Victorian Equal Opportunity
& Human Rights Commission

Submission to the Victorian Law Reform Commission

in response to the Guardianship Consultation Paper

3 June 2011

Prepared by the Victorian Equal Opportunity and Human Rights Commission

ABOUT THE COMMISSION

The Victorian Equal Opportunity and Human Rights Commission is an independent statutory body with responsibilities under three laws:

- *Equal Opportunity Act 1995*
- *Racial and Religious Tolerance Act 2001*
- *Charter of Human Rights and Responsibilities Act 2006*

The Equal Opportunity Act makes it against the law to discriminate against people on the basis of a number of different personal characteristics.

The Racial and Religious Tolerance Act makes it against the law to vilify people because of their race or religion.

Under the Equal Opportunity Act and the Racial and Religious Tolerance Act, the Commission helps people resolve complaints of discrimination, sexual harassment and racial or religious vilification through a free and impartial complaint resolution service with the aim of reaching a mutual agreement.

The Charter of Human Rights and Responsibilities means that government and public bodies must comply with human rights and must consider relevant human rights when making decision. The Commission's role is to educate people about the rights and responsibilities contained in the Charter and to report annually to the Victorian Government about the operation of the Charter. The Commission does not handle complaints related to the Charter.

Services provided by the Commission include:

- a free telephone Enquiry Line
- a free and impartial dispute resolution service
- information and education about equal opportunity, racial and religious vilification and the Charter of Human Rights and Responsibilities
- education, training and consultancy services.

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INTRODUCTION

Overview

The Victorian Equal Opportunity and Human Rights Commission ('the Commission') welcomes the opportunity to provide comments on the Guardianship Consultation Paper prepared by the Victorian Law Reform Commission ('the VLRC').

A review of Victoria's guardianship laws provides a unique opportunity to address human rights issues in relation to a set of laws which affect some of the most vulnerable groups of people in Victoria. Whilst the term 'guardianship laws' refers primary to the *Guardianship and Administration Act 1986* (Vic) ('G&A Act'), it also means those parts of the *Instruments Act 1958* (Vic) that deal with powers of attorney and those parts of the *Medical Treatment Act 1988* (Vic) that deal with decisions by agents.

The review of Victoria's guardianship laws by the VLRC is a significant process of law reform. It is the first time there has been a complete review of Victoria's guardianship laws since they came into force in 1986. The current review is especially significant because it is the first time the guardianship laws have been looked at through a human rights lens to ensure they are consistent with rights protected under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') and the international Convention on the Rights of Persons with Disabilities ('CRPD').

The Commission's submission addresses the following key issues from the Guardianship Consultation Paper, especially in the context of the role the Charter and CRPD should play in the development of new guardianship laws in Victoria:

- general principles and decision-making principles
- supported decision-making
- personal appointments especially regarding the wishes of parents of children with disabilities
- advance directives – medical and lifestyle
- the criterion for appointments of guardians and administrators by the Victorian Civil and Administrative Tribunal ('VCAT') and whether the link between impaired decision-making capacity and disability should be retained
- the assessment of capacity and whether it should involve capacity principles and a legislative definition of incapacity
- lowering the age of guardianship to 16
- the powers of guardians and administrators including the Office of the Public Advocate ('OPA') and State Trustees ('STL')
- automatic appointments and the issue of admission into residential care
- consent to medical treatment and medical research
- the 'best interests' vs. 'substituted judgment' approach to substituted decision-making, and
- the interaction of the guardianship laws with other laws including the *Disability Act 2006* (Vic) and the *Mental Health Act 1986* (Vic).

GUARDIANSHIP AND HUMAN RIGHTS

Human rights and the review process

The objective of the review of Victoria's guardianship laws is to report on the desirability of changes to the G&A Act. In doing this, the VLRC must have regard to:[1]

a) the principle of respect for the inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons, and the other General Principles and provisions of the [CRPD]
b) the introduction of the [Charter]
c) developments in policy and practice in respect of persons with impaired decision making capacity since the Act commenced
d) the increase in Victoria's ageing population and the changing demographic nature of the clients of the Office of the Public Advocate.

The purpose of the review of is to 'ensure that guardianship and administration law in Victoria is responsive to the needs of people with an impaired decision making capacity and advances, promotes and protects the rights of people with impaired decision making capacity'.[2]

There has been an opportunity for community input into the review of the guardianship laws and the production of the Consultation Paper is a positive step. Human rights considerations have been incorporated into the general principles of the Consultation Paper.[3] However, the human rights dialogue in the Consultation Paper is at a high-level and in general terms and does not fully inform the community about the way in which Charter rights will be engaged and limited by the proposed changes to the guardianship laws.

Human rights obligations

Domestically, the Victorian Parliament has adopted human rights legislation that enshrines and protects certain human rights in the Charter. The Charter promotes human rights dialogue between the executive, the legislature, the judiciary and the community. Section 28 of the Charter requires the legislature, when enacting legislation, to consider the consistency of proposed legislation with human rights protected under the Charter.[4]

Guardianship and administration can enliven a number of human rights under the Charter, as appointments allow vital life and financial decisions to be made by one person on behalf of another. These appointments should only be authorised and administered in a manner that is consistent with human rights law. They trigger a range of fundamental human rights under the Charter including:

- the right to recognition and equality before the law, including recognising the capacity of all persons, and ensuring protection from discrimination (section 8)

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[1] Victorian Law Reform Commission, *Guardianship: Consultation Paper* (2011), Terms of Reference [1] p14.
[2] Victorian Law Reform Commission, *Guardianship: Consultation Paper* (2011), Terms of Reference [2] p14.
[3] Victorian Law Reform Commission, *Guardianship: Consultation Paper* (2011), Chapter 5: Principles of Laws pp77-96.
[4] Under section 29 of the Charter, a failure to comply with section 28 of the Charter does not render the law invalid if it is inconsistent with human rights principles.

- the right not to be subject to medical treatment without full, free and informed consent (section 10)
- the right to freedom of movement (section 12)
- the right to liberty and security of person (section 21)
- the right to privacy and reputation (section 13)
- the right to protection of families (section 17), and in some cases
- the protection from cruel, inhuman or degrading treatment (section 10).

Therefore, any proposed changes to the guardianship laws put forward by the VLRC must be consistent with the rights protected under the Charter.

The Charter directs the Courts and Tribunals to consider whether guardianship laws are consistent with human rights law under section 32 when they are interpreting the law. Section 32(2) specifically provides that international law, including the CRPD, may be considered when interpreting statutory provisions. Consequently, the VLRC must keep in mind that VCAT will attempt to interpret the new guardianship laws in a way that is compatible with human rights. In order to avoid issues arising in VCAT, and from a policy perspective, the VLRC should seek to ensure its proposals are compatible with human rights in the first instance.

The Charter also obliges public authorities to act in a way that is compatible with the human rights set out in the Charter, and give proper consideration to such rights when making decisions (section 38). These requirements apply to OPA, STL (at least when acting as administrator under a VCAT order) and VCAT when it is acting in its administrative capacity.

Internationally, Australia is a party to seven core human rights treaties:

- the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD')[5]
- the International Covenant on Civil and Political Rights ('ICCPR')[6]
- the International Covenant on Economic, Social and Cultural Rights ('ICESCR') [7]
- the International Convention on the Rights of Persons with Disabilities ('CRPD')[8]
- the Convention on the Rights of the Child ('CRC')[9]
- the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW')[10] and

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[5] *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature on 7 March 1966, 660 UNTS 195, entered into force 4 January 1969.

[6] *International Covenant on Civil and Political Rights,* opened for signature on 19 December 1966, 999 UNTS 171, entered into force 23 March 1976.

[7] *International Covenant on Economic, Social and Cultural Rights,* opened for signature on 19 December 1966, 999 UNTS 3, entered into force 3 January 1976.

[8] *International Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 611 UNTS 66, entered into force 3 May 2008.

[9] *International Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS, 3, entered into force 2 September 1990.

[10] *Convention on the Elimination of All Forms of discrimination against Women,* opened for signature on 18 December 1979, 1249 UNTS 13, entered into force 3 September 1981.

- the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment ('CAT').[11]

In becoming a party to these treaties, Australia accepted the obligations and responsibilities each of them imposes on it. The CRPD is the most recent of the UN conventions on human rights and is the first legally binding international document that specifically promotes and protects the rights of persons with disabilities.

The CRPD is a comprehensive treaty. It includes civil, political, economic, social and cultural rights without distinction and protects them all equally. The CRPD provides an authoritative reference point for Australian governments, including the Victorian Government, when reviewing and developing legislation affecting people with a disability. Any suggested reforms to the Victorian guardianship laws should be consistent with the human rights principles articulated in the CRPD and the obligations and responsibilities it places on Australia

Human rights may be limited

In recognising that human rights protections are vital safeguards to incorporate into revised guardianship laws, the Commission also notes the general limitation provision contained in section 7(2) of the Charter. This provision means that the protection of and adherence to human rights does not automatically preclude any limitation on rights. However, section 7(2) of the Charter provides that such limits on human rights must be reasonable and demonstrably justified in a free, democratic society based on human dignity, equality and freedom depending on the nature of the right and the importance of the limitation.

The current Victorian guardianship laws limit the rights of persons under guardianship or administration orders and the review must consider whether these limits are justified under section 7(2). Equally, the review must ensure that any proposed changes to the guardianship laws that limit human rights are reasonable, proportionate and necessary under section 7(2). The Consultation Paper does not carry out such a human rights analysis on any of the proposed changes.

The VLRC must clearly highlight these human rights considerations in its final report due December 2011.

Summary

Human rights provide a legal and policy framework that maximises the capabilities of all people to reach their potential and participate fully in society. In particular, international human rights law recognises the need to respect individual autonomy, including 'the freedom to make one's own choices' (CRPD, Article 3(a)).

The Charter and CRPD provide an important component of the legal framework within which to review Victoria's guardianship laws. This importance needs to be highlighted in the final report of the VLRC on proposed changes to Victoria's guardianship laws.

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[11] *International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature on 10 December 1984, 1465 UNTS 85, entered into force 26 June 1987.

In its current form, the Consultation Paper risks capturing human rights as general principles that are not applied practically. More attention needs to be paid to how human rights engage with practical outcomes for people affected by Victoria's guardianship laws.

Any reform to the Victorian guardianship laws should be consistent with the human rights principles articulated in the Charter and in the CRPD.

SCOPE OF THE SUBMISSION

Content of this submission

The Commission has only addressed in this submission those questions upon which it has a view from the perspective of our responsibilities for human rights and equality, rather than attempting to address the entire scope of the VLRC's work.

Key principles informing this submission

The earlier submission by the Commission to the Guardianship Information Paper in May 2010 focussed on the human rights framework within which the VLRC needed to consider the existing guardianship laws and any proposed changes.[12]

The submission outlined the Commission's views on the issues of capacity and autonomy and the role of the CRPD and considered whether there is a continuing need for substitute decision-making laws. It stressed the Commission's support for a presumption in favour of supported decision-making as the starting point, and identified broad principles that need to be considered and addressed in respect of potential safeguards. Each of these matters will be discussed in more detail throughout this submission

The Commission has made a number of other submissions, which are relevant to this review. These include:[13]

- *Submission to the Law Reform Committee Inquiry into Powers of Attorney* (2009). This submission addresses many of the issues which arise in the Consultation Paper in respect of enduring powers of attorney and guardianship;
- *Submission to the Department of Health with comments on the Mental Health Bill 2010 Exposure Draft* (2011). This submission addresses a number of relevant issues including supported decision-making, capacity, the use of advance directives and the relationship to the G&A Act. It also adopts a human rights approach to the Exposure Draft analysing the Bill's clauses in the light of the Charter and the CRPD;
- *Submission to the Victorian Civil and Administrative Tribunal – President's Review* (2009). This submission looks at whether VCAT makes itself open to people with disabilities and other access barriers, and if the processes currently used by VCAT ensure that all parties to a dispute are given a fair hearing and an opportunity to present their case; and,
- *Submission to Protecting Victoria's Vulnerable Children Inquiry* (2011). This submission looks at the issues with the current child protection system in Victoria and outlines the human rights framework within which the inquiry should take place.

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[12] Victorian Equal Opportunity and Human Rights Commission, *Submission to VLRC Guardianship Information Paper* (2010) is available for download on the Commission website at http://www.humanrightscommission.vic.gov.au/. Go to Resources -> Submissions.
[13] These submissions are available for download on the Commission website at http://www.humanrightscommission.vic.gov.au/. Go to Resources -> Submissions.

The Commission has also recently released a report titled *'Talking Rights: Consulting with Victorians about the rights of people with disabilities and the Charter'*.[14] The report explores the protection of the rights of persons with disabilities in Victoria in light of Australia's ratification of the CRPD on 17 July 2008.

It is clear from the report that whilst certain rights of persons with disabilities are protected in Victoria, the community feels that there are significant improvements that are needed to ensure 'the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities' (Article 1 CRPD). The report refers to the G&A Act, the *Disability Act 2006* (Vic) and the *Mental Health Act 1986* (Vic) as legislation that limits the rights of persons with disabilities. It also touches upon a number of issues with the State Trustees and administration orders.[15]

The Talking Rights report provides the VLRC with good background material from the community to help it look at how the proposed changes to Victoria's guardianship laws are compliant with the Charter and meet the requirements and obligations the CRPD places on Australia.

Disability Reference Group

In preparing this submission, the Commission consulted with members of the Commission's Disability Reference Group ('DRG'). The DRG is composed of 15 people including people with direct experience of disability, parents of children with a disability, advocates and service providers. Members meet quarterly with the Commission. The aims of the DRG include assisting the Commission to identify human rights priorities affecting people with disabilities and providing advice to the Commission on the development of policies and procedures.[16]

The views in this submission are those of the Commission, but we are grateful for the perspectives and personal experiences offered by DRG members.

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[14] The report is available for download on the Commission website at http://www.humanrightscommission.vic.gov.au/. Go to Resources -> Reports.
[15] See Report, pp 29-30.
[16] Victorian Equal Opportunity and Human Rights Commission, *Disability Reference Group Terms of Reference* (2007).

DEFINITIONS

In this submission:

- Commission refers to the Victorian Equal Opportunity and Human Rights Commission. The Victorian Law Reform Commission is referred to as the VLRC;
- Guardianship includes both guardianship and administration.
- Advance directive refers to any kind of instructional directive.

Other terms used in this submission are consistent with the definitions provided for those terms in the Consultation Paper.

SUMMARY OF RESPONSES TO THE GUARDIANSHIP CONSULTATION PAPER QUESTIONS

PART 2: THE DIRECTION OF NEW LAWS

Question 1:
- The Consultation Paper does not go far enough in outlining how revised guardianship laws would incorporate Charter and CRPD considerations and embody compliance with human rights. The VLRC must ensure, as far as possible, that all suggested revisions to Victoria's guardianship laws in its final report are Charter compliant.

Question 2:
- The VLRC should adopt the revised Statement of Purpose put forward by the Commission.

Question 3:
- New guardianship laws should include a set of general principles.
- The general principles should be drafted to reflect the relevant articles of the CRPD.
- The general principles should include principles concerning the assessment of capacity and decision-making principles.
- The decision-making principles should apply to every person or entity that performs a function or exercises a power under Victoria's guardianship laws.

Question 4:
- The general principles should include principles concerning the importance of a person's culture and the role of their families and carers when providing decision-making support.

PART 3: SUPPORTED DECISION MAKING (SDM)

Questions 14:
- The Commission agrees with the VLRC's proposal to introduce new supported decision-making arrangements.

Question 15:
- The Commission agrees with all the proposed roles of supporters and co-decision-makers.

Question 20:
- The Commissions view is that supporter and co-decision making arrangements should apply to financial matters as well as personal matters. The Commissions view is that these arrangements should apply to all matters in the same way.

Question 22:
- Whilst not outlining any specific safeguards, the Commissions reiterates the importance of safeguards for all forms of decision-making under new

guardianship laws to protect individuals from abuse, neglect or exploitation by supporters, co-decision-makers or substitute decision-makers.

PART 4: PERSONAL APPOINTMENTS

Questions 24:

- The Commission believes that parents and carers of children with disabilities should be able to file a document with VCAT and/or OPA that states their wishes and preferences about future guardianship and administration arrangements, and more generally about arrangements for the future care and support of their child.

Question 25:

- VCAT must be required to consider these wishes in making an appointment of a supporter, co-decision-maker or substituted decision-making under Victoria's guardianship laws.

Question 38:

- The Commission believes that the law concerning advance directives should be set out in legislation. The Commission believes there should be legally recognised advance directives not only for medical decisions but also for all other decisions including personal and financial. The Commission believes that the adoption of advanced directives in new guardianship laws would enhance compliance with the Charter and CRPD, and represent a commitment to uphold the human rights of individual's with impaired decision-making capacity to the fullest extent possible.

Questions 39, 40 and 41:

- The Commission believes it should be possible for a person to make advance directives outlining their wishes and preferences in all areas of their life including medical, financial and lifestyle.
- Advance directives should be binding on substitute decision-makers unless overridden by VCAT.

PART 5: VCAT APPOINTMENTS

Question 50:

- The Commission agrees with the VLRC proposal that disability should no longer be a separate criterion for the appointment of a substitute decision-maker. The Commission goes further though and believes disability should be removed from the criteria altogether (Option C). The Commission submits that it is vital that lack of capacity be the key focus of any decision to appoint a guardian or administrator. Therefore, it should not 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 administrator.

Question 51:

- The Commission agrees with the VLRC's suggestion for capacity principles (Option A) in order to provide legislative guidance on how to determine when a person is unable to make their own decisions. The capacity principles should

form a subset of the general principles included at the beginning of the legislation. The Commission does not believe in having a legislative definition of incapacity (Option B) because any legal definition in necessarily prescriptive and runs counter to the premise that capacity is decision-specific and can fluctuate over time.

Question 52:
- The Commission does not agree with the VLRC's proposal (Option B) that new guardianship laws should allow VCAT to appoint a guardian or administrator in anticipation of future need.

Questions 53 and 54:
- The Commission does not agree with the VLRC's proposal (Option C) to lower the age limit of the G&A Act to 16 and raise the age limit of the CYF Act to 18. The Commission prefers the option of raising the age limit of the CYF to 18 whilst keeping the age limit of the new guardianship laws as 18 (Option A), so guardianship laws only apply to adults.

Question 55:
- The Commission agrees that the current distinction between guardianship and administration should be retained. The Commission has no view on which option is preferable as long as it retains the distinction.

Question 58:
- The Commission agrees with the preferred option of the VLRC (Option A (iii)) to abolish plenary guardianship orders and include in the legislation a non-exhaustive list of decision-making powers and restrictions on those powers.

Question 66:
- The Commission believes that if OPA has expertise in this area then they should conduct litigation on behalf of an adult who is incapable of doing so themselves. If not, then the Commission favours the establishment of a specialist agency to act as a litigation guardian when one is required. The fundamental issue is to ensure that the rights of the represented person are not breached merely because there is no one available to conduct litigation on their behalf.

Questions 68 and 69:
- The Commission agrees that new guardianship legislation should permit VCAT to authorise a guardian, or other person, to use some force to ensure that a represented person complies with the guardian's decision but only in exceptional circumstances.
- The Commission agrees with the VLRC that the current safeguards in section 26 G&A Act are seriously inadequate and need strengthening in new guardianship laws. The criteria VCAT uses in making enforcement orders must be predicated on a section 7 analysis under the Charter focusing on whether there is any less restrictive means available to achieve the purpose of the order.

PART 6: STATUTORY APPOINTMENTS

Questions 70 and 71:

- The Commission does not agree with the VLRC's proposal (Option B) that the hierarchy for automatic appointees to the role of person responsible, as currently set out in section 37 of the G&A Act should be retained.
- The Commission believes the hierarchy for automatic appointments should list personal appointees before any tribunal appointees.
- The Commission agrees that there is a need to clarify and strengthen the role and responsibilities of the person responsible.

Question 72:

- The Commission believes that new guardianship legislation should require all decision-makers to follow the same approach to decision-making. This includes personal appointees, VCAT appointees, automatic appointees, OPA, STL and VCAT itself.

Question 73:

- The Commission agrees with the preferred option put forward by the VLRC (Option B) that new guardianship legislation should contain additional measures for scrutinising the decisions of automatic appointments.

Questions 74 and 75:

- The Commission believes 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.
- The Commission does not agree with the VLRC's Option E that new guardianship legislation should extend the automatic appointment scheme to permit the 'person responsible' to authorise living arrangements in a residential care facility even if there are additional safeguards.
- The Commission argues strongly that Option C is the approach that should be adopted. This would require the introduction of a new scheme of safeguards similar to the Deprivation of Liberty Safeguards scheme in the UK.

Questions 82 and 83:

- The Commission supports Option A in the Consultation Paper which retains the current requirement that a medical practitioner must obtain the person responsible's consent to conduct a medical procedure, no matter how minor.
- The Commission believes that no distinction should be made between minor and other medical procedures when a person is unable to consent.

Questions 85 and 86:

- The Commission believes that the process for obtaining substituted consent to participation in medical research procedures should not be the same as the process for obtaining substituted consent for medical treatment.
- Because of the potential grave human rights implications, the Commission believes that only VCAT should be authorised to consent to medical research procedures for persons with impaired decision-making capacity.

PART 7: RESPONSIBILITY AND ACCOUNTABILITY UNDER THE LAW

Questions 89:

- The Commission agrees with the VLRC that new guardianship laws should include set of decision-making principles.
- The Commission believes that the decision-making principles should apply to every person or other entity that performs a function or exercises a power under Victoria's guardianship laws

Question 90:

- The Commissions preference is for substituted judgment to be one of the guiding principles substitute decision-makers are required to consider when making decisions.

Question 91:

- The Commission believes that substituted judgment is relevant to supported decision-making because decision-making capacity can be decision-specific and fluctuate over time, and a person may move up and down the decision-making continuum. This may mean that at certain times the roles of supporter and co-decision-maker become more akin to that of a substitute decision-maker.

Question 94:

- The Commission supports VLRC's suggestion that one general set of decision-making principles should apply to all types of decisions.
- The Commission believes that new guardianship laws should contain the same decision-making principles for financial decisions and personal decisions.

Question 96:

- The Commission submits that the general set of decision-making principles should apply to medical decision-makers along with a set of additional principles to guide this particularly important area of decision-making.

Question 97:

- The Commission agrees with the VLRC'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.
- The relevant provisions of new guardianship legislation should limit any infringement on privacy rights only to the extent permissible in accordance with section 7 of the Charter.

Question 106:

- The Commission agrees with the VLRC's proposal (Option G) to introduce increased and more specific penalties for substitute decision-makers who fail to meet their responsibilities or who abuse their powers.

Questions 111 and 112:

- The Commission does not agree with the VLRC's proposal (Option B) that new guardianship laws should only permit merits review of decisions made by OPA as guardian and STL as administrator. The Commissions prefers Option C, which broadens the scope of merits review to include individual decisions made by both public and private appointments. This would allow the represented person to challenge individual decisions made by any substitute decision-maker in VCAT including OPA and STL amongst others.
- The Commission agrees with the VLRC's view that applications to VCAT for merits review of decisions should be limited to the represented person and people with a special interest in the affairs of the represented person.

Question 116:

- The Commission believes that VCAT should be the entity that conducts merits review of decisions of substitute decision-makers.

PART 8: IMPLEMENTING AND REGULATING NEW LAWS

Question 118:

- The Commission agrees with the suggestions put forward by OPA in their submission to the Guardianship Information Paper especially in respect of extending their investigative powers to include situations of neglect in addition to situations of apparent abuse and exploitation.

Question 123:

- The Commission supports the proposal to clarify and strengthen OPA's advocacy role, both individual and systemic.

Question 135:

- The Commission agrees with the views of the VLRC that there needs to be more active coordination and investigation of matters prior to hearings. In terms of particulars, the Commission has no view on whether a body such as the New South Wales Guardianship Tribunal's Coordination and Investigation Unit should be established.

Question 137:

- The Commissions supports Option C to create a statutory power for VCAT to order that a person be provided with legal representation when VCAT considers it necessary.

Question 138:

- The Commission believes that VCAT should be required to consider making supported and co-decision-making orders before appointing substituted decision-makers.
- The appointment of a substituted decision-maker must be an option of last resort, only taken when VCAT has thoroughly explored all other possibilities.

Question 139:

- The Commission does not think that new guardianship legislation should specify a maximum period for all guardianship and administration orders. The Commission does believe, however, that new guardianship legislation should

specifically require VCAT when making orders to ensure they meet the safeguards required by Article 12 of the CRPD. This includes ensuring such orders ‘apply for the shortest time possible’.

Question 151:

- The Commission refers the VLRC to its Submission to the Victorian Civil and Administrative Tribunal – President’s Review (2009).
- The Commission stresses how critical it is that VCAT operate consistently to ensure the rights contained within the Charter are protected.

PART 9: INTERACTION WITH OTHER LAWS

Question 156:

- The Commission does not have a view on the appropriateness of extending the compulsory treatment provisions in the DA to people with a cognitive impairment other than intellectual disability. The Commission submits, however, that any form of compulsory treatment in Victoria should only be authorised in a manner that is consistent with human rights principles, regardless of the legislation such provisions are contained in.

Question 157:

- The Commission does not have a fixed view on whether it should be possible 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 a mental illness.
- The Commission believes there are arguments in favour of fusing guardianship and mental health laws in Victoria. Whilst this is a complicated and controversial issue, the Commission believes the time is right to address this issue whilst both sets of laws are under review.
- The Commission recommends a separate inquiry to run in parallel with the main guardianship and mental health reviews which seeks to look at the fusion argument in more depth and make recommendations on whether this approach such be adopted in Victoria.
- This sub-inquiry should also consider the broader issues concerning the human rights impact of a substitute decision-maker making medical treatment and place of residence decisions for a person who is unable to consent due to impaired decision-making capacity.

RESPONSES TO THE GUARDIANSHIP CONSULTATION PAPER QUESTIONS

PART 2: THE DIRECTION OF NEW LAWS

Chapter 4 – Structure of new laws

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

The Commission welcomes the current review of Victoria's guardianship laws as a means of ensuring the human rights deficiencies in the existing legislative scheme can be amended to ensure that the rights of persons with impaired decision-making capacity in Victoria are protected and promoted in a way that complies with their Charter rights and rights under the CRPD. The Commission congratulates the VLRC on undertaking the major task of reviewing Victoria's guardianship laws in such a comprehensive way. It is obvious from the detailed Consultation Paper how thoroughly the VLRC has researched the issues in the area of guardianship including looking at models from around Australia and internationally. This is a very constructive and useful piece of work. It is heartening to see that the VLRC is demonstrating leadership and is looking to the changes in thinking about guardianship that is occurring around the world in response to the adoption of the CRPD.

Since the G&A Act was passed in 1986, there have been a number of developments in human rights law as it related to people with disabilities. The two main developments occurred in 2006 with the adoption of the CRPD and the passage of the Victorian Charter. Any recommended changes to Victoria's guardianship laws must be driven by a genuine commitment to advancing the rights, dignity and autonomy of people with disabilities. One of the main ways of doing this is by ensuring Victoria's guardianship laws comply with the rights of persons with disabilities under the Charter and CRPD. Revised guardianship laws should respond to need, and in doing this, seek to protect a person's inherent dignity, and individual autonomy.

With Australia's ratification of the CRPD, all Australian governments should be taking steps to promote the human rights of persons with a disability. This includes adopting laws and administrative practices to protect the rights recognised in the CRPD as well as eliminating laws, policies, customs and practices that discriminate against persons with disabilities. These obligations set the scene and the overriding parameters for this review of Victoria's guardianship laws. Therefore, these considerations should be paramount in the discussions concerning proposed changes to the current guardianship laws.

The Commission looks at Victorian legislation through the lens of the objectives of the Charter which is to protect and promote the human rights of all people, including those with a disability and to ensure that any limitation on rights allowed under

legislation is reasonable, proportionate and necessary in accordance with section 7(2) of the Charter. The Commission has a special interest in the appointment of substituted decision-makers under the G&A Act, the *Instruments Act 1958* (Vic) and the *Medical Treatment Act 1988* (Vic) given the human rights implications of such arrangements and the limits they place on the rights of persons with disabilities in Victoria to make their own decisions.

The Charter and CRPD provide a clear and transparent framework of rights against which options for reform of the guardianship laws could be assessed by the VLRC. In order to protect these rights there must be an increased effort to implement a human rights culture when substituted decision-making appointments, such as guardianship, are made. By enabling one person to make fundamentally important life decisions on behalf of another, guardianship can potentially engage a number of Charter and CRPD rights. This is especially true when the trigger for guardianship is the inability of the represented person to make 'reasonable judgements' about matter relating to their own circumstances. These rights include:

Charter

- Section 8 Recognition and equality before the law including protection from discrimination
- Section 10 Protection from torture and cruel, inhuman or degrading treatment (medical experimentation or treatment without consent)
- Section 12 Freedom of movement
- Section 13 Privacy and reputation
- Section 14 Freedom of thought, conscience, religion and belief
- Section 15 Freedom of expression
- Section 17 Protection of families and children
- Section 18 Taking part in public life
- Section 19 Cultural rights especially in respect of Aboriginal persons and those from culturally and linguistically diverse (CALD) backgrounds
- Section 20 Property rights
- Section 21 Right to liberty and security of person
- Section 22 Humane treatment when deprived of liberty
- Section 24 Fair hearing

CRPD

- Article 5 Equality and non-discrimination
- Article 12 Equal recognition before the law
- Article 13 Access to Justice
- Article 14 Liberty and Security of Person
- Article 15 Freedom from torture or cruel, inhuman or degrading treatment or punishment
- Article 16 Freedom from exploitation, violence and abuse
- Article 17 Protecting the integrity of the person
- Article 18 Liberty of movement and nationality
- Article 19 Living independently and being included in the community
- Article 21 Freedom of expression and opinion and access to information
- Article 22 Respect for privacy
- Article 23 Respect for the family

- Article 29 Participation in political and public life
- Article 30 Participation in cultural life, recreation, leisure and sport

All of the Charter rights may be subject under law to ‘such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’ (section 7). However, such limits must take into account all relevant factors including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and whether less restrictive means are reasonably available to achieve the purpose of the limitation. This process must be a core part of any revision to Victoria’s guardianship laws, which severely curtail the human rights of people under guardianship orders.

In the Commission’s previous annual Reports on the Operation of the Charter, the Commission has noted that regular review of policies, procedures and guidelines is required in order to ensure continuing compatibility with human rights in a modern and democratic society. The Commission believes that the current Consultation Paper should provide that any new guardianship laws provide for regular and timely monitoring and evaluation of the impact that the changes in the legislative scheme for guardianship and administration in Victoria have on human rights.

Ensuring that the new guardianship regime contains a ‘built-in’ process and period for review would provide a clear opportunity for Parliament, government, the community, OPA, the Commission, VCAT, health professionals, represented persons, families, guardians and administrators to consider how the legislation operates in practice. A time clearly identified for review of the legislation would also ensure, as a safeguard, that there is an opportunity and commitment to make amendments to the legislation where it is determined that the legislation has had an unforeseen impact on the human rights of persons with impaired decision-making capacity.

The Commission is pleased to see the VLRC in the Consultation Paper refer to the changing legal environment brought about by the Charter and CRPD[17] and then give weight to the human rights obligations found in these instruments when developing draft general principles to guide new guardianship laws.[18] Even though the Consultation Paper includes Charter and CRPD issues in further chapters, it does not go far enough in outlining how revised guardianship laws would incorporate Charter and CRPD considerations and embody compliance with human rights. Nor does the Consultation Paper seek direct feedback on ways of making guardianship laws compliant with the Charter and CRPD.

This becomes more important when one considers the range of mechanisms employed by the Charter to protect and promote human rights and how this shapes and informs the development, passage and application of the legislation which may follow the VLRC process. These include providing for the scrutiny of new legislation for its compatibility with human rights, firstly by the Member presenting a Bill to Parliament (section 28), and separately, by the Scrutiny of Acts and Regulations Committee (section 20). This means that any revised guardianship laws resulting

[17] Victorian Law Reform Commission, *Guardianship Consultation Paper* (2010), Chapter 3: A Changing Environment [3.47]-[3.68], pp52-54.
[18] Ibid, Chapter 5: Principles of Laws.

from this review will be scrutinised for compliance with human rights during the legislative process. The Charter also requires all Victorian statutory provisions to be interpreted compatibly with human rights provided to do so is consistent with the purpose of the statutory provision (section 32). This means that courts and tribunals will have to interpret any revised guardianship laws compatibly with human rights.

The Charter places obligations on public authorities to act compatibly with human rights and give proper consideration to relevant human rights when making decisions (section 38). This means that public authorities with a role in implementing any part of Victoria's guardianship laws have to do so in a way that is Charter compliant. Such public authorities include OPA, STL and VCAT in relation to the general administration of the Guardianship list. The Charter binds VCAT when it has functions under the Charter. For instance, the right to a fair hearing would apply to VCAT when making guardianship and administration orders under the G&A Act. The VLRC, established under the *Victorian Law Reform Commission Act 2000* (Vic), is also a public authority under section 4(b) of the Charter.

These mechanisms make it incumbent upon the VLRC to ensure, as far as possible, that all suggested revisions to Victoria's guardianship laws in its final report are Charter compliant. In order to do this, VLRC needed to adopt a human rights approach to the review involving looking at all canvassed issues and suggestions through a human rights lens. The VLRC is also compelled to consider Charter rights in the course of finalizing its substantive recommendations due to its character as a public authority under the Charter.

The Commission is encouraged by the Consultation Paper referring to the new legal environment for the protection of the rights of persons with disabilities under the Charter and CRPD in its background chapters and briefly in other parts of the paper. However, it is unclear to the Commission the extent to which the VLRC adopted a human rights approach in assessing options for reform of Victoria's guardianship laws. The passing of the Charter and Australia's ratification of the CRPD creates a great opportunity to apply a human rights framework within which to carry out the review of Victoria's guardianship laws. It would be useful for the VLRC to make its analysis in relation to this framework clear to help inform the Government and the community in the deliberations that will follow this important report.

Chapter 5 – Principles of Laws

Question 2: Do you agree with the VLRC'S draft statement of purpose for new guardianship laws?

There is no bright line between capacity and incapacity. Therefore, any revisions to Victoria's guardianship laws must start out with premise of supported decision-making in which the person is assisted to make or participate, to the maximum extent possible, in decisions that affect the person's life. Substituted decision-making should be an option of last resort; after all other potential options on the supported decision-making continuum have been explored.

The proposed statement of purpose is suggestive of substituted decision-making rather than supported decision-making. The statement does not refer to supporting

people to make their own decisions regarding matters that affect their lives, only to supporting them to participate in making these decisions. Whilst participation is crucial in substituted decision-making, it is not enough for supported decision-making where the aim is to assist the person to make their own decisions. The Commission suggests the following revisions to the VLRC's statement of purpose (changes bold):

> *The purpose of the Act is to protect and promote the* ***inherent*** *dignity,* ***individual autonomy*** *and human rights of* ***all*** *people with impaired decision-making capacity. To this end, the Act establishes mechanisms to support and assist people* ***to make or, if this is not possible, participate to the maximum extent practicable*** *in decisions that affect their lives, realise their rights and protect their inherent dignity.*

Question 3: Do you agree with the VLRC'S draft general principles for new guardianship laws?

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

The Commission agrees with the VLRC that the principles in Victoria's guardianship laws need to be modernised in light of the Charter and the CRPD to reflect the contemporary 'rights based' approaches of the Charter and CRPD. The CRPD in particular represents a paradigm shift from the outdated 'medical model' and 'welfare based' approach to disability, to a 'social model' and 'rights based' approach to the advancement and protection of the rights of persons with disabilities.

Traditionally, the 'medical model' approach emphasises the mental or physical *deficit* of a person and causes disability to become narrowly equated with a person's health status, limited capacity and need for the protection by society through such measures as guardianship and administration. The CRPD transforms this perspective into a rights-based approach predicated on promoting, protecting and ensuring 'the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities' (Article 1 CRPD). This includes treating people under new guardianship laws with respect for their inherent dignity and autonomy.

The Commission agrees with the VLRC that new guardianship laws should include a set of general principles. The general principles should include principles concerning the assessment of capacity and decision-making principles. The VLRC Consultation Paper states that the decision-making principles should apply to substitute decision-makers such as guardians, administrators and automatic appointees.

The Commission believes that the application of the decision-making principles should be broader than this and apply to every person or other entity that performs a function or exercises a power under Victoria's guardianship laws. This would ensure that all substituted decision-makers, including OPA and STL, had to comply with the decision-making principles. The decision-making principles would also apply to OPA and STL when exercising any other functions under new guardianship laws and to VCAT when exercising jurisdiction under the guardianship legislation, including

when deciding whether to appoint a supporter, co-decision-maker, guardian or administrator.[19]

Question 5 of the Consultation Paper asks whether people agree with the VLRC proposal that Victoria's various substitute decision-making laws be consolidated into one single Act. Whilst not having a firm view on this question, except to note it seems to make sense, the Commission would stress that the general principles should be included in all Acts that relate to substitute decision-making for people with impaired decision-making capacity. For instance, in Queensland the general principles are set out in the first schedule to both the *Guardianship and Administration Act 2000* (Qld) ('Qld Q&A Act') and *Powers of Attorney Act 1998* (Qld).

Victoria would need to take a similar approach if its substituted decision-making laws were not consolidated into a single Act. However, the Commission recommends that the general principles not be set out in a schedule to the relevant Act or Acts because of their fundamental importance to the revised guardianship scheme in Victoria. Instead, the general principles should be inserted into each relevant Act in a prominent location towards the front of the Act, preferably in the preliminary section after Definitions and Objects.

In the Consultation Paper, Queensland is referred to as having 'the most comprehensive set of rights and principles in its guardianship laws'.[20] It is clear that the general principles put forward by the VLRC owe a lot to the principles in the Queensland Act. It is worth noting, however, that the Queensland Law Reform Commission (QLRC)'s review of Queensland's guardianship laws recommends a redraft of their general principles 'to reflect more closely the relevant articles of the United Nations Convention on the Rights of Persons with Disabilities, to provide a more logical structure, and to avoid duplication within the General Principles'.[21]

The Commission believes the general principles set out in the Consultation Paper also need to be redrafted to align more closely with the CRPD and the Charter. The easiest way to do this is to use the same wording wherever possible. The redrafted general principles put forward by the Queensland Law Reform Commission provide a lot of guidance in this respect and should be a model followed closely by the VLRC.[22] The Commission also believes the general principles forming part of Victoria's new guardianship laws should be divided into sections for added clarity as with the redrafted Queensland General Principles. These subsections would include, amongst others, decision-making principles and principles for assessing capacity. This ensures a holistic base where the general principles apply to all sections of new guardianship laws and to any person or entity performing a function or exercising a power under those laws.

[19] For a discussion of this in the Queensland context, see Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010), Chapter 4: The General Principles pp33-149.
[20] Victorian Law Reform Commission, *Guardianship Consultation Paper* (2010), [5.83] p90.
[21] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010), Recommendation 4-1 p143.
[22] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010), *Redrafted General Principles* pp144-149.

In respect of the draft general principles put forward in the Consultation Paper,[23] the Commission makes the following specific suggestions.

The first general principle should be the presumption of capacity. Guardianship laws are concerned with the question of whether a person has the ability 'to make reasonable judgments'[24] in respect of all or any of the matters that affect their lives. In all questions on this issue, the starting point should be the presumption that every adult is legally competent to make his or her own decision unless it can be shown otherwise. This matches General Principle 1 of the Qld G&A Act, and left unchanged in the QLRC redrafted General Principles. It also aligns with Article 12(2) of the CRPD, which provides that:

> States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

The second general principle in the Consultation Paper concerning entitlement to human rights currently states:[25]

> All adults are entitled to the same basic human rights, and should be empowered to exercise those rights wherever possible.

This should be rewritten as:

> All adults are entitled to the same human rights and fundamental freedoms, and should be empowered to exercise those rights.

This more closely aligns it with Article 1 of the CRPD. It also removes the words 'basic' and 'wherever possible' from the text. The term 'basic human rights' should be removed because it suggests there are additional non-basic human rights that some adults are not entitled to. The term 'wherever possible' should be removed because adults should be empowered to exercise their rights at all times. Any limits on these rights needs to be reasonable, proportionate and necessary under section 7(2) of the Charter. In this regard, the Commission welcomes the inclusion of the principle that 'any limitations on the ability of adults to make decisions that affect their lives must be justified, reasonable and proportionate'. The Commission recommends that this principle explicitly refer to section 7(2) of the Charter as providing the steps that need to be taken to ensure the limitation is reasonable, proportionate and necessary.

The CRPD includes a number of general principles. These include respect for inherent dignity, individual autonomy, equality and non-discrimination, full and effective participation and inclusion in society, respect for difference of persons with disabilities, equality of opportunity, accessibility and equality between men and women (Article 3 CRPD). The Commission believes the wording from Article 3 should be included directly in the draft general principles in a similar way to the way the QLRC has done in the redrafted General Principles for Queensland's guardianship laws.[26]

The Commission supports the general principle in the Consultation Paper that directly relates to supported decision-making, which closely aligns with Article 12(3)

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[23] Victorian Law Reform Commission, *Guardianship Consultation Paper* (2010), [5.101] p93.
[24] See G&A Act s 22(1)(b) and s46(1)(a)(ii).
[25] Law Reform Commission, *Guardianship Consultation Paper* (2010), [5.101] p93.
[26] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010), Recommendation 4-3 p144.

of the CRPD. This general principle also uses the phrase ‘make or participate’, which would match it with the revised draft statement of purpose above:

> All adults are entitled to the support necessary for them to make or participate in decisions affecting their lives.

The Commission supports the inclusion of principles concerning the assessment of capacity. It agrees that the assessment of capacity should take into account that impaired decision-making capacity is sometimes time-specific and decision-specific and can fluctuate over time. It is unclear how these capacity principles relate to the ones under discussion later in Chapter 10 of the Consultation Paper.[27] The Commission agrees with the capacity principles put forward in Chapter 10 and believes they should be included in the general principles. The format of the redrafted Queensland General Principles provides a model to follow where all the capacity principles grouped together under a single heading.

The Commission is very pleased to see a general principle relating to communication, ‘[a]ll adults have the right to communicate in any way that allows them to understand and be understood’. This is crucial in ensuring that people with disabilities get across their wishes and preferences in order that they can enjoy their human rights in the same way as everyone else.

The Commission comments on the specific decision-making principles in our answer to Question 89 later in the submission. We reiterate, however, that decision-making principles should form a subset of the general principles as with the redrafted Queensland General Principles, where the decision-making principles are included in the sections on ‘Performance of functions and powers’[28] and ‘Structured decision-making’.[29]

In terms of Question 4 of the Consultation Paper, the Commission believes the importance of a person’s culture and the role of their families and carers should be included in the general principles for Victoria’s new guardianship laws. The Commission submits that in the Victorian context any legislation or policy regulating family and or carers roles as guardians and administrators needs to be culturally appropriate and respectful of diverse family types/kinship relationships. The redrafted Queensland General Principles provide a good starting point for discussions on what should be included in its sections on ‘Maintenance of adult’s existing supportive relationships’[30] and ‘Maintenance of adult’s cultural and linguistic environment and values’.[31]

The maintenance of an adult’s existing supportive relationships is especially important if supported and co-decision making is adopted as an integral part of Victoria’s guardianship laws as it is people from this network who will be taking on the roles of supporter and co-decision-maker. It is also important to parents of

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[27] Victorian Law Reform Commission, *Guardianship Consultation Paper* (2010), [10.133] p201.
[28] Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010), Recommendation 4-4 p146.
[29] Ibid.
[30] Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010), Recommendation 4-3 p145.
[31] Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010), Recommendation 4-3 p145.

children with disabilities who turn 18 and enter the guardianship regime to ensure the overarching principle is to keep the parents as supporters, co-decision-makers or guardians/administrators, whichever is appropriate, whilst recognising the wishes and preference of the represented person particularly with fluctuating capacity.

In terms of an adult's cultural and linguistic environment and values, section 19 of the Charter protects the rights of all persons with a particular cultural, religious, racial or linguistic background to enjoy their culture and identity, to declare and practice their religion and to use their language. It also refers to the distinct cultural rights of Aboriginal persons. Article 30(4) of the CRPD explicitly protects the right of people with disabilities to recognition and support of specific cultural and linguistic identities on an equal basis with others. Promotion of the right to life and equal treatment is particularly required for Indigenous Australians with impaired decision-making capacity. There is also a requirement in respect of medical treatment and research to consider the cultural rights of Aboriginal persons and those from CALD communities. This requires Victoria's guardianship laws to adequately protect and respect these rights through the maintenance of an adult's cultural and linguistic environment and values'.

In summary, there is a definite need for Victoria's new guardianship laws to include a set of general principles. These general principles should include, amongst other things, specific decision-making principles, capacity principles and principles concerning a person's culture and the role of their families and carers. The general principles included in the Consultation Paper along with the redrafted General Principles put forward by the QLRC provide a good base upon which to develop a final set of principles for Victoria.

SUMMARY OF COMMISSION RESPONSES TO PART 2 OF THE CONSULTATION PAPER

Question 1:

- *The Consultation Paper does not go far enough in outlining how revised guardianship laws would incorporate Charter and CRPD considerations and embody compliance with human rights. The VLRC must ensure, as far as possible, that all suggested revisions to Victoria's guardianship laws in its final report are Charter compliant.*

Question 2:

- *The VLRC should adopt the revised Statement of Purpose put forward by the Commission.*

Question 3:

- *New guardianship laws should include a set of general principles.*
- *The general principles should be drafted to reflect the relevant articles of the CRPD.*
- *The general principles should include principles concerning the assessment of capacity and decision-making principles.*
- *The decision-making principles should apply to every person or entity that performs a function or exercises a power under Victoria's guardianship laws.*

Question 4:

- *The general principles should include principles concerning the importance of a person's culture and the role of their families and carers when providing decision-making support.*

PART 3: SUPPORTED DECISION MAKING (SDM)

Chapter 7 – Supported Decision Making

Question 14: Do you agree with the VLRC'S proposal to introduce new supported decision-making arrangements?

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

All people have the right to autonomy, exercise of capacity and self-determination on an equal basis (CRPD). The CRPD assumes that people with disabilities can exercise capacity, while embracing the idea that some people may need extra support to enable them to exercise the rights other take for granted in a meaningful way. It requires support to be provided where necessary, accepting that all people are generally able to reason and understand a decision and its consequences. Supported decision-making should be a way for people with impaired decision-making capacity to gain more control over decisions that affect their lives.

The overarching principle of supported decision-making is its presumption in favour of the person affected by the decision, and its emphasis on enabling the individual to exercise their legal capacity to the greatest extent possible and according to their own wishes and preferences. The individual is the decision-maker, the support person or network explains the issues and communicates the person's choices to those who need to know. Substituted decision-makers are only appointed as a measure of last resort.

In a supportive system, the individual with a disability remains the decision-maker with a supporter or support network at hand to provide assistance when necessary. The United Nations Handbook on the CRPD states:

> Supported decision-making can take many forms. Those assisting a person may communicate the individual's intentions to others or help him/her understand the choices at hand. They may help others to realize that a person with significant disabilities is also a person with a history, interests and aims in life, and is someone capable of exercising his/her legal capacity.[32]

The CRPD obliges the Victorian government to recognise that people with disabilities are entitled to enjoy legal capacity on an equal basis with all others in all aspects of their life (Article 12). This article represents an important breakthrough in advancing the equality rights of people with disabilities and impaired decision-making capacity.

However, the CRPD also recognises that some people with disabilities may require assistance in exercising this capacity, and that States must do what they can to support this process. Article 12(3) states:

> States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

[32] United Nations, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*, pp90-91. Available online at http://www.un.org/disabilities/default.asp?id=212 (last visited 17 May 2011).

Victoria's current guardianship laws do not contain any supported decision-making mechanisms, although it may occur in practice through informal support relationships. However, Article 12(3) of the CRPD establishes a clear right to support in decision-making and places an obligation on the Victorian government to take measures, including legislating, to ensure people with disabilities in Victoria receive the assistance they need to exercise their legal capacity and fully participate in making decisions that affect their lives. The current review of Victoria's guardianship laws, therefore, provides an opportune time to consider how Victorian law might recognise and facilitate supported decision-making in the area of guardianship.

Such an approach is evident in the recent review of the *Mental Health Act 1986* (Vic). The general principles set out in clause 7 of the Exposure Draft of the Mental Health Bill ('the Exposure Draft') show a clear move to supported rather than substituted decision-making in relation to mental health treatment decisions. The Explanatory Guide to the Exposure Draft says that:

> The principles reflect a supported decision-making model. Currently the *Mental Health Act 1986* (Vic) reflects a substituted decision-making model: psychiatrists provide substituted consent to treatment if a person who is subject to an order is unable or refusing to consent. In contrast, supported decision making is based on a presumption that people subject to compulsory orders have the capacity to make their own decisions unless it is determined otherwise.[33]

The Commission congratulates the VLRC for taking such a positive approach to the issue of supported decision-making in Victoria. The Consultation Paper in Chapter 7 comprehensively addresses the issue of supported decision-making. It outlines some views on what is supported decision-making and how it differs from substituted decision-making. The Paper makes it clear that supported decision-making is not formally recognised in any current Victorian law providing for substituted decision-making, even though substituted decision-making clearly limits many of the rights of the represented person under the Charter and CRPD. The Paper explores supported decision-making models overseas, especially in Canada, and developments in Australia before arriving at its preferred option.

The Commission supports VLRC's proposal to introduce new supported decision-making arrangements modelled on, but going further than, the Canadian examples and agrees with the proposed roles of supporters and co-decision makers.

Several Canadian provinces have incorporated supported decision-making into law and practice. The United Nations has held up the Province of British Columbia as a prime example of supported decision-making in practice.[34] The Commission commends the VLRC for taking these models and expanding upon them in its proposal, which, if enacted, would make Victoria a world leader in respect of supported decision-making.

The Commission supports the VLRC proposal to introduce the following four new appointments.

Personal Appointments

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[33] Department of Health, *Exposure Draft Mental Health Bill 210: Explanatory Guide*, p 2.

[34] United Nations, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*, p90.

- Supported decision-making agreements
- Co-decision-making agreements

VCAT Appointments

- Supported decision-making orders
- Co-decision-making orders

This would provide a decision-making continuum in Victoria, which preserves the highest level of autonomy, whilst acknowledging that autonomy may sometimes need to be restricted in certain circumstances as a last resort and subject to safeguards, which recognise that capacity is time-specific and decision-specific and can fluctuate over time.

The continuum would start with full autonomy at one end and end with one or more VCAT appointed substitute decision-makers at the other end. In-between, there would be informal arrangements as occur now, personally appointed supporters, personally appointed co-decision makers, personally appointed substituted decision-makers (enduring guardians, enduring powers of attorney and medical agents), VCAT appointed supporters, VCAT appointed co-decision-makers and VCAT appointed substituted decision-makers (guardians and administrators).

This range of arrangements allows the person affected to make their own choice of the kind of support they require now and in the future. When coupled with advance directives (see below) this provides a powerful mechanism for people affected to ensure they retain as much autonomy as possible, allowing them to make the decisions that affect their lives. However, sometimes people do not plan ahead and the new arrangements provide VCAT with the opportunity to protect the rights of the person affected without having to go straight to making rights-restrictive guardianship and administration orders.

There is a need to ensure people without families or an existing support network can access supported and co-decision-making. OPA establishing and coordinating a volunteer support program to assist people who do not have family and friends willing and able to take on these roles is an option that should be explored further to address this issue, recognising that such a program will need to be properly resourced. Volunteers will need access to training and ongoing support in these roles. OPA already coordinates a number of volunteer programs to assist people with impaired decision-making capacity including Community Visitors and the Independent Third Person Program and so is that natural place for a supported and co-decision making volunteer program to sit.

As the Commission stated in its original submission a number of points must be emphasised:

- The presumption must always be in favour of supported decision-making – that is always the starting point
- The imposition of guardianship and administration orders must be a measure of last resort by VCAT after they have explored all other less restrictive options. VCAT's aim must be to make the appointment that is least restrictive of the affected person's rights consistent with the person's inherent dignity

- Departures from supported decision-making to partial or full substitute decision-making must satisfy a test of being a reasonable limitation on the human rights of the person affected by the VCAT appointment – the elements of such a test being those found in section 7(2) of the Charter and referred to in the general principles to the new guardianship laws, and
- One departure from supported decision-making with a particular person does not mean substitute decision-making must take place from then on. This is reaffirming the principle that capacity is not static but can be decision-specific and fluctuate over time.

New guardianship laws should work in a holistic manner with the introduction of a decision-making continuum including supported and co-decision-making, where the making of guardianship and administration orders is a last resort measure. The decision-making principles inserted into the legislation must require VCAT to explore all other less restrictive options before considering guardianship and administration. VCAT is currently limited in the types of orders it can make with nothing in-between making no orders or making guardianship and administration orders. The introduction of supported and co-decision making orders will give VCAT the flexibility it needs to enable it to take a more rights based approach in line with the Charter and CRPD based on '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons' (Article 39(a) CRPD).

With these points in mind, the Commission believes the proposals put forward by the VLRC are very forward thinking and would provide the support required for people with impaired decision-making to make, or at the very least to participate to the maximum extent possible, the decisions that affect there lives.

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

The Victorian Government should 'take the appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity' (Article 12(3) CRPD). This support should not be restricted to certain aspects of an affected person's life but not others.

Whilst acknowledging the concerns of banks and the STL, the Commission believes that it is much more important to stay true to the underlying premise of the CRPD, that persons with disabilities are entitled to exercise their legal capacity in all aspects of their life in the same way as everyone else. Mere inconvenience to banks, the STL and other third parties, is no reason to restrict a person's autonomy, independence and freedom to make their own decisions.

The Commission's view is that supporter and co-decision making arrangements should apply to financial matters as well as personal matters. The Commissions view is that these arrangements should apply to all matters in the same way.

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

Whether it is founded on principles of supported or substituted decision-making, any legal regime that permits one person to influence or make critical life decisions for another, requires significant safeguards. The architects of the CRPD were aware of this, and made sure they included such safeguards in Article 12(4):

> States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Whilst these safeguards have been taken as applying to substituted decision-making, they are a good starting point in a legislative approach that provides for a continuum of decision-making options from supported, through co-decision-making to substituted.

The Commission's approach in its initial submission to the Guardianship Information Paper did not articulate a definite framework of safeguards but rather identified broad principles or requirements that needed to be considered and addressed in any such framework. These included:

- preventative safeguards;
- automatic and ad-hoc monitoring;
- monitoring and review of substantive decisions and the decision-making process; and
- resources and support.[35]

The Commission refers the VLRC to its previous submission but reiterates the importance of safeguards for all forms of decision-making under new guardianship laws to protect individuals from abuse, neglect or exploitation. The Commission does agree, however, with OPA having a role in the training and monitoring of supported and co-decision-making arrangements, including investigating allegations of abuse or misuse of the role of supporter or co-decision-maker and conducting regular reviews of how such arrangements are going. In order to carry out these additional functions, OPA needs to be sufficiently resourced and have appropriate administrative arrangements in place to avoid any potential conflicts of interest.

The most important thing is to establish a framework in new guardianship laws that emphasises an obligation to adhere to supported decision-making, except where to do so is otherwise reasonably justified. This framework needs to be supported by appropriate resources and support as well as a strong and multi-faceted range of safeguards.

[35] Victorian Equal Opportunity and Human Rights Commission, *Submission to VLRC Guardianship Information Paper* (2010) p6.

SUMMARY OF COMMISSION RESPONSES TO PART 3 OF THE CONSULTATION PAPER

Questions 14:

- *The Commission agrees with the VLRC's proposal to introduce new supported decision-making arrangements.*

Question 15:

- *The Commission agrees with all the proposed roles of supporters and co-decision-makers.*

Question 20:

- *The Commissions view is that supporter and co-decision making arrangements should apply to financial matters as well as personal matters. The Commissions view is that these arrangements should apply to all matters in the same way.*

Question 22:

- *Whilst not outlining any specific safeguards, the Commissions reiterates the importance of safeguards for all forms of decision-making under new guardianship laws to protect individuals from abuse, neglect or exploitation by supporters, co-decision-makers or substitute decision-makers.*

PART 4: PERSONAL APPOINTMENTS

Chapter 8 – Personal Appointments

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

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

The Commission believes that parents and carers of children with disabilities should be able to file a document with VCAT and/or OPA that states their wishes and preferences about future guardianship and administration arrangements, and more generally about arrangements for the future care and support of their child. VCAT must be required to consider these wishes in making an appointment of a supporter, co-decision-maker or substituted decision-making under Victoria's guardianship laws.

The Commission recognises the concern of parents of adult children with lifetime disabilities in respect of future arrangements for their children. At the moment, there is no effective way for them to express their wishes about who should care for their child when they get too old to do so. Parents are understandably concerned about this issue and want to be able to make satisfactory arrangements for the future support and care of their child well in advance. The only way parents can outline their wishes and preferences for their child now is through a will that may not come to the attention of VCAT.

The system of VCAT appointments is supposed to provide a protective system for people with impaired decision-making capacity. VCAT must ensure these appointments, which by their very nature restrict the rights of the person concerned, are reasonable, proportionate and necessary under the Charter (and proposed general principles). The expansion of the range of appointments to include supported decision-making and co-decision-making orders alongside the existing guardianship and administration orders adds a new layer of flexibility for VCAT to ensure the order it makes is the one least restrictive of a person's rights and autonomy.

In making the right order, VCAT needs to have all the relevant information before it. One of the most important pieces of information is the wishes and preferences of parents and carers who have had the primary responsibility of the adult child with a disability up to the present moment. Whilst VCAT should retain the ultimate decision-making authority, it must be required to take into account the wishes and preferences expressed by parents and carers before making its decision.

New guardianship laws should work as a holistic whole. The requirement on VCAT to take account of parents' and carer's wishes and preferences should be included in the specific decision-making principles and in the general principles under maintenance of an adult's existing supportive relationships.

The Commission believes that the questions about how parents and carers of adult children with lifelong disabilities can best secure the future care and support arrangements for their children are not a settled issue. The Commission recommends the VLRC stress in its final report that this is an area needing further work and attention.

Chapter 9 – Documenting wishes about your future

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

The Commission believes that the law concerning advance directives should be set out in legislation. The Commission believes there should be legally recognised advance directives not only for medical decisions but also for all other decisions including personal and financial. The Commission believes that the adoption of advanced directives in new guardianship laws would enhance compliance with the Charter and CRPD, and represent a commitment to uphold the human rights of individual's with impaired decision-making capacity to the fullest extent possible.

It is also worth noting that the Exposure Draft of the Mental Health Bill has incorporated advanced directives into its structure and it would ensure consistency between all the 'capacity-affecting' laws, if they were set out in new guardianship legislation.

The Commission considers that advanced directives should be adhered to in a way that is proportionate and tailored to an individual's need during a period of incapacity. This takes into account that impaired decision-making capacity is sometimes time-specific and decision-specific and can fluctuate over time, and is consistent with the application of reasonable and demonstrably justified limits under section 7(2) of the Charter (and included in the general principles).

Any system of advance directives must take into account that a person's wishes and preferences can change over time such that reliance on advance directives prepared many years previously can be risky. There should be some requirement that advance directives need to be checked and updated annually whilst a person still has capacity. Advanced directives, where properly made, should be enforceable and adhered to at all times, in accordance with the right of autonomy of all persons with a disability unless there is a strong and identifiable reason to depart from the wishes and preferences of the patient expressed in the advanced directive. Even so, an advance directive should only be able to be overridden by a decision of VCAT in exceptional circumstances. For example, circumstances may have changed so the original intentions of the person in making the directive are no longer valid or the person genuinely seems to have changed their mind upon falling ill. A person should not be locked into a course of action if it is clear their wishes and preferences have changed when placed in the situation they prepared the advance directive to cover.

In making the decision to override an advance directive, VCAT would have to follow the decision-making principles specified in the new legislation, one of which is taking into consideration the wishes and preferences of the person as previously expressed

in such documents as advance directives. This will ensure VCAT has to think long and hard, and have good reasons, before overriding an advance directive.

The first guiding principle of the CRPD contained within Article 3(a) confirms that respect for autonomy is central to the objectives and operations of the CRPD. Advance directives are advance statements of the wishes and preferences of the person and one way the individual can specify the choices they want to make in the future, either with or without support. Advance directives are crucial in promoting autonomy in decision-making by people with impaired decision-making capacity. Advance directives are one way to maximise autonomy on the decision-making continuum from supported to substitute decision-making, especially at the substitute decision-making end.

Advance directives are based on the rights-enabling view that decision-makers should respect a person's wishes, preferences and freedom to make their own choices. A person should be able to make or, if this is not possible, participate to the maximum extent practicable, in decisions that affect their lives even if they need the support of others to do this. Advance directives are one way the individual can express their wishes and preferences.

Substituted decision-makers must be required to take into account advance directives under specific decision-making principles proposed for the new guardianship laws. The Commission comments on the specific decision-making principles in our answer to Question 89 later in the submission. If the decision-making principles involve the substituted decision-maker 'standing in the shoes' of the represented person and making the decision that person would have made if they had capacity, any advance directives made by that person will be invaluable in helping the decision-maker in this task.

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

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

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

The Commission believes that guardianship laws should be based on '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons' (Article 3(a) CRPD). In order to maximise a person's autonomy it should be possible for a person to make advance directives outlining their wishes and preferences in all areas of their life including medical, financial and lifestyle. As stated above, these advance directives should be binding on substitute decision-makers unless overridden by VCAT including when forming part of a document making a personal appointment.

SUMMARY OF COMMISSION RESPONSES TO PART 4 OF THE CONSULTATION PAPER

Questions 24:

- *The Commission believes that parents and carers of children with disabilities should be able to file a document with VCAT and/or OPA that states their wishes and preferences about future guardianship and administration arrangements, and more generally about arrangements for the future care and support of their child.*

Question 25:

- *VCAT must be required to consider these wishes in making an appointment of a supporter, co-decision-maker or substituted decision-making under Victoria's guardianship laws.*

Question 38:

- *The Commission believes that the law concerning advance directives should be set out in legislation. The Commission believes there should be legally recognised advance directives not only for medical decisions but also for all other decisions including personal and financial. The Commission believes that the adoption of advanced directives in new guardianship laws would enhance compliance with the Charter and CRPD, and represent a commitment to uphold the human rights of individual's with impaired decision-making capacity to the fullest extent possible.*

Questions 39, 40 and 41:

- *The Commission believes it should be possible for a person to make advance directives outlining their wishes and preferences in all areas of their life including medical, financial and lifestyle.*
- *Advance directives should be binding on substitute decision-makers unless overridden by VCAT.*

PART 5: VCAT APPOINTMENTS

Chapter 10 – VCAT appointments and who are they for

Question 50: Do you agree with the VLRC'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?

The Commission agrees with the VLRC proposal that disability should no longer be a separate criterion for the appointment of a substitute decision-maker. The Commission goes further though and believes disability should be removed from the criteria altogether (Option C). The Commission submits that it is vital that lack of capacity be the key focus of any decision to appoint a guardian or administrator. Therefore, it should not 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 administrator.

The Commission believes that removing disability as a separate criterion but keeping it as the reason why a person is incapable of making their own decisions will not change things in practice. A diagnosis of disability will still be required as the first step in deciding whether someone needs a substitute decision-maker, which the Commission regards as a discriminatory step. One of the objects of guardianship laws is to protect those who have impaired decision-making capacity. Therefore, the appropriate test should be one of capacity. The human rights implications of using a test other than one based on capacity are significant and should not be underestimated.

Worries or fears that the guardianship laws will capture too many people if 'disability' is removed entirely are overstating the potential issue. New guardianship laws should be seen as a holistic whole where VCAT is only able to make a guardianship or administration order as a measure of last resort after they have explored all other less restrictive options available. In doing this, VCAT will have to explore if there is a need to make an order at all, or if the existing informal support network is all that is required. If VCAT believe an order is needed, they will have to determine if a supported decision-making order is sufficient or whether a co-decision maker order is required. VCAT will have to work with OPA and the family in making these decisions, or if no family or support available, look at the option of using volunteer supporters or co-decision-makers through OPA. Finally, and only after exploring in depth all the other less restrictive options, will VCAT have to consider making a guardianship and/or administration order. In making any of these decisions, VCAT will have to follow the decision-making principles outlined in the legislation. This new approach should ensure the right of the individual to autonomy and freedom of choice is respected as the primary aim of all concerned, including VCAT.

At the same time, VCAT will be using the capacity principles in the new legislation to determine whether the person has impaired decision-making capacity. If these capacity principles are sufficiently rigorous and detailed, it will ensure any substitute

decision-making orders made by VCAT apply only to people who genuinely have impaired decision-making capacity. Such orders will also take into account that impaired decision-making capacity is sometimes decision-specific and can fluctuate over time.

Finally, Article 12(4) of the CPRD requires parties to ensure that 'all measures that related to the exercise of legal capacity provide for appropriate and effective safeguards'. These safeguards in the CRPD require that any substitute decision-making orders by VCAT are 'proportional and tailored to the person's circumstances' and 'apply for the shortest time possible'. They must also be 'subject to regular review by a competent, independent and impartial authority or judicial body', which in the Victorian situation would be review by VCAT.

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

The Commission agrees with the VLRC's suggestion for capacity principles (Option A) in order to provide legislative guidance on how to determine when a person is unable to make their own decisions. The capacity principles should form a subset of the general principles included at the beginning of the legislation. The Commission does not believe in having a legislative definition of incapacity (Option B) because any legal definition in necessarily prescriptive and runs counter to the premise that capacity is decision-specific and can fluctuate over time.

The Commission views the capacity principles on page 201 of the Consultation Paper as an excellent starting point for determining the capacity principles to go into new Victorian guardianship laws.[36] In order to ensure consistency between 'capacity affecting' legislation, however, the VLRC should discuss with the Department of Health about including the same capacity principles in the Exposure Draft of the Mental Health Bill, taking note that the Draft Bill does include a definition of capacity in Clause 3(2).

Determination of capacity should take into account the human rights of the person concerned especially their right to autonomy and freedom of choice. The starting point should always be the presumption of capacity. Consistent with Article 12 of the CRPD, new guardianship laws must move away from an 'all or nothing concept'[37] of capacity (i.e., a person either has full capacity to make a decision or none at all) but rather, it should be assessed as proportionate to the needs of the individual concerned. This is especially relevant to persons under guardianship and administration orders whose capacity is sometimes decision-specific and can fluctuate over time.

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[36] Victorian Law Reform Commission, *Guardianship: Consultation Paper* (2011), Chapter 10: VCAT Appointments and Who They are for pp200-202.
[37] Aaron Dhir, 'Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, (2005) 41 *Stanford Journal of International Law*, 181.

A person's capacity is not a fixed notion but may improve, fluctuate, deteriorate or remain the same. A person may have capacity to make certain kinds of decisions but not others, or make certain kinds of decisions now and others in the future. New guardianship laws must require substitute decision-makers to ask themselves each time a decision is required whether the person has the capacity to make the decision for themselves, and if not, how they can assist the person to participate in making the decision to the fullest extent possible. The degree a person can exercise capacity relates not only to the person's level of decision-making capacity but also the level of support they have available to help them make decisions

Any determination of whether a person has capacity to make decisions that affect their lives must include an analysis in accordance with section 7 of the Charter. This is because the appointment of a substitute decision-maker necessarily limits the human rights of the represented person. Any approach needs to ensure the least restriction on the rights engaged by the process of making a determination of capacity.

The Commission believes that having capacity principles in the new guardianship legislation will provide the clarity required when the need arises to assess a person's decision-making capacity.

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

The Commission does not agree with the VLRC's proposal (Option B) that new guardianship laws should allow VCAT to appoint a guardian or administrator in anticipation of future need.

The appointment of a guardian or administrator involves arrangements that can limit a person's autonomy and freedom of choice and, thereby, limit a number of the rights of the person concerned. Any limitation of these rights must be reasonable, necessary and proportionate. Specifically, any limitation of the rights set out in the Charter must be in accordance with section 7(2) of the Charter. Article 12(4) of the CPRD also requires parties to ensure that 'all measures that related to the exercise of legal capacity provide for appropriate and effective safeguards'.

New guardianship laws should require that the appointment of guardians and administrators is an option of last resort. Before such an appointment is even considered, VCAT must look at all other available options that are less restrictive of the person's rights, including supported decision-making and co-decision making, to determine if these orders are more appropriate in the present circumstances. It may be that no decision is required at all at this time. A clear need for the appointment of a guardian or administrator must be apparent before one is appointed. Anticipation of future need for a guardian or administrator, a need that may never eventuate, is not enough of a justification to limit the rights of a person under section 7 of the Charter

(or the new general principles). It also seems not to be consistent with the safeguards under the CRPD such as ensuring guardianship orders 'apply for the shortest time possible'.

It is the Commission's view that a decision to appoint a substitute decision-maker in anticipation of future need would not be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom' (section 7). On this basis, the Commission does not support the option put forward by the VLRC. The Commission believes the current practice should be retained.

Chapter 11 – Age

Question 53: Do you agree with the VLRC's proposal (Option C) to lower the age limit of the G&A Act to 16 and raise the age limit of the Children, Youth and Families Act 2005 (Vic) ('CYF Act') to 18?

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

The Commission does not agree with the VLRC's proposal (Option C) to lower the age limit of the G&A Act to 16 and raise the age limit of the CYF Act to 18. The Commission prefers the option of raising the age limit of the CYF to 18 whilst keeping the age limit of the new guardianship laws as 18 (Option A).

Option A closes the current gap between child and adult guardianship systems and ensures that Victoria's child protection system is consistent with Australia's international obligations under the CRC, which defines child to mean 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.[38]

Option A is also more consistent with section 17(2) of the Charter concerning protection of families and children, in that every child has the right to protection as is needed by him or her due to being a child. The Charter defines child to mean 'a person under 18 years of age' (section 3). For the section 17(2) Charter right to be limited, there must be a justifiable limitation under section 7 of the Charter. Arguably, the setting of an age limit below 18 in new guardianship legislation would be an arbitrary measure, which is not a reasonable, proportionate or necessary limit on the rights of the child. Raising the CYF to 18 is clearly a 'less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve' (section 7(2)(e) Charter). Further, even if the Charter right could be limited using a section 7(2) analysis, the CRC right to protection up to 18 years cannot be limited.[39]

Option A has the following additional benefits:

- It promotes national consistency, being consistent with age jurisdictions in all other states and territories, except NSW, where adult guardianship orders can be made from 16 years.[40] It is consistent with previous recommendations by

[38] *Convention on the Rights of the Child*, Art 1.
[39] *Charter of Human Rights and Responsibilities Act 2006* s7(3).
[40] *Guardianship Act 1987* (NSW) s 15(1)(a).

the Australian Human Rights Commission and the Australian Law Reform Commission
- It maintains a clear legal distinction between the child and adult guardianship systems.

This distinction is particularly important when concepts such as 'best interests' have very different meanings in child protection and adult guardianship.[41] Keeping children in the child protection system and out of the adult guardianship system allows for better clarity around the best interests of the child as required under the CYF Act and the Charter.

Chapter 12 – Difference between guardianship and administration

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

The Commission agrees that the current distinction between guardianship and administration should be retained. The Commission has no view on which option is preferable as long as it retains the distinction.

Chapter 13 – Powers of Guardians and Administrators

Question 58: Do you agree with the VLRC'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?

The Commission agrees that plenary guardianship orders should be abolished because the powers granted under these orders are too broad, vague and undefined, and can potentially limit the rights of the represented person to a greater extent than required. Under the Charter, any limit on person's rights must be reasonable, proportionate and necessary (section 7). The limits a plenary guardianship order places on a person's rights may not satisfy this requirement.

The Commission agrees with the preferred option of the VLRC (Option A (iii)) to abolish plenary guardianship orders and include in the legislation a non-exhaustive list of decision-making powers and restrictions on those powers.

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

The Commission welcomes the discussions in the Consultation Paper around the issue of who should conduct litigation on behalf of a person who is unable to do so themselves. Without some clarity in this regard, it may leave the represented person unable to access justice. This may breach their equality rights (section 8) and right to a fair hearing (section 24) under the Charter. It also does not satisfy Article 13 of the

[41] Although best interests of the child is broadly supported, 'best interests' in adult guardianship is regarded by many as out-dated and paternalistic.

CRPD, which requires that ‘States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others’.

The Commission believes that if OPA has expertise in this area then they should conduct litigation on behalf of an adult who is incapable of doing so themselves. If not, then other alternatives need to be explored. The issue of litigation guardians also ties in with the question of legal representation covered in Question 137.

The fundamental issue is to ensure that the rights of the represented person are not breached merely because there is no one available to conduct litigation on their behalf.

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

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

The appointment of a guardian in itself can potentially limit a large number of rights of the represented person under the Charter and CRPD, requiring the decision by VCAT to be reasonable, proportionate and necessary under section 7 of the Charter. Permitting VCAT to authorise a guardian, or other person, to use force to ensure a represented person complies with a guardian’s decisions goes much further in respect of restricting the rights of the represented person. The Commission recognises that VCAT already has the power to make such authorisations under section 26 of the G&A Act, and that in exceptional circumstances such a power may be necessary.

However, the Commission agrees with the VLRC that the current safeguards in section 26 are seriously inadequate and need strengthening in new guardianship laws.

Safeguards must include strict criteria for VCAT to consider before making an enforcement order, a reduction in the 42-day review period to something like 14 days and a requirement for an independent third party to report to VCAT on the use of the power by the 14-day review. The independent body should not be OPA who may be the guardian authorised to use force and reporting on themselves is clearly a conflict of interest.

The Commission also agrees with OPA and the VLRC that the criteria VCAT must follow should be predicated on a section 7 analysis under the Charter focusing on whether there is any less restrictive means available to achieve the purpose of the order.

SUMMARY OF COMMISSION RESPONSES TO PART 5 OF THE CONSULTATION PAPER

Question 50:

- *The Commission agrees with the VLRC proposal that disability should no longer be a separate criterion for the appointment of a substitute decision-maker. The Commission goes further though and believes disability should be removed from the criteria altogether (Option C). The Commission submits that it is vital that lack of capacity be the key focus of any decision to appoint a guardian or administrator. Therefore, it should not 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 administrator.*

Question 51:

- *The Commission agrees with the VLRC's suggestion for capacity principles (Option A) in order to provide legislative guidance on how to determine when a person is unable to make their own decisions. The capacity principles should form a subset of the general principles included at the beginning of the legislation. The Commission does not believe in having a legislative definition of incapacity (Option B) because any legal definition in necessarily prescriptive and runs counter to the premise that capacity is decision-specific and can fluctuate over time.*

Question 52:

- *The Commission does not agree with the VLRC's proposal (Option B) that new guardianship laws should allow VCAT to appoint a guardian or administrator in anticipation of future need.*

Questions 53 and 54:

- *The Commission does not agree with the VLRC's proposal (Option C) to lower the age limit of the G&A Act to 16 and raise the age limit of the CYF Act to 18. The Commission prefers the option of raising the age limit of the CYF to 18 whilst keeping the age limit of the new guardianship laws as 18 (Option A).*

Question 55:

- *The Commission agrees that the current distinction between guardianship and administration should be retained. The Commission has no view on which option is preferable as long as it retains the distinction.*

Question 58:

- *The Commission agrees with the preferred option of the VLRC (Option A (iii)) to abolish plenary guardianship orders and include in the legislation a non-exhaustive list of decision-making powers and restrictions on those powers.*

Question 66:

- *The Commission believes that if OPA has expertise in this area then they should conduct litigation on behalf of an adult who is incapable of doing so themselves. If not, then the Commission favours the establishment of a specialist agency to act as a litigation guardian when one is required. The*

fundamental issue is to ensure that the rights of the represented person are not breached merely because there is no one available to conduct litigation on their behalf.

Questions 68 and 69:

- *The Commission agrees that new guardianship legislation should permit VCAT to authorise a guardian, or other person, to use some force to ensure that a represented person complies with the guardian's decision in exceptional circumstances. However, the Commission agrees with the VLRC that the current safeguards in section 26 G&A Act are seriously inadequate and need strengthening in new guardianship law. The criteria VCAT uses in making enforcement orders must be predicated on a section 7 analysis under the Charter focusing on whether there is any less restrictive means available to achieve the purpose of the order.*

PART 6: STATUTORY APPOINTMENTS

Chapter 14 – Automatic Appointments

Question 70: Do you agree with the VLRC's proposal (Option B) that the hierarchy for automatic appointees, as currently set out in section 37 of the G&A Act should be retained?

Question 71: What alterations, if any, should be made to the list?

The Commission does not agree with the VLRC's proposal (Option B) that the hierarchy for automatic appointees to the role of person responsible, as currently set out in section 37 of the G&A Act should be retained. The Commission does agree, however, that there is a need to clarify and strengthen the role and responsibilities of the person responsible.

New guardianship laws should be about ways of maximising the autonomy of people who fall under the legislation. The Commission's submission has stressed this approach throughout. This approach is consistent with a presumption of capacity, supported decision-making and, if a substituted decision-maker is needed, a preference for personal appointees chosen by the represented person over VCAT appointees.

The hierarchy of automatic appointees should also show a preference for personal appointees the represented person has made in respect of medical procedures or treatment. The current list should be rearranged to ensure that people appointed specifically by the patient to make decisions in relation to the proposed procedure or treatment before they became incapable of giving consent come before any tribunal appointments as the person responsible. In particular this requires (d) and (e) to replace (b) and (c) in the current list.

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

The Commission believes that new guardianship legislation should require all decision-makers to follow the same approach to decision-making. This includes personal appointees, VCAT appointees, automatic appointees, OPA, STL and VCAT itself. The relevant principles are discussed in the answer to Question 89. Automatic appointees, and all other substituted decision-makers, must also have regard to advance directives made by the represented person. As stated earlier, these advance directives should be binding on substitute decision-makers, including automatic appointees, unless overridden by VCAT

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

The Commission agrees with the preferred option put forward by the VLRC (Option B) that new guardianship legislation should contain additional measures for scrutinising the decisions of automatic appointments. The Commission agrees with the measures put forward in the Consultation Paper including random audits by OPA of decisions made by the person responsible and an obligation on medical practitioners to notify OPA if they believe a person responsible is not acting appropriately. These would be in addition to the general safeguards in the legislation in respect of all decision-makers.

Chapter 15 – Informal Assistance –Admission into Care

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

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

The Commission thinks 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.

Nowadays, a person with impaired decision-making capacity who cannot consent to their living arrangements is often admitted to a residential care facility, such as a nursing home, with the informal consent of a close family member. Whilst the close family member may have been providing care and support to the person prior to their admission, they may not be the legal guardian of the person. In fact, the person may not have any legal guardian. In this case, there is no legal basis for the person's admission into a residential care facility. There is also the associated issue of elderly people in hospital being admitted to aged care facilities without their consent by the hospital applying to VCAT for a guardianship order.

In such circumstances, the admission of a person to residential care facilities without consent raises a potential breach of the person's right to liberty and security under section 21 of the Charter. Section 21 provides that:

> (1) Every person has the right to liberty and security.
> (2) A person must not be subjected to arbitrary arrest or detention.
> (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

This gap in the legal protection of very vulnerable people who cannot consent to their own living arrangements needs filling in specific laws that cover this matter in order that the rights of such persons are adequately protected.

However, the Commission does not agree with the VLRC's Option E that new guardianship legislation should extend the automatic appointment scheme to permit

the 'person responsible' to authorise living arrangements in a residential care facility even if there are additional safeguards. The Commission argues strongly that Option C is the approach that should be adopted. This would require the introduction of a new scheme of safeguards similar to the Deprivation of Liberty Safeguards scheme in the UK.

Under the current guardianship laws, the person responsible is the first person in the list in section 37 of the G&A Act 'who, in the circumstances, is reasonably available and willing' to make a decision whether to consent to a proposed medical research procedure, or proposed medical or dental treatment. This necessarily means that the person responsible has a short-term responsibility in respect of the proposed procedure or treatment. This is significantly different to having responsibility for the long-term living arrangements of a person who is unable to consent to these arrangements.

There is definitely a significant issue at present in how persons who are unable to consent are admitted into residential care facilities where they may remain for the rest of their life. This issue needs addressing as a matter of urgency. However, whilst the option of extending the automatic appointment scheme to permit the person responsible to make this decision may seem a simple and practical solution to a difficult issue, the potential impact such decisions would have on a person's right to liberty and security make it an untenable option even with additional safeguards.

The Commission believes that the admittance of a person to residential care facilities without their consent is such a limit on the right to liberty and security of the person concerned that it should only be allowed under the strictest safeguards possible. This ensures the decision to admit someone without consent to a residential care facility is reasonable, proportionate and justified under the Charter (section 7).

Whilst the Commission recognises that the introduction of deprivation of liberty safeguards may be extremely resource intensive, it still believes the introduction of such safeguards is the only way to protect the rights of the person concerned. The very nature of this issue and the fundamental human right involved requires more than a simple solution. The Commission does not expect the VLRC to develop the deprivation of liberty safeguards as part of this review process but to put it in the final report as an area of concern that the government needs to address urgently.

Chapter 16 – Medical Treatment

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

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

The Commission supports Option A in the Consultation Paper which retains the current requirement that a medical practitioner must obtain the person responsible's consent to conduct a medical procedure, no matter how minor.

The Commission believes that no distinction should be made between minor and other medical procedures when a person is unable to consent. One issue with this is the difficulty in making the distinction between minor and major medical procedures. The major issue, however, is the way such a distinction could lead to serious breaches of the human rights of the person affected. Since the Commission believes no distinction should be made, Question 83 does not apply.

One of the most fundamental human rights internationally is the right to protection from torture and cruel, inhuman and degrading treatment. This is reflected in section 10 of the Charter and Article 15 of the CRPD. Section 10(c) of the Charter provides that no one shall be 'subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent'. Article 15(1) of the CRPD provides that 'no one shall be subjected without his or her free consent to medical or scientific experimentation'.

The current process of substitute consent to medical treatment under the G&A Act subjects the person affected to medical treatment without their full, free or informed consent. By providing that the person responsible can provide consent on behalf of another person to medical treatment, the current G&A Act significantly limits the rights of the person affected under section 10 of the Charter.

Whilst human rights under the Charter may be subject under law to 'such reasonable limits as can be demonstrably justified' (section 7), any such justification must take into account a number of factors. These include the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and whether less restrictive means are reasonably available to achieve the purpose of the limitation. The limits should also take into account Article 12 of the CRPD.

Therefore, the current situation allowing substitute consent to medical treatment is already fraught with human rights implications that require strict safeguards to prevent abuse. Taking this a step further and allowing minor medical procedures, regardless of how the distinction between minor and major is made, to be undertaken not only without the consent of the person affected but also without the consent of the substitute decision-maker, goes way too far in abrogating one of the most fundamental rights under the Charter. This is especially true when the main reason for this abrogation of rights seems to be to save medical practitioners the inconvenience of having to track down the person responsible. This is clearly not proportionate to the nature of the limitation.

Whilst it may be argued that the purpose of the limitation is to relieve the pain and suffering of the person affected, the current G&A Act already contains adequate provisions that apply when the person responsible is either unavailable (section 42K) or withholds consent (sections 42L-42N). It also contains provisions that apply in cases of emergencies (section 42A (1)). There is no need to make a distinction between minor and major medical procedures and allow minor medical procedures to be carried out without the protection of even substituted consent.

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

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

The Commission believes that the process for obtaining substituted consent to participation in medical research procedures should not be the same as the process for obtaining substituted consent for medical treatment.

The current process of substitute consent to participation in medical research procedures under the G&A Act subjects the person affected to medical experimentation without their full, free and informed consent and significantly limits the rights of the person affected under section 10 of the Charter. Consequently, the presumption should be against substitute consent to medical research procedures in order to protect the affected person's rights under section 10(c) of the Charter.

Whilst the benefits of medical treatment may be immediately apparent, this will not be the case with medical research procedures. For this reason, the process for obtaining substituted consent to participation in medical research procedures should be even more stringent than that required for obtaining substituted consent to medical treatment.

The Commission accepts that there may be a need for people with impaired decision-making capacity to be part of medical research in the final stages of testing new treatments for conditions such as dementia, but only when the researchers can definitely show that there are no less restrictive means for carrying out the research. Allowing substitute consent to medical treatment is fraught with human rights impacts that must be considered by the person responsible each time such treatment is thought necessary. Allowing substituted consent to medical research procedures that may be of no benefit in the long or short-term, and even adversely affect the person involved, raises the human rights danger level to such an extent that it may teeter on the brink of being unacceptable in any circumstances.

Because of the potential grave human rights implications, the Commission believes that only VCAT should be authorised to consent to medical research procedures for persons with impaired decision-making capacity. This will add an unwanted bureaucratic hurdle for researchers, but a necessary one that forces them to consider in depth whether there really is a need to carry out this research on vulnerable people who are unable to consent.

SUMMARY OF COMMISSION RESPONSES TO PART 6 OF THE CONSULTATION PAPER

Questions 70 and 71:

- *The Commission does not agree with the VLRC's proposal (Option B) that the hierarchy for automatic appointees to the role of person responsible, as currently set out in section 37 of the G&A Act should be retained.*
- *The Commission believes the hierarchy for automatic appointments should list personal appointees before any tribunal appointees.*
- *The Commission agrees that there is a need to clarify and strengthen the role and responsibilities of the person responsible.*

Question 72:

- *The Commission believes that new guardianship legislation should require all decision-makers to follow the same approach to decision-making. This includes personal appointees, VCAT appointees, automatic appointees, OPA, STL and VCAT itself.*

Question 73:

- *The Commission agrees with the preferred option put forward by the VLRC (Option B) that new guardianship legislation should contain additional measures for scrutinising the decisions of automatic appointments.*

Questions 74 and 75:

- *The Commission believes 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.*
- *The Commission does not agree with the VLRC's Option E that new guardianship legislation should extend the automatic appointment scheme to permit the 'person responsible' to authorise living arrangements in a residential care facility even if there are additional safeguards.*
- *The Commission argues strongly that Option C is the approach that should be adopted. This would require the introduction of a new scheme of safeguards similar to the Deprivation of Liberty Safeguards scheme in the UK.*

Questions 82 and 83:

- *The Commission supports Option A in the Consultation Paper which retains the current requirement that a medical practitioner must obtain the person responsible's consent to conduct a medical procedure, no matter how minor.*
- *The Commission believes that no distinction should be made between minor and other medical procedures when a person is unable to consent.*

Questions 85 and 86:

- *The Commission believes that the process for obtaining substituted consent to participation in medical research procedures should not be the same as the process for obtaining substituted consent for medical treatment.*

- *Because of the potential grave human rights implications, the Commission believes that only VCAT should be authorised to consent to medical research procedures for persons with impaired decision-making capacity.*

PART 7: RESPONSIBILITY AND ACCOUNTABILITY UNDER THE LAW

Chapter 17 – Responsibilities

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

The Commission agrees with the VLRC that new guardianship laws should include a set of decision-making principles. The Commission believes the decision-making principles should be included as one of the sections forming part of the general principles. This matches up with the approach taken by the QLRC in its redrafted Queensland General Principles, where the decision-making principles are included in the sections on 'Performance of functions and powers'[42] and 'Structured decision-making'.[43] These principles should also apply to any person or entity that performs a function or exercises a power under new guardianship laws in relation to an adult with impaired capacity.

The VLRC Consultation Paper states that decision-making principles should apply to substitute decision-makers such as guardians, administrators and automatic appointees. The Commission believes that the application of decision-making principles should be broader than this and apply to every person or other entity that performs a function or exercises a power under Victoria's guardianship laws. This would ensure that all substituted decision-makers, including OPA and STL, have to comply with the general principles. The general principles would also apply to OPA and STL when exercising any other functions under new guardianship laws and to VCAT when exercising jurisdiction under the guardianship legislation, including when deciding whether to appoint a supporter, co-decision-maker, guardian or administrator.[44]

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

Clearly, there is a need to replace the outdated 'best interests' approach to substituted decision-making with one that is consistent with the CRPD and puts much greater emphasis on the wishes and preferences of the represented person. However, the Commission does not believe that substituted judgment should be the paramount consideration for decision-makers.

The Commission's preference is for substituted judgment to be one of the guiding principles substitute decision-makers are required to consider when making

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[42] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010), Recommendation 4-4 p146.
[43] Ibid.
[44] For a discussion of this in the Queensland context, see Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010), Chapter 4: The General Principles pp33-149.

decisions. The Commission believes the Queensland approach of maximum participation and minimal limitations combined with substituted judgment is the approach Victoria should adopt in its new guardianship legislation. This ensures respect for an adult's autonomy and provides a way for them to be involved, as much as is practicable, in making decisions that affect their lives. In respect of the decision-maker's role, they adopt the substituted judgment approach of making the decision they consider best equates with the decision the adult would have made. How much the substitute decision-maker needs to do this for each particular decision will vary to a greater or lesser extent dependent on the level of participation the represented person can be supported to have in making the decision. Substitute decision-makers must not assume that they, and not the represented person, know best. This requires new guardianship laws to make it a requirement that substitute decision-makers make every effort to identify the represented person's wishes and follows them as much as possible. This may mean bringing in other people whom the represented person knows and trusts to act as their intermediary in the conversation and following advance directives unless there is a strong and identifiable reason to depart from the wishes and preferences expressed in the directive (and only then with VCAT approval).

This is contrasted with the 'best interests' standard, which requires a decision-maker to make decisions they consider best promote the adult's welfare. There is no doubt that the term 'best interests' in relation to adult guardianship is outdated and has taken on negative connotations. Many organisations consider a 'best interests' approach in guardianship as paternalistic and not consistent with the rights-based principles underpinning the CRPD. These principles include respect for inherent dignity, individual autonomy including the freedom to makes one's own choices and independence of persons, equality and non-discrimination and full and effective participation and inclusion in society (Article 3 CRPD). In respect of guiding principles, the CRPD places the rights, will and preferences of the person as the starting point for substitute decision-making (Article 12(4)).

In contrast, the current guardianship legislation has a 'best interests' approach to substitute decision-making which regards the wishes of the represented person as simply one of a number of factors the substitute decision-maker has to consider when making a decision (see sections 28 and 49 of the G&A Act). In the list of factors to be taken into account by guardians and administrators, the wishes of the represented person come last. Whilst the factors are supposed to be equal, this positioning is telling. This approach to substituted decision-making is arguably inconsistent with Victoria's obligations under the CRPD to ensure 'that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person'.

Substituted judgment is an approach, which requires a substitute decision-maker to 'step into the shoes' of the represented person and make the decision the represented person would have made if they had capacity. This approach gives paramount consideration to the wishes and preferences of the represented person. One issue with this approach is that it may be difficult to work out what the wishes and preferences of the person are, especially where the person has had a significantly impaired decision-making capacity for a long period.

In applying a substituted judgement approach, a range of factors should be considered including the wishes and preferences expressed by the person at the time of the decision, any wishes and preferences expressed previously through such things as advance directives or by any other means and the history of the person including their views, values and goals. This involves consulting closely with important people in the life of the person (family, carers and supporters). It also involves taking into account that a person's wishes and preferences are not static and can change over time, so ones expressed previously by the person may not be what their current views and preferences are.

One example often used explaining substituted judgment involves a person with capacity freely choosing to ignore advice about his high cholesterol level in deciding what to eat and drink. After the person loses capacity to make decisions about what he eats and drinks, a best interests approach would remove high cholesterol items from his diet. On the other end, a substituted judgment approach would continue to include high cholesterol items in his diet because that is his known wish and preference. It has to be taken into account though, that whilst a person's initial wishes and preferences are to ignore the doctor's advice, his wishes and preferences may well change later in life when he starts to feel the ill health affects of his high cholesterol diet. Whilst it is obvious that the substituted judgment approach is much more appropriate than the best interests approach, it has to be applied by the substitute decision-maker in a way that recognises a person's will and preferences are not fixed but can, and do, change over time. This becomes more important if the person is unable to express their wishes and preferences at the time of the decision, and the extent they can participate in making the decision is limited.

The Queensland approach to substitute decision-making involves preserving, to the greatest extent possible, a person's right to make his or her own decisions combined with the principle of substituted judgment. This approach is further clarified in the redrafted general principles put forward by the QLRC,[45] and is a model that should be closely looked at by the VLRC.

The Commission would like to stress that it is only in respect of adult guardianship that 'best interests' has become an outdated term. In respect of children, the paramount consideration remains the best interests of the child as reflected in the CRC and section 17 of the Charter. The Commission discusses 'best interests' in this context in its *Submission to the Department of Health with comments on the Mental Health Bill 2010 Exposure Draft* (2011) and *Submission to Protecting Victoria's Vulnerable Children Inquiry* (2011).

Question 91: Is substituted judgment relevant to supported decision-making?

In theory, substituted judgement should not be relevant to supported decision-making because the supporter is merely assisting the represented people to make their own decisions. Substituted judgment is not relevant because there is no substituted decision-making going on. In reality, though, we know that decision-making capacity

[45] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010), Recommendation 4-4 pp146-147 and Recommendation 4-5 pp147-148.

can be decision-specific and fluctuate over time, and a person may move up and down the decision-making continuum. This may mean that at certain times the roles of supporter and co-decision-maker become more akin to that of a substitute decision-maker.

This may not be the aim of the legislation and tend to happen in an informal manner as the person's capacity fluctuates, but as long as the general set of decision-making principles apply it should ensure that the represented person is at all times able to make, or participate to the maximum extent possible, in decisions affecting their lives. If the general set of decision-making principles includes substituted judgment as the primary consideration for decision-makers, then this will also apply to supporters and co-decision-makers.

Of course, the capacity of the person as assessed using the capacity guidelines will determine whether a supporter, co-decision-maker or substituted decision-maker is appointed but this approach reflects the reality that a person's level of capacity is not static and can depend on a range of factors. Factors can include such things as the type of decision (complicated or simple), the timing of the decision, the person's health and any the level of stress the person is under.

The decision-making continuum then includes supporters who assist the represented person to make their own decisions and co-decision-makers who make decisions jointly with the represented person, both parties having to agree to the decision such that the represented person is still fully participating in decisions that affect their life. The continuum ending with substitute decision-makers who try to 'stand in the shoes' of the represented person and make the decision the represented person would have made if they had capacity (subject to the provisos above). All these options trying to enable the represented person to 'enjoy legal capacity on an equal basis with others in all aspects of life' (Article 12 CRPD) and ensure that their rights, will and preferences are respected.

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

The Commission supports VLRC's suggestion that one general set of decision-making principles should apply to all types of decisions. The Commission does not believe there is a need for additional principles to guide financial and personal decision-making.

The Commission believes that new guardianship laws should contain the same decision-making principles for financial decisions and personal decisions. In fact, the decision-making principles should not relate to the type of decision to be made, except in the case of medical decisions (see below), but apply to any decision made by a substitute decision-maker, regardless of whether they are personal appointees, VCAT appointees or automatic appointees. The VLRC should also seek to ensure these decision-making principles are included in all other 'capacity affecting' legislation.

The decision-making principles should form part of the general principles that apply to all substitute decision-makers regardless of the decisions they are authorised to make.

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

The Commission submits that the general set of decision-making principles should apply to medical decision-makers along with a set of additional principles to guide this particularly important area of decision-making.

The Commission believes that the Queensland approach should be followed in Victoria. The current Queensland legislation contains specific health care principles, which apply to medical decision-makers as well as the general principles. The QLRC's review of Queensland's guardianship laws recommends a redraft of their health care principles 'to reflect more closely the relevant articles of the United Nations Convention on the Rights of Persons with Disabilities, to avoid duplicating matters dealt with by the General Principles, and to provide guidance about the application of the General Principles in the context of health care'.[46]

The redrafted health care principles put forward by the QLRC provide a lot of guidance in this respect, including how they interact with the general principles, and should be a model followed closely by the VLRC.[47]

Chapter 18 – Confidentiality

Question 97: Do you agree with the VLRC'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?

In determining where the balance lays between the right to privacy of the represented person, and the needs of substitute decision-makers to access information that will help them to care for the person, the relevant provisions of new guardianship legislation should limit any infringement on privacy rights only to the extent permissible in accordance with section 7 of the Charter. At a bare minimum, this should include a requirement that confidential and private information is only released to substitute decision-makers on a 'need to know' basis and only for matters relevant to the specific decision.

If the substitute decision-maker does not need the particular information in order to make the decision for the represented person then they should not have access to it. However, they must have access to documents such as advance directives, as soon as they assume their roles since these documents provide them with much needed

[46] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010), Recommendation 5-1 p214.
[47] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010), *Redrafted Health Care Principles* pp214-216.

information regarding the views, wishes and preferences of the represented person that they are obliged to consider when making decisions under the decision-making principles included in the new legislation.

Chapter 19 – Accountability and review of substituted decision-making

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

The Commission agrees with the VLRC's proposal (Option G) to introduce increased and more specific penalties for substitute decision-makers who fail to meet their responsibilities or who abuse their powers. The Commission agrees that these penalties should apply to all substitute decision-makers whether personally appointed (enduring power of attorney, enduring guardian and medical agent) or appointed by VCAT (guardians and administrators).

Question 111: Do you agree with the VLRC's proposal (Option B) that new guardianship laws should permit merits review of decisions made by OPA as a guardian and STL as an administrator?

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

The Commission does not agree with the VLRC's proposal (Option B) that new guardianship laws should only permit merits review of decisions made by OPA as guardian and STL as administrator. The Commissions prefers Option C, which broadens the scope of merits review to include individual decisions made by both public and private appointments. This would allow the represented person to challenge individual decisions made by any substitute decision-maker in VCAT including OPA and STL amongst others.

The Commission notes that specific issues have been raised by its stakeholders which support the need for an independent merits review process for STL decisions in particular. Stakeholder concerns include the potential for STL to charge a fee for investigating complaints about its decisions. While the Ombudsman is able to investigate administrative actions by STL, the Commission notes that its practice is to refer complainants to STL in the first instance.[48]

While STL is a corporation, in exercising its powers and duties under the Guardianship and Administration Act it plays a significant role in the lives of vulnerable people and it is imperative that effective, independent mechanisms exist for review of its decisions.

The Commission notes that while the functions, powers and duties of OPA are included in the terms of reference for this review, those of STL are not. The Commission submits that, pending the outcomes of this review, STL's internal review process and external regulatory environment may be worth further exploration.

[48] Ombudsman Victoria, *Report of Investigation of Complaints Against State Trustees Ltd* (2003), p43

In terms of merits review of individual decisions of guardians and administrators, the lack of provision for such review in the current legislation is a significant gap in the protections available for a represented person, as it means they currently cannot challenge an individual decision by a guardian or administrator in VCAT. New guardianship laws must fill this gap by permitting merits review of individual decisions made by all substitute decision-maker on behalf of another person.

As highlighted throughout this submission, the appointment of a substitute decision-maker necessarily limits the rights of the represented person. Such limits must be shown to be reasonable, necessary and proportionate (section 7 Charter). One way of doing this and protecting the rights of a represented person, is to have a process available whereby the represented person, or another person (see below), can challenge individual decisions made by a substitute decision-maker supposedly on their behalf in an accessible tribunal such as VCAT. One basis for doing this could be that the substitute decision-maker has not applied the decision-making principles in the legislation in making a certain decision. For example, the substitute decision-maker has not tried to maximise the participation of the represented person in making the decision, and if this was not possible, has not taken into account the represented person's previously expressed wishes and preferences.

The Commission agrees with the VLRC's view that applications to VCAT for merits review of decisions should be limited to the represented person and people with a special interest in the affairs of the represented person. Legislation could provide guidance on which people are taken to have a special interest in the represented person such as family members, carers and close friends, with VCAT having the discretion to determine whether an applicant has the necessary special interest to seek a review.

Question 116: Who should conduct merits review of decisions of substitute decision-makers?

The obvious choice to conduct such reviews is VCAT. VCAT already has a well functioning Guardianship List and experience in guardianship matters. It will be important to ensure that the VCAT member who appointed a particular guardian or administrator is not the VCAT member who reviews their decisions, but VCAT can handle procedural matters such as this internally.

In making this recommendation, the Commission is of the view that VCAT needs to improve the accessibility of its processes for people subject to orders under the G&A Act to ensure their right to a fair hearing under the Charter is met. It is critical that VCAT operate consistently to ensure the rights contained within the Charter are protected. In this respect, the Commission draws VLRC's attention to its *Submission to the Victorian Civil and Administrative Tribunal – President's Review* (2009) and responses to Questions 135 and 151 below.

SUMMARY OF COMMISSION RESPONSES TO PART 7 OF THE CONSULTATION PAPER

Questions 89:

- *The Commission agrees with the VLRC that new guardianship laws should include set of decision-making principles.*
- *The Commission believes that the decision-making principles should apply to every person or other entity that performs a function or exercises a power under Victoria's guardianship laws*

Question 90:

- *The Commissions preference is for substituted judgment to be one of the guiding principles substitute decision-makers are required to consider when making decisions.*

Question 91:

- *The Commission believes that substituted judgment is relevant to supported decision-making because decision-making capacity can be decision-specific and fluctuate over time, and a person may move up and down the decision-making continuum. This may mean that at certain times the roles of supporter and co-decision-maker become more akin to that of a substitute decision-maker.*

Question 94:

- *The Commission supports VLRC's suggestion that one general set of decision-making principles should apply to all types of decisions.*
- *The Commission believes that new guardianship laws should contain the same decision-making principles for financial decisions and personal decisions.*

Question 96:

- *The Commission submits that the general set of decision-making principles should apply to medical decision-makers along with a set of additional principles to guide this particularly important area of decision-making.*

Question 97:

- *The Commission agrees with the VLRC'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.*
- *The relevant provisions of new guardianship legislation should limit any infringement on privacy rights only to the extent permissible in accordance with section 7 of the Charter.*

Question 106:

- *The Commission agrees with the VLRC's proposal (Option G) to introduce increased and more specific penalties for substitute decision-makers who fail to meet their responsibilities or who abuse their powers.*

Questions 111 and 112:

- *The Commission does not agree with the VLRC's proposal (Option B) that new guardianship laws should only permit merits review of decisions made by OPA as guardian and STL as administrator. The Commissions prefers Option C, which broadens the scope of merits review to include individual decisions made by both public and private appointments. This would allow the represented person to challenge individual decisions made by any substitute decision-maker in VCAT including OPA and STL amongst others.*
- *The Commission agrees with the VLRC's view that applications to VCAT for merits review of decisions should be limited to the represented person and people with a special interest in the affairs of the represented person.*

Question 116:

- *The Commission believes that VCAT should be the entity that conducts merits review of decisions of substitute decision-makers.*

PART 8: IMPLEMENTING AND REGULATING NEW LAWS

Chapter 20 – The Public Advocate

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

The Commission agrees with the suggestions put forward by OPA in their submission to the Guardianship Information Paper especially in respect of extending their investigative powers to include situations of neglect in addition to situations of apparent abuse and exploitation.[49]

OPA should have the power to investigate any complaint of abuse, neglect or exploitation of any person with a disability including, but not limited to, a person under a guardianship or administration order, of for whom a personal appointment has been made. OPA should also have the power to instigate own motion investigations of matters where no complaint has been made. The Commission notes that OPA needs to be adequately resourced in order to carry out these functions effectively.

Question 123: Do you support clarifying OPA's individual and systemic advocacy functions in guardianship legislation?

The Commission supports the proposal to clarify and strengthen OPA's advocacy role, both individual and systemic.

Chapter 21 – VCAT

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

The Commission agrees with the views of the VLRC that there needs to be more active coordination and investigation of matters prior to hearings. In terms of particulars, the Commission has no view on whether a body such as the New South Wales Guardianship Tribunal's Coordination and Investigation Unit should be established.

VCAT has an obligation under section 24 of the Charter to ensure that parties to civil proceedings, including guardianship matters, have a fair hearing. In order to do this, VCAT needs to ensure that the represented person is aware of the hearing and able to attend as it is their rights that will be limited if a guardianship or administration order is made. VCAT also needs to engage fully with parties directly prior to hearings, explain the process more fully and ensure sufficient evidence is available.

[49] Office of the Public Advocate, *Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper* (2010), pp27-28.

The Commission congratulates VCAT for releasing a Practice Note on its fair hearing obligation.[50]

If possible, VCAT should attempt to resolve matters in other ways than through a hearing. Whilst VCAT operates in an informal manner, attending a hearing can still be a daunting environment to place a person with impaired decision-making capacity. Alternate ways VCAT could look at include mediation, conferencing and conciliation. Such processes could take place at the represented person's home or at the hospital or residential care facility where the person currently resides.

The Commission submits that VCAT needs to reassess the scope and length of the guardianship and administration orders it makes in light of the safeguards articulated in the CRPD in respect of 'measures relating to the exercise of legal capacity'. Article 12(4) of the CRPD provides an obligation on States Parties to ensure that:

> all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Compliance with Article 12(4) of the CRPD requires VCAT to be a competent, independent and impartial body that has the expertise and sufficient understanding of people with impaired decision-making capacity to enable them to make guardianship and administration orders that have the least restrictive impact on the represented person's ability to exercise their own legal capacity. The Commission agrees VCAT when exercising its review capacity is a 'competent, independent and impartial authority of judicial body' as required by the CRPD and a much more appropriate body to deal with guardianship matters than a court.

VCAT must also ensure that persons or bodies appointed as guardians and administrators respect the rights, will and preferences of the represented person and are free of conflict of interest and undue influence. Guardianship and administration orders made by VCAT must apply for the shortest time possible and be proportional and tailored to the person's individual circumstances. Current guardianship and administration orders may not satisfy these requirements because they are not proportional to the person's needs and apply for too long. As part of satisfying the requirement of proportionality, the new guardianship laws must not give VCAT the power to make plenary orders. VCAT should already be addressing the issue of proportionality when imposing guardianship and administration orders that limit a person's rights in accordance with section 7 of the Charter to ensure sure limits are reasonable, necessary and proportionate.

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

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[50] Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT 3 (Fair Hearing Obligation)* (1 October 2010).

The Commission welcomes the discussions in the Consultation Paper around options to permit individuals that appear before VCAT to receive legal advice and be legally represented. Whichever option is chosen it must be such as to ensure the right of the represented person to a fair hearing has been accorded with.

The Commission supports Option C to create a statutory power for VCAT to order that a person be provided with legal representation when VCAT considers it necessary. There are concerns about the number of unrepresented people appearing before VCAT in guardianship and administration matters, because the very people who it is being suggested cannot make their own decisions are supposed to represent themselves or often rely on the person seeking the order to speak for them.

In the alternative, the Commission supports Option B to amend section 62 of the *Victorian Civil and Administrative Act 1998* (Vic) to give a represented person or a proposed represented person a right to legal representation in all Guardianship List matters.

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

The Commission believes that VCAT should be required to consider making supported and co-decision-making orders before appointing substituted decision-makers. This should be one of the keystones of Victoria's new guardianship legislation, the starting point of which must be supported decision-making

Under the current G&A Act, VCAT has to exercise its powers in a way so that 'the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted' (section 4(2) (a)). This would require VCAT to consider supported decision-making and co-decision-maker before looking at whether to appoint a substitute decision-maker. However, the Commission believes that current wording is not strong enough. New guardianship laws have to make it clear that the appointment of a substituted decision-maker is an option of last resort, to be taken only when all other possibilities have been rigorously checked.

The new guardianship legislation should work as a holistic whole, with supported decision-making preferred, then co-decision-making and only if these are not possible, substituted decision-making as the last resort. Supported decision-making agreements and co-decision-making agreements preferred if the person has the capacity to make them because this is consistent with their right to 'individual autonomy including the freedom to make one's own choices' (Article 3(a) CRPD). If the person does not have capacity to make these agreements, then VCAT should look at making a supported decision-making order if possible followed by a co-decision-making order. Only if there is no other option available, should guardianship or administration orders enter the picture.

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

The Commission does not think that new guardianship legislation should specify a maximum period for all guardianship and administration orders. The Commission does believe, however, that new guardianship legislation should specifically require VCAT when making orders to ensure they meet the safeguards required by Article 12 of the CRPD. This includes ensuring such orders 'apply for the shortest time possible'.

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

The Commission refers the VLRC to its *Submission to the Victorian Civil and Administrative Tribunal – President's Review* (2009). This submission looks at whether VCAT makes itself open to people with disabilities and other access barriers, and if the processes currently used by VCAT ensure that all parties to a dispute are given a fair hearing and an opportunity to present their case

The Commission also stresses how critical it is that VCAT operate consistently to ensure the rights contained within the Charter are protected. The following rights are particularly relevant to VCAT proceedings in the Guardianship List:

- Section 8 Recognition and equality before the law including protection from discrimination
- Section 10 Protection from torture and cruel, inhuman or degrading treatment (medical treatment and medical research procedures without consent)
- Section 12 Freedom of movement
- Section 13 Privacy and reputation
- Section 17 Protection of families and children
- Section 18 Taking part in public life
- Section 19 Cultural rights especially in respect of Aboriginal persons and those from culturally and linguistically diverse (CALD) backgrounds
- Section 21 Right to liberty and security of person
- Section 22 Humane treatment when deprived of liberty
- Section 24 Fair hearing

The Charter clearly excludes courts and tribunals from the definition of a public authority, except when they are acting in an administrative, as opposed to judicial, capacity. Consequently, VCAT has specific obligations under section 38 of the Charter when it is acting in an administrative capacity. Section 38 of the Charter imposes duties on public authorities to act compatibly with human rights and to give proper consideration to relevant human rights when making a decision. Whilst it has not been determined whether VCAT is acting in an administrative capacity in the Guardianship List, the Commission submits that it should act compatibly with human rights and properly give consideration to human rights when making guardianship and administration orders.

Even if it is determined that VCAT is acting judicially when making such orders, the Charter does apply by virtue of section 6(2)(b) to courts and tribunals when acting judicially ‘to the extent that they have functions under Part 2 and Division 3 of Part 3’ of the Charter. This includes when VCAT is interpreting provisions of the new guardianship legislation. VCAT should also be bound to apply the general principles proposed for new guardianship legislation including the specific decision-making principles.

SUMMARY OF COMMISSION RESPONSES TO PART 8 OF THE CONSULTATION PAPER

Questions 118:
- *The Commission agrees with the suggestions put forward by OPA in their submission to the Guardianship Information Paper especially in respect of extending their investigative powers to include situations of neglect in addition to situations of apparent abuse and exploitation.*

Question 123:
- *The Commission supports the proposal to clarify and strengthen OPA's advocacy role, both individual and systemic.*

Question 135:
- *The Commission agrees with the views of the VLRC that there needs to be more active coordination and investigation of matters prior to hearings. In terms of particulars, the Commission has no view on whether a body such as the New South Wales Guardianship Tribunal's Coordination and Investigation Unit should be established.*

Question 137:
- *The Commissions supports Option C to create a statutory power for VCAT to order that a person be provided with legal representation when VCAT considers it necessary.*

Question 138:
- *The Commission believes that VCAT should be required to consider making supported and co-decision-making orders before appointing substituted decision-makers.*
- *The appointment of a substituted decision-maker must be an option of last resort, only taken when VCAT has thoroughly explored all other possibilities.*

Question 139:
- *The Commission does not think that new guardianship legislation should specify a maximum period for all guardianship and administration orders. The Commission does believe, however, that new guardianship legislation should specifically require VCAT when making orders to ensure they meet the safeguards required by Article 12 of the CRPD. This includes ensuring such orders 'apply for the shortest time possible'.*

Question 151:
- *The Commission refers the VLRC to its Submission to the Victorian Civil and Administrative Tribunal – President's Review (2009).*
- *The Commission stresses how critical it is that VCAT operate consistently to ensure the rights contained within the Charter are protected.*

PART 9: INTERACTION WITH OTHER LAWS

As a general comment, the Commission submits that the same capacity principles proposed for the new guardianship laws should be used in all 'capacity affecting' laws that provide for substituted decision-making. This would ensure consistency between all pieces of legislation authorising substitute decision-making for people with impaired decision-making capacity.

Chapter 22 – *Disability Act 2006* (Vic)

Question 156: Do you agree with the VLRC'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?**

The Commission does not have a view on the appropriateness of extending the compulsory treatment provisions in the *Disability Act 2006* (Vic) to people with a cognitive impairment other than intellectual disability. The Commission submits, however, that any form of compulsory treatment in Victoria should only be authorised in a manner that is consistent with human rights principles, regardless of the legislation such provisions are contained in. There is also the issue of the different regimes and protections applying to people with disabilities depending on which piece of legislation you fall under.

The Commission believes this is an important issue that needs further discussion because compulsory treatment provisions of any kind are a significant limitation on a number of rights under the Charter, not least of which is the right of a person not to be subjected to medical treatment without their full, free and informed consent (section 10(c) Charter). Other important rights limited include the right to recognition and equality before the law (section 8) including the discriminatory application of the rules only to people with a disability, the right to freedom of movement including the right to choose where to live (section 12) and the right to liberty and security (section 21). Any limitation on these rights under the *Disability Act 2006* (Vic) or guardianship laws needs to pass the test set out in section 7(2) of the Charter, which requires such limits to be reasonable, proportionate and necessary.

The Commission is not aware of the justification for recommending that compulsory treatment provisions be extended to a broader group but as these provisions involve significant limitations on rights, any moves to broaden them beyond intellectual disability must be treated with caution. If guardianship laws are being used as the default means of authorising compulsory treatment for people with impaired decision-making capacity who are not intellectually disabled or mentally ill, such as those with acquired brain injury, and guardianship laws offer fewer protections than under the *Disability Act 2006* (Vic), then the VLRC's previous recommendation should be considered. For example, the Office of the Senior Practitioner oversees the provisions in the *Disability Act 2006* (Vic) providing for the use of restrictive interventions and compulsory treatment. There is no equivalent oversight mechanism under the G&A Act.

In considering this option, a human rights analysis must be carried out on the impact of such an extension prior to any decision being made using section 7 of the Charter as the guide. The intent of the Charter is to engender a rights based framework within Victorian government and service delivery that requires such assessments to be made right at the start of the process, not as an afterthought at the end.

The broader issue for the Commission, however, is the use of compulsory treatment provisions of any kind in Victoria and the right not to be subjected to medical treatment without consent under the Charter.

Chapter 23 – *Mental Health Act 1986* (Vic)

Question 157: Do you agree with the VLRC'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?

The Commission does not have a fixed view on whether it should be possible 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 a mental illness.

The Commission does want to emphasise its recommendation earlier in this submission that reference to disability should be removed completely from the criteria VCAT uses to decide if a substitute decision-maker is needed. The appropriate test should be one of capacity, recognising that capacity fluctuates over time and can be decision specific.

In determining this, VCAT will have reference to the capacity guidelines in the new legislation. If this approach is adopted, the reason a person is unable to make a decision, whether due to mental illness or otherwise, becomes irrelevant. In these circumstances, the Commission is not sure why guardianship should not be used to authorise psychiatric treatment and decide the place of residence for persons unable to make their own decisions due to mental illness.

This tends to support the fusion argument where mental health laws would be subsumed within the new guardianship legislation and guardianship would become the sole legal mechanism under which medical treatment, hospital confinement and place of residence decisions would be made for all people with impaired decision-making capacity for any reason. Removing disability as a criterion under the new guardianship laws ensures such laws are non-discriminatory. In a similar way, merging the mental health laws into the guardianship laws would remove the inherently discriminatory nature of the mental health laws against people with a mental illness. All people with an impaired decision-making capacity would then face the same set of rules. This would ensure compatibility with everybody's right to equality before the law in section 8 of the Charter.

This is a complicated and controversial issue. However, the Commission submits the time is opportune to address it now whilst both the guardianship and mental health

laws are under review. The Commission recommends a separate inquiry to run in parallel with the main guardianship and mental health reviews which seeks to look at the fusion argument in more depth and make recommendations on whether this approach should be adopted in Victoria.

This sub-inquiry should also consider the broader issues concerning the human rights impact of a substitute decision-maker making medical treatment and place of residence decisions for a person who is unable to consent due to impaired decision-making capacity.

Additional Comments

The Commission refers the VLRC to its *Submission to the Department of Health with comments on the Mental Health Bill 2010 Exposure Draft* (2011). This submission addresses a number of relevant issues including supported decision-making, capacity, the use of advance directives and the relationship to the G&A Act. It also adopts a human rights approach to the Exposure Draft analysing the Bill's clauses in the light of the Charter and the CRPD.

In its submission, the Commission recommended that the Exposure Draft be amended to clarify the relationship that the nominated person scheme is intended to have with the G&A Act.[51] In seeking consistency in legislative schemes the Commission recommends that the VLRC take up this matter with the Department of Health.

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[51] Victorian Equal Opportunity and Human Rights Commission, *Submission to the Department of Health with comments on the Mental Health Bill 2010 Exposure Draft* (2011), Recommendation 21 p31.

SUMMARY OF COMMISSION RESPONSES TO PART 9 OF THE CONSULTATION PAPER

Questions 156:

- *The Commission does not have a view on the appropriateness of extending the compulsory treatment provisions in the Disability Act 2006* (Vic) *to people with a cognitive impairment other than intellectual disability. The Commission submits, however, that any form of compulsory treatment in Victoria should only be authorised in a manner that is consistent with human rights principles, regardless of the legislation such provisions are contained in.*

Question 157:

- *The Commission does not have a fixed view on whether it should be possible 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 a mental illness.*
- *The Commission believes there are arguments in favour of fusing guardianship and mental health laws in Victoria. Whilst this is a complicated and controversial issue, the Commission believes the time is right to address this issue whilst both sets of laws are under review.*
- *The Commission recommends a separate inquiry to run in parallel with the main guardianship and mental health reviews which seeks to look at the fusion argument in more depth and make recommendations on whether this approach such be adopted in Victoria.*
- *This sub-inquiry should also consider the broader issues concerning the human rights impact of a substitute decision-maker making medical treatment and place of residence decisions for a person who is unable to consent due to impaired decision-making capacity.*