Submission to the Victorian Law Reform Commission regarding Guardianship Consultation Paper 10

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ACRONYMS

Convention on the Rights of Persons with Disabilities	CRPD
Enduring Power of Attorney (and, unless specified, does not include EPOAs granted under the MT Act)	EPOA
Enduring Power of Guardianship	EPOG
Guardianship and Administration Act 1986 (Vic)	G & A Act
Medical Treatment Act 1988 (Vic)	MT Act
Office of the Public Advocate	OPA
Power of Attorney	POA
Senior Rights Victoria	SRV
Victorian Civil and Administrative Tribunal	VCAT
Victorian Law Reform Commission	VLRC

Part A – Executive Summary & Position on Questions

1. Executive summary

1.1 Seniors Rights Victoria (**SRV**) welcomes the opportunity to comment on the Guardianship Consultation Paper issued by the Victorian Law Reform Commission (**VRLC**) as part of its review of Victoria's guardianship laws.

1.2 Victoria's population is ageing and both the number of older people and their proportion of the state's population are increasing. An increase in the incidence of age-related disability, in particular dementia, is expected to accompany the ageing of the population.[1]

1.3 Sadly, an increase in the incidence of elder abuse is also a likely consequence of the increase of the number of Victorians over the age of 60.

1.4 Elder abuse is defined by the World Health Organisation as:

> *a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.*[2]

1.5 Elder abuse is any knowing, intentional or negligent act by a caregiver or any other person that causes harm (including physical, psychological, financial or social) or a serious risk of harm to a vulnerable adult. This most commonly occurs where the older person and the person carrying out the action or behaviour are in a relationship which involves trust, dependency or proximity.

1.6 Elder abuse takes many forms. The range of potential harms includes:

- physical (such as slapping, pushing, burning, physical restraint or inappropriate use of medication);
- financial (misuse of funds, forcing or forging signatures, denying access to funds or property, misuse of a POA, overcharging, promise of long-term care in return for money and improper changes to legal documents such as wills or insurance policies);
- psychological (such as verbal intimidation, threats, shaming, loss of privacy, humiliation, loss of dignity, harassment, isolation, deprivation and withholding of affection);
- sexual (such as rape, indecent assault and sexual harassment); and
- neglect (such as leaving the older person with no means to care for themselves and with poor hygiene and personal care which may result in bedsores etc. Neglect also includes a lack of social, cultural, intellectual or physical stimulation).

[1] Victorian Law Reform Commission – Guardianship Consultation Paper 10, p 48-49.

[2] World Health Organisation, *A Global Response to Elder Abuse and Neglect,* 2008.

1.7 While some forms of elder abuse are extreme and involve criminal acts, the problem is often subtle and hidden, occurring between older people, their families, neighbours and carers. For this reason, elder abuse has been referred to as "a hidden problem, under-recognised and under-reported due to a stigmatisation and a lack of community awareness".[3]

1.8 Elder abuse is typically carried out by someone close to an older person, with whom they have a relationship implying trust. This is typically family members, such as a spouse, adult children, grandchildren, siblings or other family members, friends or carers and may be perpetrated as a result of ignorance, negligence or deliberate intent.[4]

1.9 In the context of the current review, it is important that the new guardianship laws address the potential for financial abuse to be perpetuated through the misuse of substituted decision making powers by those in positions of trust and confidence.

1.10 Financial abuse is defined by the World Health Organisation as "the illegal or improper exploitation or use of funds or resources of the older person".[5] Financial abuse is associated with "greed leading to opportunistic or well planned exploitation, family expectations around inheritance and cultural differences surrounding the use and management of older people's finances".[6]

1.11 There is limited data available as to the extent of elder abuse, but from the available data it appears that up to 6% of older people may be the victims of elder abuse.[7] The issue is probably unreported. There are a number of reasons why victims are unlikely to report abuse including isolation and reliance on the perpetrator for care and companionship.

1.12 Whilst there are clear benefits to older Victorians having arrangements in place for another person to make decisions on their behalf in the event that they are no longer able to make those decisions themselves, the powers conferred on substitute decision makers have also been used to perpetrate elder abuse.

1.13 SRV works to respond to and prevent elder abuse amongst older Victorians. We undertake this work using a human rights approach. This submission frames the discussion on reforming Victoria's guardianship laws within a human rights context. A human rights framework empowers individuals, especially those who are marginalised or disadvantaged, such as those at risk of or experiencing elder abuse. Identifying elder abuse as a human rights issue and responding within a rights framework empowers older people to take action and enables them to live their lives with dignity and respect.

1.14 The core recommendation of this submission is that the goal of guardianship legislation should be for the represented person to continue to live the life that they would have lived

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[3] Report on the Elder Abuse Prevention Project (2005) *Strengthening Victoria's Response to Elder Abuse.*

[4] Office of Senior Victorians, *Victorian Government Elder Abuse Prevention Strategic Implementation Plan,* August 2007, Department of Planning and Community Development.

[5] World Health Organisation/International Network for the Prevention of Elder Abuse (2002) The Toronto Declaration on the Global Prevention of Elder Abuse, Geneva, cited in the Report on the Elder Abuse Prevention Project (2005) *Strengthening Victoria's Response to Elder Abuse*.

[6] Deborah Setterlund, Cheryl Tilse and Jill Wilson "Older People's Knowledge and Experiences of Enduring Powers of Attorney: The Potential for Financial Abuse" (Queensland Law Society Incorporated, Brisbane, 2000).

[7] World Health Organisation World Report on Violence and Health 2002 Ch. 5 Older People.

and for decisions to be made as they would have been made by the person but for their incapacity. Key means of achieving this goal include provision for supported decision making by older people, greater participation of older Victorians in guardianship proceedings, increased accountability of substitute decisions makers and improved community education.

2. Structure of this submission

2.1 This submission is structured around the parts and chapters of the VLRC's Guardianship Consultation Paper that SRV has experience in relation to, and is able to contribute to based on, our work with our clients who are Victorians over the age of 60 who are at risk of, or experiencing, elder abuse or have a legal issue associated with ageing.

2.2 This submission responds to many of the questions raised in the Consultation Paper and provides case studies, where relevant, to illustrate the need for greater protection for older Victorians against elder abuse arising out of misuse of guardianship or administration powers.

2.3 Specifically, in Part B, SRV supports guardianship legislation which protects and promotes the dignity and human rights of people with impaired decision making capacity by supporting and assisting them to make decisions with the goal of following the wishes of the represented person wherever possible. SRV also proposes an education and awareness campaign, with continuing peer education, greater educational material and publication of data on the operation of guardianship laws.

2.4 In Part C, SRV supports in principle the introduction of supported decision making arrangements to provide less restrictive options for those people facing incapacity in relation to decision making. SRV recognises that incapacity is not a binary concept but rather can fluctuate and may exist only in relation to certain types of decisions. This part also discusses safeguards which should be implemented alongside the introduction of supported decision making arrangements, including a requirement that a person meet the criteria for a guardianship or administration order before supported decision making arrangements are made. Here SRV also supports the establishment of a high quality support person program, potentially to be administered by the Office of the Public Advocate (**OPA**), together with a role in training, supporting and monitoring supported decision makers.

2.5 Part D provides SRV's views on the proposed changes in relation to personal appointments. For example, SRV supports a mandatory, free, online registration system for all enduring power appointments and directives, provided that VCAT has the power to validate an unregistered instrument. Registration at the time of execution should be encouraged, but otherwise, registration should occur by the time the power has been activated and the time of activation of enduring powers should be nominated by the person granting the power. SRV does not believe that the number of enduring appointments should be reduced, but the appointments should be made in the one document to reduce confusion. Finally, SRV is of the view that instructional directives should be binding and their use should be clarified in legislation.

2.6 Part E deals with VCAT appointments. SRV prefers the retention of an objective element along the lines of “disability” as a criteria to be satisfied in order for VCAT to make an

appointment, in that the lack of capacity of the proposed represented person must be by reason of a disability, but we do not see the need to retain disability as a separate stand alone criteria. However, we consider that the term "disability" should be replaced by a term that more accurately reflects the required loss of decision making capacity such as “cognitive or mental impairment”. SRV agrees with the VLRC's suggestions regarding the need for statutory principles in relation to capacity and supports adopting a definition of capacity similar to that used in the United Kingdom.

2.7 SRV supports the retention of the distinction between guardianship and administration and makes some suggestions for managing the overlap between the powers. For example, SRV supports the proposal that new laws include a non-exhaustive list of decision-making powers that guardians and administrators can exercise.

2.8 In Part F, SRV agrees with the VLRC that the hierarchy for automatic appointees should be retained, subject to the inclusion of additional measures to scrutinise decisions made by those appointees and the requirement that the substituted judgment approach be taken by automatic appointees. SRV believes that the definition of medical treatment should be broadened and a distinction made between minor and other medical procedures, with substituted consent not required for minor medical procedures if a second opinion is obtained by a medical practitioner.

2.9 Part G focuses on responsibility and accountability. SRV considers that guardians and administrators should place greater emphasis on the wishes of the represented person, making "substituted" decisions where possible, and that a set of decision making principles should be included in guardianship legislation to guide decision makers in this process. Substituted decision makers should be required to act honestly and respond appropriately to conflicts, as well as be able to access confidential and private information on a need to know basis. SRV also supports guardians and administrators being provided with more training and ongoing support.

2.10 We are of the view that requiring private guardians to submit periodic reports is unnecessary and is likely to deter people from assuming the role. Instead, we propose a system of education and statutory declarations of compliance coupled with random audits. Private guardians would be required to undertake training in relation to their role and lodge an annual declaration that they have complied with their responsibilities. A body such as OPA would then be charged with conducting random audits of decisions made by a sample of private guardians each year. VCAT should also have the power to order the repayment of misused funds and to impose penalties for misuse of powers.

2.11 In Part H, the role of OPA and VCAT is contemplated in implementing and regulating new laws. SRV submits that the powers of OPA should be clarified and widened to address growing concerns about abuse of older persons, with OPA also empowered to advocate for individuals with a disability and to train and support private guardians. In addition, OPA should continue to be a guardian of last resort. Ideally, however, the investigatory and compliance powers should be vested in a new independent statutory body.

3. Summary of answers to the VLRC's questions

3.1 For ease of reference, we have summarised our answers to the questions raised by the VLRC in the Guardianship Consultation Paper in the table in the Appendix to this Submission.

4. About SRV

4.1 SRV provides leadership across Victoria in responding to older people experiencing abuse, through a network of legal and other supports. SRV was established in April 2008 and is jointly managed by the Council On The Ageing (**COTA**) (as the lead auspice), the Public Interest Law Clearing House, Eastern Community Legal Centre and Loddon Campaspe Community Legal Centre, under a joint-venture agreement.

4.2 SRV is still the only service of its kind in Victoria. We have expertise in the area of substitute decision making and are, therefore, well positioned to comment on the proposed changes to Victoria's guardianship laws, particularly as the laws may affect older people.

4.3 SRV's objectives are to:

(1) provide leadership in knowledge, policy and advocacy on issues of abuse and older people;

(2) develop and implement education and awareness raising programs for older people and the general community;

(3) engage in collaborative partnerships and networks to improve responses to the needs of older people;

(4) provide a key point of contact for older people, their families, professionals working with older people and the general community;

(5) assist individuals to receive appropriate services and support to make informed decisions in relation to their situation;

(6) provide free and accessible legal services that empower clients to meet their legal needs; and

(7) establish premises and infrastructure from which to provide information, support and legal services to the target community.

4.4 Since July 2010, SRV has received upwards of 1,467 inquiries to our telephone advice line. This resulted in the provision of 563 advices and 237 cases opened.

4.5 Over the course of our operation, SRV has provided 220 community education sessions, which have been attended by 7,122 people, as well as 125 professional education sessions attended by 3,043 people.

4.6 SRV also operates four pro bono outreach clinics (the Seniors Rights Legal Clinics) (**SRLC**) around metropolitan Melbourne. The clinics see an average of six clients per week and are staffed on a voluntary basis by lawyers from five of Victoria's major law firms.[8]

Part B – Direction of New Laws (Part 2)

5. Chapter 5: Purpose and principles of the new laws

Statement of purpose and general principles: Response to Questions 2 and 3

5.1 SRV is broadly supportive of the VLRC's draft statement of purpose for the new guardianship laws, namely:

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

5.2 The clear articulation of the importance of respecting the human rights of those with impaired decision-making capacity, and helping them to assert those rights, is an important step forward for Victoria's guardianship laws. SRV believes that the human rights framework can help to empower older people and should inform the development and interpretation of the new laws.

5.3 SRV is also supportive of the proposed guiding principles and their content which includes:

(1) that all adults are entitled to the same human rights and should be empowered to exercise those rights;

(2) that decision-making capacity is specific to the decision being made and can fluctuate over time;

(3) that the substituted decision should, as far as possible, be the decision that the person would have made if they were able to make the decision;

(4) that all adults are entitled to support when making decisions or to participate in the making of which decisions affect them; and

(5) that all adults are entitled to take risks and make choices that others may disagree with.

6. Chapter 6: Clear and accessible laws

Consolidated legislation: Response to Question 5

6.1 SRV agrees with the VLRC that it would be preferable to consolidate Victoria's various substituted decision-making laws into one single Act. This would help ensure consistency

[8] Clinics are located at Doutta Galla Community Health Service, Niddrie (staffed by lawyers from Norton Rose), Western Region Health Centre, Footscray (staffed by lawyers from Lander & Rogers and Hall & Wilcox), Caulfield Hospital Memory Clinic, Caulfield (staffed by lawyers from Holding Redlich) and Bundoora Extended Care Centre, Bundoora (staffed by lawyers from Herbert Geer).

with definitions and formalities across all substituted decision-makers resulting in reduced complexity and increased accessibility to members of the community. However, there would need to be an extensive community education campaign, particularly targeting vulnerable groups, including older Victorians, to explain the new laws.

Terms used for substituted decision makers: Response to Questions 5 to 9

6.2 SRV supports the VLRC's proposal that the term "person responsible" should be replaced by either "medical decision maker" or "health decision maker", as these terms would be more easily understood by members of the community. SRV does not have a preference as to either medical or health decision maker being used as the replacement term.

6.3 We also support the VLRC's proposals that the term "guardian" should be replaced by the term "adult guardian" and the term "administrator" should be replaced by the term "financial guardian". SRV believes that this change will help to reduce confusion as to what these roles entail and assist in increasing community understanding of the roles.

6.4 SRV also agrees that the terminology used for powers of attorney should be integrated with the terminology used for guardianship and administration. SRV supports the use of the terms "enduring adult guardian" and "enduring financial guardian".

Community education: Response to Questions 10 and 12

6.5 Community education will be vital in order to ensure that members of the community, in particular potentially vulnerable groups including older people, understand the operation of the new laws. Adequate funding to existing networks, such as community legal centres including SRV and other community organisations, will be crucial.

6.6 SRV has considerable experience delivering community education sessions to seniors groups. The SRV Community Education Program delivers presentations and talks to seniors groups throughout Victoria. Sessions are delivered by SRV staff members and volunteers who receive extensive training and ongoing support. The presentations consider powers of attorney in the context of preventing elder abuse and this topic always generates a lot of questions and discussion following the conclusion of the talk. This forum, where the session is delivered to a group of peers, provides a safe environment for attendees to ask questions and to discuss what they have done in regard to these matters with each other. Similar programs, in relation to the new guardianship laws, would assist in raising community awareness and understanding of the new laws in a non-threatening environment that is familiar to the attendees. In addition to the Community Education Program, SRLC lawyers who assist clients with drafting powers of attorney, also deliver community legal education sessions regarding powers of attorney to seniors groups.

6.7 SRV also supports OPA playing a greater role in producing educational material and educating the community about substitute decision-making and would support OPA receiving increased funding to allow it to fulfil this role.

6.8 A community awareness campaign would assist the community to better understand and make use of guardianship laws. This would be especially critical for aged-care facilities where, for example, the differences between guardianship, powers of attorney (financial) and other substituted decision-making documents are not always known or understood.

Case Study Example 1

An older man was diagnosed with mild dementia and while hospitalised signed an enduring power of attorney (**EPOA**) (financial) appointing his son as his attorney. His son moved the older man to a nursing home and used the EPOA (financial) to instruct the nursing home manager not to let anyone speak to the older man and not to let the older man leave the nursing home.

More data on the operation of guardianship laws: Response to Question 13

6.9 SRV believes that considerably more information about the operation of guardianship laws should be made publicly available. It is essential for the administration of justice, particularly in an area where fundamental human rights are concerned, that the process is transparent and founded on a reliable evidence base.

6.10 A reliable evidence base will not only enable effective analysis and evaluation of the system and accountability of those charged with enforcing the new laws, but will also assist in allocating resources to provide support to the most vulnerable users of those laws.

6.11 In order to understand the operation of the laws, it would be necessary to collect data concerning:

(1) the age, ethnicity, gender and specific disabilities of the proposed represented person;

(2) the percentage of cases in which a represented person attends the hearing;

(3) the percentage of cases in which a represented person is legally represented at the hearing;

(4) a breakdown of the types of matters dealt with at the hearings;

(5) the number of plenary and limited orders made; and

(6) the length of orders made.

Part C – Supported Decision Making (Part 3)

7. Chapter 7: Supported decision making

New supported decision making arrangements: Response to Questions 14 to 16, and 20

7.1 SRV supports in principle the introduction of supported decision-making arrangements. The proposed arrangements would accord with Article 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD), provide more options for those facing incapacity in relation to decision-making (and for VCAT when considering what is the least restrictive option appropriate in the circumstances), and will help those in carer relationships deal with third parties by formalising their relationship.

7.2 Supported decision-making could, for example, assist represented persons in accessing information in order to make a decision, or in dealing with businesses or agencies and communicating the represented person's decision.

7.3 In combination with VCAT being required to consider the least restrictive option available when making orders, supported decision-making would provide a valuable alternative to those subject to a potential VCAT order.

7.4 However, the introduction of the new arrangements will make the system more complicated. It will be necessary to commit resources to ensure that the community, including proposed represented persons, advocates and service providers, understand the new arrangements and that all people who require assistance understanding the various options available, and which is the most appropriate for them, are able to access that assistance.

7.5 Furthermore, it will be important to retain the same entry criteria so that supported decision making arrangements are seen only as a less restrictive alternative for people for whom a substituted decision maker would currently be appointed, rather than a new option for people who would not currently come under the guardianship regime.

7.6 Finally, as with any substitute decision making arrangement, there is the risk that the supporter, or more particularly co-decision maker, may abuse, overbear or exploit the represented person. Appropriate accountability mechanisms would be vital to reduce the incidence of abuse by people in a support role. We discuss accountability mechanisms further at section 18 below. However, it also will be important to ensure that any reporting requirements are not so onerous as to dissuade family members or friends from entering into the new formal arrangements.

7.7 On balance, SRV is of the view that as long as the safeguards described above are in place, a formalised supported decision-making arrangement would be beneficial. However, given the lack of available data from other jurisdictions, and acknowledging the concern that the new guardianship laws should do not harm, we recommend that further research is undertaken before finalising the model to be adopted.

7.8 We see no reason why these arrangements shouldn’t apply to both financial and personal decision-making, however we note that there is limited practical experience of supported decision making arrangements in relation to financial matters in other jurisdictions.

Establishment of a volunteer support program: Response to Questions 18-19 and 21

7.9 As with all appointments, it will be necessary to ensure supporters and co-decision makers receive adequate training regarding their obligations and responsibilities, as well as ongoing support and random monitoring. Significant resources will be required in order to provide adequate training, ongoing support and random audits of the activities of supporters and co-decision makers. SRV supports a new statutory body or failing that, OPA undertaking these functions with adequate additional funding and resources.

7.10 Isolation is one of the risk factors for elder abuse. Many of our clients are isolated and do not have family members or friends willing to take on the role of supporter or co-decision maker. It is important that the new guardianship laws ensure that everyone has access to appropriate support to enable them to participate in the decision making process to the greatest extent possible. In order to ensure that the new alternatives are available to everyone, it will be necessary to establish a support person program of people willing to take on that role for those who do not have any existing supports. Ideally, this would be a

program with sufficient funding to employ suitably qualified people to take on the role, much like the staff of OPA and professional administrators. However, if funding does not permit this, a volunteer support program could be an option, provided that sufficient funding is allocated to ensure that volunteers receive adequate ongoing training and support and the performance of their duties is subject to random audits in order to minimise the risk of abuse of older people. If OPA has a new auditing role under the new laws, it may not be appropriate for it to administer such a program. If a new body is established to undertake auditing and compliance functions, OPA may be an appropriate organisation.

Part D – Personal Appointments (Part 4)

8. Chapter 8: Personal appointments

Activation of enduring powers: Response to Questions 26 and 27

8.1 Current guardianship laws are inconsistent in relation to matters such as the activation of enduring powers. SRV strongly supports the consolidation of the current provisions into one Act to enhance community understanding and simplify the system.

8.2 In our view, the new guardianship laws should provide that the donor is able to elect when each of the respective powers (granted under the one document pursuant to the one piece of legislation) comes into effect. Instruments would come into effect immediately, or upon another date or event to be specified by the donor of the power, by checking the appropriate box on the approved form. Furthermore, the donor could specify that certain evidence is required confirming the occurrence of an event, for example, a doctors' report confirming loss of capacity.

8.3 Activation of the power would be noted on the register (discussed at paragraph 8.6 on onwards below), providing certainty to third parties seeking to rely on the instrument and notification provisions would alert the donor, and anyone else the donor has elected to receive notifications, of the fact that the substitute decision maker is relying on the power.

> **Case Study Example 2**
>
> An older lady had executed a power of attorney (financial) in favour of her son. She was living independently in her own home, managing her bills and other expenses. She had no idea that the power had been activated until SRV undertook a property search, which revealed that her home had been transferred to her son and a mortgage had been secured against the property.

Reduction of the number of enduring appointments: Response to Questions 26 and 27

8.4 SRV supports the recommendation made by the Victorian Parliamentary Law Reform Committee for a consolidated single form for all three existing enduring powers. The current separate forms, with different witnessing and other requirements, are confusing. In our view, the use of a single form will simplify the process for members of the community, especially older people and reduce any costs associated with seeking assistance in completing the relevant form. It will be important that the new prescribed form is not to

complex; however, it will also be important to include sufficient explanatory material to ensure that substitute decision makers are aware of their obligations under the instrument. Any concerns regarding privacy that arise from having the three powers in the one documents can be addressed through strict controls over access to the free online register discussed below at paragraphs 8.11 and 8.12.

8.5 However, we do not support the reduction of the number of powers from three to two. In our experience, clients often feel that different members of their family have different skills and experience and the person who may be appropriate to make lifestyle decisions, may not be the person appropriate to make medical decisions. In order to ensure that clients retain control over who they give specific decision making powers to, SRV does not support any reduction of the number of enduring appointments from the current three.

Mandatory online registration system: Response to Questions 28 to 33

8.6 SRV supports the introduction of a mandatory online registration system for enduring powers. We believe that mandatory registration of all enduring instruments could lead to a reduction in the incidence of elder abuse, as registration would prevent people from purporting to rely on powers that have subsequently been revoked. Registration, coupled with other safeguards, including notification of activation, annual declarations of compliance and random audits, is likely to further reduce the incidence of abuse.

8.7 In making this submission, SRV draws upon the experiences in Tasmania, the United Kingdom and Scotland. We endorse the Tasmanian practice of free registration of enduring guardians.[9] We also consider that, as in England and Wales, mandatory registration of powers of attorney for both personal and financial matters should be required.[10]

8.8 Ideally, SRV supports a national register of powers of attorney and recommends that any register be capable of being adapted to a national register.

8.9 In our view, registration should be encouraged at the time that the document is executed, but be required before the instrument is activated. VCAT should be granted the power to hear challenges to the registration of an instrument and to validate appointments made under unregistered instruments that have been validly executed.

8.10 Many SRV clients have fluctuating capacity. In some cases, capacity will fluctuate on a daily basis. In other cases, for example a client who suffers a stroke, the client may lose capacity but regain the ability to make decisions after a period of rehabilitation. In our view, if a client's capacity fluctuates on a daily basis, it will be necessary to activate the power on the register, even though they may retain the ability to make decisions on certain occasions. However, we believe that it will be important for the registration system to provide for the deactivation of powers on the register in circumstances where the person regains capacity. This will be preferable to requiring the person to revoke the power and go to the trouble and expense of drafting and registering a new document once they have regained capacity.

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[9] As opposed to the requirement to pay a fee to register a power of attorney in Tasmania.

[10] See *Mental Capacity Act 2005* (UK) c 9, s 9(2)(b).

8.11 In order to provide certainty for third parties and protect the privacy of donors, the registration system will necessarily be quite complex. Some powers may be limited and others may only come into effect on the occurrence of an event which may be difficult to prove, such as a loss of capacity.[11] It will be important that third parties have access to any limitations to relevant powers, without gaining access to directives and other sensitive personal information that may not be relevant to the third party. Third party access should be limited to information that is strictly necessary in order for them to establish the validity and extent of the power.

8.12 We recommend implementing any or all of the following options in an effort to safeguard donors' private details and wishes:

(1) provide substituted decision makers with a certificate that notes the powers they have been granted, rather than them relying on the instrument itself which may contain other sensitive personal information not relevant to their role. This certificate could be given upon registration of the power of appointment and be required to be produced when making substituted decisions;[12]

(2) requiring a person to pre-register before searching the system;[13]

(3) when searches of the register are performed, requiring as much detail about the person performing the search as is feasible – for example, their name, address and date of birth – before information is made available to the person searching the register;

(4) instituting a tiered system of restricted access for third parties that could be regulated by using a PIN system, with different PINs having different access levels to the information contained in the registrar; and/or

(5) requiring a person undertaking a search of the registration system to state the purpose of their search and to agree to the terms and conditions of the search.

Notification of activation to interested parties: Response to Questions 34 to 37

8.13 A donor should be able to specify in the power of attorney that certain people or regulatory authorities be notified when a power is activated but this should not be mandatory.

8.14 In circumstances where the person's capacity is fluctuating, we suggest that notification should only occur when activation first occurs. However, in circumstances where a person loses capacity due to temporary illness and the register is activated, but then regains capacity and the register is deactivated, the nominated person should be notified of the deactivation and any reactivation.

8.15 If substitute decision makers are required to notify the registry when activation occurs (this is our preferred option), the registry could be responsible for providing notification of the

[11] In relation to defining when a person loses capacity, SRV believes that the definition discussed in relation to VCAT appointments at paragraph 10.3 below should also be applicable in relation to personal appointments. Guidance as to the practical application of this definition would also be helpful for non-professional guardians and administrators to aid them in determining whether or not they are able to exercise the powers granted to them.

[12] This suggestion is based upon the system in Scotland. See, for example, the prescribed certificate SSI 56 Schedule 1.

[13] This is the mechanism used to access land titles and property certificates in Victoria.

activation, in accordance with any direction in the instrument, to the nominated people. Alternatively, the substituted decision maker could be required to notify; however, this would be very difficult to enforce.

8.16 Notification to the registry will ensure that any relevant notifications are made, will provide certainty to third parties that powers have come into operation and could be the trigger for the commencement of the requirement to provide annual declarations of compliance and random audits. The notice of activation should only require proof of incapacity if specified by the donor and VCAT should have the power to validate any actions taken by substituted decision makers who had failed to comply with the notification requirements. However, again it will be vital to ensure that adequate safeguards were in place to prevent unauthorised access to this information.

9. Chapter 9: Documenting wishes about your future

Directives in General

Instructional medical directives legislation: Response to Questions 38

9.1 The current system is extremely confusing and many people do not realise they can only create a Refusal of Treatment Certificate for an existing condition and that the status of other Advance Directives is uncertain.

9.2 SRV supports Option B, to broaden and clarify the statutory right to make enforceable advance directives in relation to medical treatment which would remove uncertainty about the enforceability of instructional medical directives. We agree that the new laws should broaden the scope of advance medical directives beyond the refusal of treatment and clarify and simplify the current distinction between refusing treatment under the MT Act and withholding consent to medical treatment under the G & A Act.

9.3 However, the legislation should provide that the person appointed is able to apply to VCAT for a decision about the instructional medical directive where there is an unforeseen change of circumstances, for example, an advance in medical treatment made since the date that the instructional medical directive was drafted.

Lifestyle and Finance Directives

Support for statutory instructional directives: Response to Questions 39 to 40

9.4 SRV believes that a person should have the ability to make statutory instructional directives about things other than medical treatment. These should include anything the donor believes is important enough to include in the directive.

Hybrid directives: Response to Questions 41 to 43

9.5 Given that it is likely that people would only consider an advance directive for significant matters, we believe that advance directives in relation to medical and lifestyle decisions should be binding on the personally appointed decision maker, but with mechanisms for review if the decision maker believes it is necessary to depart from the wishes set out in the directive. Random audits would also assist in ensuring compliance with directives. The same rules should apply to both enduring guardians and enduring attorneys.

> **Case Study Example 3**
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> An older man had appointed his son as his attorney (financial) and had expressed a desire to live in his own home as opposed to in a nursing home but not had committed such a desire to writing. His son did not consult with the older man in relation to these decisions and attempted to sell the older man's property. SRV worked with the older man to have the POA revoked and to have an independent guardian and administrator appointed. He now lives at home with appropriate support.

Sanctions: Response to Question 45

9.6 Disregard of a directive by a substituted decision maker should be met with sanctions. These sanctions should be the same as those applicable for the misuse of powers of attorney.

Registration: Response to Questions 46 to 48

9.7 SRV supports the mandatory registration of lifestyle and financial directives as well as instructional medical directives.

Part E – VCAT Appointments (Part 5)

10. Chapter 10: VCAT appointments and who they are for

VCAT appointments: Response to Question 50

10.1 SRV prefers the retention of a concept along the lines of disability, in that a guardian or administrator should only be appointed in cases where a person does not have the capacity to make decisions and that incapacity is caused by a cognitive or mental impairment (Option B). In our view, this option retains an objective element and ensures that people who make unwise decisions are not caught in the guardianship and administration net.

10.2 However, in order to clarify the fact that disability is only relevant to the extent that the disability impacts the person's capacity, we believe that the term "disability" should be replaced by "cognitive or mental impairment" to more accurately reflect the circumstances in which a VCAT appointment is needed.

> **Case Study Example 4**
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> An older person had his capacity questioned as a result of engaging in behaviour that a service provider deemed to be "harmful" or "risky". The VCAT application was accompanied by a neuropsychologist's report but not a more recent ACAS assessment that showed he had no cognitive impairment. As a result, VCAT did not have all the information regarding the older person's capacity. However, with SRV's assistance, he attended the hearing and had the hearing adjourned to allow for a plan to be formulated allowing him to return home with appropriate support without having a guardian appointed.

Definition of capacity: Response to Question 51

10.3 We agree with the VLRC that the introduction of capacity principles and a legislative definition of incapacity would provide guidance when assessing when a person is unable to make their own decisions.

10.4 SRV supports a two stage capacity assessment test. The first stage requires an assessment as to whether the person has a cognitive or mental impairment. Medical evidence may be required in order to make this assessment.

10.5 The second stage requires as assessment as to whether the person, by reason of the cognitive impairment, is unable to do a number of things including:

(1) understand the information relevant to the decision;

(2) retain that information;

(3) use or weigh that information as part of the process of making the decision; or

(4) communicate the decision in some way (whether by talking, using sign language or any other means).

10.6 The second stage is incorporated in the definition of capacity used in the *Mental Capacity Act 2005* (UK). We support the adoption of a definition of capacity along these lines, together with the guiding principles contained in section 3(1) of the *Mental Capacity Act 2005* (UK) with one exception. In our view, mere memory lapses or an inability to retain long-term memories should not be sufficient to find that someone has lost capacity, as long as they are able to retain information for as long as is necessary for them to make the decision.

10.7 The determination of capacity should not be solely the role of medical professionals. As capacity is both a legal concept, and one that is decision specific, it is imperative that any determination with regard to the capacity of the donor is undertaken by a legal professional.[14] As a result, a medical report alone is not sufficient evidence to make a finding of incapacity. While medical evidence is clearly relevant to the assessment of whether there is a cognitive or mental impairment, it remains necessary for the VCAT member (or substituted decision maker in the context of personal appointments) to form a view taking into account all the evidence, including speaking to the proposed represented person and being guided by the relevant principles, as to whether that person is able to do the things articulated in second stage of the process. This will determine whether the criteria have been established to reach the legal standard for the appointment of a guardian or administrator.

[14] See generally Peteris Darzins, D William Molloy and David Strang, *Who Can Decide? The six step capacity assessment process*, 2000, Memory Press Australia, Adelaide.

Appointments in anticipation of a future need: Response to Question 52

10.8 Under the current guardianship laws, VCAT must be satisfied that the proposed represented person needs a guardian or administrator before making an order. SRV supports Option C, which retains the existing practice that there must be a demonstrated need for a substitute decision maker before a guardian or administrator can be appointed.

10.9 The powers of a guardian or administrator should be limited specifically to the types of decisions that the proposed represented person is unable to make at that point in time. We believe that this approach helps to maximise the independence of the proposed represented person and respects their autonomy to the greatest degree. Allowing pre-emptive appointments would hamper that autonomy without providing a corresponding benefit that would warrant such a limitation.

10.10 Personal appointments should be promoted as part of the community education sessions delivered in relation to the new laws to encourage people to plan ahead to avoid what is often a crisis-driven application to VCAT once the need for a substitute decision maker has arisen.

11. Chapter 12: The distinction between guardianship and administration

Retention of distinction: Response to Question 55

11.1 SRV supports the retention of the distinction between guardianship and administration and provision for dual appointments for all guardians and administrators (Option A(i) in the Guardianship Consultation Paper).

11.2 Having two types of decision makers allows maximum flexibility for donors to choose who is best suited for what are quite different roles and provides checks and balances on particularly major decisions that are made, such as where the represented person should live, which ordinarily would require the guardian and administrator to agree. However, dual appointments may be entirely appropriate in relation to private substituted decision makers.

Overlap between powers of guardians and administrators: Response to Question 56

11.3 SRV believes that the overlaps between the powers of guardians and administrators can be managed by:

(1) clarifying what powers can be exercised by guardians and what powers can be exercised by administrators. SRV notes that this is particularly important in relation to litigation powers as at present the boundaries between the powers of guardians and administrators in commencing litigation is unclear. A non-exhaustive list of such powers would be helpful;

(2) creating a duty for guardians and administrators to consult each other;

(3) having formal dispute resolution processes for guardians and administrators to follow in the event of conflict and provide for VCAT to determine the dispute in the event that the matter fails to resolve; and

(4) providing increased training and support for guardians and administrators on what is required in the performance of their roles.

11.4 SRV does not support the new legislation pre-determining that either the guardian or administrator should prevail in the event of a dispute occurring. In these circumstances, it is appropriate for VCAT to resolve the dispute.

Disputes between family members and OPA and State Trustees: Response to Question 57

11.5 SRV encourages the use of mediation between family members when a dispute arises in relation to the appointment of a guardian or administrator.

Case Study Example 5

An older man who wished to remain in his home was subject to a guardianship application at VCAT. His children did not support his wish to remain in his home. With SRV's assistance an adjournment of the VCAT hearing was obtained while a meeting with the family, SRV and a rehabilitation facility was arranged to organise a support package to allow him to remain in his home.

11.6 In our experience, the current practice for resolving disputes between family members about decisions being made on behalf of a represented person is for VCAT to appoint OPA, State Trustees or other independent body as an independent guardian or administrator.

11.7 Where mediation fails to resolve the issue and an application is made to VCAT, VCAT should attempt to ascertain what is best for the represented person in determining whether to appoint one of the family members who is in conflict or an independent guardian or administrator. In our view, VCAT should hear evidence about the history of the relationships between the family members and the proposed represented person, the current relationships, the wishes of the donor together with any expert evidence and make findings about that evidence. Family members should not be automatically ruled out as guardians or administrators solely on the basis that there is a conflict with another family member. To do so may deprive the proposed represented person of having the most appropriate person appointed to the role and result in that person unnecessarily incurring the fees of an independent substituted decision maker.

12. Chapter 13: Powers of guardians and administrators

Decision making powers: Response to Questions 58 to 63

12.1 SRV agrees that the new guardianship laws should contain a comprehensive non-exhaustive list of decision-making powers that guardians and administrators can and cannot exercise (Option A(iii)).

12.2 Guardians should be able to the exercise the following powers under the new guardianship laws:

(1) make decisions relating to living arrangements;

(2) commence and defend litigation concerning lifestyle matters;

(3) act as litigation guardian;

(4) settle claims and proceedings;

(5) access personal information;

(6) make health decisions;

(7) make nutrition and hygiene decisions;

(8) make employment related decisions; and

(9) make decisions relating to education and training.

12.3 Guardians should not be able to exercise the following powers under the new guardianship laws:

(1) voting;

(2) decisions regarding personal relationships;

(3) marriage and divorce;

(4) making a will;

(5) consent to sexual relationships;

(6) adoption of children;

(7) the welfare and wellbeing of children of represented person;

(8) ending a person's life;

(9) consenting to “special procedures”; and

(10) acting as a personal legal representative of a deceased estate.

12.4 We support administrators conducting litigation for the represented person, but do not believe they should be able to make a will for the represented person or act as a personal legal representative of a deceased estate on behalf of the represented person.

12.5 SRV does not believe that any of the other options presented are better ways of dealing with what decision-making powers guardians or administrators should have.

12.6 We do not support the idea of allowing VCAT to order a guardian or administrator to have the power to make decisions relating to whether a represented person should hold a driver's licence,[15] wills or organ donation.

12.7 SRV believes that the new guardianship laws should retain the gifting provisions in section 50A of the G & A Act and extend the application of those provisions to personally appointed financial decision makers in addition to administrators.

Litigation: Response to Question 66 to 67

12.8 We agree that the current laws, which require a person with a disability under an administration order to have a litigation guardian in order to conduct litigation, are a serious barrier to people under a disability (and those seeking to bring a claim against a person under a disability) accessing the justice system.

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[15] We note that VicRoads already has the power to refuse to issue a licence in appropriate circumstances and that to grant such a power to a guardian is, therefore, unnecessary and creates another potential avenue for abuse or misuse.

12.9 We are concerned by the recent decision in *State Trustees Ltd v Andrew Christodoulou,*[16] which has the effect of discouraging administrators from pursuing legitimate causes of action that their client may have in fear of being exposed to an order for costs not recoverable from the estate of the person that they represent. The operation of the current rules also has the effect of limiting the rights of litigants seeking to bring a claim against a person under a disability, as proceedings can potentially not proceed[17] or be stayed[18] in the event that the defendant is unable to find someone willing to take on the role of litigation guardian.

12.10 In our view, the guardianship and administration regime which is in place to cover assisted and substituted decision making should also include litigation, rather than imposing another separate regime for legal proceedings in circumstances where the person already has a substituted decision maker. If an administrator or guardian has the power, and is willing, to conduct litigation, the litigation should be conducted by the guardian or administrator in the name of the represented person. Unless limited, ordinarily an administrator's litigation powers under section 58(B)(2)(1) of the G & A Act include matters relating to a person's finances and estate, for example, claims for compensation for injury and family law property settlements. Similarly, unless limited, a guardian's litigation powers encompass lifestyle litigation, including family law issues such as contact arrangements for children.[19]

12.11 The court rules concerning litigation guardians remain relevant for people who are incapable of managing their affairs in relation to a legal proceeding but do not need a guardianship or administration order, but are unnecessary for a person who has a guardian or administrator with appropriate powers to conduct litigation. This was the view of Underwood J in the Tasmanian Supreme Court decision of *Crockett & Anor* v *Roberts & Anor.*[20] In that case, the court held that the statutory provisions empowering the administrator to conduct litigation in the relevant guardianship legislation made the appointment of a litigation guardian "otiose".[21]

12.12 In our view, it should not be possible for the court to order that an administrator or guardian be personally liable for the costs of litigation, unless the administrator or guardian was negligent or not acting in the best interests of the represented person and we support any necessary amendments to the court rules or relevant legislation. In the absence of negligence SRV believes that the represented person should be liable for the costs of the proceedings brought or defended on their behalf, which is the same security for costs that litigants have against a person who is not under a disability. Without this protection, it is unlikely that guardians and administrators will agree to conduct litigation on behalf of represented persons. Already the State Trustees have indicated their reluctance to conduct or defend litigation on behalf of represented persons, which presents a very serious barrier to people with a disability accessing justice.

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[16] [2010] VSCA 86.

[17] *Supreme Court (General Civil Procedure) Rules 2005*, Rule 15.04.

[18] *Slaveski* v *State of Victoria & Ors* [2009] VSC 423.

[19] Office of the Public Advocate, Litigation Guardian at www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG15_Litigation_Guardian_09.pdf.

[20] [2000] TASSC 148.

[21] Ibid at page 8.

12.13 As the litigation guardian regime is relevant for people under a disability who do not have an administrator or guardian, it is also important that the new laws provide for people who are unable to find someone to take on that role to ensure that they are able to access the legal system and assert their rights. We support the establishment of a specialist agency to act as litigation guardian for disabled persons who are unable to find someone to take on the role to ensure access to justice for people under a disability.

12.14 In summary, we strongly support the new guardianship laws clarifying that a guardian or administrator is able to conduct proceedings on behalf of their represented person without being appointed as litigation guardian and attracting the resulting liability.

Types of legal proceedings

12.15 In our view, clarification is needed in relation to the types of legal proceedings that guardians and administrators can engage in on behalf of their represented person. At present, the lack of guidance in the legislation means that it is unclear when a guardian can commence or defend proceedings and could lead to hesitance on the part of guardians to do so. It may also result in conflict between guardians and administrators in relation to who can conduct litigation on behalf of a represented person.

12.16 SRV believes that a guardian should be able to conduct or defend litigation on behalf of a represented person insofar as the litigation relates to lifestyle matters that come under the general purview of the guardian's powers. This litigation power should be explicitly contained in the new law, similar to how the power of administrators to act in legal proceedings is currently contained in s 58B(2)(l) of the current G & A Act.

Enforcement powers against a represented person: Response to Questions 68 and 69

12.17 SRV does not support guardians being allowed to use force to have the represented person comply with their decision. In circumstances where the donor is unwilling to comply with the guardian's decision, the guardian should apply to VCAT for an order that the donor comply with the decision. The guardian can then rely on that order to have the relevant authority, such as an ambulance or the police, assist in the enforcement of the decision. To safeguard against the abuse of such a power, SRV supports the reduction of the 42 day reassessment period and the involvement of an independent body such as OPA to review the use of these powers and report to VCAT.

12.18 Any such order should only be made where it is reasonable, justified, proportionate, the least restrictive option available and after consultation with the represented person.

> **Case Study Example 6**
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> An older man was frustrated with a rehabilitation facility that would not allow him to return home in circumstances where his children did not support his desire to do so. The man's capacity was not impaired, but the facility was concerned about their duty of care. The man was told that if he attempted to leave the facility the police would be called.

Part F – Statutory Appointments (Part 6)

13. Chapter 14: Automatic appointments

Response to Questions 70 to 72

13.1 SRV agrees with the VLRC that the hierarchy for automatic appointees, as currently set out in section 37 of the G & A Act should be retained. No alternations should be made to the list of people stated in the section.

13.2 The new guardianship legislation should require an automatic appointee to take a substituted judgment approach to decision making.

Safeguards in legislation for automatic appointees: Response to Question 73

13.3 SRV believes that there should be additional measures contained in the new guardianship legislation for scrutinising the decisions made by automatic appointees. These additional measures should take the form of:

(1) random audits; and

(2) the availability of an investigation or inquiry by OPA or new statutory body into any concerns held by third parties that a person responsible is not acting appropriately.

14. Chapter 15: Informal assistance – admission into care

Admission in to care: Response to question 74

14.1 SRV is of the view that there should be specific laws about people being admitted to, and remaining in, residential care facilities where they do not have capacity to consent to those living arrangements but are not objecting to the arrangements.

"Persons responsible" and living arrangements: Response to questions 75 and 76

14.2 SRV is generally supportive of the VLRC's Option E, which suggests that the new guardianship legislation should extend the automatic appointment scheme to permit the "person responsible" to authorise living arrangements in a residential care facility if there are additional safeguards in place. SRV recognises that this could be achieved by extending the definition of medical treatment to include the decision to be discharged from hospital. However in our view, the term "medical treatment", as currently used in guardianship legislation, should be replaced with the broader term "health care".

14.3 We agree that if the automatic appointment scheme is expanded it is important that all of the safeguards suggested by the VLRC should be introduced. We have observed that the current practice in relation to medical decision-makers often involves an element of ageism, in that elderly spouses are regularly discounted by staff at medical facilities or carers when a person responsible is needed. This, combined with the potential for a conflict between the represented person and family members in relation to decisions to admit the older person into care, increases the risk of abuse and the need for the types of safeguards discussed in the Consultation Paper. We also recommend that the proposed reforms to this area of the law make its application clearer for medical professionals and

that sufficient professional education is provided to medical professionals in order to protect older people from discrimination and abuse.

15. Chapter 16: Medical Treatment

Definition of medical decision: Response to Questions 79 to 80

15.1 SRV considers that the definition of medical treatment should be broadened, and that the broader definition should include the prescription and administration of pharmaceutical drugs.

Minor medical decision: Response to Questions 82 to 84

15.2 SRV believes that a distinction should be made between minor and other medical procedures in circumstances where a person is unable to consent to treatment. We consider that the distinction should be made using the Queensland model; that is, that the distinction be left undefined, with the concepts defined broadly.

15.3 Minor medical procedures should not require substituted consent if certain safeguards are met; namely, that the medical practitioner be required to obtain a second opinion from another medical practitioner. In these circumstances, we believe that it is unnecessary for the law to retain the requirement that a medical or dental practitioner must notify OPA when the practitioner intends to carry out a minor and uncontroversial procedure and cannot obtain consent from a person responsible.

15.4 In line with SRV's answer to question 83, the safeguard that should exist in these circumstances is that the practitioner be required to obtain a second opinion from another practitioner, before carrying out the procedure that has not been consented to.

Part G – Responsibility and Accountability (Part 7)

16. Chapter 17: Responsibilities

16.1 Article 12(4) of the CRPD provides that measures relating to the exercise of legal capacity should respect the rights, will and preferences of the person, be proportionate and tailored to the person's circumstances, apply for the shortest time possible and be subject to regular review. We believe that the rights, will and preferences of the person should be starting point, and not just a consideration, in the decision-making process of a substitute decision maker.

Substituted decision making: Response to Questions 87 to 90, 92 and 94 to 96

16.2 In light of this, SRV agrees with the VLRC that guardians and administrators should place greater emphasis on the wishes of the represented person rather than the person's need for protection from harm. Focusing primarily on the person's wishes is, in our view, more likely to ensure that the person continues to live the same life as before but for the order. We support the proposed shift from the protective "best interests" approach towards the proposed "substituted decision" model, including a legislative direction requiring a substitute decision maker to make the decision that the person would have made if they were able to do so. Substitute decision makers should only depart from the wishes of the

represented person in circumstances where the decision is likely to cause serious harm to that person.

Case Study Example 7

An older man whose case manager was concerned about his drinking signed an application for a guardian without being given the chance to read it. The case manager, who thought she was acting in the best interests of the older man, placed him a nursing home in a locked ward to "dry" him out. The older man wished to return to his home and live independently but was not allowed to.

16.3 We support the introduction of a general set of decision-making principles applicable to all types of substituted and supported decisions which are consistent with the proposed general principles of the new legislation.

16.4 The new guardianship laws should specifically require substituted decision makers to act honestly and respond appropriately to conflicts of interest. This is consistent with the view expressed by the VLRC in the Guardian Consultation Paper and with the current Queensland guardianship legislation.[22] However, it will be necessary to ensure that adequate community education is provided to ensure that substituted decision makers understand their obligations.

16.5 We agree that it is desirable to have uniform principles for all types of decisions. However, in light of the VLRC's concerns about the adoption of a singular approach to decision making, additional guidance may be required for decisions of a financial and medical nature and for the resolution of conflict between a person's wishes and the administrator's obligations as trustee.

16.6 Potential conflicts may arise under the new laws between the requirement to act in accordance with the represented person's wishes and the obligation to act prudently and, particularly, in accordance with sections 6, 7 and 8 of the *Trustee Act 1958* (Vic).

16.7 Examples of regimes in other jurisdictions which have mechanisms to deal with potential conflicts between duties include:

(1) South Australia, Queensland and the Australian Capital Territory laws which require substituted decision making (to various extents), limited by the requirement that the decision be consistent with the proper care and protection of the represented person;[23]

(2) in relation to medical decisions, legislation which states that the best interests of the represented person is paramount[24] or requires that a substituted decision maker to act in the person's best interests,[25] after acting in accordance with any

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[22] See *Guardianship and Administration Act 2000* (Qld) ss 35(1) and 37.

[23] *Guardianship and Administration Act 1993* (SA) s 5; *Guardianship and Administration Act 2000* (Qld) s 34 and sch 1 pt 1 cl 7(5); *Guardianship and Management of Property Act 1991* (ACT) s 4(2).

[24] As the *Powers of Attorney Act 2006* (ACT) does.

[25] *Guardianship and Administration Act 2000* (Qld) s 61 and sch 1 pt 2 cl 12; *Powers of Attorney Act 2006* (ACT) sch 1 cl 1.11.

lawful conditions and directions contained in any medical power of attorney,[26] effectively overcoming any potential conflict between this and the substituted judgment of the represented person.

16.8 However, in our opinion, the represented person's wishes should only not be followed in circumstances where the decision will result in serious harm to the person and not in circumstances when the decision is not in the person's best interests. We acknowledge that this may have the consequence of creating a conflict of a guardian or administrator's duties in certain circumstances.

16.9 We therefore recommend that practical guidance be given to guardians and administrators in resolving any conflict of duties that may arise.

16.10 Substitute decision makers are currently able to apply to VCAT seeking advice in relation to a decision, or approval of decisions, if there is some uncertainty or conflict surrounding a major decision to be made.[27] Administrators and guardians should have access to advice and assistance in relation to these applications.

16.11 We also consider that the practical suggestions made by the South Australian OPA should be incorporated into the guardianship framework in Victoria; namely, for substituted decision makers, when trying to resolve apparent conflicts between their duties, to be encouraged to:

(1) contact OPA and speak to one of its enquiry officers; and

(2) talk with service providers who have specialist knowledge in the problem area,

before seeking assistance from VCAT.

16.12 We also agree with the VLRC that guardians and administrators should be provided with more training and ongoing support to carry out their role. It is also necessary to adequately fund bodies such as State Trustees to ensure that the case load of administrators is such that they are able to communicate and consult with represented persons about their wishes in order to properly carry out their role. Appropriate funding and training will result in better decisions by substituted decision makers resulting in fewer applications to VCAT seeking a review of those decisions.

17. Chapter 18: Confidentiality

Access to and misuse of confidential information: Response to Questions 97 and 98

17.1 SRV is supportive of the VLRC's proposal to insert provisions in the legislation authorising 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.

[26] *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(8).

[27] See *Guardianship and Administration Act 1986* (Vic) ss 30, 35E, 42I. 42W and 55, such an application has the effect of protecting substituted decision makers from legal proceedings. See also the Office of the Public Advocate, *Administration Guide,* [2.1] at www.publicadvocate.vic.gov.au/file/file/Administration/Administration%20Guidev2%20for%20web5.pdf.

17.2 We also believe that the new guardianship legislation should contain a provision similar to s 101 of the *Guardianship Act* in NSW for dealing with misuse of confidential or private information.

18. Chapter 19: Accountability and review of substitute decision making

Accountability mechanisms: Response to Questions 99 to 104

18.1 In our view, increased accountability of the conduct of substituted decision makers is essential in order to reduce the incidence of abuse of substituted decision making powers. However, we are concerned that any of the new obligations are not so onerous as to dissuade ordinary people from taking on the role of substituted decision maker. It is important that the new guardianship laws are accessible and user friendly to enable those whom proposed represented people trust to assume the role of substituted decision maker.

18.2 With this in mind, we propose a system which requires:

(1) the substituted decision maker to sign a statement agreeing to comply with their responsibilities before they undertake their role, as is already the case in relation to some personal appointments;

(2) the substituted decision maker to keep accurate separate records of all decisions made;

(3) the substituted decision maker to submit an annual declaration of compliance with their obligations during the previous year; and

(4) random audits of the records of a percentage of all substitute decision makers.

18.3 In our view, the requirement to lodge annual declarations is not too onerous for substituted decision makers. Whilst the lodgement of annual declarations alone is unlikely to prevent abuse, the annual declarations form part of an overall regime which we believe will reduce the incidence of abuse without being overly onerous.

18.4 Safeguards and accountability mechanisms should be the same, regardless of the size of the estate the attorney or administrator is administering.

18.5 Again, it will be necessary to devote significant resources to provide training and ongoing support of non-professional substitute decision makers given the complexity of the role and the importance of involving the represented person in the decision making process. For example, we agree with the comments expressed by the Homeless Persons Legal Clinic, that attending information sessions should be a condition of assuming the role of a guardian or administrator. Ongoing training and support should be provided to private administrators, potentially delivered by OPA, State Trustees and/or VCAT.

18.6 Declarations of compliance could be lodged with VCAT or OPA/State Trustees. We suggest that, with appropriate resources, OPA and State Trustees could conduct the random audits of the records held by guardians and administrators respectively. Alternatively, if a new independent statutory body is established to carry out investigations and take action for breach of penalty provisions, it may be appropriate for that body to also receive the declarations of compliance and carry out the random audits.

Penalties: Response to Question 105 to 110

18.7 SRV shares the view that VCAT should be empowered to make orders requiring administrators and financial attorneys to repay funds that have been misused. This power would alleviate the need to commence new proceedings, avoiding further stress and expense for the represented person.

18.8 We also support the introduction of increased and more specific penalties for the misuse or abuse of power by substitute decision makers and the introduction of civil penalties. These powers may be best placed with an independent new statutory body.

New guardianship laws should allow for merits review: Response to Questions 111 to 114

18.9 SRV agrees with the VLRC's proposal that new guardianship laws should permit merits review of decisions by all guardians and administrators, not just OPA and State Trustees. In our view, the represented person's rights should not depend on the identity of the substituted decision maker.

18.10 This is preferable to the current system, where the only option for interested parties who are unhappy with a decision made by a guardian or administrator is to apply to VCAT to have the administration or guardianship order itself revoked. This is not an appropriate mechanism to resolve the dispute over one particular decision of a guardian or administrator. Furthermore, if the applicant is unsuccessful at VCAT, the only further avenue available is to make an application to the Supreme Court on the basis of an error of law. The Supreme Court, in our opinion, is not the appropriate forum to determine a dispute regarding a decision made by a substitute decision maker.

18.11 The option of making an application to VCAT seeking a review of the relevant decision should be available only after all internal mechanisms of review, if applicable, have been exhausted.

18.12 Where existing review mechanisms have been exhausted or a review mechanism is not available, an interested person may apply to VCAT to have the decision reassessed rather than reviewed.

18.13 SRV shares the VLRC's view that the represented person and people with a special interest in their affairs should be entitled to apply for merits review of a guardian's or an administrator's decision.

18.14 We suggest that an approach similar to that in New South Wales should be adopted in relation to defining what constitutes a "reviewable decision". The New South Wales guardianship laws provide that a reviewable decision includes all those decisions made by guardians and administrators in connection with the exercise of their powers under the equivalent to the G & A Act.

18.15 We agree with the VLRC that no additional steps are required to limit trivial, vexatious or repeated applications for merits review of a guardian or administrator's decision. The New South Wales experience suggests that the requirement that all internal options be exhausted and VCAT's ability to strike out will be sufficient to ensure that the Tribunal does not receive an overwhelming number of applications.

Merits review: Response to Questions 115 to 116

18.16 In our view, merits review of decisions by administrators should not be treated differently to merits review of decisions by guardians.

18.17 A specialist guardianship and administration review list at VCAT should hear applications for a merits review of a decision of a guardian or administrator.

Mandatory training: Response to Question 117

18.18 SRV supports mandatory training for all non-professionals appointed as a guardian or administrator.

Part H – Implementing and Regulating New Laws (Part 8)

19. Chapter 20: The Public Advocate

OPA investigation of elder abuse: Response to Questions 118 to 122

19.1 SRV supports the inclusion of investigatory powers in the new laws to ensure that concerns about the possible of abuse of people with disabilities are adequately investigated. Whilst we do not support mandatory reporting, it is important that there is a body charged to follow up concerns expressed in relation to vulnerable members of our community.

19.2 We understand that currently organisations and individuals are able to seek assistance from Victoria Police to conduct "welfare checks" on individuals who may be at risk of abuse. This usually occurs where a case officer has concerns about the safety or well-being of an individual. It appears, however, that the power to conduct safety checks is not prescribed by statute but rather is based on a discretionary power that the police can exercise when they determine it is appropriate.

19.3 Given the lack of clarity over when welfare checks will be undertaken and what they will entail, we believe that a statutory body should have clearly identified powers to investigate cases of suspected abuse of people with a disability, not just people who are the subject of a guardianship or administration order. The legislation should set out clear guidelines on when the use of such powers are appropriate and ensure that appropriate records are kept regarding the use of the powers.

19.4 Ideally, a new independent statutory body should be established to carry out these functions rather than OPA, so that OPA can retain its identity as an advocate rather than enforcement agency. However, in the absence of the establishment of a new body, an extension of the functions of OPA may be the most practical solution.

19.5 The new legislation should expressly permit the relevant body to require people and organisations to provide them with documents and answers to relevant questions. Without such powers, any investigative function would be severely crippled.

19.6 We also support the recommendation that the relevant body should have the power to enter premises with a warrant issued by a judicial officer where there are reasonable grounds for suspecting a person has been neglected, abused or exploited on the premises.

19.7 To encourage cooperation and assistance with the investigation of potential abuse, neglect or exploitation, we support the VLRC's proposal to provide anonymity to people who report concerns about the potential abuse of a person under a disability. This would increase the likelihood of members of the community reporting instances of suspected abuse and protect people who do report concerns from adverse consequences.

19.8 Finally, we also support the VLRC's proposal that the relevant body have the power to take civil penalty proceedings against people who have allegedly breached guardianship legislation. We agree with the VLRC's assessment of the existing penalty provisions being unworkable and agree with OPA and the VLRC that civil penalty proceedings are more appropriate for cases where Victoria Police do not need to be involved.

OPA's advocacy functions under the legislation: Response to Questions 123 to 126

19.9 SRV supports the VLRC proposal that OPA's individual and systemic advocacy functions under guardianship legislation should be clarified. SRV supports the view that this would empower OPA to advocate for individuals with a disability, who as a result are at high risk of abuse, and that these reforms will achieve positive results for people with a disability.

19.10 We also support the proposal to introduce into legislation principles to guide OPA in the exercise of its advocacy functions and retaining the functions in relation to community advocacy.

19.11 We agree that OPA should continue to be both the guardian of last resort and advocate and that OPA should be permitted to delegate any powers of guardianship without VCAT approval, given that the guardianship role is a significant and resource intensive function. By permitting OPA to delegate without VCAT approval, the process for guardianship can be made more efficient and OPA's resources can be more effectively managed.

Training and supporting private guardians: Response to Questions 127 to 129

19.12 It would be appropriate to vest responsibility for training and supporting private guardians with OPA given its expertise.

19.13 OPA would also have the expertise to take on an active role in monitoring the activities of private guardians to ensure accountability. This is also in line with the VLRC's suggestion that OPA be given greater investigative powers. Whilst it would be preferable for these powers to vest in a new independent statutory body, in the absence of such a body, OPA would be an appropriate body to take on this role.

19.14 We suggest that monitoring could include receipt of statements of compliance, random audits of the activities of private guardians and investigation of complaints regarding the conduct of private guardians.

Register of personal appointments: Response to Questions 130 and 131

19.15 SRV supports the proposal that OPA have a role in designing a register of personal appointments of substitute decision makers. Given the expertise OPA currently possesses in this area, it would be best placed to design an effective register.

Misuse of substituted decision making powers: Response to Question 133

19.16 We also support the proposal by the VLRC that a new statutory body or OPA should have the power to deal with misuses of power by all substitute decision makers, including those automatically appointed by legislation. This suggestion is in line with the proposed reforms which aim to give OPA greater investigative and enforcement powers, as discussed above, as well as to simply the guardianship regime.

Reporting requirement: Response to Question 134

19.17 SRV agrees with the proposal that OPA be required to report annually to Parliament for the purposes of accountability and independence and to raise the profile of OPA and of people with disabilities.

20. Chapter 21: VCAT

NSW Guardianship Tribunal Coordination and Investigation Unit: Response to Question 135 to 136

20.1 SRV supports the VLRC recommendation for the establishment of a body similar to the NSW Guardianship Tribunal Coordination and Investigation Unit, which could take on an active role in engaging with parties prior to hearings. We believe that this will assist to ensure that proposed represented persons are aware of the hearing, understand the potential consequences of orders that could be made at the hearing, know how to attend the hearing and know how to obtain legal and other assistance.

20.2 We support either VCAT or OPA undertaking this type of role.

Right to legal representation: Response to Question 137

20.3 SRV is concerned that proposed represented people receive insufficient legal assistance and advocacy support. In our experience, there is often very limited evidence placed before VCAT in relation to an application for the appointment of a guardian or administrator. Without appropriate advocacy to test the evidence or lack of evidence, orders may be made in cases where they would not have been made had the proposed represented person been in a position to obtain legal representation. Given that VCAT orders concern the most fundamental human rights, including the right to self determination, we believe that it is critical that people who are the subject of a guardianship or administration application are able to access legal advice and representation.

20.4 Option B, a statutory right to legal representation, and Option C, a statutory power for VCAT to order that a person be provided with representation when VCAT believes this step is necessary, are consistent with this position. We also support Option A, to provide all proposed represented people with information and referrals around advocacy services before the hearing, in addition to Options B and C.

20.5 Funded legal representation through Victoria Legal Aid, private or community lawyers would be preferable. Pro bono legal services may be appropriate to fill any gaps in the provision of funded legal aid, but is no substitute for appropriate levels of government funding. Any volunteers should be legally qualified, for example, pro bono lawyers.

Obligations on VCAT: Response to Question 138

20.6 SRV supports Option B, that VCAT should be required to consider whether a supported or co-decision making order would be more appropriate and less restrictive than making an order for a substituted decision maker. This is in line with the existing requirements that the order be the least restrictive option available in the circumstances. In addition, we would encourage VCAT to also consider options, such as mediation, before making a guardianship or administration order.

Confidential information: Response to Questions 142 to 144

20.7 One of the fundamental requirements, in order that the proposed represented person receives a fair hearing, is that they have access to all the evidence before the Tribunal. In our experience, the current practice is often to require the proposed represented person or their representative to apply to the Tribunal to obtain access to medical reports and other evidence to be relied on by the applicant. Whilst we appreciate that evidence in guardianship matters is often sensitive, in our opinion, the current practice is skewed too far in favour of confidentially at the expense of procedural fairness.

20.8 We therefore support the proposal that VCAT should make parties aware that confidential information will be made available to the proposed represented person and other parties unless a confidentiality order is made. The onus would be on the person alleging that the information should be confidential to justify why the material should remain confidential.

20.9 However, given the sensitive and personal nature of guardianship proceedings, we believe that VCAT Guardianship List files should be closed to the public, with only the parties having a right of access without a VCAT order granting access.

Start period for apply for a hearing: Response to Questions 145 and 146

20.10 SRV agrees with the concerns raised about the short period available to apply for a rehearing and supports the proposal to extend the time in which a person may apply for a rehearing beyond the current 28 day limit. Furthermore, to ensure that parties are aware of their rights for a rehearing, we support the proposal that VCAT be obliged to inform parties of their right to a rehearing.

Reassessment process: Response to Question 147 and 148

20.11 SRV supports the proposal of an opt-out reassessment process, as this would increase participation and ensure that the represented person is aware of the importance of the hearings. We are also of the view that the new guardianship laws should ensure that represented persons have a right to at least one reassessment hearing during the period of their order.

VCAT panels: Response to Questions 150 to 152

20.12 Given the impact of guardianship orders on the fundamental rights of vulnerable members of the community, SRV supports the proposal that it should be standard practice for all guardianship list matters to be heard by a multi-member panel comprised of members from a variety of backgrounds, as is the case in NSW for complex cases.

VCAT Guardianship List

20.13 In our view, VCAT Guardianship List hearings should be as informal as possible and involve the proposed represented person as much as possible. The member(s) presiding should ensure that the proposed represented person understands all aspects of the proceedings and, if necessary, the hearings should be held where the proposed represented person lives.

20.14 In order to achieve better attendance at VCAT hearings, the new legislation should provide that the proposed represented person should be in attendance and the VCAT notice of hearing should:

(1) be written in clear letters in large font;

(2) look less like infringement notice, as per the concerns from the Mental Illness Fellowship of Victoria;

(3) advise the proposed represented person of the importance of the hearing and potential outcomes;

(4) identify legal and other assistance available; and

(5) be followed up by contact from a member of the investigation team to confirm the attendance of the proposed represented person and if the person is unable to attend, whether arrangements can be made to accommodate the proposed represented person.

APPENDIX 1

Table of questions answered

Consultation Paper Questions to Guide Submissions		
Part 2: The Direction of New Laws		
Chapter 4: Structure of New Laws		
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?	N/A
Chapter 5: Principles of New Laws		
2.	Do you agree with the Commission's draft statement of purpose for new guardianship laws?	Support, see paragraph 5.1
3.	Do you agree with the Commission's draft general principles for new guardianship laws?	Support, see paragraph 5.3
4.	Are there principles you think should be added or removed from these general principles?	N/A
Chapter 6: Clear and Accessible Laws		
5.	Do you agree with the Commission's proposal that Victoria's various substitute decision-making laws be consolidated into one single Act?	Support, see paragraph 6.1
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?	Support, see paragraph 6.2
7.	Do you agree with the Commission's proposal that the term “guardian” should be replaced with “adult guardian”?	Support, see paragraph 6.3
8.	Do you agree with the Commission's proposal that the term “administrator” should be replaced with “financial guardian”?	Support, see paragraph 6.4

9.	Should the terminology used for powers of attorney be better integrated with the terminology for guardianship and administration? What terms should be used?	Support, see paragraph 6.5
10.	Do you have any specific ideas about how to better target education about guardianship laws towards:	
	• people with disabilities	N/A
	• family, friends and carers of people with disabilities	N/A
	• CALD groups	N/A
	• Indigenous communities	N/A
	• older people	See paragraphs 6.5 to 6.6
	• young people	N/A
	• health and community sector professionals	N/A
	• lawyers?	N/A
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?	See paragraph 6.7
12.	Would an educational and awareness campaign assist the community to better understand and make use of guardianship laws?	Support, see paragraph 6.8
13.	What type of data do you think needs to be collected and made available and from what bodies?	See paragraphs 6.9 to 9.11
Part 3: Supported Decision Making		
Chapter 7: Supported Decision Making		
14.	Do you agree with the Commission's proposal to introduce new supported decision-making arrangements?	Support, see paragraph 7.1

15.	Do you agree with any or all of the proposed roles of supporters and co-decision makers?	Support, see paragraph 7.2
16.	What steps would need to be taken in order to ensure that these appointments operated fairly and efficiently?	Support, see paragraph 7.4
17.	Do you agree that the Public Advocate should not be a "supporter" or a "co-decision maker"?	N/A
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?	Support, see paragraph 7.9
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?	Support, see paragraph 7.10
20.	Should "supporter" or "co-decision-maker" arrangements apply to financial matters, or be limited to personal decision making?	See paragraph 7.8
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?	Support, see paragraph 7.10
22.	What safeguards do you think are necessary to protect supported people from abuse?	See paragraph 7.6
Part 4: Personal Appointments		
Chapter 8: Personal Appointments		
23.	Should all enduring powers be activated at the same time? If so, when should this occur?	See paragraph 8.2
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?	N/A
25.	Should these wishes be a factor VCAT is required to consider when it appoints a substitute decision maker or supporter?	N/A
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?	See paragraphs 8.4 and 8.5

27.	Should there only be one type of appointment with a range of possible powers?	Do not support, see paragraph 8.5
28.	Should an online registration system be created for enduring powers?	Support, see paragraph 8.6
29.	Which organisation should hold the register?	N/A
30.	Should registration be voluntary or compulsory?	Compulsory, see paragraph 8.6
31.	If registration is compulsory, what effect should this have on unregistered appointments?	See paragraph 8.9
32.	When is the best time for registration to occur?	See paragraph 8.9
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?	See paragraphs 8.11 and 8.12
34.	Should it be necessary to notify a public authority and/or various other people when a power of attorney is activated?	Support, see paragraphs 8.13 to 8.16
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?	Support, see paragraphs 8.13 and 8.16
36.	How might notification work in a situation where a person's capacity is fluctuating?	See paragraph 8.14
37.	Should a donor also be able to specify that people/bodies should not be notified when a power of attorney is activated?	N/A
Chapter 9: Documenting Wishes About Your Future		
38.	Do you think that the law concerning instructional medical directives should be set out in legislation?	Support, see paragraphs 9.1 to 9.3
39.	Do you think it should be possible to make statutory instructional directives about things other than medical treatment?	Support, see paragraph 9.4
40.	What types of things should it be possible to include in an instructional directive?	See paragraph 9.4

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?	See paragraph 9.5
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?	See paragraph 9.5
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?	See paragraph 9.5
44.	Should the same rules apply to both enduring guardians and enduring attorneys (financial)? If not, in what circumstances should they differ?	N/A
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?	See paragraph 9.6
46.	Should there be an electronic registration system for advance directives?	Support, see paragraph 9.7
47.	Should registration extend to medical and lifestyle instructional directives?	Support, see paragraph 9.7
48.	Should registration be voluntary or compulsory?	Compulsory, see paragraph 9.7
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?	N/A
Part 5: VCAT Appointments		
Chapter 10: VCAT Appointments and Who They Are For		
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?	Do not support, see paragraph 10.1
51.	Do you agree with the Commission's suggestions for capacity principles (Option A) and a legislative definition of	Support, see

	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?	paragraphs 10.3 to 10.7
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?	Do not support, see paragraphs 10.8 to 10.10
Chapter 11: Age		
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?	N/A
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?	N/A
Chapter 12: The Distinction Between Guardianship and Administration		
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?	Support, see paragraphs 11.1 and 11.2
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?	See paragraph 11.4
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?	See paragraphs 11.5 to 11.7
Chapter 13: Powers of Guardians and Administrators		
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?	Support, see paragraph 12.1
59.	If yes to Q 58, what decisions should a guardian be able and unable to make?	See paragraphs 12.2 and 12.3

60.	If yes to Q 58, what decisions should an administrator be able and unable to make?	See paragraph 12.4
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?	Do not support, see paragraph 12.5
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?	Do not support, see paragraph 12.6
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?	Yes, see paragraph 12.7
64.	Should new guardianship legislation alter or clarify the anti-ademption provisions in section 53 of the *Guardianship and Administration Act 1986* (Vic)?	N/A
65.	Should new guardianship legislation enable State Trustees to be given the same powers as those of other administrators?	N/A
66.	Who should conduct litigation on behalf of a represented person?	See paragraphs 12.8 to 12.14
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?	Do not support, see paragraph 12.12
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?	Do not support, see paragraphs 12.17 and 12.18
69.	If yes to Q 68, do you agree with the additional safeguards proposed by the Commission?	N/A
Part 6: Statutory Appointments		

Chapter 14: Automatic Appointments—The Person Responsible		
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?	Support, see paragraph 13.1
71.	What alterations (if any) should be made to the list?	None, see paragraph 13.1
72.	Do you think new guardianship legislation should require an automatic appointee to take a substituted judgment approach to decision making?	Support, see paragraph 13.2
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?	Support, see paragraph 13.3
Chapter 15: Informal Assistance —Admission Into Care		
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?	Support, see paragraph 14.1
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?	Support, see paragraph 14.2
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?	Support, see paragraph 14.3
77.	If the automatic appointment scheme is expanded to cover these circumstances, should the hierarchy of automatic appointees be changed?	N/A
78.	If the automatic appointment scheme is expanded to cover these circumstances, what residential facilities should fall within the scheme?	N/A
Chapter 16: Medical Treatment		
79.	Do you think that the definition of medical treatment should be broadened?	Support, see paragraph 15.1

80.	Should a broader definition include the prescription and administration of pharmaceutical drugs?	Support, see paragraph 15.1
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?	N/A
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?	Support, see paragraph 15.2
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?	Support, see paragraph 15.3
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?	Do not support, see paragraphs 15.3 and 15.4
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?	N/A
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?	N/A
Part 7: Responsibility and Accountability Under The Law		
Chapter 17: Responsibilities		
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?	Support, see paragraph 16.2
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?	See paragraph 16.2
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?	Support, see paragraph 16.3
90.	Do you agree with the Commission's proposal (Option C) that substituted judgment should be the paramount	Support, see

	consideration for decision makers? Or, do you think that substituted judgment should be just one guiding principle to consider?	paragraphs 16.2 to 16.4
91.	Is substituted judgment relevant to supported decision making?	Support, see paragraph 16.2
92.	Do you agree that new guardianship laws should specifically require substitute decision makers to act honestly and respond appropriately to conflicts of interest?	Support, see paragraph 16.4
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?	N/A
94.	Should new guardianship laws contain the same decision-making principles for financial decisions and personal decisions?	See paragraphs 16.5 to 16.7
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?	See paragraphs 16.7 to 16.12
96.	Should there be separate and distinct principles for medical decision making? If so, what should these principles be?	N/A
Chapter 18: Confidentiality		
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?	Support, see paragraph 17.1
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?	Support, see paragraph 17.2
Chapter 19: Accountability and Review of Substitute Decision Making		
99.	Do you think that private guardians and attorneys should be required to lodge periodic reports about their activities with a public official?	Do not support, see paragraph 18.1
100.	Should people exercising substitute decision-making powers be required to provide periodic declarations of compliance with their responsibilities?	Support, see paragraphs 18.2 to 18.4

101.	Who should receive and monitor the declarations?	See paragraph 18.6
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?	Support, see paragraph 18.2
103.	Should there be random audits of the way substitute decision makers perform their responsibilities?	Support, see paragraph 18.2
104.	Who should carry out these random audits?	See paragraph 18.6
105.	Should VCAT be able to order administrators and financial attorneys to repay funds that have been misused?	Support, see paragraph 18.7
106.	Is there a need for more specific penalties for substitute decision makers who misuse or abuse their powers?	Support, see paragraph 18.8
107.	If yes, what types of conduct should warrant a specific penalty?	N/A
108.	Should penalties for substitute decision makers who misuse or abuse their powers be increased?	Support, see paragraph 18.8
109.	Should penalties be the same, regardless of whether the substitute decision makers have been personally appointed or appointed by VCAT?	N/A
110.	Should civil penalties be introduced for substitute decision makers who misuse or abuse their powers?	N/A
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?	Support, see paragraphs 18.9 to 18.12
112.	Who should be entitled to apply for merits review of a guardian's or administrator's decision?	See paragraph 18.13
113.	What should constitute a “reviewable decision”?	See paragraph 18.14
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?	Do not support, see paragraph 18.15

115.	Should merits review of decisions by administrators be treated differently to merits review of decisions by guardians?	Do not support, see paragraph 18.16
116.	Who should conduct merits review of decisions of public guardians and administrators?	See paragraph 18.17
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?	Support, see paragraph 18.18
Part 8: Implementing and Regulating New Laws		
Chapter 20: The Public Advocate		
118.	Do you believe the Public Advocate's investigation function should extend beyond cases concerning guardianship and administration?	Support, see paragraphs 19.1 to 19.8
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?	Support, see paragraphs 19.3 to 19.5
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?	Support, see paragraph 19.6
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?	Support, see paragraph 19.7
122.	Should the Public Advocate be able to take civil penalty proceedings against people who have allegedly breached guardianship legislation?	Support, see paragraph 19.8
123.	Do you support clarifying the Public Advocate's individual and systemic advocacy functions in guardianship legislation?	Support, see paragraph 19.9
124.	Do you think that the legislation should include principles to guide the Public Advocate when undertaking her advocacy functions?	Support, see paragraph 19.10
125.	Do you think that the Public Advocate's functions in relation to community advocacy are necessary?	Support, see paragraph 19.10

126.	Do you agree that the Public Advocate should continue to be both the guardian of last resort and an advocate?	Support, see paragraph 19.11
127.	Should the Public Advocate be responsible for training and supporting private guardians?	Support, see paragraph 19.12
128.	Should the Public Advocate be responsible for monitoring the activities of all or some private guardians?	See paragraph 19.13
129.	If so, how should any monitoring activities be performed?	See paragraph 19.14
130.	Do you think the Public Advocate should play a role in designing a register of personal appointments?	Support, see paragraph 19.15
131.	Do you think the Public Advocate should be given responsibility for monitoring the activities of personally appointed substitute decision makers?	Support, see paragraph 19.15
132.	If so, what functions and powers should be given to the Public Advocate to undertake this responsibility?	See paragraph 19.14
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?	Support, see paragraph 19.16
134.	Do you think the Public Advocate should be required to report annually to Parliament?	Support, see paragraph 19.17
Chapter 21: VCAT		
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?	Support, see paragraph 20.1
136.	Should the Public Advocate be funded to undertake this role?	Support, see paragraph 20.2
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?	See paragraphs 20.3 to 20.5
138.	Should VCAT be required to consider making supported and co-decision-making orders before appointing a substitute decision maker?	See paragraph 20.6

139.	Do you think that new guardianship legislation should specify a maximum period for all guardianship and administration orders?	N/A
140.	If so, what should that maximum period be?	N/A
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?	N/A
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?	Support, see paragraphs 20.7 to 20.9
143.	Should a person who provides VCAT with confidential information be responsible for requesting and justifying the need to keep the information confidential?	Support, see paragraph 20.8
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?	See paragraph 20.9
145.	Should the period in which an application for a rehearing can be made be extended beyond the current 28-day limit?	Support, see paragraph 20.10
146.	Should VCAT be required to inform parties of the right to seek a rehearing?	Support, see paragraph 20.10
147.	Should a represented person be requested to opt out of, rather than opt in to, a reassessment hearing?	Support, see paragraph 20.11
148.	Should a represented person be entitled to at least one unscheduled reassessment of the order during the period of the order?	Support, see paragraph 20.11
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?	N/A
150.	Should multi-member panels, with members drawn from a range of backgrounds, be the standard practice for initial guardianship and administration applications?	Support, see paragraph 20.12
151.	Do you have any views about how VCAT Guardianship List hearings should be conducted?	See paragraphs 20.13

		and 20.14
152.	Do you have any ideas about how to achieve better attendance of the represented person at VCAT hearings?	See paragraphs20.14
153.	Do you have any ideas about how to make the Guardianship List more accessible to Indigenous people?	N/A
154.	What can be done to make the Guardianship List more accessible to users who come from culturally and linguistically diverse backgrounds?	N/A
155.	What can be done to make the Guardianship List more accessible to users in regional areas?	N/A
Part 9: Interaction with other Laws		
Chapter 22: *Disability Act 2006* (Vic)		
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?	N/A
Chapter 23: *Mental Health Act 1986* (Vic)		
157.	Do you agree with the Commission's proposal (Option C) that it should be possible, in some circumstances, for guardianship to be used as a mechanism for authorising psychiatric treatment and place of residence decisions for a person who is unable to make their own decisions due to mental illness?	N/A
Chapter 24: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)		
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?	N/A
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)?	N/A