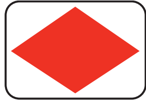 Office of the Public Advocate

Submission to the Victorian Law Reform Commission in Response to the Guardianship Consultation Paper

May 2011

Contact: John Chesterman
Manager, Policy and Education

Office of the Public Advocate

Ph: 9603 9567

Email: john.chesterman@justice.vic.gov.au

Office of the Public Advocate
Level 5, 436 Lonsdale Street, Melbourne, Victoria 3000
PO Box 13175 Law Courts, Victoria 8010. DX 210293
Tel: 1300 309 337 Fax: 1300 787 510
www.publicadvocate.vic.gov.au

Introduction

OPA commends the Victorian Law Reform Commission for the high quality and impressive breadth of its Guardianship Consultation Paper, and notes in general that the Commission's work promises an exciting future for the guardianship jurisdiction in Victoria. OPA is pleased to have this opportunity to provide responses to each of the 159 questions posed by the Commission.

As an introductory note, OPA hopes that the final report of the Commission, and indeed any subsequent guardianship legislation that is enacted, will ensure that the value our society places on all people, including people with disabilities, will be among the core principles. While the Consultation Paper understandably concentrates its attention on deficits in the current guardianship system, it is important to remember that guardianship legislation is not solely concerned with capacity and decision-making. It also has an important educative and social-shaping role that determines not only *when* a person might have a guardian appointed for them, but also expresses *why* society sometimes elects to follow this course, and explains *how* the practice of guardianship should be carried out. The aim of any new legislation in this field must be articulated and justified, in OPA's view, on the basis that guardianship is one mechanism we use to strive to enable all Victorians to lead flourishing lives.

This submission is the second of OPA's submissions to the Commission in its review of Victoria's guardianship law. It draws on the consultations that informed the first submission, which involved both internal and external individuals and groups, and on subsequent consultations with OPA staff and stakeholder groups.[1] Where relevant this submission points to arguments or concerns that OPA has raised previously, and OPA encourages anyone seeking a broad view of OPA's position to read this submission in conjunction with our previous one.[2]

This submission also draws on a range of materials that OPA has prepared with this review in mind. This includes the following papers, which are all available on the OPA website at the 'Research' portal:[3]

---

[1] The internal consultations have consisted of the following: an OPA planning morning on supported decision-making (29 July 2009); a series of lunchtime talks (over five days in September 2009) on 'Principles in the Act', 'Capacity', 'Guardianship', 'Administration', 'Medical Treatment' and 'Privacy and Freedom of Information'; a half-day review of OPA's likely key contributions to the review (15 October 2009); and a series of update and discussion sessions (1 December 2009, 2 February 2010, 28 April 2010, 21 March 2011 and 2 May 2011). The external consultations so far have included discussions with the Victorian Disability Advocacy Network, the Self-Advocacy Resource Unit, Star Victoria, Alzheimer's Australia, Huntington's Victoria, Council on the Ageing, Seniors Rights Victoria and VCAT. In February 2010 OPA hosted a key stakeholders forum on supported decision-making.

[2] See OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, available at: http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2010/OPA-Submission-to-VLRC-May-2010.pdf.

[3] See OPA website, 'Research' portal, at the 'Discussion Papers' section: http://www.publicadvocate.vic.gov.au/research/132/.

- ‘Principles and values in Victorian guardianship legislation’
- ‘The role of the Public Advocate’
- ‘Guardianship trends in Victoria 1988-2008’
- ‘Too much guardianship? Reflections on guardianship 1988-2008’
- ‘Supported decision-making: Background and discussion paper’
- ‘Supported decision-making: Options for legislative recognition’
- ‘The struggle to maintain advocacy’
- ‘Decision-making by a guardian: Should it be different if the represented person once had capacity’?
- ‘What role should VCAT have for persons under the age of 18 years?’

Please note that a discussion paper on guardianship and ageing is currently being finalised and will be forwarded to the Commission (and will be available on OPA’s website) when it is complete.

OPA has also produced the following articles that are relevant to this review:

- John Chesterman, ‘The Review of Victoria’s Guardianship Legislation: State Policy Development in an Age of Human Rights’, *Australian Journal of Public Administration,* vol. 69, 2010, pp. 61-5.
- Barbara Carter, ‘The Case for Dignity as the Governing Principle of Adult Guardianship’, *Res Publica*, vol. 19, 2010, pp. 1-6.
- Barbara Carter, ‘Adult Guardianship: Human Rights or Social Justice?’, *Journal of Law and Medicine*, vol 18, 2010, pp. 143-55.
- John Chesterman, ‘Capacity in Victorian Guardianship Law: Options for Reform’, *Monash University Law Review*, forthcoming 2011.

Before turning to answer each of the Commission’s questions, OPA wishes to reiterate here the point we made in our previous submission about deprivations of liberty and restrictive interventions.

In OPA’s May 2010 submission we wrote that:

> ‘OPA nominates as a key human rights topic of the next five years, the need for Victoria (and indeed Australia) to better regulate the means by which people with disabilities are subjected to some degree of “deprivation of liberty” or are subjected to unregulated or under-regulated restrictive interventions.’[4]

OPA welcomes the Commission’s engagement with the *Bournewood* ‘deprivation of liberty’ challenges, although OPA believes the Commission’s proposed solution is not quite the right response (see further the response to Question 75).

Since there is no particular question raised by the Commission in relation to restrictive interventions, OPA would like here to reiterate the point we made in our last submission:

[4] OPA, ‘Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper’, May 2010, par. 1.18.

> 'OPA notes that a range of restrictive interventions are currently used in relation to people with disabilities, many of which are unregulated or under-regulated. It is routine, for instance, for some pharmaceuticals to be used for purposes of modifying the behaviour of some people with cognitive impairments or mental ill health in ways that constitute restrictive interventions. Yet the administration of these pharmaceuticals is sometimes not considered by service providers to be subject to existing restrictive intervention oversight (such as is contained in Part 7 of the *Disability Act*) ...
>
> OPA calls here for all restrictive interventions that apply to people with disabilities to be brought within the regulatory mechanisms established in the *Disability Act*. OPA would also like to see new guardianship legislation contain a provision about the need for all restrictive interventions to be legislatively authorised and subject to review.'[5]

OPA repeats here the call for better regulation of restrictive interventions.

This submission follows the Commission's recommended format, and answers each of the 159 questions posed in the Consultation Paper in turn. A summary of OPA's responses to those proposals concerning OPA's core roles is contained at the end of this submission.

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?

OPA notes the prominence given to the ageing demographic in this report and in Australian policy considerations generally. We note that older people with dementia have always constituted a significant group of guardianship clients. It may be a temptation to overstate the extent of a changing guardianship demographic.

Western European countries also have well-established modern guardianship systems and are dealing with an ageing demographic ahead of Australia's by approximately 20 years. We can learn from them. In addition, the population profile of Australia is strongly influenced by migration policy. We can change our age profile by increasing our migration numbers, an option Western European countries are not attracted to.

OPA perceives a trend in our society of increasing individualisation and associated isolation of many people with disabilities. There appears to be a lower level of social connection in the community. OPA believes that it is necessary to actively promote the principle of community participation, and one of the ways in which this can be done is through the articulation of this principle in guardianship legislation.

A major issue in the community is the lack of appropriate services and accommodation for people with disabilities. While the original focus of the Act may have been de-institutionalisation, much of the work of OPA today centres around trying to obtain the supports and services necessary for our clients to lead full lives.

[5] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, pars 1.23, 1.26.

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

Yes.

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

OPA notes that six out of the eleven proposed general principles at Paragraph 5.101 relate to decision-making. In addition, the Commission is proposing that decision-making principles should also be included in the Act. OPA submits that the general principles of the Act should be largely about how the central purposes of the Act are to be achieved. As mentioned in the introduction to this submission, the principles should describe not only *when* a person might have a guardian appointed for them, but should also express *why* society sometimes elects to follow this course, and explain *how* the practice of guardianship should be carried out.

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

OPA considers that the principles 4, 5, 7 and 8 should be transferred to the decision-making principles section and suggests the addition of the following general principles:

- All adults are entitled to the support necessary for them to participate fully in society and reach their potential (this is an extension of proposed principle number 7);
- The promotion of the personal and social well-being of a person with impaired decision-making ability is the purpose of any action taken under this Act.

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

OPA agrees with the Commission that there is much public confusion about Victoria's range of substitute decision-making laws. This confusion is caused in part simply because of the range of laws. Of the three options suggested by the Commission, OPA favours Option B. OPA is particularly in favour of Victoria's medical treatment laws being incorporated into our guardianship laws (Options B and C). OPA recognizes that the two Acts proposed in Option B (a separate 'Powers of Attorney Act' and 'Guardianship and Administration Act') could quite easily become one piece of legislation (Option C), and that harmony between the various provisions would be more likely if this were so. The challenge with Option C is to ensure that public education campaigns about the various discrete parts of one large piece of legislation are not overlooked. On balance this is why OPA favours Option B over Option C.

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?

OPA believes that the term 'person responsible' is growing in popular consciousness (and is gradually replacing the old 'next of kin' terminology), though there is still considerable ignorance about it. There is support among OPA staff for a new term such as 'medical decision maker' to replace 'person responsible'. One danger with this proposal is that the role of medical decision maker may appear to be broader than it actually is. For instance, it would need to be made clear that some medical decisions (such as psychiatric decisions) could not be made by a medical decision maker.

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

OPA has previously commented that we believe the term 'guardian' has wide resonance.[6] OPA does receive calls to its advice service from people who have questions in relationship to 'guardians' generally, which can include questions about the guardians of children. But on balance OPA does not think the term 'adult guardian' should replace 'guardian'.

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

OPA agrees that the term 'administrator' might be replaced. We have previously suggested that 'financial manager' could be used instead.[7] We are concerned that the Commission's suggestion of 'financial guardian' will lead to widespread confusion with 'guardian'. (This confusion would exist even if the Commission's preferred term 'adult guardian' were in use, since the terms 'financial' and 'adult' are not mutually exclusive.) Another possibility is that the term 'financial administrator' be used.

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

An initial point that OPA would make here is that there is already considerable public confusion about the source of the legal authority for substitute decision makers (whether this source is a personal appointment or a VCAT order). The source of the authority, however, is important, and in OPA's view should be identifiable from the name given to the substitute decision maker.

OPA has already indicated its preference for the terms 'guardian' and 'financial manager' when the appointment is made by VCAT, so applying these to enduring powers of attorney could lead to the appointment of an 'enduring guardian' and an 'enduring financial manager'. Another factor to consider here is whether the Enduring Power of Attorney (Medical Treatment) will continue in its current form (as we point out in answer to Question 26, OPA agrees with the Commission that it would be better for this instrument to be subsumed by the Enduring Power of Guardianship).

---

[6] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 22.1.

[7] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 22.2.

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
- CALD groups
- Indigenous communities
- older people
- young people
- health and community sector professionals
- lawyers?

OPA has successfully trialled an enduring powers of attorney training program that targeted workers from health and community organisations, in particular from rural and regional communities and CALD organisations. The program provided a thorough grounding in information about powers of attorney as well as presentation skills and resources to support future sessions. This has been especially effective in more remote rural areas where OPA is more constrained in providing community education.

This 'train the trainer' type model would have similar application for guardianship laws and could be specifically modified for services working with any of the identified target groups below.

Other specific ideas include:

- people with disabilities
    - Improved accessibility of formats in which resources appear, including more online resources
    - Greater collaboration with NGOs in the disability field
- family, friends and carers of people with disabilities
    - Greater collaboration with carer organisations
- CALD groups
    - While OPA's fact sheets are printed currently in eleven different languages, there is scope for increasing this number
    - Improved coordination with interpreter services to increase the knowledge and understanding of interpreting staff who may be called on to assist in group sessions
    - The 'train the trainer' model outlined above has also proven very effective with workers from CALD organisations
- Indigenous communities
    - OPA is currently in discussion with Indigenous health workers and hospital liaison staff to establish effective models for dissemination of information on substitute decision-making in inner-urban Indigenous communities
- older people

  - Provision of information on in-house hospital and health service TV channels
  - Greater collaboration with well-networked volunteers and groups such as RSL, Probus, U3A (this is more in relation to laws relating to powers of attorney)
- young people
  - Greater use of online tools and social media – eg Facebook, YouTube
  - Radio interviews on youth stations and disability stations/programs
  - Improved collaboration with student services at tertiary education facilities
- health and community sector professionals
  - Regular large group sessions focussing on specific issues and client groups
  - Intensive half-day and full-day workshops on substitute decision-making in the context of specific casework practice
- Lawyers
  - Access to an online tool such as that proposed by OPA in a recent application to the Victoria Law Foundation. The proposal is to create an interactive online facility that would encourage people who are considering signing an enduring power of attorney to consider a range of questions that should be, but routinely are not, engaged by people in such situations (questions such as: Whom should I appoint? What powers should I give my representative? What conversations should I have with my representative?).

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?

OPA already has substantial experience in producing well-utilised materials and providing community education. In the last financial year OPA provide 185 community education sessions to an audience of 7,229 people, and OPA's advice service provided assistance to 13,673 inquirers.[8] The 'Take Control' dvd and kit (co-produced by OPA and Victoria Legal Aid) continues to be highly popular. As the Victorian Parliament Law Reform Committee noted in its recent report on powers of attorney: 'In 2008-2009, approximately 10,000 copies of *Take Control* were downloaded from the websites of OPA and Victoria Legal Aid, and a further 36,000 hard copies were distributed'.[9] OPA's website is heavily and increasingly being utilised by members of the public, with hundreds of copies of various fact sheets and forms being downloaded each month (for instance, in January 2011, there were 499 downloads of the EPA Financial Form and a further 418 downloads of the EPA Financial Form with instructions. The same month there were 169 downloads of the guardianship fact sheet.).

Given all of this activity, and recognising that there is a need for greater community education to be provided about substitute decision-making, it would be logical for OPA's role to be expanded.

---

[8] OPA, *Annual Report 2009/2010*, pp. 14, 16.

[9] Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney*, 2010, p. 257.

The other bodies that would have a role to play in increased community education activities would include Victoria Legal Aid, community legal centres, State Trustees, Seniors Rights Victoria, the Council on the Ageing, and the Victorian Human Rights and Equal Opportunity Commission, all of whom have education and training programs in place.

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

The challenges facing designers of any education campaign on guardianship matters include the following:

- guardianship laws (despite rising rates of dementia and the ageing of the population) are not viewed as having universal application (unlike other community education initiatives such as those that promote safe driving or organ donation). This means that audiences are not necessarily receptive to 'cold' education about guardianship laws, so such education tends to be provided best to targeted groups;
- guardianship laws are complex and cannot easily be simplified for brief educational interventions (e.g. 30 second sound bites);
- the message, particularly as it relates to personal appointments of substitute decision makers, needs to incorporate notes of caution (so that inappropriate appointments are not made). In other words, a campaign around powers of attorney would not want to be reduced to a simple message such as 'everyone should have one', since this could give rise to inappropriate appointments (which can then give rise to financial or other abuse).

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

Useful data that might be collected includes the following:

- Accurate statistics about the type of orders being made at VCAT, the length of orders, the incidence of reappointments, details of those people appointed by VCAT as substitute decision makers, and the types of disability of people whose matters are before VCAT.
- The essentially private nature of enduring powers of attorney makes it difficult to collect information about them, but it would be very instructive to know how many people have powers of attorney in place, and to know demographic data about principals and representatives. Some of this information would be easily attainable were enduring powers of attorney required to be registered, as has been recommended by the Victorian Parliament Law Reform Committee.[10]
- It would also be good to have greater data about the incidence of financial abuse of people with disabilities. We note the State Trustees commissioned

[10] Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney*, 2010, recommendation 67, p. 236.

research on elder financial abuse, which has so far produced four reports.[11] Further research and data on this topic is needed.

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

Yes, however OPA considers that any arrangements must clearly identify where responsibility lies for the decisions made.

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

OPA agrees with the Commission's proposals that both supported and co-decision making arrangements should be able to be established either through personal appointments or by VCAT appointments.

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

In order to ensure the appropriate operation of the proposed appointments, OPA notes that:

- The scope of the role must be clearly defined.
- The appointments should be registered and monitored.
- There should be a review of this part of the legislation after five years. By this time, supported decision-making will be established in many jurisdictions and the research on how people actually make decisions will have expanded. For example, the medical decision making model currently enshrined in the guardianship legislation is coming under question by philosophers and psychologists.

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

Yes. It is better that OPA not be involved as a supporter or co-decision maker. One important reason is that it could be difficult to distinguish between those roles and other roles that OPA might play, such as an advocate or guardian.

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?

Yes, this would be consistent with OPA's current roles as well as being consistent with its expertise. Alternatively, the establishment of an NGO such as Nidus in Canada could perform this role.

---

[11] Peteris Darzins et al, *Financial Abuse of Elders: A Review of the Evidence* (STL, June 2009); Jo Wainer et al, *Prevalence of Financial Elder Abuse in Victoria* (STL, May 2010); Jo Wainer et al, *Staying Safe with Money: The Experience of Older English Speaking Victorians* (STL, November 2010); Jo Wainer et al, *Diversity and Financial Elder Abuse in Victoria* (STL, February 2011).

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?

OPA considers that there should be a clear legislative preference that supporters have a close existing relationship with the person. The use of a volunteer program should be a last resort.

OPA would be well placed to set up such a program and already has a strong volunteer base. In the legislation this program should be clearly identified as a volunteer program, distinct from the other roles of the Public Advocate under the legislation.

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

OPA does not have a firm view on whether supported decision making or co-decision making should apply to financial matters. It may be that the introduction of financial supported decision-making should be considered after personal supported decision-making mechanisms have been in place for some time.

While the few supported decision-making arrangements in other countries appear to include financial decision-making, our history is different and this needs to be taken into account. The dangers of financial abuse are, of course, the prime concern about this development.

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?

OPA agrees that it should have a role in the training and monitoring of support arrangements. OPA submits that it should also be empowered to set standards and principles for supported and co-decision making.

OPA would also be well placed to carry out reviews of supported or co-decision-making arrangements when requested to do so by interested parties or by VCAT. These reviews could be carried out under OPA's proposed increased investigative powers (see the response to Question 118). OPA is not in favour of being given auditing powers in relation to supported or co-decision-making arrangements, and believes that a complaints-based system will be far more administratively efficient.

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

OPA believes that the following safeguards will be required:

- Registration of all agreements
- Police checks on supporters and co-decision makers

- A limit on the number of persons an individual supporter or co-decision maker can support. OPA suggests that if that number is greater than two, then the approval of VCAT should be required.

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

OPA believes that all enduring powers of attorney should be able to be activated immediately upon signing (though a principal should retain the option of being able to activate an enduring power of attorney at a specified time). OPA would like to see consistency in the law in this regard (currently only the EPA (Financial) can operate prior to incapacity). As OPA submitted to the Victorian Parliament Law Reform Committee, there are three reasons for suggesting that an enduring power of attorney should be able to be activated once it has been signed.

> 'First, OPA recognises that there are currently many circumstances when financial EPAs are appropriately used where principals retain capacity, such as when an attorney attends a bank on behalf of a principal with mobility problems. If the law required the principal in this situation to lack capacity before the EPA could be utilised, then this would cause much unnecessary angst (and would require the signing of additional general powers of attorney to enable such transactions to continue) …
>
> Second, the current laws tend to deal with loss of capacity as a "point in time" event, after which capacity is not regained. The experience of OPA is that certain disabilities, such as acquired brain injuries and strokes, may fall into this category, but that other forms of cognitive impairment do not. Episodic mental illnesses, for instance, may result in times of incapacity, but will often see capacity return for differing amounts of time. People with dementia may have capacity in the morning but may lose it later in the day. A requirement that principals must lack capacity before an EPA can be exercised would often thus result in some degree of uncertainty in cases where a principal's capacity is fluctuating …
>
> Third, capacity is usually regarded as being decision-specific. A requirement that EPAs could only be used at times of incapacity would, strictly, require point-in-time reassessments, depending on the nature of the decision being made. Principals may have capacity to make simple financial decisions, but lack it in relation to more complex decisions. A requirement of incapacity can thus be quite problematic in these circumstances ...
>
> A simple way around this problem is to enable principals to initiate all EPAs immediately upon signing, which would make testing of capacity redundant insofar as the exercise of power under EPAs is concerned.'[12]

It is important to note that OPA's argument here is also qualified by the need to provide greater protection to principals from abuse. OPA has proposed a number of safeguards in this regard, including:

[12] Submission by the Victorian Office of the Public Advocate to the Victorian Law Reform Committee's Inquiry into Powers of Attorney, 4 August 2009, available at http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2009/OPA%20Powers%20of%20Attorney%20submission%204%20August%202009.pdf, section 10.

- the optional appointment of personal monitors (who are obliged to receive certain information about the operation of enduring powers of attorney);
- the creation of a new offence regarding enduring powers of attorney; and
- the proposal that representatives be obliged always, where feasible, to ascertain the wishes of principals before acting under an enduring power of attorney, and to be obliged to act on these wishes where reasonable to do so.[13]

As OPA told the Commission:

> 'These changes, if adopted, would more readily enable enduring powers of attorney to exist as tools of supported decision-making. For instance, if the call for immediate activation of enduring powers of attorney were accepted, then attorneys would be able to gather information on a principal's behalf without necessarily then making decisions for the principal. It would only be when principals were demonstrated to have lost capacity in relation to a decision that they would no longer be able to make their own determinations. (Even then, their views would still need to be given serious consideration.)'[14]

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?

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

Parents and carers should be able to file advance care documents with VCAT, and VCAT should be obliged to take them into consideration before deciding on a person's guardianship status. However, OPA feels that such documents should not have any greater force than this, since guardianship appointments should either be made by the person themselves in advance, or by VCAT, in consideration of the personal and social well-being of the proposed represented person. The wishes of family members should be given serious consideration but should not themselves be determinative.

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?

Yes, OPA believes it would be preferable to have two rather than three enduring appointments, and that the Enduring Power of Guardianship should incorporate the Enduring Power of Attorney (Medical Treatment).

---

[13] Submission by the Victorian Office of the Public Advocate to the Victorian Law Reform Committee's Inquiry into Powers of Attorney, 4 August 2009, available at http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2009/OPA%20Powers%20of%20Attorney%20submission%204%20August%202009.pdf, section 11.

[14] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 15.5.

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

Rather than having one appointment type (with a range of powers) OPA prefers the option of limiting to two the number of possible enduring appointments. OPA shares the Commission's concerns about having one appointment type. Primarily these concerns relate to the confusion that would surround existing appointments. For that reason, OPA sees the transition to two possible enduring appointments as the preferred course to follow.

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

OPA is on record as supporting the creation of a registration system for enduring powers of attorney, and OPA supports the notion that this registration system should be online.

29. Which organisation should hold the register?

OPA has suggested that the Victorian Registry of Births, Deaths and Marriages would be an appropriate registering authority for enduring powers. OPA is aware that concerns have been raised about this suggestion, most notably that the Registry of Births, Deaths and Marriages does not currently regulate 'active' documents, but rather serves a more administrative function (even though it no doubt encounters some degree of fraud). OPA recognises that the Registry of Births, Deaths and Marriages would need to develop higher level practices around document invigilation and abuse recognition and prevention if it were asked to serve as the registry for enduring powers.

30. Should registration be voluntary or compulsory?

OPA has argued that registration would need to be mandatory for it to be meaningful. A transition arrangement would nominate a date and any enduring powers signed after that date would need to be registered if they were to be enforceable. OPA would suggest that older enduring powers of attorney – those executed prior to the nominated date – could also be registered, but on a voluntary basis only.

31. If registration is compulsory, what effect should this have on unregistered appointments?

If a compulsory registration system were adopted, unregistered appointments would be of limited legal significance (this would not, however, apply to those unregistered appointments that pre-date the introduction of the compulsory registration system – as discussed in the previous response). Such appointments might be used in guardianship hearings as evidence of a person's future wishes, and VCAT might choose to appoint a person named in an unregistered appointment as a co-decision-maker or substitute decision maker.

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

For pragmatic reasons OPA believes that registration ought to be expected shortly after execution. However, OPA would propose that registration would legally only be required prior to the exercise of any power under an enduring power.

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?

Access to the register should be restricted to those who are named in the document and those who need to verify the document in order to implement a decision made under an enduring power. Many safeguards will need to be put in place, and a process by which the register is updated and corrected will need to be established. Different levels of access will need to be created. Members of the public who are principals and or representatives ought only to be able to access information on the enduring powers in which they are named (and OPA notes its call for the creation of personal monitors, which the Victorian Parliament Law Reform Committee has supported).[15] Institutions such as hospitals and banks, which will need ready access to the register, would need to be able to search the entire register. This level of access would be subject to certain safeguards, such as the requirement to nominate particular individuals who would have access to the database (and records of who has accessed the register would need to be maintained). The information available on the database would consist, at a minimum, of:

- the principal's full name and date of birth
- the name of the representatives, and
- the type of enduring power that has been executed.

Where a person wishes to access information about a personal appointment and that person is not named in an instrument and does not have the elevated access to the register that would be possessed by banks and hospitals, an application would need to be made either to the registry or to an outside body. OPA would be happy to play this 'gatekeeper' role. Were OPA to gain this responsibility, access requests, which would need to be made during business hours, would be made initially through OPA's Advice Service.

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

In answering this question OPA notes here its previously stated view that the default position should be that enduring powers should be able to be activated immediately, a view endorsed by the Victorian Parliament Law Reform Committee in its report on powers of attorney in the guardianship and financial fields.[16]

OPA does not believe it should be necessary to require a public authority to be notified of the activation of an enduring power. This would constitute another layer of

[15] Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney*, 2010, recommendation 57, p. 200.

[16] See Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney*, 2010, pp. 91-93 (including recommendation 25).

bureaucracy over and above registration of the document, and OPA does not believe the benefits of this requirement would outweigh the costs.

The case for requiring notices of activation is particularly weak in relation to powers of attorney in the medical and guardianship fields. Here the time between activation and the need for decisions can sometimes be very brief (particularly in medical situations). In addition, fraudulent usage of powers of attorney in these fields is not common. The administrative hurdle that the requirement would represent is not, in OPA's view, justified.

The case for requiring notices of activation is stronger in relation to financial powers of attorney. However, OPA submits that even here the costs of the proposal outweigh the benefits. While the benefits relate to limiting inappropriate usage of powers of attorney, the costs include the following:

- If the notice of activation required proof of incapacity then this would add another administrative hurdle that would act as a disincentive for powers of attorney to be executed and/or activated. This would also present difficulties in situations where a person has fluctuating capacity. Moreover this requirement would be the basis for widespread public confusion, given that financial powers of attorney are able to be activated without a person losing capacity. The requirement would thus only apply to some and not all enduring powers of attorney.
- Assuming that financial powers of attorney will remain able to be activated immediately upon execution, then oftentimes activation will occur immediately after execution. In these cases the notice of activation would be registered at the same time that the instrument was registered. OPA believes that over time this would become the routine practice, and that notices of activation would tend to be lodged upon execution. This would tend to strip the requirement of any meaningful purpose.
- If non-compliance with an activation notice requirement resulted in actions undertaken by representatives being ruled invalid, then otherwise appropriate conduct might be placed in jeopardy for reasons of administrative technicality.
- There would be elevated privacy concerns if the registry of personal appointments contained lists not only of people who had executed powers of attorney, but those people whose powers of attorney had been activated. The names of a particularly vulnerable group of people would thus be available to a wide range of people who had access to this part of the register.

Rather than supporting this proposal, OPA believes that other safeguards are sufficient to protect the interests of people who execute powers of attorney. These safeguards include the requirement that the register be checked by those recognising or implementing a decision made by a representative (such as banks or hospitals). OPA also notes here its answer to Question 23, which lists the other safeguards proposed by OPA. OPA's proposed power to investigate situations of concern also constitutes another proposed safeguard (see the response to Question 118).

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?

A donor (or principal) should be able to specify the names of individuals who should be notified about the activation of an enduring power of attorney. Such people would include any personal monitors listed in the instrument.[17]

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

Situations of fluctuating capacity provide particular problems for enduring powers that are only activated by a loss of capacity (which is why OPA has responded to Question 23 in the way that we have).

Notification, in OPA's view, should only be required where the exercise of power under an enduring power was contingent on some future event, such as loss of capacity. In such situations, where a representative wishes to exercise power under an enduring power, the notification requirement would simply be that the representative would need to contact all parties and any listed personal monitors. Those people would be able to challenge the use of the enduring power at VCAT if they believed, for instance, that the condition had not been met. VCAT would ultimately be responsible for determining whether the condition (such as a lack of capacity) had been met at the relevant time.

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

Yes, a principal should be able to specify that certain people not be told that an enduring power has been activated. Such people may, of course, subsequently become aware that a power has been activated (for instance, through involvement as a party to a transaction in which the power of attorney is utilized).

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

Yes, it would be helpful for legislation to make reference to instructional medical directives. Such reference would inevitably elevate the status of instructional medical directives, but that is appropriate. As OPA previously advised the Commission:

> 'OPA believes as a general principle that all people who are entrusted to act on behalf of non-competent patients – such as agents and attorneys under enduring powers of attorney, guardians, and persons responsible – should legislatively be required at least to give serious consideration to any advance directive that has been signed by the patient. Moreover OPA supports the retention of the current provisions in the *Medical Treatment Act* governing the situations in which Refusal of Treatment Certificates must be honoured'.[18]

The Commission has proposed that legislation concerning instructional medical directives could replace the Refusal of Treatment Certificate scheme by setting out 'a

---

[17] See also Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney*, 2010, recommendation 60, p. 205.

[18] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 26.2.

broader range of binding instructional directives about medical care'.[19] While OPA supports the legislative articulation of instructional directives, and supports retention of the Refusal of Treatment Certificate scheme, it does not wish to broaden the situation in which binding directives can be made.

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

Yes, OPA supports the ability of people to make instructional directives about matters other than medical treatment.

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

Such matters would not necessarily need to be unduly limited, but might include future accommodation preferences and preferences a person might have regarding the people with whom they wish to remain in contact.

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?

OPA takes the view that the advance wishes expressed by a person in a personal appointment document should be instructive rather than binding on the decision maker. (Please note that OPA supports the retention of the current Refusal of Treatment Certificate scheme.)

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

Yes. Of the three options suggested by the Commission, OPA favours Option B (which would bring about 'a statutory requirement that personally appointed decision makers consider and provide reasons for departing from instructional directives').[20] (Again, OPA notes here that it supports the retention of the current Refusal of Treatment Certificate scheme.)

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?

Given the previous answer, this is unnecessary to answer.

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

---

[19] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 9.83.

[20] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, p. 177.

Yes, the rules should apply equally to enduring guardians and attorneys.

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?

Where an instructional directive is overridden in a way not sanctioned by the law, the penalty should be consistent with the penalties that exist for breaches of other duties by substitute decision makers (and OPA notes the Commission's reform suggestions in this regard that are contained elsewhere in the Consultation Paper).

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

Yes, an electronic registration system for advance directives would be a sensible development.

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

If there were to be electronic registration of advance directives, OPA sees no reason why this should not extend equally to lifestyle and medical instructional directives.

48. Should registration be voluntary or compulsory?

For any registration system to be workable, OPA would recommend compulsory rather than optional registration. This is because one advantage of registration might be that service providers (such as hospitals) could check to see whether a person has made a directive. In practice, this would only happen routinely if registration were mandatory.

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?

The challenges presented by designing an effective advance directive register will differ from those presented by establishing a personal appointment register. In essence the latter is a system that registers decision-makers, and the former is a system that registers decisions. OPA reiterates its view that while the Refusal of Treatment Certificate scheme should continue, OPA does not wish to broaden the number of situations in which binding advance directives can be made.

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?

Yes, OPA agrees with the Commission's proposal that in order for a guardian or administrator to be appointed there should be a link between a person's disability and the person's inability to make decisions. OPA articulated this position in our previous submission in the following way:

> 'OPA ... proposes that a guardianship order should only be made where a person has an impairment that renders the person unable to make or give effect to their own decision about a particular health or welfare matter, and either:
> • a decision is required, or
> • the person's health or welfare is at serious risk with regard to that matter.'[21]

OPA's preference is for the term 'impairment' to be used instead of disability. A more detailed articulation of the reasons for this proposition are contained in a forthcoming law journal article.[22]

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?

OPA agrees with the Commission's proposal to introduce principles in guardianship legislation that will help to assist in determining whether a person does not have capacity. OPA supports each of the principles contained in Paragraph 10.133 of the Consultation Paper.

OPA also supports the proposed legislative definition of incapacity such as that used in the United Kingdom *Mental Capacity Act*, as quoted in Paragraph 10.137 of the Consultation Paper. This is now a standard way in which incapacity is defined, and OPA supports its introduction to Victoria.

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?

The proposal that VCAT be able to appoint a guardian or administrator ahead of there being a need for this has some merit. In particular, this would allow guardianship and administration appointments to be made in advance of a crisis point. It would, for instance, enable arrangements to be put in place where a person with a disability has ageing carers who know they will not be able to provide informal support for the person's entire life.

On the other hand, this proposal may lead to a large number of unnecessary applications to VCAT. The proposal suggests that applications might be made where a person 'might have some future need for a guardian or an administrator'. This is so broad a possibility that virtually every Victorian who is 'unable to make their own decisions because of a disability' would be eligible for a guardian and an administrator. In effect the proposal removes the criterion of need from the legislation. Over time the implementation of this proposal would have an effect on the informal way in which decisions are made by, with and for people with profound

---

[21] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 6.12.

[22] See John Chesterman, 'Capacity in Victorian Guardianship Law: Options for Reform', *Monash University Law Review*, forthcoming 2011.

disabilities, and would tend to see guardianship and administration become more highly utilised than currently they are. Overall OPA does not see this as being beneficial, and thus OPA does not support this proposal.

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?

OPA agrees with the Commission that Victorian legislation should close the gap that currently exists between child protection (up to 17 years of age, although an earlier order can apply until the person turns 18) and guardianship under the *Guardianship and Administration Act* (available only to 18 year olds and over).

The Commission notes: 'Victoria is the *only* Australian jurisdiction to exclude 17 year olds (not subject to an existing protection order) from its child protection system.'[23] OPA supports the proposal that the *Children, Youth and Families Act* be extended to cover people up to 18 years of age (and notes that this protection should arguably be available to help people with cognitive impairments into their mid twenties).

OPA also supports the proposal that administrators be able to be appointed for 16 and 17-year-old children. The fact that disability support pensions and other benefits can be available to 16 year olds brings forward the need to provide substitute decision making authority in relation to financial affairs.

OPA does not, however, believe that the guardianship legislation should enable guardians to be appointed for 16 and 17-year-old children. OPA's principal concern about this proposal is that it will likely lead to guardians playing case management roles.

As OPA argued in May 2010:

> 'In particular, OPA is concerned that this has the potential to see guardianship become a means through which social service commitments may be diminished or completely withdrawn once an individual turns 17, and that closure of the existing gap carries with it the danger that guardianship will be increasingly asked to provide case management for people leaving state care, instead of being provided by a proper "leaving care team"'.[24]

If the proposal were adopted the likelihood is that child protection services will seek to have guardians appointed as soon as possible and thereby transfer to guardians the responsibility for providing protection to those individuals in the protection system who have disabilities. This will not, as a rule, assist the personal and social wellbeing of those individuals.

OPA does recognise that some 16 and 17 year olds would benefit from OPA's independent assistance, and for that reason OPA proposes that OPA's advocacy services be available to 16 and 17 year olds with cognitive impairments or mental illness.

Medical treatment decisions concerning children

[23] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 11.48.

[24] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 20.2.

In the context of this question about the extension of guardianship laws to children, OPA wishes to submit that the guardianship legislation provisions concerning medical treatment (part 4A of the *Guardianship and Administration Act*) should apply to all people with disabilities, not just to those over the age of 18.

OPA is occasionally involved as an amicus curiae, and sometimes even as a party, in Family Court cases where medical treatment decisions concerning children are being considered (for a recent instance, see the case of *Baby D*, which is discussed in the answer to question 123). OPA is concerned that the Family Court is not the proper place for these cases to be heard. In our May 2010 submission OPA argued that VCAT was better placed than the Family Court to make medical treatment decisions for children with disabilities,[25] and it is worth noting that Queensland's and Tasmania's guardianship legislation empower the relevant tribunal or board to make some medical decisions (such as sterilisation) concerning children with disabilities.[26]

A number of factors make the Family Court a less than optimal forum for the making of these decisions. These factors include:

- The relatively small number of such cases that come before the Family Court;
- The somewhat uncertain jurisdiction of the Court in relation to when its authorisation is required;[27]
- The adversarial nature of Family Court hearings; and
- The prohibitive costs of Family Court applications.

The latter two points act as significant disincentives for matters to be brought before the Family Court. This significantly weakens the ability of the Court to provide effective oversight of ethically complex medical treatment decisions concerning children. Contrastingly, VCAT, which is an accessible and inquisitorial forum, regularly hears cases involving the medical treatment of people who themselves cannot consent to it. OPA strongly supports VCAT's authority being extended to include medical decisions concerning children. This could be done by extending VCAT's jurisdiction in Part 4A of the *Guardianship and Administration Act* to include children.[28]

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?

[25] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 20.3.

[26] *Guardianship and Administration Act 2000* (Qld), chapter 5A; *Guardianship and Administration Act 1995* (Tas), sections 3, 36, 39.

[27] The Family Court has jurisdiction in relation to medical treatment decisions concerning children that constitute 'special medical procedures' or 'special cases'. See *Re Baby D (No. 2)* [2011] FamCA 176, pars 199ff.

[28] OPA recognises that there would need to be debate about whether all aspects of Part 4A of the *Guardianship and Administration Act* should apply to children in the same way that they apply to adults. For instance, one question would be whether the 'person responsible' hierarchy that applies to adults should be exactly the same for children.

If the Commission's proposal is adopted there is a real risk that the services now available to children will no longer be available. This point was made in OPA's first submission (which is quoted in the response to the previous question). Since a guardian does not have the authority to direct service providers, it is hard to see how guardianship itself will be able to ameliorate this risk.

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?

Yes, OPA believes the current distinction between administration and guardianship should be retained. As we stated in our previous submission:

> 'A key argument for continuing to separate public guardianship from professional administration is the idea that this separation of functions is in the interests of clients. The argument is that this distinction:
>
> • Stops too much power over a person's life residing in one person or organisation.
>
> • Enables financial decisions to be made within an understandably "cautious" cultural environment, while enabling guardianship decisions to be informed by the range of rights-promoting and tolerance-promoting principles that have always underpinned the work of OPA.'[29]

Of the five possibilities suggested by the Commission where this distinction is retained, OPA supports the proposal that only private administrators and guardians ought to be able to have 'dual appointments' as both guardians and administrators (option A ii).

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?

The Commission has proposed a number of ways by which to manage the overlap that can exist in relation to the powers of administrators and guardians. OPA agrees with all five suggestions contained in Paragraph 12.93, which cover: greater articulation of powers; a requirement that guardians and administrators liaise with one another; legislative articulation of whose decision should prevail; introduction of dispute resolution processes; and training.

In addition to these, and in further articulation of the third point, OPA would favour following New Zealand's practice, whereby the decision of a guardian would prevail in situations where there is an overlap. On this point it is worth noting that the Victorian Parliament Law Reform Committee made a similar recommendation in relation to powers of attorney, stating that:

> 'The Committee recommends the Powers of Attorney Act provide that if there is conflict between a representative with powers in relation to guardianship matters (whether appointed by VCAT or a principal) and a representative with

[29] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par 12.4.

> powers in relation to financial and legal matters, then the decision of the representative with powers in relation to guardianship matters prevails, and the representative with powers in relation to financial and legal matters must take such available steps as may be necessary to allow the decision of the representative with powers in relation to guardianship matters to be implemented.'[30]

OPA recognises that oftentimes disagreements between administrators and guardians centre around whether the person has the funds needed for a guardianship decision to be implemented. OPA also recognises that automatically favouring a guardian's decision in such scenarios may involve, in the eyes of an administrator, an unreasonable financial risk to the person. In such situations, an administrator would be at liberty to challenge a guardian's decision at VCAT.

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?

OPA supports the retention of the current requirement that VCAT consider 'the desirability of preserving existing family relationships' in ascertaining the suitability of a person to be a guardian,[31] and recommends extending this principle to the corresponding provision concerning the suitability of a person to be an administrator. VCAT would need to be satisfied, of course, that any administrator had the requisite financial skills to be able properly to perform the role.

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?

OPA supports the abolition of plenary guardianship orders and supports the Commission's third option (Option A (iii)) in this regard. This would mean that new 'legislation would contain non-exhaustive lists of both the powers available to a guardian or administrator and the powers that cannot be given to a substitute decision maker'.[32]

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

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

Guardians and administrators should be unable to make decisions on behalf of represented persons in the following areas:

---

[30] Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney*, 2010, recommendation 47, p. 165.

[31] *Guardianship and Administration Act 1986* (Vic), section 23(2)(b).

[32] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 13.114.

- voting
- marriage or divorce
- personal relationships (including sexual relationships)
- the wellbeing of a represented person's children
- the carrying out of 'special procedures'
- the carrying out of psychiatric treatment
- detention of the represented person, unless the primary goal is the protection of the represented person (rather than the protection of others).

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?

This is unnecessary to answer.

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?

Yes, OPA considers that there are times when it would be appropriate for VCAT to be able to make orders regarding the ability of guardians and administrators to make decisions about:

- the holding of a driver's licence by a represented person
- a represented person's will (such as allowing an administrator to view such a will)[33]
- future organ donation (after death).

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?

OPA believes the current provisions regarding gift-giving by administrators to be appropriate. OPA notes here that the Victorian Parliament Law Reform Committee has proposed changing the law so that gift-giving by representatives under enduring powers of attorney are subject to similar legal requirements as currently confront administrators.[34]

[33] As proposed by State Trustees, see Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 13.45.

[34] See Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney*, 2010, recommendation 58, p. 202.

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

Yes, the anti-ademption provisions of section 53 require clarification. OPA supports the proposal by State Trustees to allow third-party remedies in these circumstances, and to make such remedies available in a variety of legal situations (not just in dealings with wills) where the dealings with a person's property by a substitute decision-maker (not just an administrator) lead to financial loss by a third party.[35]

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

Yes, OPA supports the proposition that State Trustees be able to exercise the same powers as other administrators.

66. Who should conduct litigation on behalf of a represented person?

OPA acknowledges the current complexity of the law surrounding the appointment of litigation guardians for people with cognitive disabilities or mental illness.

In our previous submission, OPA remarked that:

> 'OPA is sometimes asked, and even on occasion required, by courts to act as a litigation guardian in order to instruct counsel representing a person with a cognitive impairment or mental illness. Sometimes it will be appropriate for OPA to act as a litigation guardian, where the substance of the court action relates to a lifestyle issue, such as access to persons. Likewise, where the matter is more exclusively financial, it will be appropriate for an administrator to be appointed litigation guardian. Since a person or body may traditionally refuse appointment as a litigation guardian, OPA would like it clearly articulated in the guardianship legislation that OPA's consent is required before it is appointed as a litigation guardian.'[36]

As the Commission notes, the unfortunate situation currently exists whereby administrators are unlikely to wish to be litigation guardians because of the fear that costs may be awarded against them.[37] At the same time, it should be noted that it will sometimes be very much against the represented person's interests for an administrator to refuse to conduct civil litigation on the person's behalf. This itself could even amount to a breach of a fiduciary duty.

OPA calls here for any new guardianship legislation to:

- clarify when costs may be awarded personally against an administrator or a guardian when acting as a litigation guardian.
- clarify which matters may properly be pursued by administrators and which matters may be pursued by guardians as litigation guardians.

---

[35] See Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 13.56.

[36] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 1.33.

[37] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 13.83.

- clarify that guardians and administrators may choose to be, or choose not to be, litigation guardians.

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?

A court should be empowered to order that a litigation guardian be liable for the costs of litigation in specified circumstances. Where the litigation guardian is an administrator or guardian these circumstances should only be where the litigation guardian's involvement in the litigation has not been in the interests of the represented person's personal and social wellbeing, or where the conduct of the litigation by the litigation guardian is in breach of appropriate professional standards.

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?

Yes, OPA has previously argued that VCAT should retain the power to order that a guardian or other specified person (usually ambulance or police personnel) be able to enforce a guardianship decision.[38]

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

The additional safeguards proposed by the Commission, concerning the criteria for the making of enforcement orders and the reduction in the review period, are supported by OPA. This would mean that enforcement orders would only be made where they are the least restrictive option available, where they are intended 'to promote the personal and social wellbeing of the person', and where they are 'reasonable and justified in the circumstances'.[39] An appropriate review period might be 21 days (rather than the current 42 days).

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?

OPA agrees with the Commission's suggested retention of the current person responsible hierarchy (contained in section 37 of the *Guardianship and Administration Act*).

OPA notes that the person responsible scheme is not without its limitations. There is currently very little scrutiny of how the scheme works, and OPA knows that many persons responsible make decisions having received inadequate amounts of

---

[38] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 19.6.

[39] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, pars 13.136 and 13.138.

information. This is particularly the case where hurried decisions are needed in a hospital setting, and where the person responsible may not have known until the last minute that they were in a legal decision-making role. Persons responsible typically receive no education about their role, but they are required to make sometimes very significant decisions.

Having said that, OPA does support the retention of the scheme, and argues that its limitations need to be met by greater community education and professional education. Indeed, OPA supports one extension of the scheme (see the response to Question 75).

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

OPA does not propose any alterations to the person responsible hierarchy.

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

OPA believes that persons responsible should make decisions that promote the personal and social wellbeing of the person in question. In making their decisions persons responsible should be obliged to consider what they believe the people in question would have wanted, had they the capacity to make the decisions themselves. But this consideration alone should not be determinative of a person responsible's decision in any particular case.

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?

While VCAT can currently remove the authority of a person responsible to make decisions on behalf of a person, OPA accepts that people rarely apply to VCAT for such orders, even when they have significant concerns about how power is being exercised by persons responsible. OPA supports the proposal that it be given greater power to receive complaints about the exercise of person responsible powers, and greater power to investigate such concerns. Where OPA concludes that a person responsible should have his or her authority removed, OPA could then avail itself of existing processes and apply to VCAT for an order in these terms.

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?

Yes, as we pointed out in our earlier submission:

> 'OPA nominates as a key human rights topic of the next five years, the need for Victoria (and indeed Australia) to better regulate the means by which people with disabilities are subjected to some degree of "deprivation of

> liberty" or are subjected to unregulated or under-regulated restrictive interventions.'[40]

OPA called for the development of deprivation of liberty safeguards which:

> '…would be focussed in Victoria on people who suffer deprivations of liberty in a variety of settings (most notably in the disability and aged care sectors) and whose treatment is not auspiced by existing involuntary or coercive treatment laws.'[41]

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?

The proposal to extend the person responsible scheme to some accommodation decisions has some merit.

In its favour, the Commission's proposal would provide a response to the challenges presented by the *Bournewood* decision without the extraordinarily high administrative burden that other options would impose (such as those that are experienced in the United Kingdom following the implementation there of deprivation of liberty safeguards).

However, OPA is not convinced that the Commission's proposal satisfactorily addresses the challenges presented by the *Bournewood* decision.

There are two important ways in which accommodation decisions, including decisions that restrict a person's freedom, differ from medical treatment ones.

The first, which the Commission recognizes,[42] is that medical treatment decisions are circumscribed by well-developed medical professional norms. This means that the available scope for decision-making by a person responsible is quite contained. The proposed medical treatment, about which a decision is required, must first be being offered. And then only a small, professionally trained group of people (doctors) can carry out the medical treatment. This makes abuse of the person responsible power quite unlikely and leaves little room for the self-interest of persons responsible to affect unduly their decisions.

The same cannot be said of accommodation decisions, which are not circumscribed by so well-developed a professional set of ethical norms. This leaves far less protection available to people who might be the subject of a person responsible accommodation decision, and leaves far greater scope for the self-interested concerns of a person responsible to come into play.

Second, the nature and implication of medical treatment decisions are quite different to accommodation decisions. Medical treatment decisions are usually decisions about a particular treatment ('do you consent to this procedure?') and the implications of

---

[40] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 1.18.

[41] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 1.19.

[42] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 15.94.

decisions either way do not jeopardize the right of the person to other ongoing treatment.

In contrast, accommodation decisions are usually broad ones about a person's future living environment. Considerations regarding limitations on freedom will be only one part of this equation. Where a person responsible is being asked to make an accommodation decision, a failure to agree to certain deprivations of liberty will often mean that the person cannot be placed in that accommodation. In other words, other considerations, beyond simply the rights and wrongs of the particular deprivation of liberty in question, will tend to be features of any decision like this. In short, the danger is that decisions about deprivations of liberty will tend not to be as considered, or as informed, as are medical treatment decisions (and we should note, as we discussed in the response to Question 70, that medical treatment decisions by persons responsible are not made on as informed a basis as they might be).

A routine scenario that OPA fears might become commonplace if the Commission's proposal were adopted is that a disgruntled son (assuming that the son is the highest ranking person responsible and that the mother here hasn't executed an enduring power of attorney) could abuse his power and move his unhappy but compliant mother into aged care to fulfill his self-interested desire to enjoy vacant possession of her house. While such a scenario happens now informally, the proposal would give the son in this situation an elevated legal basis for his decision. In OPA's view this outcome might satisfy the legal problems presented by the *Bournewood* decision, but it would not constitute a satisfactory outcome for the person with a disability.

OPA's preferred response to the *Bournewood* challenge is not to call for the UK deprivation of liberty model to be implemented in Australia, which OPA acknowledges to be unduly administratively burdensome.[43] But OPA believes it is possible to implement deprivation of liberty standards in Victoria without the same administrative requirements as exist in the United Kingdom. These could involve a legislative articulation of procedures that need to be in place before accommodation providers can implement liberty-constraining features (and OPA reiterates the point made in the introduction about the general need for restrictive interventions to be better regulated).

A final point in response to this question is that OPA does favour one change that would extend the person responsible scheme to a particular group of accommodation decisions.

One routine scenario that confronts OPA occurs when people need to be discharged from hospital and where guardianship applications for this one decision seem to be an unduly time-consuming and administratively burdensome process. At present the administrative energy and delays involved in this process tend not to be justified by the improvements that a discharge decision can make to a person's life. This process currently involves: having the matter listed for hearing at VCAT; having the matter heard and determined by VCAT; having any order communicated to OPA; and having the matter internally allocated at OPA. Under the 'statutory health attorney' system in place in Queensland, as the Commission notes, 'admission to some nursing facilities is included in the list of health care decisions to which a statutory health attorney can consent'.[44]

[43] See Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, pars 15.59ff.

[44] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 14.27.

A possibility here, drawing from Queensland's experience, would be simply to extend the guardianship legislation's definition of 'medical treatment' to include the decision to be discharged from hospital. This would enable the person responsible scheme to apply to discharge decisions. (Another option here would be to replace the term 'medical treatment' in guardianship legislation with the broader term 'health care', and to define 'health care' in such a way that it includes decisions concerning discharge from hospital.) A further addition to this scheme would be to statutorily appoint OPA to be able to make certain decisions, including discharge decisions, where there is no person responsible available to do so (see also the responses to Questions 82-84).

OPA would still have some concerns here about even this limited proposal (one danger might be that unscrupulous persons responsible could seek to admit people to hospital in order to be able to exercise their power to discharge such people to new accommodation settings). If this proposal were adopted OPA would want to see safeguards built in, such as a requirement that a matter proceed to a guardianship application if a person consistently objects to a discharge decision being made by a person responsible. Another, or alternative, safeguard might be to require OPA to be notified when a person consistently objects to a discharge decision being made by a person responsible. This could then trigger an OPA investigation.

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?

As indicated by the previous response, OPA does not consider that the Commission's proposal is a satisfactory solution to the challenges presented by the *Bournewood* decision. But if the Commission's proposal were nonetheless adopted, OPA would wish to see in place a number of the safeguards proposed by the Commission.

- The need for medical certification prior to the exercise of the person responsible power would be a good safeguard, and one that would not be unduly burdensome on facilities. Facilities could have on-site staff who were skilled in making these capacity assessments, and these assessments could be recorded on the person's file.
- OPA does not support the proposal that we be advised when a person responsible power is used. The large administrative task this would involve would not be justified, and indeed it is the times the Public Advocate is not notified that would be the situations of greatest concern. An alternative proposal is suggested at the end of OPA's answer to this question.
- OPA supports the ability of the person, or a supporter of the person, to challenge at VCAT any decision made by their person responsible. OPA also agrees that the person responsible power should not apply if the person were actively resisting admission.
- OPA supports the requirement that the person responsible consider a range of matters before using their power, and that the person acknowledge their consideration of these matters by signing a form. These matters would include information on the duration of their decision, and the specific restrictions to which they are agreeing. The person would also need to acknowledge that no

less restrictive options feasibly exist. This form would be retained by the relevant facility.

- OPA agrees that the person responsible process should not apply to admission or detention under disability or mental health legislation.
- Consistent with OPA's answer to the previous question, OPA proposes that another safeguard might be to require OPA to be advised where a person is consistently objecting to an accommodation decision made by their person responsible.
- OPA agrees that there would need to be some placements that could not be authorized by the person responsible, as discussed in the answer to Question 78.

In addition to these suggested safeguards, and consistent with our answer to question 73, OPA would welcome increased power to receive complaints about the exercise of power by persons responsible, and increased power to investigate such complaints. OPA would then be able to apply, where appropriate, to VCAT for an order removing the person responsible from having decision-making authority.

OPA also believes there is a need for legislative articulation of the principles that should guide facilities which utilize those restrictions that may be considered to be deprivations of liberty.

Such legislative articulation would put the onus on facilities to name restrictive practices as such, and to justify their use by pointing to the absence of less restrictive options.

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

Some changes would be needed to the hierarchy of automatic appointments if the automatic appointment scheme were expanded to cover some accommodation admissions. In particular, people exercising guardianship powers (such as guardians and enduring guardians) would need to take priority (in making accommodation admission decisions) over individuals appointed with financial and medical powers.

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

The residential facilities to which an expanded person responsible system might apply would include all government funded and supported accommodation settings as well as all government regulated accommodation settings. It would not apply to those facilities that are subject to higher-level safeguards, such as those accommodation settings where people are detained under disability or mental health legislation.[45]

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

As OPA submitted to the Commission in May 2010:

---

[45] See Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 15.101.

> 'OPA considers that the current definition of "medical treatment" (section 3) in the guardianship legislation needs tightening and, in some instances, expanding.
>
> OPA notes that the guardianship legislation defines medical treatment in one way, while the *Medical Treatment Act* (section 3) defines medical treatment differently, while the *Mental Health Act* has a definition of "non-psychiatric treatment" (section 83), which differs again. OPA calls for these differences to be removed ...
>
> OPA also notes that the term "health care" appears in the guardianship legislation in relation to the powers of a plenary guardian (section 24) and in the notes concerning the appointment of enduring guardians (schedule 4, form 1). But just how "health care" relates to "medical treatment" is not entirely clear.'[46]

In this regard OPA has suggestions which are recorded below, but OPA here repeats the general point that the legislation would be far more user-friendly if it were to 'follow the lead of legislation such as the *Family Violence Protection Act 2008* (Vic), which provides examples alongside its legislative definitions (see, for instance, section 5 of that Act)'.[47]

OPA also submits here that thought should be given to extending the definition of 'medical treatment' to include the decision to discharge a person from hospital (see the response to Question 75).

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

Yes. As OPA noted in May 2010:

> 'Currently the standard "administration of a pharmaceutical" is not included in the definition of "medical treatment", which would run contrary to most people's expectations. This means that consent of a person responsible is not usually required in relation to the administration of a prescribed pharmaceutical to a person who is unable themselves to consent to it ...
>
> The advantage of exempting the standard "administration of a pharmaceutical" from the definition of "medical treatment" in the guardianship legislation is that a person responsible does not need to be located in order to consent to routine tablet taking (by a person who is unable to give consent). But there are strong reasons why such protection should be required. Some pharmaceuticals constitute interventions that are more significant than some of the procedures that are currently captured by the definition of medical treatment, while some pharmaceuticals also carry possible side effects that are every bit as serious as the side effects that may flow from an operation. In addition, by dictating that the administration of pharmaceuticals is usually not "medical treatment", the person responsible cannot agree to a person receiving a pharmaceutical that

[46] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, pars 23.4, 23.7.

[47] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 23.6.

> they may actually wish them to receive (but which may not be suggested without their advocacy for it). OPA calls for the administration of prescription pharmaceuticals to be included in the guardianship legislation's definition of medical treatment.'[48]

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?

OPA submitted in May 2010 that:

> 'The current definition of "medical treatment" applies to treatment "normally carried out by … a registered practitioner". OPA suggests that thought be given to broadening out the range of health professionals whose activities should specifically be subject to the consent and substitute consent provisions of the Act. These people would include nurse practitioners, naturopaths, physiotherapists, alternative/natural medicine practitioners and Chinese medicine suppliers.'[49]

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?

OPA has argued that there should be a distinction in Victorian law between 'minor and uncontroversial treatment' and other treatment.

As OPA pointed out in our earlier submission, where medical treatment is proposed for someone who cannot consent to it, and where there is no person responsible available:

> 'Victorian legislation, and accompanying regulations, should distinguish between "minor and uncontroversial treatment" and major treatment, and should require substitute consent for the latter.'[50]

In defining what constitutes major treatment, OPA's suggestion would be that Victoria follow the practice in New South Wales (where 'major treatment' is defined in regulations). Indeed the New South Wales list would be a good starting point for Victoria.[51] This is preferable to leaving the definition more open, as is the case in Queensland.

---

[48] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, pars. 23.8, 23.11.

[49] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 23.14.

[50] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 23.24. See also Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 16.65.

[51] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 16.86.

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?

As OPA argued in its previous submission, where the person cannot consent to the treatment and there is no person responsible available to consent on the person's behalf, then:

> 'Minor and uncontroversial treatment should be able to be performed after a second practitioner agrees with the proposed course of action. This should be evidenced by a note on the patient's file which is supported by the signature of the second practitioner (this proposal was suggested to us by the VLRC in one of our meetings). Where the person is in a regional or rural setting, the giving of a second opinion may need to take place through a documented telephone call.'[52]

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?

As OPA argued in our previous submission, where the person cannot consent to the treatment and there is no person responsible available to consent on the person's behalf, then treatments that are not 'minor and uncontroversial', and any treatments objected to by the person, should require substitute consent. OPA was previously of the view that such substitute consent should be provided by a guardian.[53] On reflection, and following our own consultations with VCAT representatives,[54] OPA has come to the view that such substitute consent could be provided by OPA as a statutory, rather than VCAT, appointment. This would avoid the need to get VCAT's authorisation before OPA could make a decision, and would be similar to the statutory health attorney provisions in Queensland (this authorization process would not apply to emergency situations).

OPA notes here that the consent of OPA to any treatment would need to be oral or written consent, rather than consent obtained by registration of a notice (such as the current section 42 K notice). In addition OPA's statutory appointment, and any exercise of power by OPA, would be subject to review by VCAT.

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?

---

[52] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 23.25. See also Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 16.65.

[53] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 23.26. See also Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 16.65.

[54] OPA held discussions with VCAT representatives about the guardianship review on 28 April 2011.

OPA supports the suggestion that the process for gaining substitute consent in relation to medical research should be the same as for gaining substitute consent in relation to medical treatment. OPA also supports the view that new criteria would need to be in place where such substitute consent were being given. OPA agrees that the consideration of whether proposed research is in the 'best interests' of the person (or promotes the personal and social wellbeing of the person) is not particularly helpful, since medical research can rarely offer much of significance to participants in the research (other than the knowledge that the participants may be helping others in the future). OPA has some thoughts to contribute about this in the response to the next 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?

OPA suggests that, in giving substitute consent for someone to be involved in medical research, a person responsible should be required to decide that the potential benefits to society of the research outweigh the likely negative effects upon the person concerned of his or her involvement in the research.

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?

No, the law should not elaborate how much weight should be given to current or past wishes. The law should provide merely that these matters need to be taken into account when a substitute decision maker is making a decision. There will be occasions when a person's current wishes conflict with their past wishes. In such circumstances, there will be times when it is in the interests of a person's personal and social wellbeing for their current wishes to prevail, just as there will be times when it is past wishes, beliefs or values that should prevail. In giving particular weighting to one or the other, the danger is that substitute decision makers will be unduly constrained in their ability to make decisions that improve the personal and social wellbeing of the person in 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?

Yes, OPA's position is that the legislation must require the person appointed to a decision-making role to identify and follow the represented person's wishes wherever possible, but not in situations where to do so would cause undue harm. Persons appointed to formal decision-making roles should never become agents of harm, but should consider and balance the positive and negative consequences of risks.

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?

Yes, the legislation should contain a set of general principles that apply to substitute and supported decision-making roles. These principles could be drawn from OPA's current guardianship standards and OPA's summary of the responsibilities of attorneys under Enduring Powers of Attorney (Financial), both of which are extracted by the Commission.[55] There would need to be additions to these principles in order to cater fully for the supported decision making initiatives that have been proposed. And in drafting such principles OPA also refers the Commission to OPA's responses to Questions 3 and 4. The principles that guide the making of substituted and supported decisions would, of course, need to be consistent with the principles behind the new legislation.

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?

OPA agrees with the Commission that substituted judgement is a very important consideration for decision makers. OPA also believes that other considerations need to be entertained by decision makers to ensure that an individual's personal and social wellbeing is promoted. OPA refers to its previous proposal that forms the basis of Option B.[56]

91. Is substituted judgment relevant to supported decision making?

Yes, substituted judgment is an important consideration when any supported decision-making arrangement is in place. Consideration also needs to be given by decision-making supporters to other matters and principles that ensure the personal and social wellbeing of the person.

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

Yes. These duties, ideally, would be elaborated upon in the proposed decision-making principles.

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?

Yes, this duty would be encapsulated in the proposed principles.

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

---

[55] These are quoted at Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, pars 17.12, 17.31.

[56] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, pars 17.130 to 17.131.

The legislation should mandate a set of core principles that apply to all decision making roles (as suggested in the response to Question 89). OPA agrees with the Commission's proposed additional duties of financial decision makers (regarding record keeping and the need to keep separate the decision maker's property from the property of the person for whom decisions are being made).[57]

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?

Financial decision makers should be required to observe and consider the proposed principles when making decisions. At all times financial decision makers should be required to promote the personal and social wellbeing of the person.

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

OPA agrees with the Commission that 'a universal set of principles should apply to personal, financial and medical decision making'.[58] But, as with financial decisions, OPA considers that legislation should specify additional principles to guide decision-makers in relation to medical treatment. Such principles should be drawn from those that currently appear in section 38 of the *Guardianship and Administration Act*.

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?

Yes. OPA makes the point here that the ability of substitute decision makers to access otherwise private information will, on occasion, be important. At the same time, OPA recognises that the privacy of the person in question is important, as is the need to respect confidential information.

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?

Yes, this would be a worthwhile reform.

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

OPA has suggested previously that private guardians should be required to present regular reports to VCAT.[59] Scrutinising such reports, which should be provided

[57] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 17.151.

[58] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 17.157.

[59] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 1.35.

annually, should constitute the minimal level of monitoring of private guardians by VCAT. Higher-level monitoring of private guardians could be provided by investigation of those guardians whose annual reports demonstrate concerns. OPA could play a role in such situations, at the request of VCAT, similar to the role it currently plays as an investigator in guardianship hearings. In these situations VCAT would ask OPA to investigate the concerns it has about the activities of a private guardian.

Of course it is worth noting that periodic reports by guardians will not be particularly instructive as regards the quality or otherwise of guardianship decisions that have been made. Determining whether particular decisions have been made in accordance with the personal and social wellbeing of the person in question will require more than the information that could reliably be contained in a periodic report. Thus the move to require periodic reporting by private guardians will need to be only one mechanism by which to monitor their activities.

As regards attorneys, the Commission notes that the private nature of enduring powers of attorney means that 'monitoring compliance with any reporting requirements would be an impossible task in the absence of a registration scheme'.[60] Even if a registration scheme is adopted, as has been proposed (and which OPA supports), OPA does not support the periodic reporting proposal in relation to attorneys. While the proposal for periodic reporting is stronger in relation to attorneys than it is for other personal appointments, OPA still considers that the costs of the proposal, both administrative and financial, would outweigh the benefit of improved attorney decision-making.

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

No. OPA shares the Commission's concerns that such declarations 'rely largely on the honesty of the appointee' and as such 'might not reveal many instances of abuse, neglect or exploitation'. OPA agrees that they also 'might become a matter of form rather than substance'.[61]

101. Who should receive and monitor the declarations?

This is unnecessary to answer.

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?

OPA does not support the proposal that a substitute decision maker should be required to sign a statement, or make an oath, prior to beginning their role. OPA fears that this requirement would constitute an administrative hurdle that would not be justified by its potential benefit to people with disabilities. While the requirement would elevate slightly the standing of personal appointments, it would likely become a 'tick a box'

---

[60] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 19.54.

[61] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 19.60.

formality with little substantive effect. Moreover the requirement would likely have the unintended consequence of invalidating otherwise acceptable arrangements (particularly if the result of failure to declare the oath or sign the statement were the invalidation of activities undertaken, even in good faith, according to the instrument).

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

OPA supports the introduction of random audits for substitute decision makers who exercise financial powers. However, OPA does not support the use of audits in the medical and guardianship fields. While OPA believes that the responsibilities of all substitute decision makers should be elevated, OPA believes that increasing our power to investigate situations of concern is a more meaningful development in the guardianship and medical fields than would be the use of audits (see also the responses to Questions 118 and 131-2).

104. Who should carry out these random audits?

Compliance requirements should be monitored by VCAT in the first instance. In addition, random financial audits on private administrators and attorneys could be conducted by State Trustees (as the Commission proposes).[62] OPA here would have a role to play when audits turned up anomalies, which might then be referred to OPA for investigation (see further the response to Question 118).

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

Yes.

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

Yes. See also the response to Question 110.

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

OPA considers that Queensland's guardianship laws, as noted by the Commission, provide instructive guidance for reform in Victoria. New guardianship laws in Victoria should create penalties for substitute decision makers who do not act with appropriate diligence, and there should be penalties where substitute decision makers are engaged in conflict of interest transactions, and where proper records are not kept.[63]

---

[62] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 19.65.

[63] See Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par 19.72.

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

Yes, see also the response to Question 110.

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

Yes, although OPA notes that intentional or knowing abuse of powers should be treated more severely than acts of omission. Acts of omission are far more likely to occur in relation to personal appointments than VCAT appointments.

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

Yes, civil penalties should be applied to substitute decision makers who abuse or misuse their powers, but without apparent criminal intent.

In addition to being liable for a civil penalty such as a fine, substitute decision makers who abuse or misuse their powers should have their powers revoked immediately, and be ruled ineligible for subsequent appointment as substitute decision makers.

Where there are grounds for a reasonably held view that substitute decision makers have abused their power with criminal intent, because they appear to have acted with malevolence or reckless indifference to the well-being of the person, there should be a heightened approach. In these cases, they should be subject to immediate removal by VCAT and referral to Victoria Police for criminal investigation.

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?

Yes, OPA supports merits reviews being allowed of OPA and State Trustees decisions, once internal complaints processes have been completed. OPA also supports the Commission's proposal to permit VCAT to have the discretion to allow decisions by private administrators and guardians to be reviewed.[64]

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

The following people should be entitled to apply for a merits review of a decision by a guardian or by an administrator: the represented person, the person's immediate family or associates (including social advocates); the person's guardian (for administration decisions); the person's administrator (for guardianship decisions); and any other person (such as a decision-making supporter) who can show a longstanding and genuine concern for the promotion of the represented person's personal and social wellbeing. Representatives of services affected by a substituted decision should not be able to seek a merits review.

---

[64] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 19.86.

113. What should constitute a ‘reviewable decision’?

OPA submits that new guardianship legislation will need to define what constitutes a ‘decision’ (perhaps elaborating on the definition articulated in the *Bond* case), and supports the Commission’s suggestion that a ‘reviewable decision’ should be a decision made by an administrator or a guardian ‘in connection with the exercise of their powers under’ the guardianship legislation.[65]

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?

VCAT’s power to refuse vexatious applications should be articulated in new guardianship legislation (as well as in the *Victorian Civil and Administrative Tribunal Act 1998*).

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

No, merits reviews of guardians’ and administrators’ decisions should not be treated differently. There may be only limited practical remedies available in some situations, for instance where a flawed decision by an administrator has led to a loss of money, or where a flawed decision by a guardian has led to an irreversible medical treatment decision. In such cases, the review might determine that the decision maker should be removed, and that the decision maker make restitution for any losses suffered by the represented person. Third parties should generally not suffer losses due to a faulty decision by an administrator, although this too should be considered on a case by case basis (see also the response to Question 64).

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

OPA favours merits reviews being conducted by a VCAT member on the Guardianship List. This member would need to be different to the member who appointed the relevant guardian or administrator. If there were sufficient demand, a separate ‘specialist guardianship and administration review list’ could be created, as foreshadowed by the Commission.[66]

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?

Yes. This would be a very important discretionary power that would ensure that training is received by those substitute decision makers who would benefit from it.

---

[65] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 19.100.

[66] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 19.114.

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

OPA agrees with the Commission that the powers of the Public Advocate to conduct investigations are 'quite limited'.[67] OPA submits that the current Section 16(1)(h) of the *Guardianship and Administration Act* is particularly problematic in arguably limiting the Public Advocate's investigative powers to situations where guardianship either is in place or should be in place. OPA would like the Public Advocate to have the power to investigate where a person with a disability is believed to be suffering abuse, exploitation or neglect.[68]

OPA notes that around the same time that the Commission's Consultation Paper was released, the Victorian Ombudsman released a report on the assault of a man with disabilities by staff of the Department of Human Services.[69] This matter came to the Ombudsman's attention after a referral by OPA (following reports from OPA's Community Visitors program). OPA does not think our investigative and reporting powers should match those of the Ombudsman, and indeed OPA is of the view that the Ombudsman should continue to play a role complementary to that of OPA. (On this point, although strictly unnecessary, OPA would like to see our power to refer matters to bodies such as the Ombudsman and Victoria Police placed in new guardianship legislation.) An increased investigative power in this case would, however, have enabled OPA more quickly to ascertain the facts of the case and to make appropriate referrals earlier than we did.

Increased investigative powers would give the Public Advocate far greater scope to follow up situations of concern. OPA regularly receives requests to investigate such situations, and OPA would be more fully able to respond to these requests were OPA's investigation powers broader than they are. By way of recent example, one advocacy organization and one Commonwealth agency have recently asked OPA to investigate situations of concern. While both situations raise serious concerns about the rights of people with disabilities, neither case is an obvious candidate for a guardianship application, and so OPA's investigative capabilities in relation to these matters are quite constrained.

The utilization by OPA of an enhanced investigation power would lead to a number of outcomes, which would include: applications for guardianship; advocacy with service providers (including arranging for emergency alternative accommodation); referrals to outside agencies such as the Ombudsman and Victoria Police; and the referral of matters for action over breaches of the guardianship legislation (see the response to Question 122). Were we to be empowered with wide-ranging investigative power, OPA recognizes that we would need to work closely with other agencies, particularly Victoria Police, to ensure that duplication is avoided and that meaningful cooperation in investigations occurs. To this end, OPA is interested in exploring further the

---

[67] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 20.37.

[68] See also OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 18.1.

[69] Ombudsman Victoria, Ombudsman Investigation. Assault of a Disability Services Client by Department of Human Services Staff, March 2011, available at http://www.ombudsman.vic.gov.au/resources/documents/Assault_of_a_Disability_Services_Client_by_Department_of_Human_Services_Staff.pdf.

relationship and protocols that currently exist between Victoria Police and child protection services, an avenue of inquiry suggested by the Commission.

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?

OPA agrees with the Commission that the 'Public Advocate's investigative powers … are not particularly clear'.[70] OPA agrees with the proposal that the Public Advocate should be able to 'require people and organisations to provide her with documents and attend her offices to answer questions.'

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?

OPA considers that the ability to enter private premises will be an important ancillary power to accompany a broader investigative role for OPA. Where the owner or occupier of private premises refuses to allow OPA to enter, or where no-one is able to authorise entry, OPA should nonetheless be able to enter private premises where a reasonable suspicion is held that a person with a disability is on the premises who is suffering abuse, neglect or exploitation. Where authority to enter is not provided by the owner or occupier of the premises, this power should be able to be exercised once a warrant has been issued. In exercising this power OPA would need also to be able to require the assistance of emergency services (and a specific legislative provision to this effect would be beneficial).

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?

Yes, OPA should not be obliged to divulge the identity of a person who has given information regarding the possible abuse, neglect or exploitation of a person with a disability (other than to those people carrying out an investigation or authorising the provision of a warrant).

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

OPA supports the proposal that civil penalty proceedings ought to be able to be instituted at VCAT against people suspected of breaching guardianship legislation. OPA recognizes that current breaches of guardianship legislation are not effectively policed, and this possibility would improve the extent to which the requirements of guardianship legislation are met.

---

[70] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 20.41.

However, OPA wishes to register two concerns about the proposal that OPA be able to institute such proceedings.

First, such a power would carry with it a clear potential conflict of interest.[71] As the guardian of last resort, there would need to be processes by which OPA itself could have civil penalty proceedings instituted against it. OPA would not be a big enough organization to enable a sufficient division to be made between its operations so that one part of the organization could take action against another part of the organization if the need existed. Therefore, if OPA had the power to institute civil penalty proceedings then, at the very least, this would mean that the civil penalty power would need to be shared with another agency or organization (so that action could be taken against OPA, if necessary).

A second, broader concern about this proposal is that it would stretch OPA's variety of roles too far. The concern here is that the proposed roles for OPA under new guardianship legislation will extend OPA's current range of roles at both ends of the spectrum, as it were; from playing a greater recruitment and facilitating role for volunteers (through the supported decision-making proposals), through to exercising greater investigative and regulatory powers. As the Commission notes, 'it might adversely affect public attitudes to the Public Advocate were it to become a law enforcement agency as well as an advocate for people with a disability.'[72] To OPA's knowledge, there is no Australian regulator with the power to institute civil penalty proceedings which also runs a sizeable volunteer program. The roles are too diffuse.

For these reasons OPA submits that the Public Advocate ought not to be able to institute civil penalty proceedings against those in breach of guardianship legislation.

Having said that, OPA recognizes that the information upon which civil penalty proceedings might be dependent, will often come from OPA, particularly if OPA is to be given an expanded power of investigation (see the response to Question 118). OPA's preference here is to be able to refer the fruits of an investigation to another agency or body with prosecutorial discretion, with the advice, where appropriate, that there is sufficient evidence upon which to base civil penalty proceedings. Such a body or agency might be (as the Commission has raised in meetings with OPA) the Attorney-General or the Secretary of the Department of Justice. OPA would suggest that the appropriate forum for the hearing of such proceedings would be before a judicial member at VCAT.

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

OPA considers that the individual and systemic advocacy functions of the Public Advocate should be clearly described in guardianship legislation. The Commission has proposed that the Public Advocate be empowered 'to advocate for … individuals with a disability who are at risk of abuse, neglect, exploitation or harm, especially

[71] See also Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 19.77.

[72] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 19.77.

where the person's disability has limited their autonomy or their capacity to assert their own rights'.[73] OPA considers this to be an excellent proposal.

It is worth noting here that OPA has recently been involved, as amicus curiae, in a Family Court case concerning the withdrawal of medical treatment from a new-born child.[74] There was considerable debate in the case about OPA's ability both to act as an amicus, and as a party in its own right, in Family Court matters involving the medical treatment of children. In this context Justice Young examined closely the sections of the guardianship legislation that purportedly give OPA this ability.[75] Justice Young also discussed earlier cases where OPA was held to have this ability.[76] These earlier decisions drew upon relatively expansive interpretations of OPA's powers, including the power to 'make representations on behalf of or act for a person with a disability'.[77]

It is worth noting that Justice Young in the *Baby D* case pointed out that there have been a number of legal, social and practice-based changes that have taken place at the state, national and international levels since those earlier cases.[78] Justice Young was not at liberty to diverge from earlier case law, which clearly recognised OPA's ability to appear before the Court in a representational role. But had he been free to do so, it is likely that Justice Young would have reached a different conclusion.[79] It would make sense, in this context, for OPA's possible role as a party and as an amicus curiae in court cases to be clearly authorized by legislation.

As regards OPA's systemic advocacy role, OPA supports the proposed legislative statement that has been suggested by the Commission. This role would cover the provision of advocacy for 'reforms that will help address systemic and social disadvantage for people with disabilities'.[80]

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

OPA supports the suggestion that guardianship legislation should contain principles that would guide how the Public Advocate exercises her individual advocacy functions.

OPA would suggest that the following principles – derived in part from the OPA discussion paper 'Principles and Values in Victorian Guardianship Legislation', and in part from an internal document – should guide the Public Advocate in the provision of individual advocacy.

---

[73] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par 20.77. See also OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, pars. 1.29 and 18.1.

[74] *Re Baby D (No. 2)*, [2011] Fam CA 176.

[75] *Re Baby D (No. 2)*, [2011] Fam CA 176, pars. 261 to 296.

[76] *Re Baby D (No. 2)*, [2011] Fam CA 176, at pars 298-311.

[77] *Guardianship and Administration Act* 1986 (Vic), section 16 (1)(f).

[78] *Re Baby D (No. 2)*, [2011] Fam CA 176, par. 314.

[79] *Re Baby D (No. 2)*, [2011] Fam CA 176, see par. 277.

[80] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par 20.77.

Those principles are that:

1. Advocacy by OPA must be provided in a way that promotes the personal and social wellbeing of the person.
2. Advocacy must give effect, wherever possible, to the wishes of the person.
3. Advocacy must be carried out, wherever possible, in consultation with the person.
4. Advocacy must be provided in a manner that is least restrictive of the person's freedom of decision and action as is possible in the circumstances.
5. Advocacy must assist the person to live in safety and security and free from abuse, exploitation and neglect.
6. Advocacy must allow the person to participate in and contribute to the community to the maximum extent possible in the circumstances.[81]

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

As OPA commented in our previous submission, 'The guardianship legislation should be modernised in relation to the activities of the Public Advocate, which would include removing functions such as supporting "the establishment of organizations … for the purpose of … instituting citizen advocacy programs …"'.[82]

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

Yes, OPA wishes to continue having a role as an advocate, as well as being the last resort guardian. An ongoing role for advocacy will be critical to ensuring that guardianship is a last-resort strategy, and OPA has clear expertise that warrants it continuing to act, as the need arises, as an advocate.

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

OPA does currently support private guardians with fact sheets and other information that is available from OPA. OPA has concerns about the professional standards of private guardians,[83] and such concerns are not so much about those private guardians who seek OPA's information and assistance, as about those who do not.

OPA would welcome an increased training role in relation to private guardians. This would include training for new private guardians as well as update training.

---

[81] Abridged from: Barbara Carter, 'Principles and Values in Victorian Guardianship Legislation', OPA Discussion Paper, November 2009, p. 16; and from a draft OPA internal document 'Model for Advocacy at the Office of the Public Advocate'.

[82] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 18.1.

[83] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 1.35.

Moreover, OPA would support VCAT, in making private guardianship appointments, being able to require newly appointed private guardians to attend at least one OPA training session. Such attendance could be a condition of the guardianship appointment. OPA notes here also that training might be required of administrators, which again might constitute a condition of appointment.

OPA does not, however, support compulsory training for personal appointments, principally because this will be a disincentive for people to agree to undertake the proposed role.

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

OPA suggests that the routine monitoring of private guardians is a role that best sits with the body that appoints them, namely VCAT. OPA acknowledges that an increased training role for OPA in relation to private guardians, and an increased investigative role (see the responses to Questions 118 and 127) will increase OPA's involvement in the work of private guardians. But OPA does not see its role as one of 'monitoring' these appointments.

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

OPA repeats here the response to Question 99. OPA has suggested previously that private guardians should be required to present regular reports to VCAT.[84] Scrutinising such reports, which should be submitted annually, should constitute the minimal level of monitoring of private guardians by VCAT. Higher-level monitoring of private guardians could be provided by investigation of those guardians whose annual reports demonstrate concerns. OPA could play a role in such situations, at the request of VCAT, similar to the role it currently plays as an investigator in guardianship hearings. In these situations VCAT would ask OPA to investigate the concerns it has about the activities of a private guardian.

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

The Commission is clear that it is 'not proposing that the Public Advocate host a register of personal appointments'. Rather the Commission argues that OPA's expertise 'could be used when designing a register'.[85] If a register of personal appointments were adopted, which presumably would include the already proposed register of enduring powers of attorney,[86] OPA would be happy to assist in the design of such a register.

---

[84] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 1.35.

[85] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 20.84.

[86] Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney*, 2010, recommendation 67, p. 236.

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

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

OPA considers that it has a leading education role in relation to personally appointed substitute decision makers, and welcomes the opportunity to expand this role. OPA also considers that it has a key training role in relation to such appointments. OPA welcomes the possibilities presented by on-line training and is keen to explore this further. At this stage OPA does not, however, believe that training for personally appointed substitute decision-makers should be compulsory.

In terms of 'monitoring' the performance of personal appointments, rather than being given auditing or compliance monitoring powers, OPA favours being given broader investigative powers (see the response to Question 118). This would enable OPA to investigate situations when there are suspicions or allegations that a substitute decision-maker is exploiting, abusing or neglecting a person with a disability. OPA also agrees with the proposal that medical practitioners and any other relevant professionals should be encouraged to report to OPA any suspicions that they may have about inappropriate usage of substitute decision-making powers.

As mentioned in response to Question 118, a corollary to OPA having broader investigative powers would be the ability of OPA to bring matters of concern before other agencies. In particular, where the situation warranted it, OPA would:

- refer a matter to police for a criminal investigation (and OPA is hopeful, consistent with the recommendations in the Victorian Parliament Law Reform Committee report into powers of attorney, that new legislation will introduce new 'breach of trust' type offences that will be easier to police than are current personal appointment laws).
- bring before VCAT any matter of concern. VCAT would then be in a position to cancel the power, where this was appropriate. OPA does not favour being given the power, even in emergency situations, of being able to cancel a substitute decision-making instrument. Rather, OPA supports VCAT retaining this power.

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?

Consistent with the previous response, OPA would welcome taking on a role in relation to the misuse of powers by automatically appointed substitute decision makers. Such a role would include being able to investigate when there are suspicions or allegations that a person who has been automatically appointed is acting in such a way as to exploit, abuse or neglect a person with a disability.

OPA also agrees with the proposal that medical practitioners and any other relevant professionals should be encouraged to report to OPA any suspicions that they may have about inappropriate usage of automatic appointment powers.

Where appropriate, OPA would be in a position to bring the outcomes of any investigation before VCAT (and VCAT would then be in a position to cancel the

appointment, where this was appropriate). OPA could also make other referrals where an investigation warranted such a course of action.

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

Yes, OPA should be required to report annually to parliament. This practice is currently adopted but should be legislatively required.

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?

There is a role for a body or organisation to better coordinate and investigate matters prior to hearings at VCAT. A point raised in our discussions with VCAT on this matter is that there is considerable difference between coordination activities, and investigations.[87]

The more administrative tasks necessary prior to hearings include:

- preparation of documents and other administrative tasks;
- information provision, including contacting the applicant, family members, service providers and the person who is the subject of the application.

These are roles that should properly be played by VCAT.

But in addition to these roles there is a clear place for an organisation to conduct investigations to ensure that sufficient evidence is available for hearings, and to explore options with a view to finding alternatives to guardianship where possible. OPA is keen to play this role.

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

The preparation of documents, administrative tasks and information provision to applicants and others should be undertaken by VCAT. Investigations conducted by OPA under section 16 currently are done within an advocacy framework seeking the best outcome for the person with a disability, exploring alternative options, and working with the parties to resolve issues without the need for guardianship.

Theoretically, VCAT's inquisitorial mandate suggests that it should undertake investigations. However, currently OPA is better positioned to undertake investigations due to our expertise in working with guardianship clients and OPA would welcome taking on a broader pre-hearing investigation role.

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?

[87] OPA held discussions with VCAT representatives about the guardianship review on 28 April 2011.

Proposed represented people currently receive insufficient independent legal assistance and advocacy support. Combining Options A, B and C in this section of the Consultation Paper would provide the best remedy.[88] Section 62 of the *Victorian Civil and Administrative Tribunal Act 1998* should be amended to give a represented person a right to legal representation in all guardianship matters. In addition, VCAT should be statutorily empowered to appoint independent representatives where this is deemed appropriate. Further, as Option A proposes, people who may be subject to guardianship orders should be provided with information and referrals about advocacy services before hearings.

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

Yes.

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

A maximum period should be specified for all guardianship and administration orders.

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

OPA considers that administration orders should apply for a maximum of three years.

The remainder of this response deals with guardianship orders. Current data indicates that most guardianship orders made by VCAT extend for twelve months. In OPA's experience, this is the correct duration for an order as it reflects the period of time it takes to make and implement guardianship decisions and to monitor their outcomes.

The Public Advocate believes that the twelve month period should apply in all except a handful of cases where a protective order of longer duration is needed to keep a decision in place. Occasionally, where a complex case has been settled using guardianship as a protective mechanism, it would be an unreasonable imposition on all parties that the order be re-made every twelve months.

OPA's position is that in the first instance an order for a period of no longer than twelve months should be granted, noting that in a small number of cases a three-year order may be required once this expires.

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?

Ideally all parties should be present for VCAT to reassess or make a new guardianship or administration order. However, where this is not possible, reassessments, or new orders, should be able to be made in the absence of parties so long as their consent to this process has been received. In such situations, all efforts should be made to ensure that the represented person is assisted to understand as much as possible the circumstances of his or her case.

[88] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, pp. 404-5.

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?

Yes.

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

Many people give information to VCAT without the knowledge or expectation that it may be made available to people involved in a guardianship application or hearing, or to the public more generally (which can happen via a published guardianship decision). VCAT has a duty to consider the material at hand and to take into account, when considering its release to parties and to the public, whether disclosure could affect any party adversely. The Public Advocate and VCAT should advise parties that the information they provide to assist VCAT may be disclosed to others. In addition, the people providing the information should be advised to explain why the information needs to remain confidential (in those cases where the providers of the information believe it should not be released).

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?

Guardianship List files should be closed to the public unless VCAT determines otherwise. This reflects the primary role of VCAT in guardianship proceedings and the fact that guardianship information is often highly confidential.

In our May 2010 submission OPA argued that new legislation might usefully

> '… provide a series of considerations which VCAT members should bear in mind in making [decisions about disclosure]. Such considerations would include:
> - the need for transparency in tribunal hearings,
> - the need for fairness in allowing individuals to rebut allegations against them,
> - the need to protect reputations and to protect information relating to personal affairs,
> - the need to protect the confidentiality under which information may originally have been supplied,
> - the need not to cause serious harm to any person's safety or health,
> - the need not to damage the personal relationships of represented persons/proposed represented persons.'[89]

[89] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 21.3.

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

Yes. In practice there can be administrative delays that render the 28-day deadline an unreasonably short one for a re-hearing application to be made.

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

Yes.

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

Yes.

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

Yes.

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?

Guardians sometimes have difficulty in getting third parties to accept their decision-making authority. Allowing guardians and administrators to apply to VCAT for an order that a third party comply with their decision – with the third party being given notice of the enforcement application and an opportunity to be heard – would enhance the ability of guardians and administrators to enforce their decisions (as well as allowing a review of any objections). The enforcement order would only be available following an application to VCAT. (Some thought would need to be given to how such a power would sit with VCAT's current injunctive powers.)

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

Multi-member panels, whose members have a variety of experiences and backgrounds, are the practice in other states. This would be one way to bring specialist non-legal knowledge to guardianship and administration decisions. This proposal could also address the fact that VCAT's membership is less specialised in the disability field than was the case with the Guardianship and Administration Board.

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

The relatively informal and investigative model that is evidenced in VCAT's Guardianship List is preferable to the more formal and adversarial nature of most court proceedings. OPA does, however, note that more formality now accompanies VCAT hearings and processes than used to exist when the Guardianship and Administration Board was in operation. In OPA's view, hearings at VCAT should be

conducted with as little formality as possible and from within a therapeutic jurisprudence approach. OPA's proposed role in the investigation of matters before VCAT (see the response to Question 136) would enable OPA to play an important pre-hearing role in future VCAT Guardianship List matters. In this expanded role OPA could help to negotiate as much as possible matters in dispute, and help to identify those matters on which VCAT decisions were required.

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

Better attendance by proposed represented persons at VCAT hearings should actively be sought. VCAT could employ a support worker to contact individuals to inform them of hearings as well as to advise them about the support and advocacy that are available to assist them at hearings. The provision of advocacy and representation are integral to the participation of proposed represented persons in hearings.

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

A 2010 article from three Griffith University academics, entitled 'Indigenous Australians and Impaired Decision-Making Capacity', suggests that guardianship may be negatively viewed, in the context of state intervention in the lives of Indigenous people, 'as a contemporary form of the previous "protectionist" legislative framework'.[90]

As such, questions about the 'cultural relevance' of guardianship to Indigenous people may need to be answered before questions about the accessibility of guardianship can be addressed. The authors of the above article suggest that the following issues need to be considered:

- 'the cultural relevance of the construct of impaired decision-making capacity', to Indigenous Australians;
- 'the cultural relevance of' guardianship to Indigenous Australians;
- the 'existing decision-making processes used by Indigenous Australians to assist those with impaired capacity'; and
- the 'difficulties experienced by Indigenous Australians when engaging with' guardianship.[91]

Such work would be an important precursor to improving the accessibility of the Guardianship List to Indigenous people.

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

---

[90] Natalie Clements, Jayne Clapton and Lesley Chenoweth, 'Indigenous Australians and Impaired Decision-Making Capacity', *Australian Journal of Social Issues*, vol. 45 (no. 3), 2010, pp. 383-93, at p. 390.

[91] Clements et al, 'Indigenous Australians and Impaired Decision-Making Capacity', p. 390.

OPA agrees with the views put to the Commission by CALD groups.[92] In addition to being translated into the various languages spoken in Victoria, VCAT information needs to be described and explained accessibly. To this end, OPA agrees that interpreters should be made available for hearings on the Guardianship List. Ideally, VCAT members should also receive training in how best to interact with interpreters. VCAT could contract an organisation like the Centre for Culture, Ethnicity and Health to undertake a diversity assessment with a view to developing a diversity strategy.

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

OPA supports the regionalisation ideas currently being considered by VCAT, which include increasing staff numbers at regional centres and having particular members responsible for particular regions.[93] OPA also supports VCAT using spaces other than courts in regional areas to ensure that VCAT's non-adversarial approach is reinforced by its physical setting.[94]

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

OPA restates here the position articulated in our May 2010 submission. This position is that:

> '… the time has come now for compulsory provisions in the *Disability Act* to be broadened to cover other people who exhibit seriously dangerous behaviour. In addition to existing criteria, OPA submits that the requirement for the person to have an intellectual disability be replaced by a requirement that the person has a cognitive impairment. Naturally, compulsory treatment could only be ordered where expert clinical opinion suggested that treatment would benefit the person, and VCAT would need to be assured before an order could be made that an appropriate treatment regime could be devised and delivered.'[95]

OPA notes here that concerns have been raised about whether people with dementia may possibly be subject to compulsory treatment provisions. At this stage OPA's proposal is only that the provisions be extended to be able to apply to people with acquired brain injuries.

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

---

[92] Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 21.206.

[93] As described in Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 21.210.

[94] See Victorian Law Reform Commission, *Guardianship Consultation Paper*, 2011, par. 21.208.

[95] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, par. 32.3.

authorising psychiatric treatment and place of residence decisions for a person who is unable to make their own decisions due to mental illness?

The Commission's proposal is that enduring guardians and individuals appointed as guardians be given limited authority to consent to psychiatric treatment on behalf of a person.

In May 2010 OPA submitted that:

> 'Guardians cannot currently consent on behalf of a represented person to the receipt of psychiatric treatment. This treatment is either received voluntarily by the person, or is ordered on an involuntary basis. The Public Advocate has a memorandum of understanding with the Chief Psychiatrist which details this, and OPA sees no reason why this should change …
>
> OPA acknowledges … that some confusion exists around the sorts of decisions that guardians may make on behalf of people receiving psychiatric treatment (especially concerning accommodation), but remains convinced that guardians should not have a role in consenting to psychiatric treatment.'[96]

One of OPA's concerns about the Commission's proposal is that it could fracture the current distinction between voluntary and involuntary treatment. The proposal, which is at this stage articulated quite generally, could enable psychiatric treatment to be administered involuntarily, through the approval of a guardian or enduring guardian. The current safeguards for such involuntary treatment might not be extended to such 'substitute consent' scenarios (and OPA notes here that OPA and many other organisations and individuals are calling for greater safeguards in the realm of involuntary psychiatric treatment). In addition, the proposal has the potential to compromise the role of supporters (who may find themselves having to agree to, and take some responsibility for, a person's psychiatric treatment). The proposal also has the potential to lessen the responsibility of authorised psychiatrists (who would propose treatment but not carry quite the same degree of responsibility for its provision).

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?

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)?

Yes, OPA considers it important that people who are subject to proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* receive advocacy support. OPA would welcome being given a formal role in this regard. This role would encompass:

- arranging, where appropriate, for the person to receive services
- assisting the person to receive appropriate legal counsel
- assisting the person in their instruction of counsel.

---

[96] OPA, 'Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper', May 2010, pars 30.1-30.2.

Summary of OPA's responses to proposals concerning OPA's core roles

Based on our responses to the Commission's questions, OPA wishes here to summarise its responses in relation to key recommendations that, if implemented, would directly affect OPA's current roles and responsibilities.

OPA **agrees** with the following proposals:

- OPA should play a greater community education role in relation to substitute decision-making (Question 11).
- OPA should play a role training supporters and co-decision-makers under the proposed supported decision-making proposals (Question 18). This would include coordinating a new volunteer program (Question 19).
- OPA should have a 'gatekeeper' role in relation to determining requests for access to the proposed register of enduring powers (Question 33).
- OPA's consent should be required (outside emergency situations) where medical treatment that is not 'minor and uncontroversial' is proposed for a person who is unable to consent to it and for whom there is no person responsible available to make a decision (Question 84).
- Private guardians should be required to lodge periodic reports with VCAT, which may give rise to requests for OPA to investigate (Questions 99 and 129).
- Substitute decision-makers in the financial field should be subject to random audits (Questions 103 and 104).
- OPA should be given a broader power to investigate situations where a person with a disability is believed to be suffering abuse, exploitation or neglect (Question 118).
- OPA should play an increased role in training and supporting private guardians, including providing some compulsory training for private guardians where so required by VCAT (Question 127).
- In relation to the investigation of matters before VCAT, OPA should be given similar investigation functions to those exercised by the New South Wales Coordination and Investigation Unit (which is part of that state's Guardianship Tribunal) (Questions 135 and 136).

OPA **does not agree** with a number of proposals. As OPA argues in the submission, OPA is of the view that:

- OPA should not have auditing functions in relation to supported decision-making arrangements (Question 21), and substitute decision-makers in the medical and guardianship fields should not be subject to random audits (Question 103).
- Public authorities should not be required to be notified when a power of attorney is activated (Question 34).

- Children aged 16 and 17 years old should not be able to have guardians appointed under guardianship legislation (Question 53). OPA does, however, agree with the proposal that 16 and 17 year olds should be able to have administrators appointed under guardianship legislation. OPA also argues that OPA may have an advocacy role in relation to people in this age cohort. OPA has also argued that the jurisdiction of VCAT in relation to medical decisions should be extended to children with a disability (Question 53).
- Private attorneys should not be required to lodge periodic reports (Question 99).
- Substitute decision makers should not be required to lodge declarations of compliance (Question 100) or declare oaths or sign statements of undertaking (Question 102).
- OPA should not be able to initiate civil penalty proceedings for breaches of guardianship legislation. OPA does, however, agree that civil penalties should apply for breaches of the legislation (Question 122).
- OPA should not, in a general sense, 'be responsible for monitoring the activities of all or some private guardians' (Question 128) or personally appointed substitute decision makers (Questions 131 and 132). However, OPA notes that the proposed increased training and investigation roles for OPA will in effect give OPA an increased ability to ensure the compliance of substitute decision makers with the guardianship legislation.
- The 'person responsible' scheme should not be extended, in the manner proposed, to authorize the placement of people in residential care facilities. OPA has suggested an alternative proposal here: that the definition of medical treatment be extended to include the decision to discharge a person from hospital (Question 75).

Conclusion

OPA thanks the Commission for the opportunity to contribute to the ongoing review of Victoria's guardianship laws, and would be happy to elaborate, in writing or in person, on anything raised in this submission. OPA also notes here that in the coming weeks attention will be paid to determining the possible costs associated with the new roles that the Commission has proposed for OPA. At this stage those costs will be calculated in relation only to those proposed changes that OPA has, in this submission, supported.