

“Strengths and tensions in the current guardianship system”

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- I would firstly like to acknowledge the traditional custodians of the land on which we meet and pay my respect to their elders past and present.
- The system of guardianship that we see today has its roots in a 25 year history. Most of you will know that the Guardianship and Administration Act, which gives the mandate for guardianship and the broader roles of the Public Advocate, is being reviewed by the Victorian Law Reform Commission.
- It is timely then, given our 25 years anniversary and the review of the Act, to consider the strengths and tensions of the current guardianship system.
- Guardianship in Victoria cannot be considered in isolation from the role of the Public Advocate and the broader roles of the Office as the adjunct roles of advocacy and systemic advocacy are inherent strengths of Victoria’s guardianship system.
- In the first part of this talk, I’ll talk about the strengths of guardianship and advocacy in the context of the legislative framework, it’s origins and how we have interpreted the legislation during our 25 year history.
- In the second part, I’ll talk about the tensions of guardianship including the ever increasing guardianship numbers, how we manage the tension between rights and protection in the context of current human rights debates, issues emerging from the current review of the Act and the future of guardianship.

PART 1. STRENGTHS

History of the legislation

- Victoria became the first Australian state to introduce legal support for people with a disability when it passed the Guardianship and Administration Act in 1986. This reform was largely driven by the adverse experience of people with an intellectual disability, many of whom lived in large institutional settings. Neglect had been occurring for decades in these settings which successive governments had acknowledged and stories about which the public conscience had been stirred by.
- Up until the 1980s, the framework of legislative arrangements for people with disabilities in Victoria could be described as one of protection, control and separation. Tens of thousands of people with a mental illness and intellectual disability were shut away in large institutions without rights, autonomy or equality and many experienced institutional abuse and neglect.
- The Supreme Court could appoint a guardian to manage the property of a person with a decision-making disability and one medical practitioner could certify a person with an intellectual disability or a mental illness for automatic admission as a compulsory patient to either a mental health institution or a training centre for people with an intellectual disability. There was little differentiation between the needs of the two groups in policy and legislation.
- The Government established the Cocks Committee in 1980 to formulate proposals for new legislation to deal with the protection of 'intellectually handicapped' persons and the preservation of their rights. The resulting Guardianship and Administration Act 1986 represented a

significant advance in the rights of people with disabilities and was introduced as part of the wave of disability-rights reform, alongside the Mental Health Act 1986 and the Intellectually Disabled Persons Services Act 1986 which are firmly grounded and based on participation, protection and rights. This reflected a stronger emphasis on disability rights both internationally and in Australia.

- The Cocks Committee recommended that an Office of the Public Advocate be established to act ‘as a guardian of last resort and an advocate for developmentally disabled people’ with the power to prevent exploitation, abuse and neglect.
- While the impetus for guardianship legislation was the need to protect people coming out of institutions, particularly people with intellectual disabilities, ultimately it was put in place as generic legislation applicable to people with cognitive impairments which included people with dementia, acquired brain injury, mental illness and intellectual disability.
- The Act was seen as a significant step in the drive to liberate people with disabilities from the oppression of large-scale residential institutions and to enable people with disabilities to participate as equal members of the community.

How the Victorian guardianship system differs from other states

- The Victorian Guardianship and Administration Act was the first Guardianship legislation in Australia and all other state’s legislation is based on the Victorian model. Victoria is still looked to for leadership in this area and other states are awaiting the results of the review of our act to see which direction guardianship is likely to go in other states.
- The Victorian Guardianship and Administration Act is still accepted as being ahead of overseas jurisdictions in many aspects. This was

illustrated in 2006 when guardianship experts from the Canadian State of Alberta visited Australia to learn about our system to draw lessons for proposed reforms in their province.

- The position of Public Advocate, as a statutory appointee of Parliament, is unique to Australia. Whilst other countries have set up Public Guardians and Public Trustees, only Australia has established a Public Advocate within its guardianship legislation.
- Australia's model of guardianship pursued the idea of popular access to justice through the tribunal rather than the court system, established complementary institutions like the Office of the Public Advocate and has been the only country to experiment with tribunal-based legislative reform.
- Some of the differences between Victoria and guardianship in overseas jurisdictions are that in other countries, a guardianship order would cost the represented person money, they would be paying for their own guardian, they would have gone through a court process and they wouldn't be subject to an automatic review. Overseas, orders aren't revoked at anywhere near the rate of ours. In Victoria, there is no cost to the person for guardianship, hearings are held in a tribunal not a court, and there are automatic review processes and few plenary orders.
- Within Australia, the Office of the Public Advocate, where guardianship is performed within an advocacy framework, is unique to Victoria, South Australia and Western Australia.
- The States that have only a Public Guardian risk providing a diminished form of guardianship where the guardian becomes more of a disinterested decision-maker, lacking the level of engagement and advocacy intended under the Act.
- Terry Carney says that much of the meaning of legislation is externally shaped by professional practices, funding levels, systems interactions or

political perceptions. It is the presence of the ‘adjunct’ institution - the Office of the Public Advocate in Victoria - with its investigative and advocacy function that shapes the progressive model of guardianship we have in this state.

- The role of the Public Advocate is not solely instrumentalised in the appointment of guardians and the operation of the guardianship system but incorporates such roles as individual advocacy, investigations of applications before the Tribunal, systemic advocacy, community education and advice.
- The Victorian Public Advocate has a broader range of functions and responsibilities than the equivalent in other states. The role includes responsibility for a strong volunteer community guardianship program and extensive responsibilities in relation to Community Visitors under the Mental Health Act, the Disability Act and the Health Services Act.
- The resolution of issues brought to the Office in order to avoid the need for the appointment of a guardian or an administrator has consistently been a major aspect of OPA’s advocacy work. This is complemented by the investigative function in relation to guardianship applications to VCAT.
- The role of independent investigator of these applications is essentially an advocacy role. It goes beyond the more limited investigation role performed in States where this function lies with officers of the Tribunal or Board.
- Another advantage of the breadth of function of OPA is that the experiences of the individual advocacy, investigation and guardianship work to shape and inform the systemic advocacy of the Office. This enriches our work immeasurably. It means that guardianship isn’t something that occurs in isolation but is linked to what is happening in the service system.

- The four Public Advocates who have held the position in Victoria since 1986 have each taken a broad view of the role and responsibilities of the position. Each has interpreted the role differently. Our 25th Anniversary is a timely reminder of this history.

OPA's early days

- Ben Bodna was Victoria's first public advocate and laid a solid foundation for OPA's rights-based disability advocacy. He stamped the public advocate role with his vision and values and in doing so established a powerful voice and safeguard for the independence, rights and interests of people with a disability.
- One of the first tasks of the Office was to investigate what was happening for the thousands of people living in institutions in Victoria. In 1991, Ben Bodna informed the Minister for Community Services of his concerns regarding the well being on patients and residents at Aradale Hospital which led to the government establishing an investigative Taskforce with a view to relocating people into the community.
- This started the many years of advocacy undertaken by OPA and others to try and improve the lives of people living in institutions. Over the subsequent years, OPA advocates were involved in investigations, advocacy and guardianship in the deinstitutionalisation of Mayday Hills, Lakeside Hospital, Caloola, Janefield, Kingsbury, Plenty, Pleasant Creek and Kew Residential Services.
- OPA also undertook advocacy in nursing homes and special accommodation homes, after uncovering serious abuses in these facilities. The Guardianship Board and OPA moved in to shut down

some of the worst places, taking people to hospital and taking out guardianship orders.

- In 1995 David Green became the second Public Advocate. His term was defined in a large part by OPA's response to the 1996 tragedy at Kew Cottages in which nine men were killed. The tragedy was met with a fierce response by OPA. Our submission was instrumental to the Coroner's finding that the nine men died in the fire because of neglect by successive state governments. The case challenged the idea that people in institutions were better off because they were safe.
- Julian Gardner's term as public advocate from 2000-2007 was marked by high profile cases involving end-of-life decisions, which showed that OPA could provide influential advice on public policy and law reform.
- In the BWV case, which concerned a 68 year old woman with a disease causing a progressive form of dementia, whose husband wanted to stop artificial tube feeding, OPA was able to argue that artificial tube feeding was a form of medical treatment and that this form of medical treatment could be refused.
- This period was marked by OPA increasing credibility in the legal arena, particularly end of life decision-making. It became clear in the BWV case in the Supreme Court that VCAT and guardianship decisions could be taken to the highest court

Systemic advocacy

- One of the strengths of our current approach is our capacity to undertake systemic advocacy. While guardianship numbers have impacted on our capacity to undertake individual advocacy, a reinvigoration of our systemic advocacy function has occurred over the past four or five years through the work of the policy and research team and is one of the strengths of the Office.

- The policy and research team in collaboration with other relevant staff have made substantial submissions to the Victorian Law Reform Commission's review of the Guardianship and Administration Act as well as the Department of Health's Mental Health Act Review. The practices and experience of Guardianship enable us to make grounded and informed submissions to these legislative reviews.
- The review of the Guardianship Act has provided an important opportunity for us to reflect on our 25 year history of the guardianship system. There have been significant changes in the policy and legislative environment that created the context for the Act in 1986.
- Our expertise in this area has been acknowledged by the Law Reform Commission and contributions to the review have occupied a significant amount of thinking and work over the past two years.
- We contributed no less than ten discussion papers and two submissions to the review in addition to three published articles in the Australian Journal of Public Administration, the Age and the Journal of Law and Medicine.
- Our website shows the range of other policy and legislative issues that we have written about and responded to over the last few years, including restrictive interventions, violence, Supervised Treatment Orders, deaths in residential aged care, enduring powers of attorney and long-stay patients in mental health settings.

Key current issues

- Two of the most significant human rights issues facing people with cognitive impairments or mental health issues in Victoria are the inappropriate use of restrictive interventions and violence.
- We have long-standing concerns about the use of restrictive interventions on people with cognitive impairments and mental ill

health. Our concerns extend to practices in many spheres including aged-care accommodation; day programs and activities; hospital emergency departments and wards and supported accommodation services. The most pressing concerns relate to the use of restrictive interventions in residential services.

- Restrictive interventions are defined as the deliberate or unconscious use of coercive power to restrain or limit an individual's freedom of action or movement, through a range of different mechanisms. The mechanisms used to restrict an individual can be chemical, environmental, mechanical or physical in nature.
- Victoria's system for monitoring the use of restrictive interventions is much improved on what it was since the introduction of the *Disability Act* in 2006 and the establishment of the Office of the Senior Practitioner.
- We believe that the use of restrictive interventions in all government funded and supported accommodation now needs clear, uniform legislative controls and reporting requirements. This includes both federal and state funded and supported accommodation, including aged-care facilities. This issue will be a focus of our work over the next couple of years.
- In 2010, we undertook a research project on the connection between disability and violence. A report documenting 86 cases of alleged violence against OPA clients, explored case involving violence against people with disabilities. Consistent with the broader research on family violence, the majority of these cases (66%) related to violence against women). The cases studies indicate that there needs to be greater coordination between disability and legal services experiencing violence.

- OPA is working with the Women with Disabilities Network and other advocacy organisations on this and other issues and the Victorian Government responded to the report by setting up an Inquiry into the experience of people with an Intellectual Disability with the criminal justice system.
- Another systemic issue that has gained momentum over the last few years is the issue of long-stay patients in mental health settings. Community Visitors collected data on patients who had extended stays in mental health units. Many patients were found to have remained in locked secure extended care settings for between ten and twenty years due to lack of alternative accommodation.
- The report contextualised these cases in terms of human rights and went to the then Minister for Community Services, Lisa Neville in 2009. This work achieved some positive results, including six patients with dual disabilities being offered intensive funding support and permanent homes in purpose-built accommodation. Community Visitors and OPA advocates continue to monitor this issue.
- In another project, in 2010 we undertook case study research into deaths of people under 50 years of age in residential aged care, an issue that highlighted to us through our involvement in the Young People in Nursing Homes Consortium.
- These deaths do not fall into any reportable category of deaths unlike deaths in mental health units, prisons and in DHS residential care and there is little information about why young people under fifty in nursing homes die.
- The aim of the project was to contribute qualitative evidence that will help to highlight factors contributing to these deaths, and, in so doing, make the case for further research and policy responses. The report is being published in the Journal of Law and Medicine in September.

Summary of PART 1

- To summarise, the strengths of the guardianship system in Victoria come from the broad scope of powers of the Public Advocate under the Act, the interpretation of the Act by each Public Advocate and the impetus the act provides for a strong systemic advocacy focus. Victoria provides leadership in this area and the legislative framework in Victoria is firmly grounded on the protection of rights.
- In the next, I will turn to challenges within the current guardianship system from a human rights perspective.

PART 2. Challenges

Introduction ‘at the heart of the jurisdiction is a paradox’

- How to balance the need to protect people who are vulnerable to exploitation, abuse and neglect with their right to autonomy is a central ethical question for guardianship.
- OPA has focussed a lot of energy on this question over the years as we are immensely conscious of the powers invested in us. We place a strong emphasis in utilising these powers on safeguarding the independence, rights and interests of people with a disability.
- In 1997, Carney and Tait wrote:
 - ‘At the heart of the jurisdiction is a contradiction. The ideology of freedom is linked to a set of legal tools to restrict freedom through the appointment of substitutes. Guardianship laws use a modern rhetoric of personal rights promoting autonomy, fostering independence, and assisting citizens to participate in social life.
 - And yet the main task of guardianship forums is to strip citizens of rights, entrust proxies with the exercise of legal decision-

making, and sometimes authorise incarceration through physical and chemical means. The strange paradox of using coercive forms to achieve emancipator purposes raised practical questions about what could possibly constitute successful intervention in the Alice in Wonderland world' (1997)

- As an organisation, this paradox goes to the heart of the tension within guardianship. In this section, I'll talk about how we manage this tension in the context of ever increasing guardianship numbers and current human rights frameworks.

Steady growth in guardianship numbers unexpected by OPA

- When OPA was established in 1987, it was thought that there would only be a need for one guardian and that advocacy and investigations would ensure that guardianship was rarely needed. A memorable quote from the late Ben Bodna, the first Public Advocate was that 'guardianship is a failure of advocacy'.
- However, once the Guardianship and Administration Act was passed in 1987, there was a steady annual growth in the number of orders made by the Guardianship and Administration Board. The total number of guardianship cases managed per annum by OPA increased from 225 in 1987/88 to 1574 in 2009/10. This rise is likely to continue with cases up by 9.8% in the last financial year.
- For many years, OPA annual reports have reported on the relentless increases in guardianship orders and the impact of this on OPA's work. In 2002 it was reported that 'on every indicator, the figures demonstrate the extremely heavy and increasing workload carried by the Office'.
- Growth in guardianship orders, because it is a statutory responsibility, takes priority over other areas of work and ironically, when you consider the expectation in the early days of the Office, individual

advocacy has been an aspect of our work over the years that has suffered. In an OPA annual report in 2003/04, it was stated as ‘disturbing that the Office could not provide advocacy in some serious matters of alleged abuse and neglect’.

Explanation for rising guardianship numbers

- There are many explanations for increases in guardianship numbers – population increases, the rising incidence of dementia, increased numbers of people with disabilities living in the community and an increased knowledge of guardianship within the service system.
- It is evident from the type of guardianship orders received by OPA that guardianship is increasingly being relied upon to manage service system failure, shortfalls in case management, crisis response capacity and shortages in accommodation and support.
- In 1996, an OPA annual report reported that there is an ‘emerging and distorted perception of guardianship arising’ which fosters the use of guardianship to address deficiencies in the service system.
- A report by Carney and Tait in 1995 entitled ‘too much access’, suggested that across Australia, guardianship may be proving to be ‘too successful’, arguing that ‘easy access to guardianship and management procedures without equivalent developments in other policies for people with disabilities may produce negative consequences’ such as unnecessary and intrusive interventions, resulting in incursions on civil liberty.
- A transfer of responsibility to guardianship was noted in the 1990s to be partly attributable to the development of a risk averse culture. There appeared to be a rising expectation that guardianship could be used to manage potential risk or dangerousness to self or the community.

- Public Advocates have consistently argued that there has been an over reliance on guardianship to fill the gaps where other less restrictive supports like case management and coordination, mediation, advocacy and community education, more accessible health care and housing would have addressed the identified issue.

What OPA has done to stem the tide of guardianship

- Guardianship was never intended to be a substitute for a robust service system. Guardianship was to be used as ‘a last resort to be considered when all other protective mechanisms have been eliminated from the list of viable alternatives’. It was supposed to be used for a ‘narrow band of cases’.
- In its 1982 report on protective legislation, the Cocks Committee proposed that three questions would be asked before a guardianship order is made. These were whether the person is likely to gain real benefit from guardianship, whether a less restrictive alternative is available and whether the order is in the best interests of the person.
- OPA has taken a number of actions over its 25 year history to respond to increasing guardianship numbers. Actions taken have been informed by the ‘least restrictive’ principle, which stems from the Public Advocate’s function of ‘minimising the restrictions on the rights of persons with disabilities’.
- The application of this principle has led OPA to ensure there is adequate scrutiny of guardianship and administration applications and to advocate for mechanisms which limit or divert the use of guardianship where appropriate. OPA has worked on a broad range of operational and systemic advocacy strategies to limit guardianship.

- These include short-term advocacy, screening guardianship applications, community education to identify preventative strategies, systemic advocacy calling for policy and legislative solutions.

Limiting the use of guardianship in civil detention was a rights issue

- OPA's work to try and keep guardianship orders to those absolutely necessary is consistent with the framework provided by the guardianship Act which emphasises the importance of rights *and* protection.
- Our work around civil detention in the 1990s and early 2000s is a good example of how guardianship was used to restrict human rights and how OPA responded.
- In 1996/97, OPA reported that there were ten orders made where OPA was appointed guardian to authorise detention within the Statewide Forensic Service or other secure residential programs. In 1999/2000, 13 cases were reported where a guardian was appointed to authorise the use of chemical restraints.
- The appropriateness of the appointment of a guardian to authorise restrictive interventions for a person where the primary reason for the appointment is the interest of the community rather than the interest of the represented person was questioned by OPA.
- OPA argued that the lack of a supportive framework to support actions amounting to civil detention of a person considered a risk to others was a gross violation of human rights, and when compared to protections for the rest of the community, was discriminatory.
- In 2001/02, OPA participated in advocacy that led to an inquiry by the Victorian Law Reform Commission into the care and treatment of

persons with an intellectual disability or other cognitive impairment that are at risk to themselves or the community.

- This was followed by a partnership between DHS, the Intellectual Disability Review Panel and OPA to review admissions to the Statewide Forensic Service.
- These reviews lead to the development of provisions in the Disability Act 2006 in relation to the compulsory treatment and detention of persons with an intellectual disability, the consequence of which is that ‘some matters of civil detention, which would previously have come to guardianship, are now dealt with more appropriately by VCAT making a Supervised Treatment Order’ or other processes outlined in the Disability Act.
- One of OPA’s roles under the new legislation is monitoring supervised treatment orders and other restrictive interventions. OPA welcomed being excluded from guardianship in these matters, noting that guardianship is not a suitable mechanism for civil detention.
- In general, OPA advocates for guardianship should be limited to orders absolutely necessary. This way of thinking is consistent with the guardianship rights framework but new thinking around rights has been critical of some aspects of guardianship.

Paternalism of the Act sits uneasily with modern human rights

- When it was introduced in 1986, the new guardianship legislation was intended to bring about a change in the extent to which legal interventions that limited freedom and access to the community were imposed on people with disabilities. They were also developed to protect vulnerable people living in the community.
- This form of guardianship that emerged was in direct contrast to what was occurring at the time, when people with a mental illness and

intellectual disability were shut away in large institutions without rights, autonomy or equality.

- The *parens patrie* principle, which translates as ‘parent of the nation’, provides the legal principle from which guardianship derives. Under this principle, it is the responsibility of the monarch to care for those who cannot care for themselves. The principle was later transferred to the courts and in Victoria, through guardianship, OPA has taken on the state’s responsibilities towards people with disabilities who are unable to make their own decisions.
- Despite the liberating intention the legislation in the 80s, the paternalism of the Act sits uneasily with modern-day conceptions of the rights of people with disabilities. For instance, one provision specifies that a plenary guardian has the same power as ‘if he or she was a parent and the represented person (was) his or her child’.
- The introduction of my term as Public Advocate coincided with the introduction of two influential human rights instruments: the International Convention on the Rights of People with Disabilities (the Disabilities Convention) was signed by Australia in 2007 and ratified in 2008 and the Victorian Charter of Human Rights and Responsibilities (the Charter) was introduced in 2006 becoming operational in 2007.
- These instruments have stimulated discussion about the role of guardianship both within OPA and outside the organisation and we have welcomed the opportunity to reflect on guardianship on the context of Australia’s and Victoria’s human rights obligations. The Guardianship review has provided a vehicle for these discussions.

The Disabilities Convention - supported decision making - protection

- The Disabilities Convention has taken a significant place in the Victorian Law Reform Commission’s review of the Guardianship Act

which commenced in 2009. The review presented us with an opportunity to engage in rigorous public discussions about the intersection of guardianship with human rights.

- The Convention has reinvigorated the discussion around protection and autonomy, although to a large extent the right to autonomy has dominated the discussion.
- Article 12 of the Convention has been particularly influential throughout the review and has driven the discussion around supported decision-making. It states that persons with disabilities have a right to equal recognition before the law and that ‘State Parties shall take appropriate measure to provide access by persons with disabilities to the support they may require in exercising their legal capacity’.
- At present guardianship law only has one response to the needs of people with impaired decision-making capacity – the appointment of a substitute decision maker to make decisions on that person’s behalf.
- The Disability Convention asks us to consider whether a model that ‘supports’ a person to make their own decisions rather than appointing someone to ‘substitute’ their decision-making, is more in keeping with human rights.
- OPA agrees in principle with the importance of supporting people to make decisions in preference to imposing a substitute decision maker on a represented person – indeed this is what we try and achieve in the way we operationalise guardianship.
- However, we believe that substitute decision-making is sometimes required for ‘protective’ reasons and we would argue that this is not anathema to human rights.
- Interestingly, the terms of reference of the review of the Act include:
 - ‘The need to balance the *protection* of the interests of an adult with impaired capacity by a guardian or an administrator with the

person's exercise and *enjoyment of the human rights*, such as the right to freedom of choice, association and movement... as expressed in the UN Convention.'

- While this acknowledges the need to provide 'protection' for people with 'impaired capacity', this need is juxtaposed with the need to recognise a person's human rights, as though protection were counterposed to the enjoyment of human rights.
- OPA's position is that the right to protection is a legitimate human right and is not contrary to human rights. There is a long-standing tradition in Australian (and English) law that people who have a disability and who lack capacity to make decisions for themselves are entitled to protection. Without protection of the law, a person could be subject to abuse and exploitation, or they may be neglected either by themselves or by others.
- This right is enshrined in Article 16 of the Convention which provides that signatories should 'take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities...from all forms of exploitation, violence and abuse'.
- While OPA is keen to ensure the Guardianship is consistent with the human right to autonomy and that the Act strikes the right balance between protection of rights and the limitation on rights, OPA wants to ensure that society sees the role played by guardianship not just in terms of rights-restriction and that the protective intention of guardianship is not lost.
- In reviewing our role for the review of the Guardianship Act, we argue that the focus of guardianship legislation should be on obtaining a just outcome for people with a disability, a life worthy of human dignity. We have put forward the concept of human dignity as a governing principle that should guide the work of guardians.

- This is consistent with our vision which has remained consistent throughout out 25 years. OPA’s 1986 mission ‘to promote the rights and dignity’ of people with disabilities in Victoria is reflected in our vision in 2011 for ‘a just society that values, respects, protects and promotes the dignity and human rights of all people’.

How OPA uses the Charter in balancing rights and protection

- Freedom, respect, equality and dignity are rights now enshrined within the Victorian Charter of Human Rights. The Charter has given us further impetus for examining guardianship from a rights perspective. We responded to a recent Inquiry into the Charter of Human Rights describing the impact that the Charter has on our work.
- While the Guardianship legislation has inbuilt mechanisms to ensure that the exercise of authority by a guardian is couched within a rights framework and requires a guardian to ‘act in the best interests of the represented person’ (s28(1)) ‘in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person’(s28(2)(e)), the Victorian Charter has gives us a human rights instrument which enables us to weigh up decisions.
- The Office of the Public Advocate (OPA), in exercising its statutory guardianship function, falls squarely within the scope of s 38 of the Charter. Section 38 states that it is: ‘...unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.’
- The Charter outlines things to consider when a right is being limited which are used as an additional lens from which guardians consider their decisions. In order to give proper consideration to human rights guardians must identify which human rights may be affected by a substitute decision.

- If a human right(s) is to be limited in some way, then the guardian must consider the nature of the right, the importance and purpose of the limitation, the extent and nature of the limitation, the relationship between the limitation and its purpose and whether any less restrictive means may be used to achieve the purpose the limitation seeks to achieve (section 7).
- The Charter provides an opportunity for balance and operates well as a tool, enabling good decisions to be made in situations where there are competing rights questions. It also provides an advocacy tool from which guardians can argue for access to services as the following case study illustrates.

Case study – OPA’s advocacy using the Charter using the Charter

- In an advocacy/guardianship case in November 2009, a man with a significant intellectual disability was kept in 23-hour prison lock up and subject to restraint. The man was found unfit to plead by a jury to charges that included intentionally causing serious injury and committing an indecent assault on a child under 16. He was held in the Melbourne Assessment Prison for four months, longer than the prison sentence that would normally be served for this offence.
- The Public Advocate was asked to step in because the Department of Human Services was arguing that there was no suitable shared supported accommodation where he would not present a risk to other residents. The man’s guardian argued that he had been heavily medicated in prison and that he had regressed enormously and that there was a link between the lack of services he had received and his deterioration.
- The guardian said that to continue in the current situation was a neglect of his needs and a significant breach of his right to ‘freedom of

movement’ (section 12) and ‘recognition and equality before the law’ (section 8). As a result of collaboration between all parties involved, the man was granted a non-custodial community supervision order and was released into 24-hour care at a residential unit.

- The case study is an example of OPA’s role in advocating for the interests of freedom of the represented person. OPA’s statutory obligation is to protect the represented person’s right to freedom and to protect the person from exploitation, abuse and neglect. The Charter and the Guardianship act work together as advocacy tools in this context as enabling OPA to argue that a person’s rights can only be limited to the extent that no less restrictive option is available.

CONCLUSION

- Regimes which impact on the human rights and freedoms of people with disabilities, such as guardianship and civil detention orders, have increasingly been required to ensure the protection of core human rights, and to be implemented in the least restrictive manner possible.
- The principles of guardianship legislation are generally in tension and guardianship is often a fragile balance between protection and autonomy, risk and rights, freedom and best interests. How to achieve the protection of people who are vulnerable to abuse, exploitation and neglect remains the central ethical issue for guardianship.
- Each Public Advocate before me and each advocate/guardian takes on the role of guardianship with a sense of great responsibility. While the Act itself provides protection from an abuse of power through the ‘best interests’ tool, we are acutely conscious that guardianship involves a substantial limitation on the legal right to autonomous decision-making.
- However, we maintain the position that substitute decision-making is not anathema to human rights as it has an important role to play in

protecting people's right to freedom from abuse, exploitation and neglect. While we support the concept of supported decision, we are not convinced that a sole focus on the right to autonomy will achieve the best outcomes for people with cognitive impairment.

- Throughout the 25 years of guardianship, OPA has maintained a consistent focus on rights. In the early days, this was through advocacy in relation to deinstitutionalisation, nursing homes and supported accommodation homes, issues like the Kew fires, end-of-life decision-making, civil detention and sterilisation.
- There were a range of events that changed the world in different ways during the late 80s and early 90s, many which we were involved in and most which I have not had time to touch on today.
- Throughout our 25 year history, increasing guardianship numbers have consistently threatened to divert our attention and force us into to an instrumental version of guardianship. However, we have been able to maintain a focus on a guardianship that is least restrictive of a person's freedoms as is possible.
- We have taken a number of actions over this history to ensure that there is adequate scrutiny of guardianship and administration applications. We have tried to divert and limit guardianship through both operational work, input into policy and legislative reform, through individual and systemic advocacy.
- Victoria's model of guardianship continues to provide leadership for other states. Our strength in systemic advocacy, exemplified in projects on restrictive interventions, violence, long stay patients in mental health settings, work on the mental health act and guardianship act are due to the broad scope of the role of the Public Advocate in Victoria and its interpretation by this Office.

- I believe that the only reasonable justification for guardianship is to make a meaningful, beneficial difference in the life of a person with a disability. We look forward to a future in which guardianship continues to sit alongside the rights advocacy work of the office with a view to achieving our vision for ‘a just society that values, respects, protects and promotes the dignity and human rights of all people’.