

**Victorian Parliament  
Law Reform Committee  
Inquiry into the Powers of Entry, Search, Seizure and Questioning by  
Authorised Persons  
Submission from the Victorian Public Advocate  
December 2001**

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## **The Public Advocate**

### **Introduction to the office of the Public Advocate**

- Created under section 14 of the *Guardianship and Administration Act 1986* (GAA), the office of the Public Advocate (OPA) promotes the rights and dignity of people with disabilities, with the aim of strengthening their position in society and reducing their exploitation, abuse and neglect. The Public Advocate is appointed by the Governor in Council.
- The legislative framework surrounding the office is one which is defined by three key elements, namely best interests, last resort and least restrictive option (in terms of a person's freedom of decision and action).
- Staff at OPA primarily undertake the roles of guardian, advocate and investigator. Much of the work at OPA is linked to/driven by the Victorian Civil and Administrative Tribunal - Guardianship List (the Tribunal). Examples include the appointment of statutory guardians by the Tribunal and the preparation of reports on applications, following referral from the Tribunal, to assist the Tribunal in its decision-making. To appoint a guardian, the Tribunal must be satisfied that a person has a disability, that this disability impacts on reasonable decision-making and that there is a current need. The Public Advocate can delegate his powers to his staff pursuant to section 18 of the GAA.

### **Legislative provisions relevant to the current Parliamentary Inquiry**

#### ***Section 26 - Power to enforce guardianship order***

- Section 26 of the GAA provides that, where the Tribunal makes a guardianship order, it can specify in the order that the guardian or some other person be empowered to take such actions as to ensure that a represented person complies with a guardian's decision. In practice, this usually occurs where a guardian has made an accommodation or health care decision which requires a person to be taken to a specific facility and the person is unwilling to comply.
- A section 26 order made by the Tribunal must be reassessed at a hearing scheduled within 42 days of the making of the order.

- Statistical information obtained from the Tribunal for the period 1 January 2001 to 26 November 2001 indicates that it had made eleven section 26 orders during that period.

### ***Section 27 - Special powers in respect of persons with a disability***

- This section of the GAA gives the Tribunal power to order that the Public Advocate (or some other person) visit a person with a disability, in the company of a member of the police force for the purpose of preparing a report for the Tribunal. The police can use such force as is reasonably necessary to enter the premises.
- Before making such an order, the Tribunal must receive evidence on oath that a person is being unlawfully detained against her or his will or is “likely to suffer serious damage to her or his physical, emotional or mental health or well-being unless immediate action is taken”. An application for guardianship must also be on foot in relation to the person with a disability.
- After an assessment is made and the Tribunal receives a report (which may be verbal and over the telephone), the Tribunal has a discretion to make a further order facilitating the removal of a person to a facility for assessment and placement, until such time as the guardianship application is heard.
- Statistical information obtained from the Tribunal for the period 1 January 2001 to 26 November 2001 indicates that there were no section 27 applications made.

### ***Section 18A - Powers of Inspection***

- A new section 18A has recently been inserted into the GAA which gives the Public Advocate the right to enter premises on which an institution is situated, inspect documents (except medical records, unless a person consents, and personnel records, unless the person to whom they relate consents), visit residents and inquire into the admission, care, detention, treatment or control of any person. These provisions mirror those related to Community Visitors which are considered below. For the purposes of this section, “institution” is defined as by reference to facilities under four pieces of legislation:
  - *Disability Services Act 1991*
  - *Health Services Act 1988*
  - *Intellectually Disabled Persons’ Service Act 1986*
  - *Mental Health Act 1986*

### **Comments on these provisions in the context of the current Inquiry**

- The Public Advocate’s role as an office of last resort, and the principles which underpin the actions taken by staff, mean that orders under sections 26 and 27 of the GAA are only sought in situations of high risk and where a person with a disability is particularly vulnerable. There is an ongoing need for the existence of this type of power.
- The exercise of the power exists in clearly defined circumstances, namely to enforce a decision of a guardian (section 26) or to intervene in situations of unlawful detention or to prevent “serious damage” to the physical, emotional or mental health of a person with a disability.
- Legislative protections exist against unwarranted intrusion, for example the giving of evidence on oath to the Tribunal, the threshold test of “serious damage” and the staged approach to the making of orders (section 27). An order of the Tribunal is required to enforce a guardian’s decision in section 26.
- The exercise of power in sections 26 and 27 is carried out with police assistance. Policies and guidelines exist at OPA to support staff in exercising the power. Records of actions taken are kept on client files.
- The GAA defines the way in which guardians are to make their decisions in section 28 of the Act, specifically acting in the best interests of the Represented Person (which is further defined in section 28(2)). Victorian Guardianship Standards also exist to guide the decision-making process. The decisions of guardians can be reviewed internally at OPA by the relevant manager or the Public Advocate. An application can be made to the Tribunal for the reassessment of an order appointing the Public Advocate as guardian.
- The Public Advocate’s powers of inspection will be covered by the comments in the following section on Community Visitors

## **Community Visitors**

### **Overview of the Community Visitors Program in Victoria**

- Community Visitors are independent Governor in Council appointees who monitor the quality of residential services delivered to people with disabilities. Their origins are in the Official Visitors schemes in institutions which started last century. Community Visitors are volunteers who are, in general, locally oriented to a particular geographic area.
- There are currently around 400 Community Visitors who are coordinated by OPA. OPA engages 5 full time staff in the coordination unit for support and administration purposes. The Community Visitors report annually to Parliament.

## Legislative provisions relevant to the current Parliamentary Inquiry

- The legislative mandate for the Community Visitors' Program is established in 4 pieces of legislation:
  - *Disability Services Act* 1991 (DSA)
  - *Health Services Act* 1988 (HSA)
  - *Intellectually Disabled Persons' Services Act* 1986 (IDPSA)
  - *Mental Health Act* 1986 (MHA)
- Following the passage this year of the *Community Visitors Legislation (Miscellaneous Amendments) Act* 2001, each Act contains broadly similar provisions to guide the work of Community Visitors including their functions, terms and conditions of appointment, visiting regimes, powers of inspection, recording of visits, annual and other reports, secrecy requirements, establishment of Community Visitor Boards and request processes to meet with a Community Visitor.
- The language of the legislation is such that the powers of entry, search and questioning are referred to by other words, specifically as follows:

entry = visit (with or without notice)

search = inspection

questioning = a requirement in the various Acts for staff of facilities to offer reasonable assistance to the activities of the Community Visitor.

	<b>IDPSA</b>	<b>MHA</b>	<b>DSA</b>	<b>HSA</b>
<b>Visit</b>	section 56	section 111	section 8	section 119
<b>Inspect</b>	section 57	section 112	section 9	section 120
<b>Receive reasonable assistance</b>	section 57	section 112	section 9	section 120

## Comments on these provisions in the context of the current Inquiry

- Many of the following comments are also relevant to the exercise of power (under section 18A of the GAA) by the Public Advocate.

### *The public interest served by the grant of power to Community Visitors*

- A civil society has, in place, social infrastructure to monitor the care, treatment and needs of those who are most vulnerable, who are unable to, or cannot communicate or advocate for themselves. This is essential for an inclusive

community which aims for tolerance and compassion. Those visited by Community Visitors include persons with complex needs and multiple disabilities and persons with a mental illness who are usually poor and isolated.

- The mixed economy of care - through facilities run by government, not-for-profit organisations, the community sector and the private for profit sector - requires a coordinated and accountable programmatic response to the monitoring of those who are frail and vulnerable.
- The powers given to Community Visitors are relevant to the purposes of each piece of legislation, in that much of the legislation is rights-based and aims to provide the best possible care and treatment in the least restrictive environment. In this way, the proportionality test is accommodated.
- Practically, it is the preferred method of Community Visitors to work with providers in a facilitative and collaborative manner in order to improve the quality of services and facilities for people with disabilities.

#### ***Exercise of the power by Community Visitors***

- Community Visitors are required to carry with them identifying information (in the form of an ID card) and to participate in regular training exercises coordinated by OPA to assist in their work and the performance of their role. They must also commit to, and sign, a code of conduct which circumscribes the substance and process of their work, including the need to maintain confidentiality and the handling of conflicts of interest.
- Their visits are spontaneous, this being an important component in order to meet the purposes of the legislation. An overtly planned visiting regime would undermine these purposes. The legislation does not grant power to seize documents. This is proportional and consistent with the fact that Community Visitors do not investigate matters but rather inquire into the adequacy of services and facilities. Referral can be made to other bodies for investigation.
- Community Visitors are volunteers selected through a process leading to their recommendation for appointment. A grant of power is given to Community Visitors under a specific piece of legislation. They visit facilities in teams and are coordinated through OPA. Accountability for their actions is evident in their annual reporting to Parliament (which records their visiting regime) and in their keeping of records. They must comply with the secrecy provisions in each Act and with relevant requirements under the Victorian *Information Privacy Act 2000* and the *Health Records Act 2001*. (Materials are currently being finalised for the use of Community Visitors in this regard).
- OPA has established a process for dealing with complaints in relation to Community Visitors. This process has been publicly promoted through leaflet material. Provisions exist in each piece of legislation dealing with the dismissal of Community Visitors.

- At times, there has been some discussion between OPA and the Department of Human Services (the lead agency for the Community Visitor legislation) on the scope of the Community Visitor's power, for example, in relation to what constitutes "any part of the premises" of a supported residential service, for the purpose of inspection. These are usually addressed and resolved through such discussion.

### **Conclusion - some areas for action**

- The Public Advocate intends to include, in his annual report to Parliament, the number of times he acts on an order under section 26 or 27 of the GAA.
- The Public Advocate will continue to discuss, as the need arises, the role and powers of Community Visitors and the operation of the Community Visitors' Program, with staff at the Department of Human Services, as the lead agency for Community Visitor legislation

**Public Advocate**  
**11 December 2001**