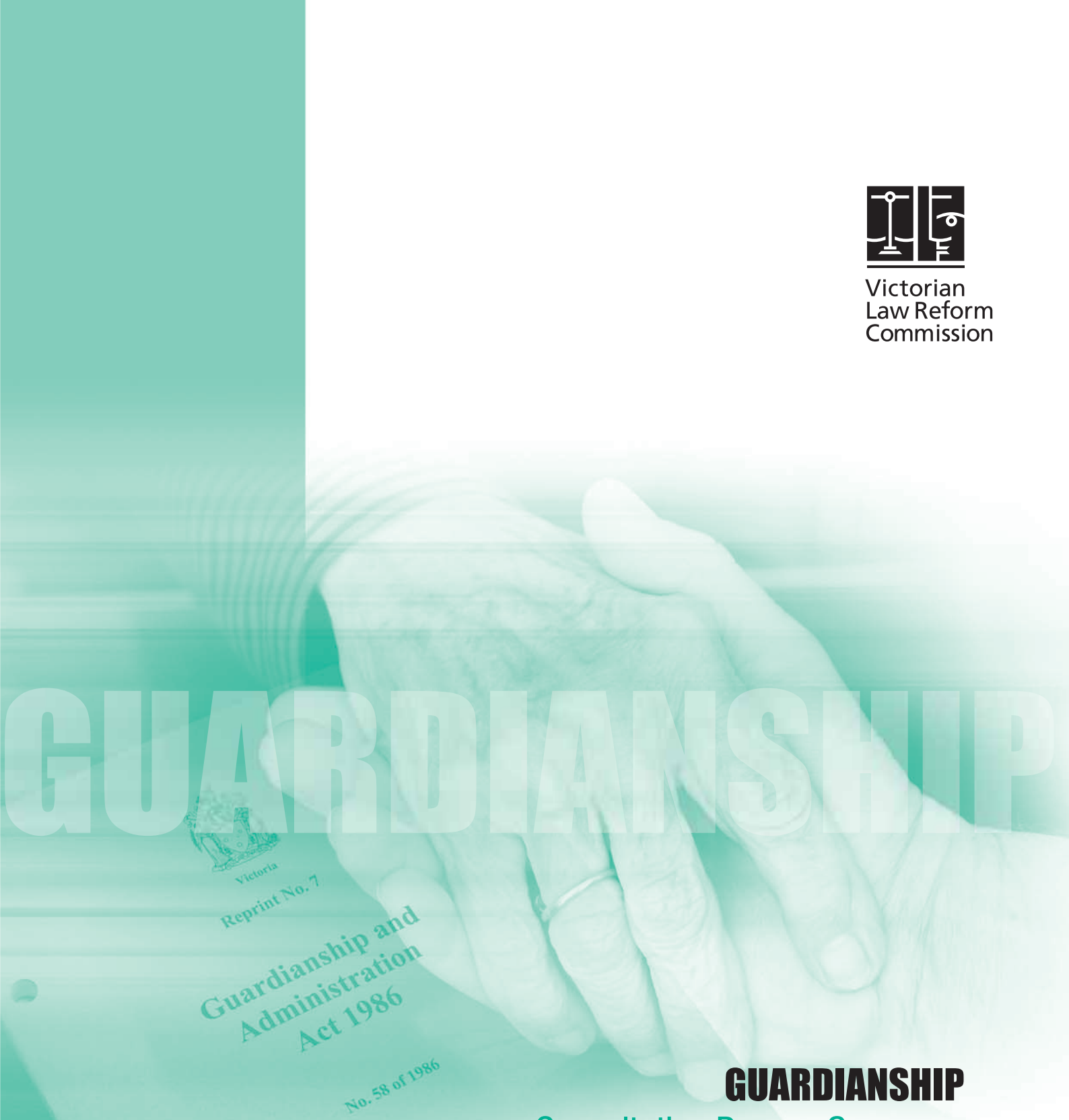
Victorian
Law Reform
Commission



GUARDIANSHIP

Consultation Paper - Summary

Victorian Law Reform Commission

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Introduction and Background

ABOUT THIS SUMMARY

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

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

The Commission has published a detailed **consultation paper** that explores how the laws can be clarified and improved to meet the needs of people with impaired decision-making capacity.

This is a **summary** of that paper. It provides a brief outline of the Commission's reform ideas and proposals. You should refer to the consultation paper if you want more detail about any of the ideas discussed in this paper.

At the end of this paper, we outline some of the ways you can contribute your ideas to this review. Your contribution will help the Commission to finalise its reform recommendations.

Terms and abbreviations commonly used in guardianship laws and throughout this paper are explained in the **glossary** on page 63.

OUR PROCESS

Information paper

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

The Commission received 60 submissions from a wide variety of organisations and individuals in response to its information paper. Most submissions are available on our website.

Community consultations

In March, April and May 2010, the Commission consulted people with disabilities, their carers and friends, and many others who have experience with Victoria's guardianship laws. We also spoke to advocate groups, health professionals, service-delivery groups, trustee organisations, the Public Advocate and VCAT. We conducted consultations in both metropolitan Melbourne and regional Victoria.

Consultative committees

The Commission has established two consultative groups to provide ongoing assistance with the law reform process. These groups have helped the Commission draw upon the experience of people who:

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

Developing our proposals for reform

The information and opinions received in submissions and consultations, as well as discussions with our consultative committees, have helped the Commission to develop proposals for reform that are set out in this paper. We anticipate that these proposals will be refined and developed by our second round of consultations and the submissions we receive in response to this consultation paper.

Next steps

After completing our second round of consultations, reviewing submissions to our consultation paper and finalising our research, the Commission will provide the Attorney-General with a final report containing recommendations for reform by 23 December 2011.

OTHER PUBLICATIONS

The consultation paper and Easy English version is available on the Commission's website: **www.lawreform.vic.gov.au**.

This summary is also available in Chinese, Vietnamese, Greek, Italian, Macedonian, Arabic, Polish, Serbian, Turkish, Russian and Croatian.

The Commission can post or email you a copy of our consultation paper in any of these formats, free of charge. You can also request another format if we do not have one that you need.

SCOPE OF THE REVIEW

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

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

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

- the role of guardians and administrators in advancing the rights of the people they represent and in assisting them to make decisions
- whether the right balance is struck between the best interests of a represented person and their rights set out in the United Nations' *Convention on the Rights of People with Disabilities* (the Convention)[1]

- whether the powers and duties of guardians are effective, appropriate and consistent with Australia's obligations under the Convention and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter)[2]
- the validity and feasibility of informal decision making
- whether the G&A Act should be extended to apply to people who are 17 years of age
- the functions, powers and duties of the Public Advocate
- the role and powers of the Victorian Civil and Administrative Tribunal (VCAT) and whether the tribunal process for appointing guardians and administrators works well
- whether there should be additional ways to review decisions made by guardians and administrators and whether there should be new ways of dealing with inappropriate conduct by guardians and administrators
- whether existing laws concerning substitute consent for medical treatment and participation in research trials, including the 'person responsible' model, are appropriate, and whether the G&A Act interacts effectively with the *Medical Treatment Act 1988* (Vic)
- whether 'disability' should continue to be a threshold requirement for the appointment of a guardian or administrator, or whether it should be replaced by other concepts such as 'capacity' or 'vulnerability'
- whether the confidentiality provisions in the G&A Act adequately balance protection of private information and the need for transparency of decisions.

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

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

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

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

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

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

CURRENT LAW

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

State appointments

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

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

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

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

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

Personal appointments

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

The three personal appointments are:

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

Other statutes

Other statutes that allow for substitute decision making are:

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

REASONS TO MODERNISE THE LAW

There are many reasons for modernising Victorian guardianship laws.

Maximising participation in decision-making

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

A more realistic view of capacity

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

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

Changing attitudes to informal arrangements

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

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

More accessible laws and more efficient legal processes

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

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

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

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

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

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

ASPECTS OF THE CURRENT LAW TO RETAIN

Guardianship and administration

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

Tribunal appointments

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

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

The link between impaired decision-making capacity and disability

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

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

The Public Advocate

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

Automatic appointments for medical treatment

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

NEW LEGISLATION

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

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

A focus for the new laws

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

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

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

New guardianship laws could integrate existing provisions for appointing:

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

Important changes

Important changes proposed by the Commission are:

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

New supported decision-making mechanisms

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

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

A new decision-making continuum

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

- new supported decision-making agreements, where one person authorises another to access information on their behalf in order to assist them to make decisions
- new co-decision-making agreements, where one person authorises another to make decisions with them, and where the decision requires the agreement of both people for it to be valid
- existing enduring powers of attorney and enduring guardianship, where a person appoints their own substitute decision maker to make decisions on their behalf if and when, and to the extent that, they lose capacity in the future

- clearer provisions for a person to indicate by way of an advance directive, when they are capable of doing so, what decisions they would want made in particular circumstances in the future
- new supported decision-making orders made by VCAT
- new co-decision-making orders made by VCAT
- existing and new arrangements for automatic appointments, where the law identifies and authorises a person to make specific decisions for someone with impaired capacity, without the need for a VCAT appointment
- existing substitute decision-making orders, where VCAT appoints a guardian or an administrator.

Modern principles

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

Improved safeguards and accountability

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

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

A greater role for the Public Advocate

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

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

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

A more accessible and effective tribunal

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

Lowering the age limit for guardianship laws

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

More automatic appointments

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

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

Interaction with other laws

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

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

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

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

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

User-friendly laws

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

WE WOULD LIKE TO HEAR FROM YOU

This review is an exciting opportunity to improve guardianship laws for Victoria's future. A summary of the options for reform are outlined in the next section. The Commission has not reached any final views about reform. Where a reform proposal is preferred by the Commission this is highlighted. We seek your comments and views on these ideas and proposals.

We would like to hear from you about which options you do and do not support and how the options might be improved. We encourage you to provide a written submission. To allow the Commission time to consider your views before deciding on final recommendations, submissions are due by **20 May 2011**. Information about how to provide a submission appears at the end of this paper.

Summary of possible reform options and questions

In the next section we provide a very brief overview of the Commission's reform options as well as the questions that appear in the consultation paper. **You are invited to respond to as many or as few of the questions as you like**.

If you would like more information about a particular topic, the overview refers to those parts of the consultation paper where the reform options are discussed in detail.

Each chapter in the consultation paper also includes summaries of:

- the current law
- community responses to our information paper
- the problems with current law and practice
- what happens in other jurisdictions
- reform options, including discussion of their advantages and disadvantages.

PART 1: HISTORY, CURRENT LAW AND CHANGE

Chapters 2, 3 and 4 identify a number of reasons to modernise the law, which have been discussed earlier in this paper. They include:

- changes to community attitudes and government policies about people with disabilities since the *Guardianship and Administration Act 1986* (Vic) (G&A Act) was introduced
- important national and international legal changes including Australia's ratification of the United Nations' *Convention on the Rights of Persons with Disabilities*
- changes to the profile of people using guardianship laws
- the need to respond to fluctuating levels of capacity
- a decline in the use of informal arrangements
- the need to assist the growing number of people likely to be experiencing decision-making incapacity in the future, particularly older Victorians
- the need for more accessible laws and more efficient legal processes

While guardianship laws must continue to provide a protective safety net, two new themes could shape the content of guardianship laws. They are:

- **participation** of people with impaired capacity in making decisions for themselves and in the life of the community whenever possible
- **integration** of the many statutory substitute decision-making schemes

Key changes proposed by the Commission include:

- new supported decision-making mechanisms
- a new decision-making continuum
- modern principles to guide decision makers
- improved safeguards and accountability
- an expanded role for the Public Advocate

- a more accessible and effective tribunal
- lowering the age limit for some appointments
- expanded use of automatic appointments
- more user-friendly laws.

Question 1 Do you have any general comments about the matters identified by the Commission as influencing the need for change? Are there any other important matters that should affect the content of future guardianship laws?

PART 2: THE DIRECTION OF NEW LAWS

CHAPTER 5: PRINCIPLES OF LAWS

STATEMENT OF PURPOSE

[5.99]–[5.100]

The statement of purpose in the current Act is quite narrowly legal and does not contain a broad vision or goal. The Commission proposes the following statement of purpose for new guardianship laws:

> *The purpose of this Act is to protect and promote the dignity and human rights of people with impaired decision-making capacity. To this end, the Act establishes mechanisms to support and assist people to participate in decisions that affect their lives, realise their rights and protect their inherent dignity.*

Question 2 Do you agree with the Commission's draft statement of purpose for new guardianship laws?

NEW GENERAL PRINCIPLES

[5.101]–[5.122]

The Commission proposes that the principles in Victoria's guardianship laws be modernised. We suggest that new principles should reflect a belief that guardianship laws should aim to promote human dignity by enabling people to participate in decisions that affect them to the greatest extent possible.

The Commission proposes the following general principles to guide new adult guardianship laws:

- All adults have an inherent human dignity which must at all times be respected and upheld.
- All adults are entitled to the same basic human rights, and should be empowered to exercise those rights wherever possible.
- All adults are presumed to have the ability to make decisions that affect their lives unless this is shown not to be the case.

- The assessment of an adult's decision-making capacity must take into account the following:
  - Capacity is specific to each decision to be made.
  - Impaired decision-making capacity may be temporary or permanent and can fluctuate over time.
- Where a person is found to be unable to make a decision, any decision made on their behalf should, as far as possible, be the decision that the decision maker believes the person would have made if they were able to.
- All adults, regardless of their ability to make decisions, have wishes and preferences that can and should inform decisions made in their lives.
- All adults are entitled to the support necessary for them to make or participate in decisions affecting their lives.
- All adults are entitled to take reasonable risks and make choices that other people might disagree with.
- All adults have the right to communicate in any way that allows them to understand and be understood.
- All adults are entitled to live in safety and security and to be protected from abuse, neglect and exploitation.
- Any limitations on the ability of adults to make decisions that affect their lives must be justified, reasonable and proportionate.

» This principle is known as 'substituted judgment' and is discussed again in Chapter 17.

Question 3 Do you agree with the Commission's draft general principles for new guardianship laws?

OTHER POSSIBLE PRINCIPLES

[5.123]–[5.128]

The Commission also explores whether consideration of a person's culture and religion should be included in new principles. In other jurisdictions, a person's cultural and linguistic environment is an explicit consideration in guardianship laws.

Victoria's guardianship laws do not contain an overarching statement about the role of carers, families and other supportive relationships in the life of a person with a disability. We ask whether new principles should include a statement about the role of family and other support networks in a person's life.

Question 4 Are there principles you think should be added or removed from these general principles?

CHAPTER 6: CLEAR AND ACCESSIBLE LAWS

STRUCTURE OF LAWS

[6.55]–[6.65]

Because Victoria's substitute decision-making laws are spread among three different Acts, it can be difficult for people to find those laws and understand how they interact.

Possible reform options to better integrate those laws are:

Option A: A 'Powers of Attorney Act' a 'Medical Treatment Act' and a 'Guardianship and Administration Act'

This option would adopt the Victorian Parliament Law Reform Committee recommendation that the enduring attorney and enduring guardian provisions be included in a new Powers of Attorney Act. All of the laws relating to consent and refusal of medical treatment would be located in one place by moving the consent to medical treatment provisions in the G&A Act into the *Medical Treatment Act 1988* (Vic).

Option B: A 'Powers of Attorney Act' and a 'Guardianship and Administration Act' (incorporating medical treatment laws across these two Acts)

This is the approach in Queensland. All personal appointments for personal, medical and financial decisions would be harmonised into a new Powers of Attorney Act. Laws around guardianship and administration, the Public Advocate and the role of VCAT would remain in the G&A Act.

Option C: One single Act consolidating all the various substitute decision-making laws (preferred)

This option would consolidate all generic substitute decision-making laws into one piece of legislation. This occurred in the United Kingdom in 2005 with the enactment of the *Mental Capacity Act 2005* (UK).

Q **Question 5** Do you agree with the Commission's proposal that Victoria's various substitute decision-making laws be consolidated into one single Act?

TERMS USED FOR SUBSTITUTE DECISION MAKERS

[6.66]–[6.67]

Responses our information paper revealed a great deal of uncertainty about the meaning of key terms such as 'guardian', 'administrator' and 'power of attorney'. The Commission has developed options for improving the current terminology used in guardianship legislation.

'PERSON RESPONSIBLE'

[6.68]–[6.72]

The term 'person responsible' is used in Part 4A of the G&A Act to refer to the person who is entitled to authorise medical treatment for an adult who cannot consent to their own medical treatment. This process happens automatically and does not require a VCAT appointment.

The term has been criticised because it is legalistic and does not reveal the matters for which such a person is responsible.

The options are:

Option A: No change—retain term 'person responsible'

Option B: 'Medical decision maker' or 'health decision maker' (preferred)

Question 6 Do you agree with the Commission's proposal that the term 'medical decision maker' or 'health decision maker' should replace 'person responsible' in legislation? If so, which one do you prefer?

'GUARDIANS' AND 'ADMINISTRATORS'

[6.73]–[6.79]

The options are:

Option A: No change—retain the terms 'guardian' and 'administrator'

Option B: The term 'guardian' should be replaced with 'adult guardian', and the term 'administrator' should be replaced with 'financial guardian' (preferred)

The term 'guardian' is open to criticism because it is commonly used to describe the relationship between a child and an adult with parental responsibilities for the child. Despite this difficulty, the Commission is wary of suggesting that the term be abandoned, because the concept of 'guardianship' appears to be reasonably well understood within the community and is used internationally. The term 'adult guardian' might be an acceptable compromise because it retains the useful term 'guardian' yet indicates that the relationship is not one involving a parental figure and a child.

The Commission observed in a number of consultations that people often use the term 'guardian' when they mean 'administrator'. The term 'financial guardian' is another alternative.

Option C: The term 'guardian' should be replaced with 'personal guardian', and the term 'administrator' should be replaced with 'financial manager'

The meaning of the term 'administrator' in guardianship law is poorly understood even though it is used in a number of other Australian jurisdictions. 'Financial manager', which is used in New South Wales, may be a clearer alternative.

Option D: The term 'guardian' should be replaced with 'personal decision maker', and the term 'administrator' should be replaced with 'financial decision maker'

'Personal decision maker' and 'financial decision maker' are terms that clearly describe the role of a substitute decision maker. Although there was some support for these terms in our consultations, others considered them too long. These terms are not used in any Australian jurisdiction.

Question 7 Do you agree with the Commission's proposal that the term 'guardian' should be replaced with 'adult guardian'?

Question 8 Do you agree with the Commission's proposal that the term 'administrator' should be replaced with 'financial guardian'?

'ENDURING POWERS'

[6.80]–[6.82]

The Commission believes there are benefits in using the same language throughout guardianship law so that the same or similar terms are used in relation to powers of attorney, guardianship and administration. For example, the terms 'enduring adult guardian' or 'enduring financial guardian' could be used.

Question 9 Should the terminology used for powers of attorney be better integrated with the terminology for guardianship and administration? What terms should be used?

COMMUNITY EDUCATION

[6.83]–[6.89]

The Commission seeks advice about how community awareness and understanding of guardianship laws more generally might be improved.

Question 10 Do you have any specific ideas about how to better target education about guardianship laws towards:

- people with disabilities
- family, friends and carers of people with disabilities
- culturally and linguistically diverse (CALD) groups
- Indigenous communities
- older people
- young people
- health and community sector professionals
- lawyers?

Question 11 Should the Public Advocate play a greater role in producing community education materials and educating the community about substitute decision making? What other bodies could play a role?

Question 12 Would an educational and awareness campaign assist the community to better understand and make use of guardianship laws?

COLLECTION OF DATA

[6.99]–[6.104]

There is limited data available about the use of personal appointments in Victoria and about Guardianship List users at VCAT. Lack of data about the operation of guardianship laws makes it very difficult to undertake evidence-based law reform and to test the success of reforms when they are implemented. The Commission believes that more data needs to be collected and published about the operation of guardianship laws.

Q **Question 13** What type of data do you think needs to be collected and made available and from what bodies?

PART 3: SUPPORTED DECISION MAKING

CHAPTER 7: SUPPORTED DECISION MAKING

NEW SUPPORTED DECISION-MAKING MECHANISMS

[7.83]–[7.106]

The Commission proposes four new formal supported decision-making appointments to allow people with some decision-making capacity to make decisions with the support of another person or together with a trusted person. These new appointments aim to better recognise the range of different decision-making abilities in our community, and provide more decision-making options for people whose capacity is impaired in some way. They are modelled on developments in Canada.

Personal appointments

Personal appointments are made by the person with impaired decision-making capacity

Personally appointed 'supporters'

This appointment enables a person to authorise another to have access to information on their behalf to assist them to make decisions

Personally appointed co-decision makers

This appointment enables a person to authorise another to make decisions with them. A decision would require the agreement of both people for it to be valid.

VCAT appointments

VCAT could also put these support arrangements in place by order.

Supported decision-making orders

Co-decision-making orders

Q **Question 14** Do you agree with the Commission's proposal to introduce new supported decision-making arrangements?

Question 15 Do you agree with any or all of the proposed roles of supporters and co-decision makers?

Question 16 What steps would need to be taken in order to ensure that these appointments operated fairly and efficiently?

WHO SHOULD TAKE ON THE ROLES OF SUPPORTERS OR CO-DECISION MAKERS?

[7.107]–[7.109]

» Also see the discussion in Chapter 20 [20.88]–[20.92].

If supported decision-making arrangements are included in new guardianship legislation, the Public Advocate could be given a training, support and monitoring role for these arrangements.

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

Question 17 Do you agree that the Public Advocate should not be a 'supporter' or a 'co-decision maker'?

Question 18 Do you think that the Public Advocate should play a role in training supporters and co-decision makers, and monitoring supported decision-making arrangements?

Question 19 Should the Public Advocate establish and coordinate a volunteer support program to assist people who do not have family or friends willing and able to take on these roles?

SUPPORTED DECISION-MAKING FOR FINANCIAL DECISIONS

[7.110]–[7.112]

The United Nations' *Convention on the Rights of Persons with Disabilities* emphasises a move towards supported decision making for financial as well as personal decisions. People we spoke to with experience of administration showed a very strong desire for greater opportunities to participate in financial decision making, and for more available alternatives to administration.

The Commission acknowledges that third parties, such as banks, will need to have confidence in any new mechanisms in order for them to operate successfully. The Commission is keen to explore how supported decision-making arrangements could provide enough certainty to third parties in financial transactions, such as banks.

Question 20 Should 'supporter' or 'co-decision-maker' arrangements apply to financial matters, or be limited to personal decision making?

SAFEGUARDS AGAINST ABUSE

[7.113]–[7.116]

Because support arrangements may be created by personal agreement, they are not subject to the same level of scrutiny as VCAT appointments. The Commission proposes some safeguards to ensure that support mechanisms do not facilitate the abuse, neglect or exploitation of people with impaired capacity.

The Public Advocate

If the Public Advocate undertakes a role to train and monitor support arrangements, this might include:

- overseeing the creation of supported and co-decision-making agreements
- providing training for people who are appointed as supporters or co-decision makers
- investigating allegations of abuse or misuse of the role of supporter and co-decision maker
- providing advice and guidance to supporters and co-decision makers as necessary
- conducting regular reviews of how supported and co-decision-making arrangements are going.

New accountability mechanisms

In Chapter 19, we consider accountability mechanisms for substitute decision makers. In that chapter, we discuss a 'register' for enduring powers. That register could also allow for registration of supported and co-decision-making agreements. 'Monitors' could also be appointed to oversee the conduct of supporters and co-decision makers.

Question 21 Do you agree with the suggested training and monitoring roles for the Public Advocate? Are there any other functions the Public Advocate should perform in relation to supporters?

Question 22 What safeguards do you think are necessary to protect supported people from abuse?

PART 4: PERSONAL APPOINTMENTS

CHAPTER 8: PERSONAL APPOINTMENTS

ACTIVATION OF ENDURING POWERS

[8.93]–[8.99]

Current law enables an enduring power of attorney (financial) to be activated immediately upon signing. In contrast, an enduring guardian and an enduring power of attorney (medical treatment) can only be activated when the person who granted the power has lost capacity. There is no independent assessment to determine if a person has lost capacity. This means that, in effect, the attorney or enduring guardian determines when their powers come into effect.

There are two ways to achieve consistency between the three types of enduring powers. The first option is for the law to change so that all types of enduring powers can only be activated at the time the person who made the appointment becomes incapable. This would involve removing the current ability for an enduring power of attorney (financial) to become operative immediately upon signing. The second option is to allow all enduring powers to be activated before the person making the appointment becomes incapable.

Question 23 Should all enduring powers be activated at the same time? If so, when should this occur?

SUCCESSION PLANNING FOR PARENTS OF ADULT CHILDREN WITH IMPAIRED DECISION-MAKING CAPACITY

[8.100]–[8.104]

There is currently no effective way for parents of adult children with disabilities to express their wishes about who should care for their children when they get older and are no longer able to do so.

The Commission is interested in exploring ways that the law could provide a mechanism for parents in this situation to express their wishes and preferences. One possibility would be to allow the parents of adult children with disabilities to register a formal record of whom they think should be appointed as a guardian or administrator, if this is required, after their death. There could be a requirement for VCAT to consider these wishes when making an appointment in the future. The Commission is interested in exploring how such a document might be registered or otherwise brought to the attention of VCAT or the Public Advocate.

Question 24 Should parents and carers of children with disabilities be able to file a document with VCAT that states their wishes about future guardianship or administration arrangements?

Question 25 Should these wishes be a factor VCAT is required to consider when it appoints a substitute decision maker or supporter?

STREAMLINING EXISTING PERSONAL APPOINTMENTS

[8.133]–[8.139]

In Chapter 6, the Commission discusses how to improve awareness and increase the use of personal appointments through education and the use of more user-friendly laws. The Commission's major option of streamlining legislation was also put forward by the Victorian Parliament Law Reform Committee. If legislation is streamlined, this will have an impact on the types and number of appointments. The following options for reform address that issue.

Option A: Reduce enduring appointment types from three to two

This could be done by removing the option of appointing an agent under the *Medical Treatment Act 1988* (Vic). Instead, an agent's powers could be included in the range of powers available to an enduring guardian. This would allow the person making the appointment to choose if they wish the enduring guardian to have the power to refuse medical treatment on their behalf.

Option B: One type of appointment with a range of available powers

A range of decision-making powers including financial, personal and medical powers could be included in that one appointment. The person making the appointment could still have the option of making more than one personal appointment to deal with different types of decision making.

Question 26 Should the number of enduring appointments be reduced from three to two by removing the option of appointing an agent under the *Medical Treatment Act 1988* (Vic) and by requiring people to use an enduring guardianship appointment for medical treatment matters?

Question 27 Should there only be one type of appointment with a range of possible powers?

REGISTRATION

[8.140]–[8.144]

The Commission proposes that there be a register of personal appointments in order to establish whether they exist or are current. This reform would require enduring powers be registered online. Registration could occur at the time the appointment is made or when the instrument is activated.

Question 28 Should an online registration system be created for enduring powers?

Question 29 Which organisation should hold the register?

Question 30 Should registration be voluntary or compulsory?

Question 31 If registration is compulsory, what effect should this have on the validity of unregistered appointments?

Question 32 When is the best time for registration to occur?

Question 33 Who should have access to the register? What safeguards could be put in place to protect an individual's privacy while allowing appropriate people to access it?

NOTIFICATION TO INTERESTED PARTIES WHEN POWER OF ATTORNEY IS ACTIVATED

[8.145]–[8.149]

This reform proposal provides that a range of people must be notified when the appointee intends to activate an enduring power. The proposal aims to provide a safeguard against attorneys who abuse their powers.

Our proposal is that the list of people who must be notified could include:

- the donor of the power, where practicable—for example, this may not be practicable when the donor is in a coma
- a public body or bodies such as the Public Advocate and State Trustees
- a number of people nominated by the donor of the power.

Question 34 Should it be necessary to notify a public authority and/or various other people when a power of attorney is activated?

Question 35 Should a donor be able to specify that certain people should be notified when a power of attorney is activated? Who should be notified and why?

Question 36 How might notification work in a situation where a person's capacity is fluctuating?

Question 37 Should a donor also be able to specify that people/bodies should not be notified when a power of attorney is activated?

CHAPTER 9: DOCUMENTING WISHES ABOUT YOUR FUTURE

Instructional directives are written instructions about decisions that a person wants made in the future if particular circumstances arise and the person is no longer able to make their own decisions. The Commission proposes a number of reforms to overcome the uncertainty about the legal status of instructional directives and the extent to which decision makers should consider them when making decisions.

The Commission believes that legislation could provide people with clear choices that enable them to choose which type of instructional directive suits them best.

INSTRUCTIONAL MEDICAL DIRECTIVES

[9.79]–[9.86]

The legal effect of instructional directives about medical treatment is uncertain. The Commission presents the following options.

Option A: No change

This option would retain the current refusal of treatment certificate scheme that is available under the *Medical Treatment Act 1988* (Vic) and any existing right to a common law advance directive.

Option B: Broaden and clarify the statutory right to make instructional medical directives to provide people with increased certainty that their instructions will be followed

All the rules, formal requirements and the circumstances in which they may and may not be made could be set out in an Act.

If this option was adopted, the current refusal of treatment certificate scheme under the Medical Treatment Act could be removed. Legislation could provide for a broader range of binding instructional directives about medical care, which could do any or all of the following:

- allow refusal for future as well as current conditions
- allow advance consent as well as advance refusal
- remove the requirement that exists under the Medical Treatment Act that the person making the certificate must receive information about the nature of the condition.

This option could expressly remove any existing common law right to make advance directives. Alternatively, they could be retained as a safety net for situations not contemplated by statute.

Question 38 Do you think that the law concerning instructional medical directives should be set out in legislation?

LIFESTYLE INSTRUCTIONAL DIRECTIVES

[9.87]

There was some support for extending the scope of instructional directives to encompass wishes about welfare or lifestyle matters as well as medical decision making. Some instructional directives about lifestyle matters will be unenforceable. For example, if the instructional directive specifies that the person wishes to live in a particular retirement village, but their financial circumstances are insufficient to fulfil this wish.

Question 39 Do you think it should be possible to make statutory instructional directives about things other than medical treatment?

Question 40 What types of things should it be possible to include in an instructional directive?

HYBRID DIRECTIVES

[9.88]–[9.99]

Hybrid directives allow individuals to appoint a personal decision maker and provide an instructional directive at the same time. Current law allows people to provide instructions or wishes when appointing an enduring guardian or an enduring attorney (financial), but it does not indicate whether personally appointed decision makers are bound by any of those instructions.

The Commission's options aim to provide more guidance about the enforceability of instructions contained in personal appointments.

There are three options for reform.

Option A: No change

Option B: Introduce a statutory requirement that personally appointed decision makers consider and provide reasons for departing from instructional directives

Option C: Introduce a statutory requirement that instructional directives made as part of a hybrid directive are binding on personally appointed decision makers, but are displaceable in certain circumstances

Question 41 Should the wishes expressed in a document making a personal appointment be binding, or should they merely be matters that the personally appointed decision maker must consider?

Question 42 If the wishes are merely one of the matters that must consider, should that person be required to provide written reasons for departing from them?

Question 43 If the wishes are binding upon the personally appointed decision maker, should it be possible to override them in some circumstances? Do you think VCAT should perform this role and (if so) in what circumstances?

Question 44 Should the same rules apply to both enduring guardians and enduring attorneys (financial)? If not, in what circumstances should they differ?

Question 45 Should there be sanctions for overriding an instructional directive in a way that does not comply with the law? What should these sanctions be?

REGISTRATION OF ADVANCE DIRECTIVES

[9.100]–[9.101]

The Commission suggests that if a registration scheme is introduced as proposed in Chapter 8, it should apply to both advance directives and enduring powers.

Question 46 Should there be an electronic registration system for advance directives?

Question 47 Should registration extend to medical and lifestyle instructional directives?

Question 48 Should registration be voluntary or compulsory?

Question 49 Are there issues that arise in relation to the registration of advance directives that differ from those that are relevant when considering the registration of personal appointments?

PART 5: VCAT APPOINTMENTS

CHAPTER 10: VCAT APPOINTMENTS AND WHO THEY ARE FOR

CRITERIA FOR APPOINTMENT

[10.115]–[10.124]

The criteria for the appointment of a guardian are set out in section 22 of the G&A Act. Section 46 describes the grounds for appointing an administrator. In both instances, there is a three-part test. Before making an appointment, VCAT must be satisfied that a person:

- has a disability
- is unable, by reason of the disability, to make reasonable judgments (either about all or any of the matters relating to their personal circumstances or estate)
- is in need of a guardian or administrator.

The Commission proposes a range of possible options for the criteria to appoint a guardian or administrator.

Option A: Retain current entry criteria

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

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

This option would remove the first part of the existing test but would provide that a person's lack of capacity to make decisions must be caused by a disability. This option removes the perception that disability by itself is a relevant factor in determining the need to appoint a guardian or administrator.

Option C: Remove disability from the criteria altogether

This option would retain the requirements that a person is unable to make reasonable judgments (or some similar concept involving incapacity), regardless of the cause of that inability, and has a need for a guardian or administrator.

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

UNDERSTANDING AND ASSESSING CAPACITY

[10.125]–[10.142]

Two important questions arise when considering incapacity. First, what degree of incapacity is required before VCAT may appoint a guardian or an administrator for a person and, secondly, how should incapacity be assessed? The Commission has developed options for dealing with these two important questions.

Options A and B are not mutually exclusive. Both of them could be included in new laws.

Option A: Provide legislative capacity principles

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

- a declaration of the presumption of capacity
- a recognition that incapacity is sometimes time-specific and decision-specific and will fluctuate over time for many people
- incapacity should not be assumed based on a person's appearance
- the fact that an adult makes a decision that others consider to be unwise does not necessarily mean they lack capacity
- a person should not be treated as unable to make a decision if it is possible for them to make that decision with appropriate support.

Option B: Provide a legislative definition of incapacity

The definition in section 3(1) of the United Kingdom's *Mental Capacity Act 2005* merits serious consideration. It provides that:

> *a person is unable to make a decision for himself if he is unable*
>
> *a) to understand the information relevant to the decision*
>
> *b) to retain that information*
>
> *c) to use or weigh that information as part of the process of making the decision, or*
>
> *d) to communicate his decision in some way (whether by talking, using sign language or any other means).*

Option C: No change

One of the possible benefits of this approach is that it allows great flexibility. It recognises that the factors that are relevant when assessing incapacity will vary from one situation to the next.

Q

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

ASSESSING THE NEED FOR A GUARDIAN OR ADMINISTRATOR

[10.143]–[10.158]

The G&A Act provides that VCAT must be satisfied that a person needs a guardian or administrator before it can make an appointment. This practice has led to the suggestion that the current regime is unnecessarily crisis-driven and does not encourage effective advance planning for people with seriously impaired decision-making capacity who might need a guardian or administrator at some time.

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

Option A: Remove the criterion of need

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

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

This option would require need for a guardian or administrator to arise because decisions have to be made either now or in the reasonably anticipated future. As with Option A, it is proposed that this broader concept of need would only apply where the tribunal is satisfied that it is unlikely that the person will achieve capacity with support or regain it.

Option C: No change

This option retains the existing practice that there must be a demonstrated need for a substitute decision maker before a guardian or administrator will be appointed.

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

CHAPTER 11: AGE

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

[11.57]–[11.72]

There is a gap between guardianship and child protection laws for young people who might need a guardian or an administrator.

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

A guardianship order under the *Children, Youth and Families Act 2005* (Vic), which provides guardianship powers to someone other than a parent, is generally unavailable once a person has turned 17. An order made before the young person's 17th birthday may remain in force until the person has turned 18.

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

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

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

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

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

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

CHAPTER 12: THE DISTINCTION BETWEEN GUARDIANSHIP AND ADMINISTRATION

DISTINCTION BETWEEN GUARDIANSHIP AND ADMINISTRATION

[12.58]–[12.91]

The law currently provides for two types of VCAT appointed substitute decision makers: guardians, who make personal and lifestyle decisions for the represented person, and administrators, who make financial decisions. The major reason for including two categories of decision makers is the different skills required of guardians and administrators. A person can be appointed to perform the role of both guardian and administrator. This is known as a dual appointment.

In daily life, decisions about personal/lifestyle matters and financial decisions do not fall into neat categories. This can sometimes confuse decision makers. The reform options aim to address the lack of clarity about who should make certain decisions.

Option A: Retain the distinction between guardianship and administration, and

- **i. Allow dual appointments for all guardians and administrators, or**
- **ii. Allow dual appointments for private administrators and guardians only, or**
- **iii. Allow dual appointments for public bodies (eg State Trustees and the Public Advocate) only, or**
- **iv. Do not allow dual appointments, or**
- **v. Only allow dual appointments**

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

Option B could result in the appointment of a single decision maker with a range of powers or the appointment of more than one decision maker with specific powers. VCAT could determine which approach is appropriate in the circumstances.

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

MANAGING OVERLAP BETWEEN GUARDIANS AND ADMINISTRATORS

[12.92]–[12.93]

If the distinction between the decisions that guardians and administrators can make is maintained, the Commission suggests possible new ways to manage the overlap between their powers:

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

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

WHO CAN BE A GUARDIAN AND ADMINISTRATOR

[12.94]–[12.100]

Some of our consultations revealed that VCAT tends to appoint the Public Advocate as guardian and State Trustees as administrator in cases of family conflict where there is dispute about the most suitable family member to appoint.

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

CHAPTER 13: POWERS OF GUARDIANS AND ADMINISTRATORS

PLENARY ORDERS

[13.92]–[13.127]

The scope of the powers of a 'plenary guardian' are described in the G&A Act as 'all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child'.

Unlike guardianship orders, 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 areas, or to order that an administrator have the full range of powers available. In effect, this is very similar to the plenary or limited orders used in relation to guardianship.

The Commission has developed a range options to address these inconsistencies and provide greater clarity about the scope of powers of guardians and administrators. Not all of the options are mutually exclusive—for instance, both B and C could be adopted.

Option A: Abolish plenary guardianship orders and

i. List available decision-making powers in the legislation

ii. Specify restrictions on decision-making powers in the legislation

iii. Include non-exhaustive list of decision-making powers and restrictions in the legislation (preferred)

Option B: Retain plenary guardianship orders but provide a clearer explanation of the available decision-making powers

Option C: Introduce plenary and limited administration orders

Option D: No change—retain plenary guardianship orders in their current form

Q

Question 58 Do you agree with the Commission's proposal (Option A (iii)) that new guardianship laws should contain comprehensive lists of the decision-making powers that can and cannot be given to a guardian and an administrator?

Question 59 If yes to Q 58, what decisions should a guardian be able and unable to make?

Question 60 If yes to Q 58, what decisions should an administrator be able and unable to make?

Question 61 Do you believe that any of the other options are a better way of dealing with the decision-making powers that a guardian or an administrator could or could not be given?

CLARIFYING THE POWERS OF GUARDIANS AND ADMINISTRATORS [13.128]–[13.130]

Some submissions suggested a need to give additional powers to substitute decision makers or to clarify existing powers so that particular decisions are implemented effectively.

Q

Question 62 Should it be possible for VCAT to order that a guardian or an administrator have the power to make decisions about any of the following matters:

- whether a represented person should continue to hold a driver licence
- a will by the represented person
- organ donation by the represented person?

Question 63 Should new guardianship legislation extend or clarify the provisions in section 50A of the *Guardianship and Administration Act 1986* (Vic) which permit an administrator to make small gifts on behalf of a represented person in limited circumstances?

Question 64 Should new guardianship legislation alter or clarify the anti-ademption provisions in section 53 of the *Guardianship and Administration Act 1986* (Vic)?

INCONSISTENCIES BETWEEN THE POWERS GRANTED TO STATE TRUSTEES AS COMPARED TO THOSE GRANTED TO OTHER ADMINISTRATORS

[13.58]–[13.63]

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

Question 65 Should new guardianship legislation enable State Trustees to be given the same powers as those of other administrators?

LITIGATION GUARDIAN

[13.131]–[13.132]

A litigation guardian is an adult through whom a person under 18 or a person with a disability acts in court. 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. A litigation guardian usually has to employ a lawyer to conduct the proceeding. Many people are reluctant to act as litigation guardians because they may be personally liable for costs. A litigation guardian is only appointed for civil matters.

The current lack of clarity about who will conduct litigation on behalf of a person who is unable to do so is highly undesirable because it limits a represented person's access to justice.

Some possible ways to deal with this issue are:

- to clarify if and when the costs of litigation conducted on behalf of a represented person by an administrator may be awarded against the administrator personally
- to clarify what type of legal proceedings are covered by section 58B(2)(l) of the G&A Act and the obligations of administrators to pursue a person's legal interests
- to clarify if and when a guardian can conduct litigation on behalf of a represented person
- to clarify if the Public Advocate's consent is required before she can be directed to conduct litigation on behalf of an adult who is incapable of doing so themselves
- to consider if a specialised agency should be established to act as a litigation guardian when one is required.

Q **Question 66** Who should conduct litigation on behalf of a represented person?

Question 67 Should it be possible for a court or tribunal to order that an administrator or guardian who conducts litigation on behalf of a represented person is personally liable for some or all of the costs of that litigation?

ENFORCEMENT POWERS AGAINST A REPRESENTED PERSON

[13.133]–[13.139]

VCAT can give a guardian or another specified person the power to use some force against a represented person to enforce a decision made by the guardian.

The Commission considers whether new safeguards should operate in relation to this power. A new requirement might be that VCAT must be satisfied that the measure is:

- solely intended to promote the personal and social wellbeing of the person
- reasonable and justified in the circumstances
- the least restrictive means reasonably available to achieve the purpose of the order.

Q **Question 68** Should new guardianship laws permit VCAT to authorise a guardian, or other person, to use some force to ensure that a represented person complies with the guardian's decisions?

Question 69 If yes to Q 68, do you agree with the additional safeguards proposed by the Commission?

PART 6: STATUTORY APPOINTMENTS

CHAPTER 14: AUTOMATIC APPOINTMENTS—THE PERSON RESPONSIBLE

The G&A Act provides for the automatic appointment of a substitute decision maker—called a 'person responsible'—to consent to medical and dental decisions for a person who is incapable of doing so. No VCAT order is required for these appointments. The G&A Act sets out hierarchy of people who can become a person responsible.

CHOICE OF APPOINTMENT

[14.32]–[14.36]

These options consider whether changes should be made to the current legislated hierarchy of substitute decision makers.

Option A: Amend the person responsible hierarchy to allow more appropriate automatic appointments to be made, including identifying people most suited to the role and taking into account cultural relevance

This might include, for example, allowing multiple appointments in cultures where families rather than individuals might make decisions. It might also include providing a place for community elders in cultures where they would be more likely to be the person respected as the appropriate decision maker.

In Alberta in Canada, the legislation sets out criteria that a third party, such as a health care provider, applies when choosing which person on the automatic appointment list is the best one for the role.

Option B: No change, but clarify and strengthen provisions around the roles and responsibilities of the person responsible (preferred)

The automatic appointee could be required to make the decision that the person themselves would have made had they had the capacity to do so (substituted judgment).

» Also see the discussion about substituted judgment in Chapter 5 [5.101]–[5.122] and Chapter 17 [17.106]–[17.116].

Question 70 Do you agree with the Commission's proposal (Option B) that the hierarchy for automatic appointees, as currently set out in section 37 of the *Guardianship and Administration Act 1986* (Vic), should be retained?

Question 71 What alterations (if any) should be made to the list?

Question 72 Do you think new guardianship legislation should require an automatic appointee to take a substituted judgment approach to decision making?

SCRUTINY OF APPOINTEES

[14.37]–[14.42]

These options address the issue of the arguable lack of scrutiny of automatic appointments.

Option A: No change

Currently the law provides that a matter can be taken to VCAT as a guardianship application, if any interested party feels that an automatic appointee is not acting in the best interests of the patient. Scrutiny of appointments could be further strengthened by the Commission's proposal to clarify and strengthen the roles and responsibilities of the person responsible.

Option B: Introduce more scrutiny of automatic appointments

This could be done by introducing some form of external review, perhaps by the Public Advocate, of how those appointments are working where a person is undertaking the role in an ongoing way. Another possibility is to require third parties to notify the Public Advocate if they believe that a person responsible is not acting in the best interests of the person they are representing.

Question 73 Do you think that new guardianship legislation should contain additional measures for scrutinising the decisions made by automatic appointees? If so, what should those measures be?

CHAPTER 15: INFORMAL ASSISTANCE—ADMISSION INTO CARE

CONSENT FOR RESIDENTIAL CARE ARRANGEMENTS

[15.79]–[15.103]

The following options consider ways of providing protection for individuals who do not have the capacity to make their own decisions about admission to, and in some cases confinement within, certain residential care facilities.

Option A: No change—relying on informal arrangements in most cases

At present, most decisions of this nature are made informally and without external scrutiny.

Option B: Use existing guardianship mechanism

Option C: Introduce a new scheme of safeguards similar to the Deprivation of Liberty Safeguards scheme in England and Wales

These safeguards seek to ensure that individuals who are or who may be deprived of their liberty in a hospital or care home are identified and the decision is externally reviewed and authorised, even if the person is not actively seeking liberty. Clinicians perform the assessment process and effectively authorise a person's detention when the Deprivation of Liberty Safeguards are met.

Option D: Extend protection through other legislation

The *Disability Act 2006* (Vic) currently provides some procedural safeguards around the admission of a person with an intellectual disability to a residential institution, including the right to have the decision reviewed by VCAT. This option might see those provisions extended to cover people with other disabilities being admitted to, or detained in, other residential services.

Option E: Expand automatic appointment provisions to cover admission into some residential care facilities with additional safeguards

Possible additional safeguards proposed by the Commission include:

- medical certification that a person lacks capacity and is at risk of harm
- notifying the Public Advocate when a decision is made about accommodation
- random audits of decisions by the Public Advocate requiring the automatic appointee to reconsider their decision regularly
- a right to challenge decisions of automatic appointees before VCAT
- automatic review of decisions by VCAT on a regular basis
- guidance in legislation about the issues an automatic appointee is required to consider before making a decision
- not allowing an automatic appointee to make a decision if the person with a disability actively refuses or resists admission or if other legislation applies
- restricting the types of residential facilities an automatic appointee can consent to.

Question 74 Do you think there should be specific laws about people being admitted to and remaining in residential care facilities in situations where they do not have capacity to consent to those living arrangements but are not objecting to them?

Question 75 If yes, do you agree with the Commission's Option E that new guardianship legislation should extend the automatic appointments scheme to permit the 'person responsible' to authorise living arrangements in a residential care facility in these circumstances if there are additional safeguards?

Question 76 If the automatic appointment scheme is expanded to cover these circumstances, do you agree with any or all of the possible safeguards suggested by the Commission? Are there any other safeguards that should be introduced?

Question 77 If the automatic appointment scheme is expanded to cover these circumstances, should the hierarchy of automatic appointees be changed?

Question 78 If the automatic appointment scheme is expanded to cover these circumstances, what residential facilities should fall within the scheme?

CHAPTER 16: MEDICAL TREATMENT

DEFINITIONS OF MEDICAL TREATMENT

[16.98]–[16.100]

These options address concerns that the definition of 'medical treatment' in the G&A Act is too narrow.

Option A: No change

Option B: Broaden the definition of medical treatment to include a wider range of procedures

These may include the prescription and administration of medication, as is the case in New South Wales, and it may also include a range of paramedical and complementary medical procedures.

Question 79 Do you think that the definition of medical treatment should be broadened?

Question 80 Should a broader definition include the prescription and administration of pharmaceutical drugs?

Question 81 Should it include paramedical procedures, such as physiotherapy? Should it include complementary health procedures, such as naturopathy and Chinese medicines? What else should it include?

ENABLING MORE MINOR MEDICAL PROCEDURES TO BE UNDERTAKEN WITHOUT CONSENT

[16.101]–[16.108]

These options explore whether a medical practitioner should be required to obtain formal consent from the patient or the person responsible for minor and uncontroversial medical procedures.

Option A: No change

This option would retain the current requirement that a medical practitioner must obtain the person responsible's consent to conduct a medical procedure, no matter how minor, if the patient is unable to consent themselves. If the medical practitioner wishes to perform the procedure without the person responsible's consent or if they are unable to contact the person responsible, they can only do so if they notify the Public Advocate under section 42K of the G&A Act.

Option B: Create distinctions between minor and other medical procedures and allow minor medical procedures to be undertaken without consent if certain procedural conditions are met, but require formal consent for other medical procedures

Procedural safeguards for minor medical treatment could include notification to VCAT, obtaining a second opinion, or noting the decision to perform the procedure without consent and the reasons for doing this in the patient's file.

Q

Question 82 Do you think a distinction should be made between minor and other medical procedures when a person is unable to consent? If yes, how should the distinction be made between minor and other procedures?

Question 83 Do you agree that minor medical procedures should not require substituted consent if certain safeguards are met? Do you agree with the safeguards suggested?

Question 84 Do you believe the law should retain the requirement that a medical or dental practitioner must notify the Public Advocate where a person responsible does not consent or cannot be identified or contacted and the practitioner still wishes to carry out the procedure? If not, are there any other safeguards that might be more appropriate in these circumstances?

MEDICAL RESEARCH

[16.109]–[16.112]

These options address the issue of substitute consent for participation in medical research trials.

The current law involves a four-step process for consent to medical research that involves:

1. obtaining ethics committee approval, and
2. ascertaining if the patient is likely to regain capacity in a reasonable time, and
3. obtaining consent from the person responsible, or
4. seeking procedural consent.

While substitute consent decisions about medical treatment must be made in the patient's best interests, the G&A Act requires that decisions to consent to medical research must `not be contrary to' the patient's best interests.

Option A: Retain current medical research provisions but simplify the legislation

The existing provisions in division 6 of part 4A of the G&A Act are complex. Clearer drafting might promote greater accessibility and increased understanding.

Option B: Have the same process for consent to medical research as medical treatment

This would mean that all medical research would need to be approved by the person responsible, or the Public Advocate would need to be notified.

We note that if the Commission's option to create a distinction between minor and other medical treatment is adopted, it would mean that medical research that is a minor medical procedure could be undertaken without consent where certain procedural safeguards are met. Medical research that is a more major medical procedure would require the consent of the person responsible or notification of the Public Advocate.

Question 85 Do you believe the process for obtaining substituted consent to participation in medical research procedures should be the same as the process for obtaining substituted consent for medical treatment?

Question 86 If the process is the same, what factors should the person responsible be required to consider before giving substituted consent to participation in a medical research procedure?

PART 7: RESPONSIBILITY AND ACCOUNTABILITY UNDER THE LAW

CHAPTER 17: RESPONSIBILITIES

WISHES

[17.100]–[17.101]

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

» Also see Chapter 5 [5.101]–[5.122].

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

‘RISKY’ AND ‘BAD’ DECISION MAKING

[17.102]–[17.105]

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

» Also see Chapter 5 [5.101]–[5.122].

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

REFORM OF DECISION-MAKING PRINCIPLES

[17.121]–[17.136]

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

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

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

The Commission has developed three options for decision-making principles. These are detailed options. We recommend that you read the relevant pages of the consultation paper if you are interested in this area.

Option A: Retain ‘best interests’

[17.117]–[17.120]

Promoting the ‘best interests’ of the person is the core decision-making principle of current guardianship laws. There appears to be significant support for this principle, but also some criticism that the law needs to provide more guidance about what it means.

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

This option adopts promotion of the ‘personal and social wellbeing of the person’ as the overriding consideration for decision makers. Some people have argued that the term ‘best interests’ is paternalistic.

This option provides guidance about how a person’s wishes should be ascertained and implemented, and considers other considerations decision makers should balance, one of which is the principle of substituted judgment.

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

[17.106]–[17.116]

» Also see Chapter 5 [5.101]–[5.122].

Substituted judgment—making decisions the person would have made if they were able to do so—is an alternative to the notion of best interests. The focus of substituted judgment is always on the actual or assumed wishes of the represented person, rather than the protective best interests approach. Substituted judgment is a particularly useful concept where a person has made decisions for themselves for most of their life and it is only later in life, perhaps because of a brain injury or dementia, that the person needs a substitute decision maker.

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

Q

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

Question 91 Is substituted judgment relevant to supported decision making?

CONFLICTS OF INTEREST AND A DUTY OF GOOD FAITH

[17.138]–[17.140]

The United Nations' *Convention on the Rights of Persons with Disabilities* requires that support provided in the exercise of legal capacity be 'free of conflict of interest or undue influence'.

To underline the importance of this duty, and promote awareness, the Commission proposes that new laws include an explicit duty for substitute decision makers to:

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

Q

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

COURTESY AND RESPECT

[17.143]–[17.144]

While acting with courtesy and respect would seem to be an implied requirement for guardians and administrators, the Commission believes there is value in including a requirement that guardians and administrators at all times treat the represented person and important people in their life with courtesy and respect.

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

FINANCIAL DECISION MAKING

[17.145]–[17.148]

In considering the best interests of the represented person, administrators are sometimes caught between conflicting obligations of ensuring prudent financial management and following the wishes of the person as far as possible.

The Commission's preferred approach to substitute decision making—the principle of substituted judgment—would require financial decision makers to attempt, as far as possible, to make the decision they believe the person themselves would have made if they had the capacity to do so.

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

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

MEDICAL DECISION MAKING

[17.154]–[17.159]

Although guardians, administrators and the person responsible must all act in the person's best interests, the G&A Act provides separate guidance about what this means when making decisions about medical treatment.

The Commission is of the initial view that a universal set of principles should apply to personal, financial and medical decision making. A unified set of principles recognises that regardless of the type of decision, the decision-making process and outcome should seek to uphold the rights, dignity and autonomy of the person, and promote their wellbeing.

The Commission acknowledges that Options A, B and C of the reform proposals for decision-making principles pitch decision-making principles at a relatively high level of generality, and this may prove challenging to ordinary members of the community who try to apply them to the specific context of medical decisions.

» See 'Reform of Decision-Making Principles' on page 41 of this paper.

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

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

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

[18.36]–[18.43]

These options address two key issues:

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

The Commission believes that these reforms should extend to all substitute decision makers appointed under guardianship laws.

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

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

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

Note: Options regarding information used in VCAT applications are contained in Chapter 21.

DISCLOSURE OF CONFIDENTIAL INFORMATION

[18.44]–[18.46]

The Commission believes that substitute decision makers should be required to respect the confidentiality of information they obtain about a represented person. Disclosure should occur only if it is reasonably necessary to provide that information to a third person in order to perform the functions of a substitute decision maker, or it is required or permitted by law.

The Commission notes that section 101 of the *Guardianship Act 1988* (NSW) is a useful precedent and suggests that new Victorian guardianship legislation contain a similar provision that would apply to all substitute decision makers. The New South Wales provision greatly restricts the use that a guardian or administrator may make of information they collect in those roles.

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

CHAPTER 19: ACCOUNTABILITY AND REVIEW OF SUBSTITUTE DECISION MAKING

NEW ACCOUNTABILITY MECHANISMS FOR SUBSTITUTE DECISION MAKERS

[19.41]–[19.54]

In order to promote accountability, administrators are usually required to lodge a financial statement and plan with VCAT soon after being appointed, and provide an annual Account by Administrator to VCAT, which is examined by State Trustees.

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

The Commission's reform options aim to strengthen the accountability responsibilities of all decision makers, promoting consistency whenever possible.

These options are not all mutually exclusive.

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

Option B: Introduce reporting requirements for private guardians and attorneys

Q

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

Option C: Introduce annual declarations of compliance with responsibilities

Q

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

Question 101 Who should receive and monitor the declarations?

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

Q

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

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

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

Question 104 Who should carry out these random audits?

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

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

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

» Also see Chapter 20 [20.75]–[20.76].

The current law provides limited criminal penalties for substitute decision makers who contravene the provisions in the G&A Act. Guardianship laws in Queensland have more detailed penalty provisions. They include penalties for guardians and administrators who fail to act with reasonable diligence and within the terms of the order, and penalties for administrators who enter into transactions involving a conflict of interest, fail to keep proper records, and do not keep their property separate from that of the represented person.

The Commission also suggests that civil penalties could be introduced, with the Public Advocate having the power to take civil penalty proceedings. Civil penalties differ from criminal penalties in two main ways: they have a lower standard of proof than criminal penalties, and there is no finding of criminal culpability.

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

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

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

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

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

MERITS REVIEW OF DECISIONS OF GUARDIANS AND ADMINISTRATORS

[19.78]–[19.90]

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

The reform options explore the possibility of introducing merits review.

Option A: No change—no merits review

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

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

This option would strike a balance between increased accountability for public bodies, without intruding too far into decisions made by private guardians, enduring guardians, private administrators and attorneys.

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

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

STANDING TO SEEK REVIEW

[19.91]–[19.94]

'Standing' is the term used to refer to a person who is permitted to commence legal proceedings. In Victoria, a person's ability to make an application under the G&A Act varies depending on the type of application made to VCAT.

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

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

WHAT IS A REVIEWABLE DECISION?

[19.95]–[19.100]

The Commission is keen to explore what types of decisions could be subject to merits review. Guardianship laws in Victoria could adopt a similar approach to New South Wales, allowing for review of decisions made by guardians and administrators in connection with the exercise of their powers under the G&A Act.

Question 113 What should constitute a 'reviewable decision'?

TRIVIAL, VEXATIOUS OR REPEATED APPLICATIONS

[19.101]–[19.102]

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

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

REVIEW OF FINANCIAL DECISIONS

[19.105]–[19.109]

Some people expressed concern that merits review might upset the finality and certainty of financial transactions affecting both represented people and third parties.

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

FORUM FOR REVIEW

[19.110]–[19.114]

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

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

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

TRAINING REQUIREMENTS FOR GUARDIANS AND ADMINISTRATORS

[19.115]–[19.120]

There are currently no compulsory training requirements for private guardians and administrators. VCAT and the Public Advocate provides optional information sessions. Private guardians and administrators receive information booklets upon appointment. These options explore whether there is a need for increased training for guardians and administrators in order to promote accountability and discourage abuse of power.

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

Option B: VCAT can make appointment conditional upon training requirements

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

PART 8: IMPLEMENTING AND REGULATING NEW LAWS

CHAPTER 20: THE PUBLIC ADVOCATE

The Commission proposes that the Public Advocate have an expanded role in supervising the operation of and informing the community about substitute and supported decision making.

INVESTIGATION

[20.72]–[20.76]

The Public Advocate's investigatory role could be clarified and broadened beyond matters relating to guardianship and administration by providing it with the power to investigate:

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

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

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

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

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

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

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

PENALTIES

[20.75]–[20.76]

In Chapter 19 we discussed introducing civil penalties for all substitute decision makers who misuse or abuse their powers.

» Also see Chapter 19 [19.71]–[19.77].

The Commission suggests that the Public Advocate could be given the power to take civil penalty proceedings against people who are alleged to have breached guardianship legislation.

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

ADVOCACY

[20.77]–[20.78]

New guardianship legislation could clarify and strengthen the Public Advocate's advocacy role by empowering her to advocate for individuals with a disability who are at risk of abuse or harm, as well take for action to address the systemic disadvantages faced by people with disabilities. This advocacy may involve a range of activities, such as taking up matters on behalf of the person with the disability with relevant authorities or government departments, or providing support to person with a disability at important times.

It might be desirable to remove the Public Advocate's current function of supporting the establishment of community advocacy organisations because it appears to be redundant.

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

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

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

PUBLIC GUARDIANSHIP

[20.79]–[20.80]

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

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

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

PRIVATE GUARDIANSHIP

[20.81]–[20.82]

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

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

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

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

PERSONAL APPOINTMENTS

[20.83]–[20.85]

Personal appointments are those that are made by a person themselves rather than by VCAT.

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

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

- requiring appointees to notify the Public Advocate when the appointment is activated
- requiring appointees to submit regular declarations of compliance to the Public Advocate.

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

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

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

AUTOMATIC APPOINTMENTS

[20.86]–[20.87]

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

» Also see Chapter 14 [14.40]–[14.42].

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

SUPPORTED DECISION-MAKING ARRANGEMENTS

[20.88]–[20.92]

In Chapter 7, the Commission proposed a number of new roles for the Public Advocate in relation to supported decision making. Please refer to the questions we asked earlier in this overview.

» Also see Chapter 7 [7.85]–[7.116].

REPORTING TO PARLIAMENT

[20.93]

New guardianship legislation could require the Public Advocate to report annually to Parliament about her activities. This could promote both accountability and independence.

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

CHAPTER 21: VCAT

The Commission proposes changes to the way in which VCAT deals with guardianship matters in order to make it more accessible.

PREPARATION FOR HEARINGS

[21.129]–[21.130]

More active coordination and investigation of matters prior to hearings

[21.131]–[21.135]

The Commission proposes that the Guardianship List take a more active role in coordinating and investigating matters prior to hearings. VCAT's Guardianship List could adopt the New South Wales Guardianship Tribunal model of a coordination and investigation unit. This would require VCAT to:

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

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

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

REPRESENTATION OF THE PERSON WITH A DISABILITY

[21.136]–[21.143]

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

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

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

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

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

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

REQUIREMENT TO CONSIDER ALTERNATIVES TO GUARDIANSHIP AND ADMINISTRATION

[21.144]–[21.148]

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

Option A: No change

VCAT is currently required to consider whether there are less restrictive alternatives to guardianship and administration before it can make either of those appointments.

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

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

DURATION OF ORDERS

[21.149]–[21.157]

The G&A Act does not impose any limits on the duration of guardianship and administration orders. In other jurisdictions, it is unusual to allow orders of unlimited duration. There are two possible approaches to this.

Option A: No change

This would mean that VCAT could continue to make orders of unlimited duration. The G&A Act provides that initial orders should be reviewed within 12 months and continuing orders at least once every three years, unless VCAT orders otherwise.

Option B: Restrict the duration of Guardianship List orders

The duration could be limited to three years. Orders could be reviewed if required, perhaps without any need for the parties to attend if they consented to this course.

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

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

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

PROVIDING INFORMATION TO VCAT TO DETERMINE THE NEED FOR A SUBSTITUTE DECISION MAKER

[21.158]–[21.164]

The following proposals concern access to information provided to VCAT for use when determining whether a person needs a guardian or administrator. The options for reform aim to facilitate the provision of information to VCAT, while also protecting the privacy of the proposed represented person.

Options A and B are not mutually exclusive. Both of them could be contained in new laws.

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

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

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

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

ACCESS TO VCAT FILES

[21.165]–[21.171]

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

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

Currently any person may inspect or obtain copies of the register of proceedings or files or documents lodged in a proceeding, except if otherwise directed or ordered by VCAT, or otherwise prohibited by the VCAT Act.

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

The right to inspect or copy files could be limited to the parties to any proceedings in the Guardianship List. VCAT could also be permitted to limit any party's access to materials in exceptional circumstances.

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

REHEARINGS

[21.172]–[21.176]

During consultations, some concern was expressed about the relatively short period—28 days—within which it is possible to apply for a rehearing of a Guardianship List matter, particularly because it appears that many people are unaware of their right to do so. The distinction between 'rehearings' and 'reassessments' also seems to be a source of some confusion. The Commission has identified three options for reform.

Option A: No change

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

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

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

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

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

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

REASSESSMENTS

[21.177]–[21.180]

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

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

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

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

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

ENFORCEMENT OF DECISIONS AGAINST THIRD PARTIES

[21.181]–[21.190]

To the extent that they are acting within the terms of a guardianship order, guardians' decisions have the same legal effect as if made by the represented person themselves had they capacity to do so.

Some people expressed concerns that guardians sometimes experience difficulty in having third parties accept their decision-making authority.

Two options merit consideration.

Option A: No change

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

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

This would involve introducing new provisions that would allow a guardian or administrator to apply to VCAT for an order that a third party comply with the guardian or administrator's decision.

In these situations, the third party could be liable for civil penalties if they fail to comply with the order. Orders would not be available to compel conduct of a third party that the represented person themselves would not have been able to compel.

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

SKILLS AND TRAINING—MULTI-MEMBER HEARINGS

[21.191]–[21.198]

The Commission wishes to explore whether multi-member panels should be re-introduced to allow people with a range of relevant skills to become the decision makers in VCAT Guardianship List matters.

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

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

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

FORMALITY OF HEARINGS

[21.199]–[21.201]

Responses to the information paper indicated a strong preference for informal VCAT hearings.

VCAT's President is currently investigating whether legislative reform to the VCAT Act might further guide the conduct of hearings, including a proposal to make 'applying therapeutic approaches to the administration of justice' an object in the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

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

[21.202]–[21.203]

ATTENDANCE OF THE PROPOSED REPRESENTED PERSON AT HEARINGS

Our consultations revealed significant concern that proposed represented people rarely attend hearings.

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

ACCESSIBILITY FOR THE INDIGENOUS COMMUNITY

[21.204]–[21.205]

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

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

ACCESSIBILITY FOR CULTURALLY AND LINGUISTICALLY DIVERSE GROUPS

[21.206]–[21.207]

The Commission is also keen to explore ways to improve accessibility of guardianship laws for culturally and linguistically diverse (CALD) communities. The growing number of people from CALD backgrounds, particularly among older people, means that the system will need to be linguistically accessible and culturally relevant in the future.

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

ACCESSIBILITY OF VCAT FOR REGIONAL VICTORIANS

[21.208]–[21.210]

The Commission observes that the ageing population in regional areas will put greater pressure on a system that is now centralised.

Responses to the information paper raised concerns about lack of appropriate venues in regional areas. The Commission notes that VCAT is currently considering reforms aimed at improving accessibility in regional areas.

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

PART 9: INTERACTION WITH OTHER LAWS

CHAPTER 22: *DISABILITY ACT 2006* (VIC)

EXPANDING THE COMPULSORY TREATMENT PROVISIONS IN THE DISABILITY ACT

[22.44]

The *Disability Act 2006* (Vic) provides for the use of restrictive interventions—chemical restraint, mechanical restraint and seclusion—and compulsory treatment in some circumstances. These provisions are overseen by the Senior Practitioner and VCAT. Compulsory treatment provisions only apply to people with an intellectual disability.

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

Q **Question 156** Do you agree with the Commission's previous recommendation that the compulsory treatment provisions in the *Disability Act 2006* (Vic) extend to people with a cognitive impairment other than intellectual disability?

» The Commission's previous recommendation to extend compulsory treatment provisions in the *Disability Act 2006* (Vic) is cited at [22.44].

CHAPTER 23: *MENTAL HEALTH ACT 1986* (VIC)

THE RELATIONSHIP BETWEEN GUARDIANSHIP AND MENTAL HEALTH LAWS

[23.69]–[23.77]

The *Mental Health Act 1986* (Vic) authorises health professionals to detain and treat some people with a mental illness in defined circumstances. While it is possible to appoint an attorney or an administrator to manage the financial affairs of a person with impaired decision-making capacity because of mental illness, it has been assumed that guardianship should not be used as a means of authorising non-consensual treatment or placing restrictions upon where a person with a mental illness lives, because these matters should only be dealt with under the Mental Health Act.

The Commission questions this assumption and proposes a number of possible options for reform about the relationship between guardianship and mental health laws.

Option A: No change

Under this option, the Mental Health Act would continue to be the sole source of authority to provide compulsory psychiatric treatment and to impose restrictions upon liberty by requiring a person to be a patient in a hospital or to live at a specific place in the community.

Option B: Fusion of guardianship and mental health laws

This option would bring about the complete fusion of mental health and guardianship laws. There would no longer be a Mental Heath Act. Guardianship legislation would become the sole legal mechanism under which medical treatment, hospital confinement and place of residence decisions would be made for all people with impaired decision-making capacity due to any disability.

Option C: Limited use of guardianship for non-consensual psychiatric treatment (preferred)

This option would allow guardianship to be used as a mechanism for authorising psychiatric treatment and place of residence decisions in some circumstances.

The Commission prefers Option C, but acknowledges that this proposal represents a marked change in the way psychiatric treatment and place of residence decisions are made for people with impaired capacity due to mental illness.

Question 157 Do you agree with the Commission's proposal (Option C) that it should be possible, in some circumstances, for guardianship to be used as a mechanism for authorising psychiatric treatment and place of residence decisions for a person who is unable to make their own decisions due to mental illness?

CHAPTER 24: *CRIMES (MENTAL IMPAIRMENT UNFITNESS TO BE TRIED) ACT 1997* (VIC)

[24.32]–[24.38]

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIUT Act) deals with situations where a person charged with a criminal offence is found unfit to stand trial or not guilty because of mental impairment.

The Commission does not believe that a guardian should have a special role in relation to people subject to the CMIUT Act. In many cases, a person under the CMIUT Act will retain capacity to make some decisions, while other decisions will be made under the provisions of the CMIUT Act.

The Commission believes that it might be desirable to provide people detained under the CMIUT Act with an advocate at particular times, including:

- at regular intervals during a period that a person is detained on a custodial supervision order
- during a special hearing under the CMIUT Act to assist the person in navigating the legal process
- during hearings such as major reviews of a supervision order, or applications to vary a custodial supervision order
- when decisions about accommodation placements after discharge are being made.

We suggest that this role could be given to the Public Advocate.

Question 158 Do you believe that an advocate should be made available to a person subject to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) at particular times?

Question 159 Do you believe that the Public Advocate should be given a formal role as an advocate for people involved in proceedings or detained under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)?

Call for submissions

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

WHAT IS A SUBMISSION?

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

WHAT IS MY SUBMISSION USED FOR?

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

HOW DO I MAKE A SUBMISSION?

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

Submissions can be made by:

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

ASSISTANCE

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

PUBLICATION OF SUBMISSIONS

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

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

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

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

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

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

CONFIDENTIALITY

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

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

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

ANONYMOUS SUBMISSIONS

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

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

SUBMISSION DEADLINE: **20 MAY 2011**

Glossary

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

ademption	When a person gives an item to someone in their will, but they no longer own the item when they die, the item is *adeemed* and the gift fails. For example, when a painting left to someone in a will is sold before the will is executed, the person would receive nothing.
administrator	A person appointed under the *Guardianship and Administration Act 1986* (Vic) to make financial and some legal decisions for a person who has a disability. VCAT determines the extent of the administrator's decision-making authority when making an appointment.
advance directive	A statement (usually written) in which a person sets out what they want to happen to them in particular circumstances in the future if they are unable to make a decision themselves. Advance directives are most commonly associated with medical decision making, but can be used in other contexts.
advocate	A person who speaks or acts on behalf of someone else. There are many different types of advocates, including people working in formal advocacy organisations, lawyers, family members and friends.
agent	A person who has been given medical power of attorney under the *Medical Treatment Act 1988* (Vic).
appointor	A person who appoints an enduring guardian under the *Guardianship and Administration Act 1986* (Vic).
attorney	A person appointed to make decisions for or on behalf of someone else. There are different types of attorneys, but all are appointed using a document called 'Power of Attorney'. The different types of attorneys are explained throughout the information paper.
best interests	A term often used to guide substitute decision making in guardianship laws. There is no simple definition of 'best interests'; it is a term used differently by different people in different contexts. It is usually linked to the idea of promoting a person's health, welfare and safety, but sometimes also includes respecting the person's wishes.
capacity	A person's ability to make their own decisions. It is used as a broad measure of cognitive ability. The term 'competence' is sometimes used with a similar meaning.
Charter	The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic). It aims to ensure that all Victorian public authorities act in ways that are consistent with human rights, and that all new laws are consistent with those rights.
Convention	The United Nations' *Convention on the Rights of Persons with Disabilities*. Australia is a signatory to this Convention, which seeks to promote and protect the rights and dignity of people with disabilities and to ensure their equality under the law.

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

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

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

ABBREVIATIONS

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