guardianship order whenever there is any inconsistency.[85]

65 *Mental Health Act* 1986 (Vic) s 83(1A); Office of the Chief Psychiatrist, *General medical health needs, annual examination, non-psychiatric treatment, special procedures and medical research procedures: Chief Psychiatrist's Guideline* <http://www.health.vic.gov.au/chiefpsychiatrist> at 2 December 2009.

66 *Mental Health Act 1986* (Vic) s 83(2).

67 *Mental Health Act 1986* (Vic) s 85. This list is smaller than the standard 'person responsible' list in section 37(1) of the G&A Act, and does not include the person's spouse or domestic partner, primary carer or nearest relative.

68 *Disability Act 2006* (Vic) s1 and s 4.

69 *Disability Act 2006* (Vic) s 3.

70 *Disability Act 2006* (Vic) s 3.

71 See *Disability Act 2006* (Vic) div 5. Information about the functions of the Senior Practitioner is available from the Victorian Department of Human Services website <http://www.dhs.vic.gov.au/disability/about_the_division/office_of_the_senior_practitioner > at 30 November 2009.

72 *Disability Act 2006* (Vic) ss 183-201.

73 *Disability Act 2006* (Vic) ss 53-55.

74 *Disability Act 2006* (Vic) s 52(2).

75 Eg, see provisions relating to the vacation of residential facilities (sections 76 and 81), the management of a residents' funds with approval of a guardian or administrator and obligations to keep and provide records to a guardian or administrator (s 93).

76 *Disability Act 2006* (Vic) s 3.

77 *Disability Act 2006* (Vic) s 141(3).

78 *Disability Act 2006* (Vic) s 142(3).

79 *Disability Act 2006* (Vic) s 144.

80 *Disability Act 2006* (Vic) ss 151-165.

81 *Disability Act 2006* (Vic) ss 166-179.

82 *Disability Act 2006* (Vic) ss 180-182.

83 *Disability Act 2006* (Vic) ss 183-201.

84 *Disability Act 2006* (Vic) s 191.

85 *Disability Act 2006* (Vic) s 200.

Chapter 3 Other Relevant Laws

SAFEGUARDS

3.68 A **treatment plan** must be prepared[86] and approved by the Senior Practitioner before any person may be given compulsory treatment. VCAT has a range of roles relating to the review of those plans[87] and to the approval of variations.[88]

3.69 In the case of a Supervised Treatment Order, VCAT must also be satisfied that:

- the person has exhibited a history of violent or dangerous behaviour
- there are no less restrictive means of reducing the risk of others being harmed by the person
- the services to be provided in the treatment plan will benefit the person and help them reduce the risk of harming others
- the person is unable or unwilling to consent voluntarily to the treatment
- it is necessary to detain the person in order to ensure they comply with the treatment plan.[89]

3.70 A Supervised Treatment Order cannot continue for longer than one year.[90] Further compulsory treatment beyond this time cannot occur without VCAT reassessing the person's circumstances.[91]

3.71 The Senior Practitioner must oversee the implementation of the Supervised Treatment Order.[92]

CHILDREN, YOUTH AND FAMILIES ACT 2005 (VIC)

3.72 The G&A Act deals with the appointment of substitute decision-makers for adults only. The common law and the Children, Youth and Families Act provide for substitute decision-making for a person under the age of 17. The common law governs most substitute decision-making by a parent[93] while the Children, Youth and Families Act deals with instances in which another person is appointed to make decisions for a person under the age of 17.[94]

3.73 We have been asked to consider whether Victorian guardianship laws should apply to people under 18. In NSW, guardianship laws apply to people over 16.[95]

3.74 A 17-year-old person in need of a substitute decision-maker falls in a gap between the Children, Youth and Families Act and the G&A Act. They are too old to have a guardian appointed by the Children's Court and too young to have one appointed by VCAT under the G&A Act.

CRIMES (MENTAL IMPAIRMENT AND UNFITNESS TO BE TRIED) ACT 1997 (VIC)

3.75 The CMIUT Act deals with the circumstances in which a person who has been charged with a crime may be found unfit to stand trial, or not guilty because of mental impairment.

3.76 In some cases a person who is unfit to stand trial, or not guilty because of mental impairment, may not have the capacity to make decisions about important aspects of their life. It is possible that a person in this situation may have a guardian appointed, but a guardian is not permitted to make decisions in relation to legal proceedings under the CMIUT Act.[96] A guardian may have a role in making other decisions.

UNFITNESS TO STAND TRIAL

3.77 If a person is unfit to stand trial, and is unlikely to become fit within the next 12 months, a 'special hearing' must be held.[97] This special hearing determines whether the person:

- is not guilty of the crime
- is not guilty because of mental impairment
- committed the crime (this is not the same as being guilty).[98]

NOT GUILTY BECAUSE OF MENTAL IMPAIRMENT

3.78 A person is not guilty of a crime because of mental impairment if when they committed the crime they were suffering from a mental impairment which meant that:

- they did not know the nature and quality of what they were doing, or
- they did not know that what they were doing was wrong.[99]

WHAT CAN HAPPEN IF A PERSON IS FOUND TO HAVE COMMITTED A CRIME, BUT IS UNFIT TO STAND TRIAL, OR IS FOUND NOT GUILTY BECAUSE OF MENTAL IMPAIRMENT?

3.79 In both of these circumstances a person can be released unconditionally,[100] or placed under a 'Supervision Order.'[101]

SUPERVISION ORDERS

3.80 Supervision Orders are used where the crime is a serious or 'indictable offence' such as murder or rape. A Supervision Order can mean one of three things:

- custody in an appropriate place
- custody in a prison
- release into the community on certain conditions.[102]

3.81 Custody in an 'appropriate place' for a person with a mental illness means an approved mental health facility, such as Thomas Embling Hospital. The person becomes a 'forensic patient' under the MH Act. For a person with an intellectual disability, an 'appropriate place' would be a residential institution or residential treatment facility such as DFATS Disability Forensic and Treatment Service, and would make the person a 'forensic resident' under the Disability Act.[103] For a person who does not have a mental illness or an intellectual disability a custodial supervision order may mean imprisonment, although this is only possible if there is no 'practicable alternative' available.[104]

REVIEW AND APPEAL OF SUPERVISION ORDERS

3.82 Supervision orders are made for an indefinite period.[105] However, the court must set a 'nominal term' for the supervision order, at the end of which there must be a major review of that order.[106]

3.83 A review of a supervision order can also be sought by the person under the order, a person who has the 'custody, care, control or supervision' of the person, the Attorney-General, or the Director of Public Prosecutions.[107]

86 *Disability Act 2006* (Vic) s 153.

87 *Disability Act 2006* (Vic) ss 154-5.

88 *Disability Act 2006* (Vic) s 153 (6)-(7).

89 *Disability Act 2006* (Vic) s 191 (6).

90 *Disability Act 2006* (Vic) s 193 (3)(d).

91 *Disability Act 2006* (Vic) s 193 (5) which enables a second application to be made before an order has expired and s 196 which allows a order to be reviewed and varied as VCAT sees appropriate.

92 *Disability Act 2006* (Vic) s 195.

93 See *Department of health and Community Services (NT) v JWB (Marion's case)* (1992) 175 CLR 218.

94 *Children, Youth and Families Act 2005* (Vic) s 3. This definition applies other than in criminal matters or in situations where a child protection order is already in place.

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

96 See *In the Matter of R* (unreported, VCAT, Deputy President Sandra Davis, 13 October 1999).

97 *Crimes (Mental Impairment an Unfitness to be Tried) Act 1997* (Vic) s 12(5).

98 *Crimes (Mental Impairment an Unfitness to be Tried) Act 1997* (Vic) s 17.

99 *Crimes (Mental Impairment an Unfitness to be Tried) Act 1997* (Vic) s 20.

100 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 18(4)(b), 23(b).

101 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 18(4)(a), 23(a).

102 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 26(2).

103 Victorian Government, *Disability Services Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* and *Practice Guidelines* (2007), 46.104 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 26(4).

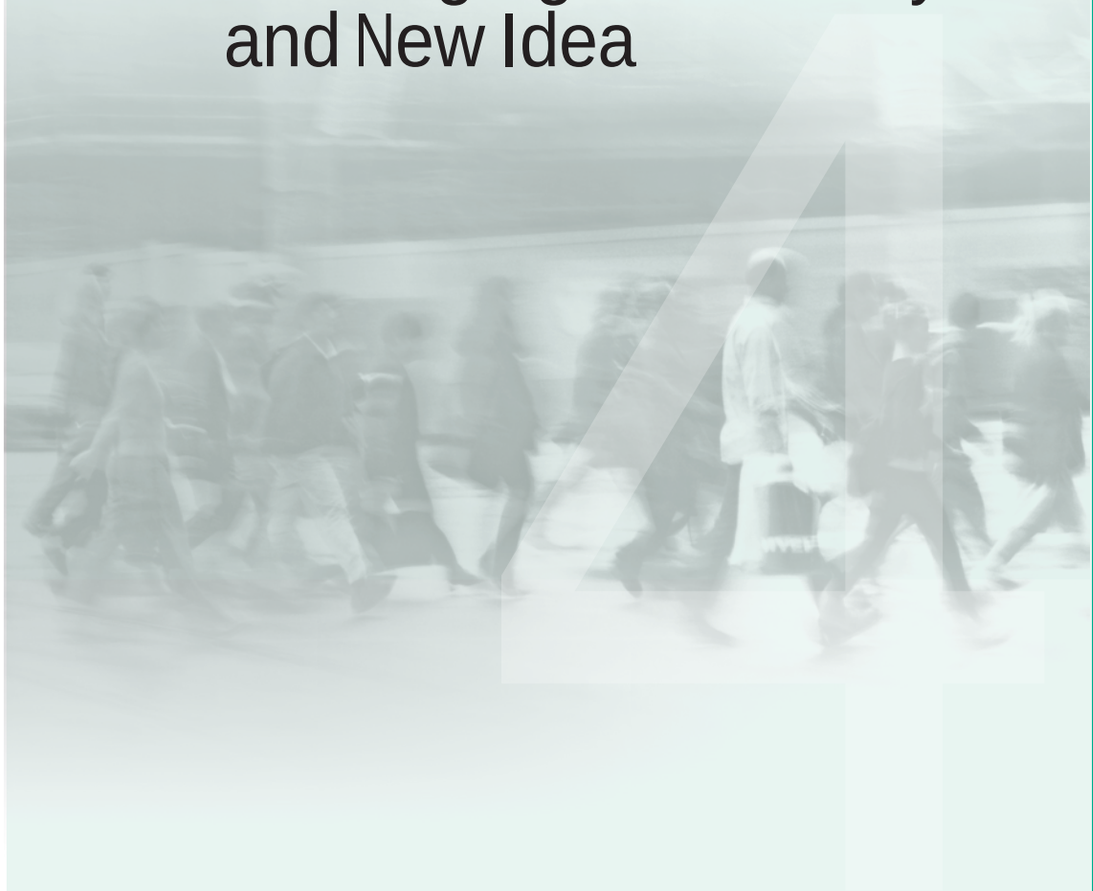
105 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27(1).

106 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 28, 35.

107 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 31(1).

Chapter 3 Other Relevant Laws

Chapter Four
A Changing Community and New Idea



CONTENTS

Chapter 4 A Changing Community and New Ideas

4.1 Much has changed in our community since the *Guardianship and Administration Act 1986* (Vic) (G&A Act) commenced 23 years ago. The commission must consider whether the law is responsive to the contemporary needs of people with impaired decision-making ability, and properly promotes and protects their rights. We have been asked to review some specific aspects of the current law. We are also required to consider the effect which changes in the make-up of our community may have upon guardianship laws.

HUMAN RIGHTS

4.2 Human rights instruments are a modern means of helping us focus on our shared values and of ensuring we consider many different perspectives when we make new laws. Any legislative changes proposed by the commission must take account of the relevant human rights in the United Nations Convention on the Rights of Persons with Disabilities (the Convention)[1] and the Victorian Charter of Rights and Responsibilities (the Charter).[2]

4.3 The terms of reference direct the commission to consider the principles of respect for dignity and individual autonomy including the freedom to make our own choices. We have been asked to look at how well guardians and administrators advance the represented person's rights and assist them to make decisions,[3] how well the regime balances the rights of people with disabilities[4] and their protection from harm, and the extent to which powers and duties of guardians and administrators are consistent with human rights obligations.[5]

THE CHARTER

4.4 The Charter establishes a legislative framework for the protection and promotion of human rights in Victoria. The Charter contains a statement of rights based upon the International Convention on Civil and Political Rights that Australia ratified many years ago.[6]

4.5 The Charter says that new Victorian laws should as far as possible be consistent with those rights[7] and that existing laws should interpreted so that they are compatible with the Charter.[8] International law and Australian court and tribunal decisions relevant to a human right may be considered when interpreting a statutory provision.[9]

4.6 Some of the Charter rights that are relevant to our review of the G&A Act are:

- the right to recognition as a person before the law[10]
- equal protection before the law and protection from discrimination[11]
- protection from cruel, inhuman, degrading treatment or punishment including medical and scientific experimentation performed without consent[12]
- freedom of movement and the right of a person to choose where they live[13]
- the right to privacy[14]
- protection of religious practices and cultural enjoyment[15]
- protection against the removal of a person's property without lawful reason[16]
- the right to liberty and security, including freedom from detention without lawful reason[17]
- the right to have a proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.[18]

4.7 The Charter applies to all public authorities, such as the Public Advocate, State Trustees Limited (State Trustees) and the Victorian Civil and Administrative Tribunal (VCAT) and to organisations contracted to provide a public service on behalf of the Victorian Government.[19] The Charter makes it 'unlawful for a public authority to act in a way that is incompatible with a human right, or, in making a decision, to fail to give proper consideration to a relevant human right'.[20]

4.8 The Charter does not directly apply to the actions of private individuals or groups. Therefore, while the actions of the Public Advocate are subject to the Charter, the actions of a private guardian are not. Similarly, the Charter does not directly apply to private administrators but does apply to any trustee company that may be considered a public authority.

4.9 Any changes recommended to law or policy must be consistent with the rights protected by the Charter. The Charter requires a Member of Parliament who proposes a new law to prepare a statement setting out whether new legislation is compatible with human rights. If a new law or policy is inconsistent with the Charter, the statement must detail the nature and extent of that incompatibility.[21] A declaration of inconsistency does not affect the validity, enforcement or operation of the new law or create any legal cause of action.[22] However, a ministerial response to the inconsistency is required.[23]

UNITED NATIONS CONVENTION

4.10 On 17 July 2008 Australia ratified the Convention.[24] Australia also ratified the optional protocol to the Convention on 21 August 2009.[25]

4.11 The purpose of the Convention is to:

> *promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*[26]

4.12 Some of the main protections for people with disabilities in the Convention relevant to the G&A Act are:

- equal recognition before the law, including the right to assistance and protection in the exercise of legal rights[27]
- equal protection and benefit of the law and protection from discrimination[28]
- right to life on an equal basis with others[29]
- liberty and security of the person, including appropriate protections in the event liberty is taken away[30]
- protection from cruel, inhuman, degrading treatment or punishment including medical and scientific experimentation performed without consent[31]
- protection against exploitation, violence and abuse[32]
- protection of physical and mental integrity on an equal basis with others[33]
- the right to choice in living arrangements and to participate in the community.[34]

Equal recognition before the law

4.13 Article 12 of the Convention is particularly relevant to this review of the G&A Act. It requires parties to the Convention to:

- recognise people with disabilities as persons before the law

1 *Convention on the Rights of Persons with Disabilities*, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006). The Convention opened for signature on 30 March 2007 and entered into force 3 May 2008.

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

3 Terms of Reference 3 a).

4 Terms of Reference 3 b).

5 Terms of Reference 3 e).

6 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976).

7 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28 requires that a statement of compatibility must be prepared in respect of any new Bill that is introduced to the Victorian parliament, outlining the Bill's compatibility, or incompatibility, with human rights.

8 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1) says 'so far as is possible to do so consistently with their purpose, all statutes must be interpreted in a way that is compatible with human rights'.

9 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2) says that '[i]nternational law and the judgments of domestic courts and tribunals relevant to a human right must may be considered in interpreting a statutory provision'.

10 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(1).

11 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8(2)-(4).

12 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10.

13 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12.

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

15 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19.

16 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

17 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21.

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

19 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(2).

20 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1). Note that individuals affected by such unlawful activities cannot take action under the Charter unless they have an existing basis, or cause of action, for challenging the unlawful activity s 39(1).

21 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28.

22 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(5).

23 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 37.

24 By 'ratifying' the Convention Australia has indicated its consent to be bound by the terms of the treaty. See articles 2(1)(b) and 14(1) of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, (entered into force 27 January 1980).

25 Signing the optional protocol has the effect of allowing the Committee on the Rights of Persons with Disabilities to investigate complaints under the Convention made by individuals which relate to Australia. This power is additional to the Committee's other main role of reviewing periodic national reports on the steps which that country has made to implement the Convention.

26 Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006), art 1.

27 Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006), art 12.

28 Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006), art 5.

29 Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006), art 10.

30 Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006), art 14.

31 Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006), art 15.

32 Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006), art 16.

33 Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006), art 19.

34 Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UN GAOR, 61st session, Agenda Item 67(b), UN Doc.A/61/611 (13 December 2006), art 19.

Chapter 4 A Changing Community and New Ideas

- recognise that people with disabilities enjoy legal capacity on an equal basis with others in all aspects of life
- provide people with disabilities with the support they need to exercise legal capacity
- ensure that this support is free from abuse, is appropriate to the person's circumstances, applies for the shortest period possible, and is subject to regular independent review
- protect the right of people with disabilities to own and control their own property, manage their own affairs, and access finance.

4.14 At the time of ratification, Australia issued a declaration about its understanding of the meaning of Article 12. It declared that:

> *Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;*
>
> *Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.*[35]

SOME SPECIFIC ISSUES

SUPPORTED DECISION-MAKING

4.15 The issue of 'supported' as opposed to 'substituted' decision-making is a topic of growing significance among people with an interest in guardianship laws. Supported decision-making emphasises collaboration between the person with the disability and others. One means by which our guardianship laws promote collaboration is by supporting the use of informal decision-making approaches for adults with impaired capacity.[36] We have been asked to consider whether this form of supported decision-making should continue.

4.16 While the current guardianship laws seek to promote participation by represented people in decisions made about their lives, there is no formal mechanism for supported decision-making. Informal supported decision-making is, however, already part of the current model. In practice, guardianship is used as a last resort when advocacy and other supported decision-making activities are not sufficient to assist and protect a person.

4.17 Supported decision-making is now part of guardianship law in some other countries. For example, Alberta, Canada, has introduced 'supported decision-making authorizations'[37] and 'co-decision-making orders'[38] in addition to guardianship. It has also abolished plenary guardianship orders. In the UK, the new Mental Capacity Act requires that 'all practical steps to help someone make a decision have been taken without success before finding that someone is unable to make a decision'.[39]

DISABILITY AS A THRESHOLD REQUIREMENT

4.18 The G&A Act requires a finding that a person has a disability before a guardian or administrator may be appointed to make decisions on their behalf.[40]

4.19 It is arguable that it is unfairly discriminatory and limiting to have a substitute decision-making regime only for people with disabilities. New guardianship laws could be based on lack of capacity to make decisions, regardless of whether that lack of capacity is the result of a disability.

4.20 In Queensland, the *Guardianship and Administration Act 2000* (QLD) refers to 'impaired decision-making capacity' rather than disability.

4.21 The commission will consider whether 'disability' is a relevant and appropriate concept for modern guardianship legislation, or whether concepts such as lack of 'capacity' and 'vulnerability' would be more appropriate.[41] If lack of 'capacity' is the preferable trigger for the operation of new guardianship laws, it will be necessary to consider whether a range of different people, such as those with various addictions, should fall within them.

BEST INTERESTS

4.22 The notion of 'best interests' decision-making is a critical part of current guardianship laws. Both guardians and administrators are expressly required to act in the 'best interests' of the represented person.[42]

4.23 There are unanswered questions about the significance of the wishes of the represented person when making decisions in their 'best interests'. It is unclear whether a 'best interests' decision can take account of the fact that all independent adults have the right to take risks and sometimes make 'bad' decisions. The extent to which protection should override freedom of decision and action when a substitute decision-maker has the responsibility of making a decision in the best interests of a represented person is an issue we have been asked to consider.[43]

DEVELOPMENTS IN POLICY AND PRACTICE FOR PEOPLE WITH DISABILITIES

4.24 When the G&A Act was first introduced, services for people with disabilities, particularly people with intellectual disabilities, were undergoing considerable change. Institutional, custodial and medically oriented services were being replaced with smaller, community-based services, built on a 'developmental' model of delivery which focused on developing the skills and potential of people with disabilities, particularly in relation to independent living, and with an emphasis on such concepts as 'normalisation' and 'the least restrictive alternative'. This approach to services was reflected in the principles which the service legislation of the day was built.[44]

4.25 Over time there have been developments in policy which may affect the content of new guardianship laws. Important policy developments include:

- a 'rights-based model'[45] which stresses the role of services in empowering people to understand and realise their rights and to exercise choice
- a 'social model of disability'[46] which draws attention to the ways society 'disables' people through discriminatory and exclusive practices
- a 'community development model'[47] which focuses on enabling people with disabilities, in the context of community, to effect change
- 'person-centred planning'[48] with its emphasis on building flexible supports around the person, rather than a service-centric approach that built services for which people could be eligible.

4.26 These changes in policy and service practice might be relevant to the ways guardianship laws operate, including:

- the ways we understand the interaction between decision-making rights and the concept of 'best interests'
- the roles communities and social networks, including family, can play in safeguarding the rights, and supporting the choices, of people with disabilities, and the extent to which this might lessen the need for substitute decision-makers to be appointed
- the ways guardianship models should practically work in support environments that are more fluid and informal than the institutionalised models that operated when the legislation was first introduced.

35 See, *Chapter IV: Human Rights, 15. United Nations Convention on the Rights of Persons with Disabilities* (2010) United Nations Treaty Collection ,http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15.en.pdf> at 14 January 2010.

36 Terms of reference 3 d).

37 *Adult Guardianship and Trusteeship Act* SA 2008 (Alberta, Canada) s 4.

38 *Adult Guardianship and Trusteeship Act* SA 2008 (Alberta, Canada) s 13.

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

40 *Guardianship and Administration Act 1986* (Vic) s 22(1). The fact that a person has a disability is not itself enough for VCAT to be satisfied that a guardian should be appointed. VCAT must also be satisfied that due to the disability the person is unable to make reasonable judgments in respect to matters relating to their person or circumstances, and that the person is in need of a guardian.

41 Terms of Reference 3 j).

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

43 Terms of Reference 3 b).

44 See *Intellectually Disabled Persons Services Act 1986* (Vic) s 5.

45 See, eg, Women With Disability Australia (WWDA) (2007), 'Working Towards a Common Understanding of Advocacy', submission to National Disability Advocacy Program (NDAP) Consultation Paper.

46 See, eg, Tony Vardaro, (2005), 'Disability and Diversity – a Paradigm shift', presentation on behalf of National Ethnic Disability Alliance (NEDA), Diversity in Health Conference, 2005.

47 See, eg, State Government of Victoria, *State Disability Plan 2002-2012*, September 2002, 37.

48 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 1 March 2006, 410-1 (Sherryl Garbutt).

Chapter 4 A Changing Community and New Ideas

CHANGING DEMOGRAPHICS

4.27 In the 23 years since the G&A Act was introduced the profile of people under guardianship and administration has changed significantly. In the first year of the G&A Act the majority of people under guardianship had an intellectual disability.[49] In 2008/2009, however, only 14 per cent of all public guardianship clients had an intellectual disability, making them the fourth largest group after people with dementia (34 per cent), people with an acquired brain injury (16 per cent) and people with a mental illness (17 per cent).[50]

4.28 The biggest single demographic change for guardianship and administration in the past 23 years has been Victoria's rapidly ageing population, and the corresponding increasing incidence of dementia. In 2003, approximately one in six Victorians was aged 65 years or older.[51] By 2011 it is estimated that one in five Victorians will be aged 65 years or older, and by 2021 this will increase to one in four Victorians.[52] It is estimated that around 63,000 people in Victoria currently experience dementia, and this figure is expected to rise to approximately 146,000 by 2030.[53]

4.29 These trends are reflected in the profile of people under guardianship. Sixty-six per cent of people under guardianship are now over 65 years old, and 38 per cent are over 80 years old.[54] Guardianship laws have become increasingly important for the protection and advancement of the rights of older persons with conditions such as dementia.

4.30 Older persons in Victoria come from increasingly diverse cultural and linguistic backgrounds. In 1996, 23.1 per cent of Victorians over the age of 65 were from cultural and linguistically diverse backgrounds.[55] By 2011 it is estimated that the figure will increase to 30.8 per cent.[56]

4.31 The many groups who now use guardianship laws may have differing needs and priorities. For example, while a person with dementia, an acquired brain injury or serious mental illness may have expressed clear independent opinions about their personal and financial matters at earlier points in their life, a person with profound intellectual disability may have always required assistance in some of these areas. We must consider how effectively the current 'one size fits all' guardianship laws cater for each of these groups.

OTHER ISSUES IN THE TERMS OF REFERENCE

REVIEWING DECISIONS OF GUARDIANS AND ADMINISTRATORS

4.32 Individual decisions made by guardians and administrators are not reviewable by anyone. The only course open to a person who wishes to challenge a decision made by a guardian or an administrator is to request a reassessment of the order by which that person was appointed.

4.33 The commission has been asked to consider whether there should be additional mechanisms for reviewing decisions made by guardians and administrators.[57] In NSW, for example, the Administrative Decisions Tribunal can review individual decisions made by the Public Guardian and the Public Trustee.[58]

CONFIDENTIALITY AND PRIVACY

4.34 The commission has also been asked to look at how principles of accountability and transparency can best be balanced with the privacy of people who provide information or are affected by decisions made under the G&A Act.[59] For example, people often provide highly sensitive information to VCAT or the Public Advocate in relation to an application for guardianship and administration. Although disclosure of that information may promote transparency in decision-making, this step might also seriously compromise the privacy of the person it concerns. Greater transparency may also discourage people from coming forward with information that would help to protect someone who is being abused or exploited.

INTERACTION WITH OTHER LEGISLATION

4.35 The commission has been asked to consider the relationship and appropriate boundaries between the G&A Act and other relevant Victorian or Commonwealth legislation.

Financial matters

4.36 As noted in Chapter 3, the Instruments Act permits a person to appoint an agent, known as an attorney, to make decisions about their financial affairs after the person loses decision-making capacity.[60] The document used to make the appointment is called an Enduring Power of Attorney (Financial).

4.37 When a person who has not appointed an enduring attorney loses capacity and needs someone to make financial decisions on their behalf, the administration provisions of the G&A Act become relevant.

4.38 Even when a person has appointed an attorney, VCAT may be asked to intervene because of concerns about the initial appointment or about the way in which the attorney is managing the represented person's financial affairs.[61] For example, VCAT is sometimes asked to consider whether an attorney was validly appointed because of concerns about the capacity of the represented person to make that appointment.[62] In other cases, VCAT may be asked to consider whether it is in the person's best interests that the power be revoked, even if the appointment was valid in the first place.[63] If the attorney's power is revoked, VCAT may decide to appoint an administrator to handle the financial affairs of the represented person if it believes a substitute decision-maker is necessary.

4.39 The commission will consider whether these two quite different ways of appointing someone to manage the financial affairs of a person who is unable to manage their own affairs overlap effectively and are well understood in the community.

Youth

4.40 As noted in Chapter 3, the G&A Act does not permit the appointment of a guardian or an administrator for a person under 18 years old. We have been asked to consider whether Victorian guardianship laws should apply to people who are 17 years of age and older. In NSW, for example, guardianship laws apply to people aged 16 years and over.

4.41 At present in Victoria most 17 year olds fall into a gap because it is not possible to appoint a guardian for them under the G&A Act or the Children, Youth and Families Act.[64]

Medical treatment

4.42 There is considerable overlap between the medical treatment provisions of the G&A Act and the MT Act. The G&A Act permits some people to *consent* to medical treatment on behalf of another person who is unable to do so themselves, while the MT Act permits a properly appointed agent to *refuse* medical treatment on behalf of another person. The existence of parallel legislation dealing with consent to and refusal of medical treatment may cause confusion.

4.43 The commission will consider whether the manner in which medical treatment issues are dealt with in these two separate Acts might be clarified and improved.[65]

Mental health

4.44 As highlighted in Chapter 3, the interaction between the G&A Act and the MH Act is at times complex. While the G&A Act does not deal separately with decisions about mental health services, the MH Act specifies that the consent or refusal of a guardian or a person responsible is not relevant for the purposes of the Mental Health Act's provisions concerning involuntary treatment.[66]

4.45 Some commentators argue that a guardian should be able to make decisions about involuntary treatment and detention as guardianship laws are a generic substitute decision-making regime for people with all forms of disability.[67] They argue that it is discriminatory to have a separate body of law, containing powers usually exercised by a guardian, for people with mental illness.[68]

49 Office of the Public Advocate (Victoria), *Annual Report* 2008/2009, 8.

50 Ibid.

51 Office of Senior Victorians, *Population Ageing in Victoria* (June 2003) < http://www.seniors.vic.gov.au> at 10 January 2010.

52 Office of Senior Victorians, *Ageing in Victoria – Discussion Paper* (May 2008) [2] < http://www.seniors.vic.gov.au> at January 2010 .

53 Access Economics, *Keeping dementia front of mind: incidence and prevalence 2009-2050* (August 2009) [70] < http://www.alzheimers.org.au> at 10 January 2010.

54 Office of the Public Advocate, *Annual Report* 2008/2009, 8.

55 Australian Institute of Health and Welfare, *Projections of Older Immigrants: people from culturally and linguistically diverse backgrounds* (2001) [38] <http://www.aihw.gov.au/publications/age/poi/poi-c03.pdf> at 2 December 2009.

56 Ibid, 40.

57 Terms of Reference 3 h).

58 *Guardianship Act 1987* (NSW) s 80A.

59 Terms of Reference 3 k).

60 The meaning of 'capacity' is outlined in the glossary.

61 See *Instruments Act 1958* (Vic) pt XI div 6.

62 If VCAT finds a person does not have the capacity to make the appointment it may make a 'declaration of invalidity', see *Instruments Act 1958* (Vic) s 125Y(1)(a).

63 *Instruments Act 1958* (Vic) s 125X(1). VCAT can only make such a determination if it is satisfied that the represented person no longer has the capacity to make a power of attorney (financial).

64 *Children, Youth and Families Act 2005* (Vic) s 3.

65 Terms of Reference 3 i).

66 *Mental Health Act 1986* (Vic) s 3A.

67 See Tom Campbell, 'Mental health law: Institutionalised discrimination' (1994) 28 *Australian and New Zealand Journal of Psychiatry* 554; Stephen Rosenman, 'Mental health law: an idea whose time has passed' (1994) 28 *Australian and New Zealand Journal of Psychiatry* 562; John Dawson and George Szmukler, 'Fusion of mental health and incapacity legislation' (2006) 188 *British Journal of Psychiatry* 504; George Szmukler and Frank Holloway, 'Mental Health Legislation is now a harmful anachronism' (1998) 22 *Psychiatric Bulletin* 662; Genevra Richardson, 'Autonomy, Guardianship and Mental Disorder: One Problem, Two Solutions' (2002) 65 *The Modern Law Review* 450.

68 See Tom Campbell and Chris Heginbotham, *Mental Illness: Prejudice, Discrimination and the Law* (1991).

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4.46 On the other hand, it can be argued that mental health laws are special measures that promote the interests of people with a mental illness rather than discriminate against them. These laws may permit early intervention more easily than guardianship laws. Guardianship laws do not contain the same range of emergency intervention provisions found in mental health laws.

4.47 The commission will consider the appropriate boundary between guardianship and mental health laws.

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997

4.48 The commission has been asked to consider the G&A Act's interaction with the CMIUT Act. A person affected by the CMIUT Act may also be in need of a guardian to make some decisions not directly related to the criminal proceeding. An issue which requires clarification is the role of guardians for people involved in proceedings under the CMIUT Act, and for those who are placed under supervision orders following these proceedings.

Disability Act

4.49 The commission has also been asked to consider the G&A Act's interaction with the Disability Act.

4.50 A number of different types of compulsory care arrangements are available under the Disability Act. Supervised Treatment Orders were introduced to provide more transparency around involuntary detention and treatment of people with disabilities and to establish appropriate checks and balances on the use of these powers. A Supervised Treatment Order prevails over a guardianship order under the G&A Act to the extent of any inconsistency. An issue that arises is whether there is a clear distinction between the circumstances in which a Supervised Treatment Order and a guardianship order may be made.

FUNCTIONS AND POWERS OF THE PUBLIC ADVOCATE AND VCAT

4.51 The commission has also been asked to consider the roles, functions and powers of the two bodies most directly involved in the administration of the Act: the Public Advocate and VCAT. [69]

OTHER RELEVANT REVIEWS

4.52 There are a number of other important current reviews of substituted decision-making laws. Some of these are directly relevant to our inquiry because they are considering laws in Victoria that overlap with the G&A Act. Others are useful because they examine similar issues in other Australian states.

THE VICTORIAN PARLIAMENTARY LAW REFORM COMMITTEE'S INQUIRY INTO POWERS OF ATTORNEY

4.53 The Victorian Parliamentary Law Reform Committee is currently conducting an inquiry into Powers of Attorney. The committee is considering ways of streamlining and simplifying power of attorney documents so Victorians can better plan for their future financial, lifestyle and healthcare needs.[70] It is due to report by 31 August 2010.

4.54 The commission will be in contact with the committee throughout the term of its inquiry.

VICTORIAN DEPARTMENT OF HEALTH REVIEW OF THE *MENTAL HEALTH ACT 1986* (VIC)

4.55 The MH Act is currently being reviewed by the Department of Health. This review is examining whether the Act provides an effective legislative framework for the treatment of people with a mental illness in Victoria.

4.56 A Community Consultation Panel was established to conduct a series of public consultations in Melbourne and country Victoria. The Panel released a Community Consultation Report in July 2009. The Government response to the Community consultation report was also published in July 2009. The Government expressed an intention to update the Act and improve its effectiveness and human rights protections.[71]

4.57 The legislation review team within the Mental Health and Drugs Division of the Department of Health is currently working with other relevant government agencies, as well as consulting with key stakeholders and experts to finalise advice to the Government to inform the drafting of new legislation. It is anticipated that the Mental Health Bill will be considered by Parliament in 2010.[72]

THE QUEENSLAND LAW REFORM COMMISSION'S REVIEW OF THE *GUARDIANSHIP AND ADMINISTRATION ACT 2000* (QLD) AND THE *POWERS OF ATTORNEY ACT 1998* (QLD)

4.58 The Queensland Law Reform Commission's review of guardianship laws covers similar issues to those being considered by the commission. The Queensland review has examined issues such as:

- the general principles of Queensland guardianship law
- the powers of guardians, administrators and other appointments
- confidentiality provisions
- review of decisions
- access to medical treatment for people with impaired capacity
- the appropriateness of treatment provided
- whether there is a need for additional provisions to allow a parent to make a binding direction to appoint a guardian or administrator for their son or daughter who has impaired decision-making capacity.[73]

4.59 The Queensland Law Reform Commission was required to report by 31 December 2009. The report will be publicly available once it is tabled in the Queensland parliament in early 2010.

THE NEW SOUTH WALES LEGISLATIVE COUNCIL STANDING COMMITTEE ON SOCIAL ISSUES' INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

4.60 This Parliamentary Committee has extremely broad terms of reference. It is required to consider whether any New South Wales legislation needs to be changed to better provide for the management of estates of people incapable of managing their own affairs and the guardianship of people who have disabilities.[74]

4.61 The committee was asked to report by February 2010.

69 Terms of Reference 3 f) and g).

70 See <http://www.parliament.vic.gov.au> for full Terms of Reference.

71 See Minister for Health, *Information Sheet - Mental Health Act Review*, August 2009, <http://www.health.vic.gov.au/mentalhealth/mhactreview/info-august09.pdf> at 18 November 2009.

72 See Minister for Health, *Information Sheet - Mental Health Act Review*, August 2009, < http://www.health.vic.gov.au/mentalhealth/mhactreview/info-august09.pdf> at 18 November 2009.

73 See <http://www.qlrc.qld.gov.au> for full Terms of Reference.

74 See <http://www.parliament.nsw.gov.au> for full Terms of Reference.

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Chapter Five
Questions

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Chapter 5 Questions

5.1 The commission is keen to receive your thoughts about the current state of Victoria's guardianship laws and whether there is any need for reform. We have developed a number of questions about specific features of those laws. You can answer as many or as few questions as you wish. Please refer to the submission information on page 4 for further detail about the submission process. Submissions are due by **14 May 2010**.

5.2 Later in the year we will publish a Consultation Paper containing proposals for law reform. There will be another opportunity for the community to provide responses to that paper.

GENERAL QUESTIONS

1. We would like to hear your views about:
   - what parts of the law work well?
   - what parts of the law don't work well and why?
   - your ideas to improve the law.
2. Is a system of guardianship and administration the best way to ensure the needs of people with impaired decision-making ability are met and their rights are protected? What other approaches might better achieve these goals?
3. Is there an adequate understanding of guardianship laws in the community? What could be done to improve this?
4. How should developments in policies and practices for people with disabilities be reflected in guardianship and administration laws?
5. People with age-related disabilities and acquired brain injuries are now the main users of guardianship and administration. Do you think the system needs to change to reflect this situation and prepare for the future? If so how should it change?

SPECIFIC QUESTIONS FROM OUR TERMS OF REFERENCE

DISABILITY

6. Should it be necessary for a person to have a 'disability' before a guardian or administrator is appointed, or is it preferable to rely on concepts such as lack of 'capacity' or 'vulnerability'?
7. What are the best ways of assessing whether a person's decision-making capacity is impaired?

BEST INTERESTS

8. Is 'best interests' a useful or appropriate guide for substitute decision-makers? Are there better approaches?
9. Does the notion of 'best interests' decision-making allow for the right of a person to take risks and make bad decisions? Should it?
10. To what extent should a guardian or administrator be required to try to identify the represented person's wishes and follow them wherever possible?

SUBSTITUTE DECISION-MAKING

11. Is there a continuing need for substitute decision-making laws?
12. Do we need to have two types of substitute decision-makers (administrators and guardians) for financial and personal decisions? Would it be preferable for VCAT to have a range of different financial, medical and lifestyle powers it could provide to one decision-maker?
13. Should plenary guardianship and administration orders be retained? Or, should VCAT be required to identify in each case the range of decisions which can be made on a person's behalf?

14. Are there any decisions substituted decision-makers cannot make at the moment that you think they should be able to? Are there some decisions that substituted decision-makers should not be able to make?

15. Is there a need for new laws that formally recognise supported decision-making? How should any supported decision-making laws operate?

REVIEW

16. Should VCAT have the power to review individual decisions made by guardians and administrators? If so, who should be able to ask for a review of a decision?

17. What powers, if any, should VCAT have to deal with substitute decision-makers who abuse their power?

PUBLIC ADVOCATE

18. Should there be any changes to the functions and powers of the Public Advocate?

VCAT

19. Should there be any changes to the functions, powers or procedures of VCAT?

AGE

20. Should VCAT have the power to appoint a guardian or administrator for a person under 18 years old?

CONFIDENTIALITY

21. Should there be any changes to the way the law operates to ensure the right balance is struck between privacy and transparency?

TERMINOLOGY

22. Should the terms 'guardian' and 'administrator' be retained? If not, what term or terms should replace them?

MEDICAL TREATMENT

23. Do the 'medical treatment' provisions in the G&A Act work effectively?

INTERACTION OF LAWS

Medical treatment

24. Do the medical treatment provisions in the G&A Act and the MT Act work together effectively? If not, how could the law be improved?

Enduring powers

25. Do the laws concerning enduring powers of guardianship, enduring powers of attorney (financial) and enduring powers of attorney (medical treatment) work effectively? Do these powers operate in harmony with VCAT appointments of guardians and administrators?

26. Directions provided by people in enduring powers or other documents are generally not legally binding. Should 'advance directives' about personal, medical or financial matters have more authority?

Crimes (Mental Impairment and Unfitness to be Tried) Act

27. What role should guardians have for people who may be affected by this Act?

Chapter 5 Questions

Mental Health Act

28. Should there be separate mental health and guardianship laws?
29. How should mental health and guardianship laws overlap?
30. Should guardians be able to consent to psychiatric treatment in some circumstances?

Disability Act

31. Is the law clear about when to seek a Supervised Treatment Order and when to seek a guardianship order?
32. What do you think is the best legislative approach for people who are a serious risk to themselves or others but are not covered by the involuntary treatment provisions of the *Mental Health Act 1986*, or the compulsory treatment provisions of the *Disability Act 2006?*

Appendix

DIFFERENT TYPES OF SUBSTITUTE DECISION-MAKERS IN VICTORIA

Name of the decision making arrangement	Title of the decision maker	Appointed by	Who can be appointed	When it comes into effect
Guardianship	Guardian	VCAT	Any suitable adult(s) or the Public Advocate	Immediately upon appointment by VCAT
Administration	Administrator	VCAT	Any suitable adult(s), or trustee company such as State Trustees	Immediately upon appointment by VCAT
General Power of Attorney	Attorney	The person on whose behalf the decisions are made (the donor)	Any adult(s) chosen by the donor	Immediately upon appointment by the donor
Enduring Power of Attorney (Financial)	Enduring Attorney	The person on whose behalf the decisions are made (the donor)	Any adult(s) chosen by the donor	Immediately upon appointment by the donor
Enduring Power of Attorney (Medical Treatment)	Agent	The person on whose behalf the decisions are made (the donor)	Any adult(s) chosen by the donor	When the donor loses capacity to make their own decisions
Enduring Power of Guardianship	Enduring Guardian	The person on whose behalf the decisions are made (the donor)	Any adult(s) chosen by the donor	When the donor loses capacity to make their own decisions
Person Responsible	Person Responsible	Guardianship and Administration Act 1986	The first person available on the list specified in s 37 of the G&A Act	When a medical treatment decision needs to be made

How long it stays in effect	What decisions the person can make	Extent of powers	Relevant legislation
As long as specified in the VCAT order	Personal/lifestyle decisions	As specified in the VCAT order	G&A Act
As long as specified in the VCAT order	Financial and legal decisions	As specified in the VCAT order	G&A Act
Until revoked or until the donor loses capacity	Financial and legal decisions	As specified in the document making the appointment	Instruments Act 1958
Until revoked	Financial and legal decisions	As specified in the document making the appointment	Instruments Act 1958
Until revoked	Medical treatment decisions	Refusal of medical treatment	Medical Treatment Act 1988
Until revoked	Personal/lifestyle decisions	As specified in the document making the appointment and to the extent that the donor has lost capacity	G&A Act
Until the medical treatment decision has been made	Medical treatment decisions (other than 'special procedures')	Consent to medical treatment other than 'special procedures'	G&A Act