Standing Guard

Submission in response to the Victorian Law Reform Commission's Guardianship Information Paper

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pilch homeless persons' legal clinic

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1. Executive summary

1.1 Overview

The PILCH Homeless Persons' Legal Clinic (**HPLC**) welcomes the opportunity to make a submission to the Victorian Law Reform Commission (**Commission**) in relation to its Guardianship Information Paper (**Information Paper**).

We commend the Commission on the initiative to undertake the review of the *Guardianship and Administration Act* 1986 (Vic) (**the Act**), having regard to the rights and obligations set out in the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (**Charter**) and to the developments in policy and practice in respect of persons affected by Victoria's guardianship and administration law since the Act was introduced 24 years ago.

This submission addresses issues that the HPLC has identified through its provision of pro bono legal services to people experiencing or at risk of homelessness, a client group which is commonly affected by Victoria's guardianship and administration law and policy.

The focus of this submission is on the legal, practical and procedural barriers that interfere with the right of people with a disability, particularly those experiencing or at risk of homelessness, to enjoy legal capacity on an equal basis with others in all aspects of life.[1] In particular, this submission considers:

- the interaction of clients who are homeless or at risk of homelessness with guardianship and administration law and policy;
- legal, practical and procedural barriers preventing these people from accessing justice under the current law and policy, including poor attendance at hearings, lack of legal representation, inadequate access to support services and limited avenues for reassessment and appeal; and
- features of the current law which tip the balance in favour of protectionism rather than individual autonomy,[2] including plenary orders, lack of review of a guardian or administrator's decisions and the concept of "best interests".

Of the questions set out in chapter 5 of the Information Paper, this submission addresses:

- Question 6 – should it be necessary to a person to have a "disability" before a guardian or administrator is appointed, or is it preferable to rely on concepts such as lack of "capacity" or "vulnerability"?
- Question 7 – what are the best ways of assessing whether a person's decision-making capacity is impaired?
- Question 8 – is "best interests" a useful or appropriate guide for substitute decision makers?

[1] See United Nations Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UNGAOR, 61st session, Agenda Item 67(b), UN Doc A/61/611 (13 December 2006) (**Convention**) art 12.

[2] See *XYZ v State Trustees Limited* [2006] VSC 444 [66] in which Cavanough J stated: "there may be a need for VCAT to re-examine the exercise of its guardianship and administration jurisdiction generally to determine whether the balance has swung too far in favour of paternalism or protection as against individual autonomy".

- Question 9 – does the notion of "best interests" decision-making allow for the right of a person to take risks and make bad decisions? Should it?
- Question 13 – should plenary guardianship and administration orders be retained? Or, should VCAT be required to identify in each case the range of decisions which can be made on a person's behalf?
- Question 16 – should VCAT have the power to review individual decisions made by guardians and administrators? If so, who should be able to ask for a review of the decision?
- Question 19 – should there be any changes to the functions, powers or procedures of VCAT?

A summary of the HPLC's recommendations is set out below. These recommendations aim to make sure that the measure of giving the power to make decisions about a person's lifestyle, health, accommodation, work or financial affairs to someone other than that person is a means of "last resort" in both theory and practice.[3]

1.2 Recommendations

In summary, the HPLC makes the following recommendations:

Recommendation 1

The Commission should review the number of applications for re-opening made under section 120 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) (**VCAT Act**) in relation to guardianship and administration orders, and compare these figures with the number of guardianship and administration orders made in the absence of the person who is the subject of the application.

Recommendation 2

VCAT should review and amend the form and content of its notices of hearings in the Guardianship List. The notices should be in plain English, larger font, simple and well-labelled envelopes and should clearly set out what the person needs to do in response to the notice.

Recommendation 3

VCAT should use text messaging to inform and remind people of hearings in the Guardianship List.

Recommendation 4

If a person does not attend a hearing and a guardianship or administration order is made, VCAT should take clear and careful measures to inform the person of their rights to have the order re-opened, including informing them of the timeframe and encouraging them to seek assistance or advice.

[3] See the declaration of the Australian government upon ratification of the Convention: "Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards … Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others...": United Nations Multilateral Treaties Deposited with the Secretary-General – Status as at 1 April 2009, Volume 1, Part I, Chapters I to VII, ST/LEG/SER.E/26 p 461.

Recommendation 5

Rule 4.19 of the Victorian Civil and Administrative Tribunal Rules 2008 (Vic) (**VCAT Rules**) should be amended to provide that an application for review under section 120 of the VCAT Act can be made within 30 (rather than 14) days after the applicant becomes aware of the order and three (rather than one) application(s) can be made in respect of the same matter without leave of VCAT.

Recommendation 6

A person's "special circumstances" should be expressly considered in determining whether a person had a "reasonable excuse" for not attending the hearing under section 120 of the VCAT Act.

Recommendation 7

Further direction should be given to VCAT members sitting in the Guardianship List regarding the application of the tests under sections 22 and 46 of the Act. There should be a procedural requirement to consider a checklist of factors before making a guardianship or administration order.

Recommendation 8

VCAT members should receive training in relation the provisions under the Act and how they should be applied in practice, including the importance of lay evidence in demonstrating a person's capacity to manage their own specific lifestyle or finances.

Recommendation 9

The preliminary step in the test of whether or not a guardianship or administration order is needed should continue to be based on whether that person has a disability, not a broader notion of "vulnerability" or "lack of capacity".

Recommendation 10

The VCAT Act should be amended to include a broad definition of special circumstances and to provide that, under section 62 of the VCAT Act, a person is entitled to representation by a professional advocate if it is apparent that they have special circumstances.

Recommendation 11

VCAT should be required to take a more pro-active role in (a) identifying when a person in the Guardianship List who is unrepresented needs representation; and (b) taking measures such as adjournment or appointment of a representative to address this need.

Recommendation 12

There should be a clear legislative requirement or policy directive that any acknowledgement of a person's special circumstances under the amended VCAT Act, will not be taken as evidence of inability or incapacity for the purpose of determining whether a guardianship or administration order should be made.

Recommendation 13

VCAT members should be give thorough and ongoing training on social, health and financial support services available to people throughout Victoria, which may provide a person with the additional support they need without the need for a guardianship or administration order.

Recommendation 14

A case management program modelled on the Victorian Magistrates' Court's Court Integrated Services Program, should be implemented in the Guardianship List at VCAT to improve people's access to support services that might provide a viable less restrictive means of support than a guardianship or administration order.

Recommendation 15

The reassessment of orders under sections 61 to 63 of the Act should be carried out in a way that genuinely contemplates the potential for changes in the circumstances of represented persons, including the potential for improved capacity and increased access to less restrictive means of support.

Recommendation 16

When necessary, VCAT members should grant adjournments to allow a person that is opposing an application or applying for a reassessment to obtain the necessary supporting documentation.

Recommendation 17

New documentation should be developed by VCAT, in co-operation with mental health and disability support service providers and consumers, to assist experts providing reports in relation to guardianship and administration order applications and reassessments.

Recommendation 18

The concept of "best-interests" should be removed from the Act, both in relation to the decision to make a guardianship or administration order and the obligations of the guardian or administrator under the order.

Recommendation 19

Recording facilities should be installed and operated at all VCAT hearing locations and transcripts should be provided free of charge to clients who satisfy the special circumstances criteria.

Recommendation 20

An appeals board within VCAT should be created.

Recommendation 21

The concept of plenary guardianship orders should be removed from the Act and both guardianship and administration orders should be limited to those powers set out in the order.

Recommendation 22

Training and practice guides should be given to VCAT members presiding on the Guardianship List to assist them in formulating orders that are appropriately moulded to the particular represented person's decision-making capacity and lifestyle.

Recommendation 23

Wherever possible, in response to an application for a guardianship or administration order, VCAT should order a trial period be carried out to determine (a) whether the order is needed; and (b) if an order is needed, the specific powers that the guardian or administrator should have under the order (with all non-specified powers remaining with the represented person).

Recommendation 24

All guardians and administrators should be required to attend annual training on their duties and obligations as a condition of taking on the role.

Recommendation 25

Guardians and administrators should be required to keep records of all decisions made under the order.

Recommendation 26

The requirements that are currently identified under the "best interests" provisions in sections 28 and 49 of the Act should be relabelled in recognition that the notion of "best interests" encourages a protectionist approach rather than a focus on autonomy.

Recommendation 27

A mechanism for review of the decisions of guardians and administrators should be included in the Act.

Recommendation 28

The Commission should consider section 52 of the Act in relation to the unreasonably high barrier it presents to people under administration orders being able to avoid the legal and financial consequences of entering into contracts.

About PILCH and the Homeless Persons' Legal Clinic

PILCH is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- address disadvantage and marginalisation in the community;
- effect structural change to address injustice;
- foster a strong pro bono culture in Victoria; and
- increase the pro bono capacity of the legal profession.

The HPLC is a project of PILCH and was established in 2001 in response to the unmet need for targeted legal services for people experiencing homelessness.[4] The HPLC is funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Project Fund, administered by Victoria Legal Aid. This funding is supplemented by fundraising and donations. While the HPLC received a one-off funding boost from the Federal Government in 2009, it does not currently receive recurrent funding from the Federal Government.

The HPLC has the following aims and objectives:

- to provide free legal services to people who are homeless or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;
- to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- to reduce the degree and extent to which people experiencing homelessness are disadvantaged or marginalised by the law; and
- to use the law to construct viable and sustainable pathways out of homelessness.

Free legal services are offered by the HPLC on a weekly basis at 14 outreach locations that are already accessed by people experiencing homelessness for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.[5] Since its establishment in 2001, the HPLC has assisted almost 5000 people at risk of, or experiencing, homelessness in Victoria.

The HPLC also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights. In 2005, the HPLC received

[4] See http://www.pilch.org.au.

[5] Host agencies include Melbourne Citymission, Café Credo, The Big Issue, the Salvation Army, St Luke's Anglicare, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Vacro, Koonung Mental Health Centre, Homeground Housing Service, Northside Geelong and St Kilda Crisis Centre. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Arnold Dallas McPherson, Baker & McKenzie, Clayton Utz, Corrs Chambers Westgarth, DLA Phillips Fox, Freehills, Mallesons Stephen Jaques, Minter Ellison, Harwood Andrews and Stella Suthridge & Associates.

the national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights. In 2009 it received a Melbourne Award for contribution to community in the City of Melbourne.

The HPLC operates and provides its services within a human rights framework. Central to the human rights framework is the right to participate, including individual and community participation and consultation, which creates an empowering environment for individuals to assert their rights and contribute to the democratic process. The HPLC recognises the right to participate by working and consulting directly with a range of key stakeholders, the most important of which is the Consumer Advisory Group (**CAG**). The CAG was established by the HPLC in 2006 and is comprised of people who have experienced homelessness or who are currently homeless. The role of the CAG is to provide guidance and advice, and make recommendations to the HPLC with a view to enhancing and improving the quality of the HPLC's service delivery, policy, advocacy, law reform and community development activities. The CAG not only provides feedback and guidance to the HPLC but also gives people who have experienced homelessness a voice to actively represent their interests and build the participation and engagement of the general community around the issue of homelessness.

2. Homelessness and guardianship and administration

2.1 Nature and extent of homelessness in Australia

The "cultural definition" of homelessness, developed by Chamberlain and MacKenzie,[6] is widely adopted when considering the nature and extent of homelessness in Australia. This definition identifies homelessness by reference to "shared community standards about the minimum accommodation that people have the right to expect in order to live according to the conventions of contemporary life."[7] In Australia, the accepted minimum community standard is understood to be "a small rented flat", with the minimum required amenities, such as a bedroom, living room, bathroom and kitchen.[8]

In broad terms, the cultural definition of homelessness has led to the identification of three categories within the homeless population:[9]

- **primary homelessness** – refers to people without conventional accommodation living on the streets, in deserted buildings, railway carriages, under bridges, in parks etc (*i.e.* "rough sleepers");
- **secondary homelessness** – refers to people moving between various forms of temporary shelter including friends, emergency accommodation, refuges and hostels; and
- **tertiary homelessness** – refers to people living permanently in single rooms in private boarding houses without their own bathroom or kitchen and without security of tenure. They are homeless because their accommodation does not satisfy the requisite conditions of the minimum community standard.[10] Medium to long-term residents of caravan parks would, in most circumstances, be considered to be experiencing tertiary homelessness.

The minimum community standard provides a benchmark for measuring and monitoring homelessness in the Australian context and the cultural definition of homelessness has been adopted by Australian Bureau of Statistics (**ABS**). Using this definition, on census night in 2006, the homeless population in Australia was calculated at 105,000 people: 16% of these people were experiencing primary homelessness, with the remaining percentage experiencing secondary or tertiary homelessness, including 45% staying temporarily with friends or relatives, 21% staying in boarding houses and 19% staying in supported accommodation (such as hostels for the homeless, night shelters and refuges).[11]

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[6] Chris Chamberlain and David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274; and Chris Chamberlain and Guy Johnson, 'The Debate about Homelessness' (2001) 36(1) *Australian Journal of Social Issues* 35, 39.

[7] Chris Chamberlain, 'Counting the Homeless: Implications for Policy Development', Australian Bureau of Statistics (2 December 1999), 49.

[8] Ibid.

[9] Chamberlain and Johnson, above n 6.

[10] Chris Chamberlain, Guy Johnson and Jacqui Theobald, 'Homelessness in Melbourne: Confronting the Challenge' (February 2007) Centre for Applied Social Research, RMIT University, 13–14.

[11] Chris Chamberlain and David MacKenzie, Australian Bureau of Statistics, 'Australian Census Analytic Program: Counting the Homeless' (2006) available at www.abs.gov.au.

2.2 Causes of homelessness and the relationship with guardianship and administration

The causes of homelessness are complex and varied.[12] They include:

- structural factors, such as poverty, severe financial hardship and lack of access to adequate income support, unemployment and lack of affordable housing;
- economic and social policy causes, such as economic and housing strategies that focus on home ownership models and housing as a commodity, lack of access to education opportunities and resource allocation to the welfare sector; and
- individual causes, such as domestic and family violence, mental illness, lack of access to appropriate health care and support, drug and alcohol dependency, gambling and legal problems.

In many cases, a number of the causal factors are interrelated. For example, and relevantly to this submission, a person experiencing mental illness, may also experience severe financial hardship, be unable to access income support and be unemployed.

A link between homelessness and mental illness is well recognised:

- The Victorian Government has acknowledged "high levels of homelessness experienced by people with severe mental health problems – an estimated 30 per cent of Australia's homeless population have a mental health problem".[13]
- The Senate Select Committee on Mental Health's first report, "A National Approach to Mental Health – From Crisis to Community (the Senate Committee Report)", observed that there are "clear causal and consequential associations" between homelessness and mental illness.[14] The Senate Committee Report cited studies indicating that "… between 30 and 80 per cent of people experiencing homelessness also experience mental disorders."[15]
- A 2005 literature review undertaken by St Vincent's Mental Health Service and Craze Lateral Solutions found that "between one quarter and one half of adult homeless persons across western cities are experiencing severe and perhaps chronic mental illness".[16]
- In 2004–05, approximately 12% of Supported Accommodation Assistance Program (**SAAP**) clients reported a mental health problem.[17]

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[12] Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139, 142. See also Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Economic, Social and Cultural Rights (3 March 2005) E/CN.4/2005/48, ¶ 22.

[13] Victorian Government Department of Human Services, 'Because Mental Health Matters: A New Focus for Mental Health and Wellbeing in Victoria – Consultation Paper' (May 2008), 93.

[14] Senate Select Committee on Mental Health, 'First Report: A National Approach to Mental Health – From Crisis to Community' (March 2006), 241.

[15] Ibid, footnote omitted.

[16] Australian Institute of Health and Welfare, 'Homeless SAAP Clients with Mental Health and Substance Use Problems 2004–05 – A Report from the SAAP National Data Collection' (March 2007), 1, quoting St Vincent's Mental Health Service and Craze Lateral Solutions, 'Homelessness and Mental Health Linkages: Review of National and International Literature' (2006).

[17] Ibid 2.

- A 2007 report on homelessness in Melbourne stated that "[w]e know there is a correlation between mental disorders and homelessness, with some people claiming that as many as eight in ten homeless people suffer from mental health problems … Such a claim sits at the extreme end of the spectrum and the general consensus is that somewhere between 20 and 30 per cent of the homeless suffer from mental health problems …"[18]

In addition to being a causal factor in the lives of people experiencing homelessness, mental illness can also be a consequence of the social dislocation, isolation and hardship that homelessness entails. A study undertaken by Johnson and Chamberlain, involving a sample of 4,291 homeless people in inner Melbourne, found that 31 per cent of the sample had mental health problems. In terms of whether mental illness preceded or followed homelessness, they found that 15 per cent of the sample had mental health problems before becoming homeless, and 16 per cent developed mental health issues after becoming homeless.[19]

In addition to mental illness, people with intellectual disabilities and brain injuries — both of which fall within the definition of "disability" under the Act — are also vulnerable to homelessness. The City of Sydney's "Homelessness Information Kit for Volunteers" contains a chapter dealing with intellectual disability and acquired brain injuries, which notes:

> "People with an intellectual disability or acquired brain injury who become homeless may become entrenched in homelessness if the right support and assistance is not provided. Those with disabilities who have no or few family supports may find it difficult to negotiate with community support providers, rental agents, health services etc." [20]

The vulnerability that (a) causes a person to become homeless; and (b) stems from that person being homeless, can often intersect with — and exacerbate — the vulnerability that brings a person within the jurisdiction of VCAT under the Act.

This link has been apparent through the HPLC's case work for clients experiencing or at risk of homelessness in relation to their guardianship or administration orders under the Act. In the 2008–2009 financial year, the HPLC opened 12 new matters dealing with guardianship and administration orders. The legal service provided to these clients includes: negotiating with guardians and administrators in relation to their obligations to the represented person; appearing at hearings regarding applications for guardianship and administration orders; and representing clients who are applying for the reassessment of existing orders. In addition, the HPLC undertakes case work for clients under guardianship or administration orders in relation to other areas of law, including housing, debt and infringements. Our submission is informed by this case work, as well as the policy and advocacy-based work the HPLC does with Victorians that are homeless or at risk of homelessness.

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[18] Chris Chamberlain, Guy Johnson and Jacqui Theobald, 'Homelessness in Melbourne: Confronting the Challenge' (February 2007), 28.

[19] Guy Johnson and Chris Chamberlain, 'Are the Homeless Mentally Ill?' - A paper presented at the Australian Social Policy Conference, University of New South Wales, 8–10 July, 2009 available at http://www.sprc1.sprc.unsw.edu.au/ASPC2009/papers/Paper375.pdf.

[20] See City of Sydney, 'Intellectual Disability & Acquired Brain Injury', *Homelessness Information Kit for Volunteers* available at www.cityofsydney.nsw.gov.au. See also Women with Disabilities Australia, 'Shut Out, Hung Out, Left Out, Missing Out', submission in response to the Australian Government's Green Paper on Homelessness available at www.wwda.org.au/homesubjune08.htm.

3. Human rights and guardianship and administration

The HPLC endorses the Commission's consideration of the Charter set out in Chapter 4 of the Information Paper and its terms of reference, which include reviewing the Act and reporting on the desirability of changes to the Act having regard to the Charter.[21]

Of the Charter-based human rights identified as relevant to the Commission's review in part 4.6 of the Information Paper, this submission focuses specifically on the rights to:

- recognition as a person before the law;[22]
- equal protection before the law and protection from discrimination;[23] and
- have a proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.[24]

The HPLC supports VCAT's recognition that "the Charter is very much part of the tribunal's future"[25] and its clear statement of the two key respects in which the Charter is relevant to VCAT:

- VCAT is a "public authority" for the purposes of the Charter and is therefore directly bound to act compatibly with human rights and to give proper consideration to human rights in its decision making;[26] and
- VCAT is required to apply the Charter when interpreting legislation and exercising certain discretions. In both of these respects, VCAT must act compatibly with human rights, subject only to contrary legislation.[27]

The HPLC recognises the significant potential of VCAT to make the justice system more accessible for marginalised clients, including those falling within the jurisdiction of the Guardianship List. However, in order to realise this potential, measures must be taken to make sure that tribunal-users are treated as equal before the law, recognising that: “[e]quality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians”.[28]

[21] Victorian Law Reform Commission, Guardianship Information Paper (March 2010) (**Information Paper**) p 5.

[22] *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 8(1).

[23] *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 8(3).

[24] *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 24.

[25] *VCAT Annual Report 2008 / 2009 – Human Rights and Access to Justice* p 14 available at http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_vcat/$file/2008-09_complete_annual_report_low_res.pdf.

[26] Ibid (referring to its obligations under section 38 of the Charter).

[27] Ibid (referring to its obligations under section 32 of the Charter).

[28] Law Council of Australia, Legal Assistance and Access to Justice Funding: 2009–2010 Federal Budget, p 3 available at http://www.lawcouncil.asn.au/programs/national-policy/legal-assistance/legal-aid_home.cfm.

A human rights-based approach to guardianship and administration law and policy acknowledges the principle of respect for the inherent dignity, individual autonomy and independence of people with disabilities, including their rights to:

- live in the community, with choices equal to others;[29]
- respect for his or her physical and mental integrity on an equal basis with others;[30] and
- equal recognition before the law, including access to appropriate assistance required to exercise legal capacity. [31]

This submission discusses current features of Victoria's guardianship and administration law and policy which are preventing people with disabilities, particularly those who are further marginalised by homelessness, from enforcing their rights. It discusses the way in which lack of equality before the law means that substitute decision-making – and the significant limitations on a person's independence and freedom of choice that this entails – is not always limited to a measure of last resort.

4. Accessing justice in the Guardianship List at VCAT

4.1 Getting people to hearings

Given the impact of a guardianship or administration order on a person's life, independence and personal autonomy, legal and procedural changes need to be made to encourage represented (or potentially represented) people to attend hearings in the Guardianship List.

The HPLC recognises that, under section 120 of the VCAT Act, if a person did not attend, and was not represented at, a hearing where they were placed under an administration order, that person can apply for a review of the order. This application for review must be made within 14 days of the initial order being made. If VCAT is satisfied that the applicant had a "reasonable excuse" for not attending or being represented at the hearing, it may, if it thinks fit, revoke or vary the order.

In practical terms, in the absence of legal representation (see part 4.3 below), a person who did not attend a hearing and was not aware of the importance of doing so, in unlikely to exercise this legislative option within the required timeframe. This provision is not an adequate mechanism for addressing the disadvantage a person experiences from failing to attend the hearing. The HPLC encourages the Commission to consider how often applications for review are made under section 120 of the VCAT Act in relation to hearings in the Guardianship List, and to compare these figures against the number of guardianship and administration orders that are made in the absence of the potential represented person. We think it is likely that these statistics will demonstrate that a very small proportion of people who have a guardianship or administration order made in their absence, make use of the option to have the hearing re-opened under section 120 of the

[29] United Nations Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UNGAOR, 61st session, Agenda Item 67(b), UN Doc A/61/611 (13 December 2006) art 19.

[30] United Nations Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UNGAOR, 61st session, Agenda Item 67(b), UN Doc A/61/611 (13 December 2006) art 17.

[31] United Nations Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UNGAOR, 61st session, Agenda Item 67(b), UN Doc A/61/611 (13 December 2006) art 12.

VCAT Act. Our recommendations in this section are intended to make this option more accessible to marginalised clients.

Furthermore, the criteria that must be satisfied before a guardianship or administration order is made, which focus on the best interests of the person, the person's capacity to make decisions and any less restrictive options that might be available to the person, cannot be given genuine consideration in the absence of that person. The recommendations set out below also seek to address come of the practical and procedural issues that prevent people attending hearings.

Improved form and content of notices

The HPLC submits that VCAT notices of hearings are:

- daunting in form – they are similar in appearance to an infringement notice, which many people experiencing homelessness have had unfavourable experiences with;
- confusing in structure – the perforated style of the notice is not a form which people are used to opening or accustomed to seeing important documents come in; and
- unclear in their message – there is no emphasis on the importance of attending the hearing and the significantly reduced chances of having the application dismissed or the order revoked if they do not attend, the potential consequence of the hearing, the option of obtaining legal representation or the option to apply for an adjournment of the hearing.

The HPLC recommends that VCAT reviews the form and content of its notices to address each of the issues identified above. In particular, the documentation should be in plain English, larger font, simple and well-labelled envelopes and should clearly set out what the person needs to do in response to the notice. In the event that a person is recorded on VCAT's records as needing an interpreter, the notice should be provided in the appropriate language.

Use of SMS reminder notifications

The HPLC commends VCAT's Residential Tenancies SMS Pilot Project in 2009, during which text messages were used to remind certain tenants (being those who were respondents in applications made using VCAT Online) of upcoming hearings.[32] That pilot project, which is still being evaluated, was designed to address the alarmingly low attendance rate of tenants who are respondents in VCAT hearings (approximately 20 per cent of those respondents attend).

In recognition of the significant importance of hearing the represented (or potentially represented) person's views and opinions about their lifestyle, wishes and interests, text messaging should be used to give practical and real encouragement to people to attend hearings in the Guardianship List.

Options if clients do not attend a hearing

The HPLC notes that, even where VCAT documentation is appropriately designed and notices are effectively communicated, disadvantaged clients may still encounter obstacles to attendance at VCAT. These issues include homelessness, mental illness, substance abuse and family violence, all of which could prevent a

[32] See Victorian Civil and Administrative Tribunal, 'Towards a Three Year Strategic Plan: Discussion Paper May 2010 – Transforming VCAT' p 9.

person from attending a hearing (but which should not be viewed as an indication of incapacity requiring a guardianship or administration order under sections 22 and 46 of the Act).

In the event that a client does not attend a hearing, and an administration order or a guardianship order is made, VCAT should take clear and careful measures to inform the person of their rights to have the order reviewed. The HPLC recommends that the timeframe for doing this should be made clear and the person should be encouraged to seek assistance or advice before this date. The recommendations in relation to case management and legal representation set out in parts 4.5 and 4.3 below are also important at this point to make sure the person is provided with access to the required support services.

In terms of the changes that are required to support these procedural recommendations, the HPLC recommends that rule 4.19 in the VCAT Rules is amended to provide that:

- an application for review of an order under section 120 of the VCAT Act must be made within 30 days after the applicant becomes aware of the order; and
- no more than three applications may be made under section 120 of the VCAT Act by the same person in respect of the same matter without leave of VCAT.

These proposed changes introduce a greater degree of flexibility that recognises the multiple hardships that may prevent people experiencing homelessness, and other marginalised Victorians, attending VCAT when scheduled. In practice, 14 days is not an adequate amount of time for a person to: (i) comprehend the order and its impact; (ii) seek legal or other advice in relation to the order; and (iii) if appropriate, lodge an application for the order to be re-opened – becoming engaged with an unfamiliar legal process and legal services can be a time consuming process. Given the magnitude of the impact of orders made in the Guardianship List on a person's life, liberty and autonomy, and the significant disadvantage a person experiences if they do not attend a hearing, the narrow window of 14 days is not adequate to ensure that a person is placed under a guardianship or administration order only when the criteria under the Act are met and not simply because they were unable to attend the hearing.

We recognise that this amendment to the VCAT Rules would cover other orders made in VCAT, which we also support (particularly in relation to orders made in the Residential Tenancies List). However, if this is not feasible, the HPLC submits that rule 4.19 should be amended specifically in relation to guardianship or administration orders made under the Act.

In addition, the HPLC recommends that a person's "special circumstances" (which should include homelessness, mental illness, hardship and health problems, discussed further below in part 4.3) are expressly considered in determining whether a person had a "reasonable excuse" for not attending the hearing under section 120 of the VCAT Act.

Recommendation 1

The Commission should review the number of applications for re-opening made under section 120 of the VCAT Act in relation to guardianship and administration orders, and compare these figures with the number of guardianship and administration orders made in the absence of the person who is the subject of the application.

Recommendation 2

VCAT should review and amend the form and content of its notices of hearings in the Guardianship List. The notices should be in plain English, larger font, simple and well-labelled envelopes and should clearly set out what the person needs to do in response to the notice.

Recommendation 3

VCAT should use text messaging to inform and remind people of hearings in the Guardianship List.

Recommendation 4

If a person does not attend a hearing and a guardianship or administration order is made, VCAT should take clear and careful measures to inform the person of their rights to have the order re-opened, including informing them of the timeframe and encouraging them to seek assistance or advice.

Recommendation 5

Rule 4.19 of the VCAT Rules should be amended to provide that an application for review under section 120 of the VCAT Act must be made within 30 (rather than 14) days after the applicant becomes aware of the order and three (rather than one) application(s) can be made in respect of the same matter without leave of VCAT.

Recommendation 6

A person's "special circumstances" should be expressly considered in determining whether a person had a "reasonable excuse" for not attending the hearing under section 120 of the VCAT Act.

4.2 Requirements for appointing a guardian or administrator

Requirements under the Act

Before making a guardianship or administration order under the Act, VCAT must be satisfied that the person:

- has a disability (defined as an intellectual impairment, mental disorder, brain injury, physical disability or dementia);[33]
- is unable by reason of the disability to make reasonable judgments in respect of:
    - in the case of guardianship, all or any of the matters relating to her or his person or circumstances; or
    - in the case of administration, the matters relating to all or any part of her or his estate; and
- is in need of a guardian or administrator.[34]

[33] 'Disability' is defined in section 4 of the *Guardianship and Administration Act* 1986 (Vic).

The Act prescribes that, when determining whether or not a person is in need of a guardian or administrator, the VCAT member must consider:

- whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action; and
- the wishes of the proposed represented person, so far as they can be ascertained.[35]

The Act also expressly prohibits VCAT from making a guardianship or administration order unless VCAT is satisfied that the order is in the person's best interests;[36] and requires that the order must be the least restrictive of the person's freedom of decision and action as is possible in the circumstances.[37]

There is, however, no further legislative guidance as to how these principles are to be applied, including how to assess the key concepts of "reasonable judgment", "best interests" or "least restrictive". As pointed out in a recent Liberty Victoria paper, these gaps in the legislation create a risk that inadequate protection is given to the dignity and autonomy of people with disabilities.[38] This inadequate guidance to VCAT members, coupled with factors referred to in this part 4 (including a lack of legal representation for people facing guardianship or administration orders), means there is an increased risk of the balance in the Guardianship List swinging "too far in favour of paternalism or protection as against individual autonomy".[39]

This lack of clarity in the Act and the way it is applied by VCAT members allows guardianship and administration orders to be made when it is strongly arguable that they should not be. While legislative "tightening" will be of some assistance in protecting the rights of people with disabilities, it is essential that VCAT members receive appropriate training to assist them to understand their obligations under sections 4(2), 22 and 46 of the Act.

Applying the requirements in the Act

The key elements that must be satisfied before VCAT can resort to making a guardianship or administration order (being (i) that a disability exists; (ii) by reason of that disability, the person is unable to make reasonable decisions; and (ii) the person "needs" a guardian or administrator), are not always given separate and careful consideration by the Guardianship List. Furthermore, as discussed elsewhere in this submission, there is often a lack of awareness of support services that would present less restrictive options for people than a guardianship or administration order, which means that sections 22(2)(a) and 46(2)(a) (requiring consideration of less restrictive means available) cannot be satisfied.

Incapacity

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[34] *Guardianship and Administration Act* 1986 (Vic) s 22(1) (regarding guardianship) and s 46(1) (regarding administration).

[35] *Guardianship and Administration Act* 1986 (Vic) s 22(2) (regarding guardianship) and s 46(2) (regarding administration). Regarding guardianship, the wishes of any nearest relatives or other family members of the proposed represented person and the desirability of preserving existing family relationships must also be considered under s 22(2).

[36] *Guardianship and Administration Act* 1986 (Vic) s 22(3) (regarding guardianship) and s 46(3) (regarding administration).

[37] *Guardianship and Administration Act* 1986 (Vic) s 22(5) (regarding guardianship) and s 46(4) (regarding administration).

[38] Ergun Cakal, Victorian Council for Civil Liberties, 'Dignity, autonomy, privacy: disability reforms' available at http://www.libertyvictoria.org/node/107.

[39] *XYZ v State Trustees Limited* [2006] VSC 444 [66].

By way of example, in XYZ, Justice Cavanough discussed the difference between a "reduced" capacity to make reasonable judgments and "incapacity" or "inability" to do so.[40] While he stated that the test is not one of "total and complete incapacity", [41] he noted that the VCAT member's references to "diminished" capacity or the notion that a person's disability "affects" his or her ability to make reasonable judgments "set the bar too low". [42] He further found that the wishes of the represented person had not been taken into consideration as required by section 4(2)(c) of the Act and that this amounted to an error of law warranting the grant of leave to appeal.[43]

The lack of a consistent test as to what constitutes an inability to make reasonable judgments presents a risk that VCAT will err on the side of caution or protectionism in making orders. While Justice Cavanough in XYZ declined to conclusively comment on the legal criteria for determining whether a person is incapable of managing his or her financial dealings,[44] he referred to capacity that is "lacking or is severely impaired,"[45] rather than simply reduced. While this could be difficult to assess, it is important for VCAT members to consider lay evidence, and evidence of the represented or potentially represented person, in determining a person's capacity to manage their own particular lifestyle *i.e.* his or her "real life capacity or ability".[46]

For clients experiencing homelessness, there is an increased risk that factors such as erratic or unreliable behaviour or a dishevelled appearance will be presumed to be an indication of incapacity rather than a product of their hardship.[47] This risk will be minimised if the person is able to have access to a legal representative who is able to advocate on the client's behalf in relation to the complicated legal tests that are applied when determining whether a person will be placed, or remain, under a guardianship or administration order.

The HPLC reiterates that the deprivation of a person's independence and autonomy to choose how they manage their lifestyle or finances is "gravely intrusive upon the rights of the represented person", [48] impacts significantly on their civil liberties and dignity[49] and must be used only as a measure of last resort.[50] The HPLC therefore submits that the reach of the Act should continue to be limited to inability that results from a

[40] Ibid [39].

[41] Ibid [42].

[42] Ibid.

[43] Ibid [37].

[44] Ibid [72]–[73].

[45] Ibid [48].

[46] Ibid [48].

[47] See New South Wales Government, Attorney General's Department, Capacity Toolkit: What is 'capacity'? Information for government and community workers, professionals, families and carers in New South Wales (June 2008) p 33: "It is wrong to assume a person lacks capacity because of their age, appearance, disability, behaviour, language skills or any other condition or characteristic. In fact, it may be discrimination under the law if you make unsupported assumptions about a person's capacity because of the way they look or behave".

[48] *McDonald v Guardianship and Administration Board* [1993] 1 VR 521 at 532.

[49] XYZ, above n 39, [43].

[50] United Nations Multilateral Treaties Deposited with the Secretary-General – Status as at 1 April 2009, Volume 1, Part I, Chapters I to VII, ST/LEG/SER.E/26 p 461.

disability rather than a broader notion of "vulnerability" or "lack of capacity".[51] To use vulnerability or lack of capacity as the first step in the test of whether or not a person should have their decision-making power put in the hands of another person or entity presents a significant risk that the Act will be applied to prevent a person from making a decision that is not deemed to be "wise" or is not socially condoned. This is not the intention of the Act. The HPLC submits that substituted decision making is not an alternative to the social, medical, financial and psychological support, which is needed assist people whose capacity is limited by addiction to re-gain that capacity independently, autonomously and in a way that preserves their inherent dignity. This issue is discussed further in part 4.8 below in relation to the concept of "best interests".

The "need" for a guardian or administrator

Lay evidence is important in answering the question of whether a person "needs" a guardian or administrator under sections 22(1)(c) and 46(1)(a)(iii) of the Act (respectively); a question which will be answered by looking at the availability or otherwise of alternative arrangements outside administration or guardianship.[52]

In relation to the question of whether a person "needs" a guardian or administrator, consideration of "alternative arrangements" should not be limited to the existence of family members or close friends who are willing to assist a person to manage their identified "inability". Social isolation should not be a reason to deny a person their right to make their own decisions in relation to their lifestyle or finances through the imposition of a guardianship or administration order. To this end, the HPLC reiterates the importance of the case management service referred to in part 4.5 below. Such a service would present the potential for a person to engage with the necessary support networks, which could remove the need for a guardian or administrator and present a less restrictive means for meeting the person's needs. Without this support and practice-based changes by VCAT, the provisions of the Act which are intended to guarantee that substituted decision making is a last resort, cannot be effective in practice.

Recommendation 7

Further direction should be given to VCAT members sitting in the Guardianship List regarding the application of the tests under sections 22 and 46 of the Act. There should be a procedural requirement to consider the following checklist of factors before making a guardianship or administration order:

Disability – is it mild, moderate or severe?

Impact of the disability on the person's cognitive or decision-making capacity – is it mild, moderate, severe?

Need for an administrator – is there other support available, what is the person's exposure to or risk of exploitation and is there an enduring power of attorney?

Person's wishes – what are they and how strongly held are they?

Is the person's condition static, fluctuating, progressive or improving?[53]

[51] Given its status as a legal services provider, the HPLC is not placed to comment on the appropriateness of the current definition of "disability", which health professionals or community-based support workers are better equipped to comment on.

[52] XYZ, above n 39, [44].

[53] See John Billings, Deputy President of the Guardianship List, *The ABC and XYZ of Guardianship and Administration*, October 2007 p 6.

Recommendation 8

VCAT members should receive training in relation to the provisions under the Act and how they should be applied in practice, including the importance of lay evidence in demonstrating a person's capacity to manage their own specific lifestyle or finances.

Recommendation 9

The preliminary step in the test of whether or not a guardianship or administration order is needed should continue to be based on whether that person has a disability, not a broader notion of "vulnerability" or "lack of capacity".

4.3 Advocacy and representation

The current provisions

Under section 62 of the VCAT Act, a person does not have a right to representation by a professional advocate (which includes a lawyer or a person who VCAT considers has had substantial experience as an advocate in proceedings of a similar nature). Only if one of the following circumstances exists can a person be represented by a professional advocate:

- another party to the proceeding is a professional advocate;
- another party to the proceeding is represented by a professional advocate;
- all the parties to the proceeding agree;
- VCAT agrees; or
- the party falls within a specified class, including children, municipal councils, the State or a Minister, public entities and certain credit providers and insurers.

While in the HPLC's experience, VCAT ordinarily grants leave for an HPLC lawyer to represent a client in the Guardianship List despite none of the other factors above being present, the HPLC submits that access to legal representation for persons facing an application for a guardianship or administration order is essential and should be a legislatively protected right. Moreover, the HPLC notes VCAT's pronouncement that "[l]egal or other representation is generally not required, however anyone may be represented by a professional advocate at a hearing [in certain circumstances]".[54] Such an approach is a legislative, procedural and practice-based impediment to people engaging legal representation in relation to their guardianship and administration matters.

The need for legal representation or professional advocacy

The HPLC notes the United Nations Human Rights Committee's observation that "[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings

[54] Victorian Civil and Administrative Tribunal, 'Guardianship and Administration Hearings' available at http://www.vcat.vic.gov.au.

or participate in them in a meaningful way".[55] We further note the comments of Justice Bell in *Tomasevic v Travaglini* that "most self-represented persons lack two qualities that competent lawyers possess – legal skill and ability, and objectivity. Self represented litigants therefore stand in a position of grave disadvantage in legal proceedings of all kinds".[56]

Amongst the unrepresented litigant group, people with an experience of homelessness encounter even greater difficulties than the average person when interacting with the legal system. The very fact that a person has been brought before the Guardianship List indicates that the person experiences some degree of vulnerability and it is incongruous to expect that person to represent themselves in a complicated and unfamiliar legal process. In the absence of legal representation or professional advocacy, it is not possible for genuine and informed consideration to be given to the criteria in sections 22 and 46 of the Act *i.e.* whether or not the legislative criteria for making a guardianship or administration order are met cannot be determined in an informed way.

As noted in the Guide for Legal Advocates to the Guardianship List published by the Villamanta Disability Rights Legal Service and the Mental Health Legal Centre: "One of the most frequent concerns of those on guardianship and administration orders is that the person's views are disregarded. Lawyers have a duty to ensure that hearings are not a continuation of this experience".[57] In order for VCAT to be properly informed of the views and wishes of the person (as required under sections 22 and 46 of the Act), persons within the guardianship and administration jurisdiction require access to an advocate to make sure that these views and wishes are clearly presented to VCAT. As discussed below, this does not necessarily mean speaking on behalf of the represented person, rather it refers to provision of much broader advice, support and explanations, which assist the person to navigate an otherwise complex legal process.

In the absence of an advocate, medical evidence as to the person's disability can be given disproportionate importance, and the required nexus between that disability and the person's ability to make reasonable judgments in respect of their lifestyle or estate may be presumed rather than properly considered. As discussed below, legal advocates also have a significant role to play in identifying (both to the client and, later, to VCAT) viable alternatives to guardianship and administration orders.

In summary, the role of legal representatives in relation to represented or potentially represented persons includes:

- explaining the proceedings to their client and maximising the person's opportunity to understand the legal process they are facing, including how the hearing will work and the potential consequences if a guardianship or administration order is put in place or upheld;
- advising clients about the prospects or merits of their matter;
- reminding clients of hearing dates and times;

[55] Human Rights Committee, General Comment No. 32: The Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc CCPR/C/GC/32 (27 August 2007) [10].

[56] *Tomasevic v Travaglini* [2007] VSC 337 [128].

[57] Villamanta Disability Rights Legal Service and the Mental Health Legal Centre, *A Guide for Legal Advocates to the Guardianship List Victorian Civil and Administrative Tribunal* (2007) p 10 available at http://www.communitylaw.org.au/clc_mentalhealth/cb_pages/guardian_advocates_guide.php.

- listening to (and, if necessary, conveying to VCAT) the person's views on the impact a guardianship or administration order will have on their life;
- explaining to the person what they will need to establish to successfully have an application dismissed or a reassessment upheld, including assisting them to access and obtain supporting documentation;
- referring clients to appropriate social, health or financial support services and making the VCAT member aware that the person has access to and is engaging with these services; and
- advising clients of the prospects of review or appeal of a decision.

In relation to clients experiencing homelessness and falling within the jurisdiction of the Guardianship List, the role of legal advocates is wider than simply appearing in VCAT proceedings and this broad form of representation is central to making the system more accessible to these clients and allowing them to participate in the process in a meaningful way.

Special circumstances considerations

As a practical way of identifying the need for certain individuals to have access to legal representation in order to ensure that their right to equality before the law is protected, the HPLC suggests that a definition of "special circumstances" is incorporated into the VCAT Act. The definition of special circumstances should be framed broadly and should include, age, disability, mental health, addiction, homelessness, cultural, linguistic and socio-economic factors.[58]

We also recommend that section 62 of the VCAT Act should be amended to provide that where special circumstances can be established, a party may be represented by a professional advocate. Further, we recommend that VCAT develop a guideline whereby, if members become aware that an unrepresented party may have special circumstances, the matter is stood down so that the individual can obtain representation or, at the very least, legal advice.

The HPLC also encourages VCAT to use its power under section 62(6) of the VCAT Act to appoint a professional advocate if a person is unrepresented in a proceeding in the event that it identifies that the person has special circumstances.

Any amendment to the VCAT Act to recognise a person's special circumstances and consequent need for legal representation should be accompanied by a clear legislative or policy change which provides that a person's special circumstances will not be taken as evidence of inability or incapacity for the purpose of determining whether a guardianship or administration order should be made. Any identified special circumstances, while recognising a degree of vulnerability and the need for representation in a complex and unfamiliar legal process, cannot be equated with incapacity in terms of managing a person's lifestyle or estate.

Case Study – the importance of legal representation

Ashley suffers from schizoaffective disorder and is subject to a Community Treatment Order under the *Mental Health Act* 1986 (Vic). He has a case worker who he reports to every fortnight.

[58] Homeless Persons' Legal Clinic and Seniors Rights Victoria, *Submission to the VCAT Review* (June 2009), p.13.

When his father died, Ashley inherited a significant sum of money. Upon learning that Ashley would be receiving a large sum of money, his case worker applied to VCAT for an administration order. The case worker later informally indicated to the HPLC lawyer that this was "a matter of course" when patients came into a large sum of money.

An HPLC lawyer provided Ashley with legal assistance to oppose the application for an administration order. The HPLC lawyer received a short note regarding the basis for the application, which stated that Ashley suffered from schizoaffective disorder, he had inherited some money and that his case worker had concerns that he would spend it.

The hearing was adjourned three times by consent as the HPLC lawyer had no material to respond to and more time was given to the applicant to provide supporting materials.

The case worker then withdrew the application, which Ashley and his HPLC lawyer consented to. At approximately the same time, Ashley received his inheritance and banked it into a term deposit account.

VCAT responded to the withdrawal, stating that it was going to conduct its own investigations and review. The HPLC was contacted by the Office of the Public Advocate as part of VCAT's investigation, and was asked questions about the money and the client's term deposit with the bank.

The matter was then listed for hearing, despite the applicant having withdrawn from the matter. The HPLC lawyer compiled supporting documentation and prepared detailed submissions to VCAT explaining the matter. The HPLC lawyer also attended the hearing with Ashley. The case worker who had initially made the application did not appear. VCAT made orders dismissing the application.

Ashley's case raises significant concerns that, if he had not had legal representation or advocacy to oppose the application, the administration order would have been granted based on an application that was made as a "matter of course". This case reiterates the importance of legal advice and advocacy in the Guardianship List. While the HPLC appreciates the notion that VCAT is intended to be a simple, quick and accessible jurisdiction, the inherent inequality between parties in the Guardianship List — in this case, Ashley, who has a mental illness and was experiencing homelessness because his siblings had sold the family home, and his case worker who has a tertiary education and is experienced in dealing with administrative bodies — presents a strong reason for providing access to professional advocates. Legal representation can be a means of correcting the inequality between parties and avoiding people being subjected to extreme limitations on their lives and autonomy because they are unable to present convincing legal arguments to the contrary.

Recommendation 10

The VCAT Act be amended to include a broad definition of special circumstances and to provide that, under section 62 of the VCAT Act, a person is entitled to representation by a professional advocate if it is apparent that they have special circumstances.

Recommendation 11

VCAT should be required to take a more pro-active role in (a) identifying when a person in the Guardianship List who is unrepresented needs representation; and (b) taking measures such as adjournment or appointment of a representative to address this need.

Recommendation 12

There should be a clear legislative requirement or policy directive that any acknowledgement of a person's special circumstances under the amended VCAT Act will not be taken as evidence of inability or incapacity for the purpose of determining whether a guardianship or administration order should be made.

4.4 Practical and procedural barriers to "the least restrictive option"

The objects set out in section 4(2) of the Act state that Parliament intended that the provisions in the Act be interpreted, and powers and functions imposed under the Act be exercised, so that:

- the means adopted is the least restrictive of a person's freedom of decision and action as is possible in the circumstances;
- the best interests of the person with a disability are promoted; and
- the wishes of the person with the disability are given effect to wherever possible.

While HPLC accepts that this is the intention of the legislation, these objectives are not always achieved in practice.[59] This submission considers some of the practical and procedural barriers which mean that people experiencing homelessness may have a guardianship or administration order imposed or upheld when less restrictive measures are available. Factors contributing to this situation can be grouped in two categories, which we have defined as procedural and structural factors.

- Procedural – in our experience, there is a lack of awareness of VCAT members of the support services that may be available to represented persons to assist them to manage their lifestyles and finances without the need for a guardianship or administration order. The causes of this lack of awareness include:
    - inadequate training and education of VCAT members regarding the broader environment in which represented persons are living; and
    - the fact that that individuals facing a guardianship or administration order are frequently unrepresented at the hearing where the order is imposed or upheld, meaning that there is no-one to advocate on their behalf and bring any relevant alternatives to the VCAT member's attention; and
- Structural – existing support services are extremely stretched in terms of funding and resources, which frequently results in long waiting periods and limited accessibility. Even where services are available, people experiencing homelessness, who are socially and financially isolated, are often not aware of, or engaged with, these supports.

The need for legal representation and professional advocacy is discussed above in part 4.3. In terms of improving the knowledge, understanding and awareness of VCAT members in relation to the social, health, financial support services, ongoing training for VCAT members sitting on the Guardianship List should be

[59] See, eg, *XYZ v State Trustees Limited* [2006] VSC 444 at [22] where Cavanough J gave counsel for the applicant leave to carry out a survey of recent decisions of VCAT in the Guardianship List and to report in writing to the Court as to the extent to which section 4(2) of the Act was specifically mentioned in the reasons for the decision. Cavanough J noted that the survey was inconclusive, "mainly do to the apparent fewness of comparable, publicly accessible decisions".

provided. Examples of the services that a person may access to assist them to manage their lifestyles or finances include:

- counselling or mental health support services;
- housing workers;
- case workers;
- occupational therapists and speech therapists;
- financial counsellors; and
- meal delivery services.[60]

In respect of administration orders, simple measures can be taken to assist a person to manage their money independently. These include:

- using separate accounts for saving and spending and dividing pensions or other income between these accounts;
- setting up automatic funds transfers for regular expenses such as rent and health care payments; and
- using Centrepay, Centrelink's direct bill-paying service, to help make sure that certain bills are regularly deducted from a person's Centrelink payment.

Without a comprehensive understanding of alternative support services available to people facing guardianship and administration orders, VCAT members cannot properly consider whether the person's needs can be met by "less restrictive means". For people experiencing homelessness and social dislocation, community and government-based support services must be considered as the kinds of alternative arrangements that mitigate the need for an order – support from family and close friends cannot be seen as the only alternative to guardianship or administration.

Recommendation 13

VCAT members should be give thorough and ongoing training on social, health and financial support services available to people throughout Victoria, which may provide a person with the additional support they need without the need for a guardianship or administration order.

4.5 Case management

A common issue faced by people experiencing homelessness is a lack of engagement with support services and networks. This lack of engagement, as well as the common dislocation from family and friends, means that these people have fewer of the informal support mechanisms that often provide a viable alternative to guardianship and administration. However, it is not adequate simply to look at the person's existing situation; it is necessary under the Act to consider whether the person's needs "could" be met by less restrictive means.[61] To enable compliance with this legislative requirement, and to meet the Act's stated objective of meeting a persons needs in a way that is "least restrictive of a person's freedom of decision and

[60] See, eg, ServiceSeeker Community Directory at http://www.serviceseeker.com.au/.

[61] *Guardianship and Administration Act* 1986 (Vic) ss 22(2)(a) and 46(2)(a).

action",[62] the HPLC recommends the implementation of a case management program as part of the Guardianship List.

This program could be modelled on the initiative at the Victorian Magistrates' Court, the Court Integrated Services Program (**CISP**). CISP was established by the Department of Justice and the Court to help defendants receive support and referral to social services and reduce rates of re-offending. The HPLC considers that, in light of the serious consequences of proceedings in the Guardianship List, including the potential imposition of significant limitations on a person's autonomy, it is extremely important to have a program that can provide assistance and referrals to help people engage with services that can support their health, social, housing, legal and other needs.

Such a program would have multiple benefits, including that it would:

- identify people being brought before the Guardianship List who are in need of support;
- link these people in with services that could provide the support needed;
- assist the person to demonstrate whether or not, with the appropriate support, they are able to manage their own lifestyle or estate *i.e.* it would identify less restrictive means of providing support and possibly remove the need for a guardian or administrator; and
- build knowledge of, and engagement with, relevant support services and networks into VCAT's procedural and operational framework, therefore making VCAT more aware of the support services available to people coming before the Guardianship List.

Guardianship and administration orders should not be used to "fill the gap" in the lives of marginalised people who do not have "informal supported decision-making arrangements" provided by family and friends as an alternative to a formal guardianship or administration order.[63] An individual case management service that proactively links homeless or marginalised people with appropriate support services would assist in ensuring that guardianship and administration orders are genuinely a last resort, and not a substitute for adequate financial, psychological and health support services.

Recommendation 14

A case management program modelled on the Victorian Magistrates' Court's Court Integrated Services Program, should be implemented in the Guardianship List at VCAT to improve people's access support services that might provide a viable less restrictive means of support than a guardianship or administration order.

4.6 Reassessment of orders

Under section 61 of the Act, VCAT must conduct a reassessment of a guardianship or administration order:

- within 12 months after making the order, unless VCAT orders otherwise; and
- in any case, at least once within each 3 year period after making the order unless VCAT orders otherwise.

[62] *Guardianship and Administration Act* 1986 (Vic) s 4(2).

[63] Ben Fogarty, Intellectual Disability Rights Service, 'Guardianship and Administration Law Across Australia' (2009) p 6.

Any person may also apply for reassessment under section 61.

The reassessment mechanism in the Act is extremely important. Essentially, it is the legislative mechanism for recognising that numerous factors in that person's life will change over time and for acknowledging people's potential for improvement. As identified by John Billings, former Deputy President of the Guardianship List:

> "… what the person's best interests require may change over time. When it is also considered that the person's condition can be static, progressive, fluctuating or improving it will be obvious that, as the legislation requires, an administration order should never be made 'once and for all' but should be reassessed later on".[64]

The HPLC submits that at present, a number of legal, policy and procedural factors mean that the reassessment process is not working as effectively and equitably as it should, meaning that some orders are effectively being made "once and for all". In particular, we note the following comments of service providers operating in the mental health and disability sector:

> "With relative ease, it seems, an applicant can get an order, as the evidence is not tested. An application form may be simply accompanied by a medical report stating that there is disability, but capacity is not addressed. However, to reverse a Tribunal decision a supportive specialist opinion may be required." [65]

> "Once a person is under formal orders, it is difficult for the person to have those orders revoked or varied – the evidentiary onus lies with *them* to prove they have re-gained capacity to manage their affairs or there is no longer a need for an order or that it is not in their best interests to have one".[66]

A key issue in the reassessment process is the accessibility of necessary expert reports, which is discussed in part 4.7 below.

Furthermore, unlike sections 22 and 46 of the Act, which prescribe the factors that must be considered before making a guardianship or administration order, the Act does not provide any direction as to what must be considered by VCAT members reassessing a guardianship or administration order. While, presumably, when carrying out a reassessment of an order the VCAT member should again step through the criteria used to make the order (i.e. whether the person has a disability; whether they are unable to manage their lifestyle or estate as a result of the disability; and whether an order is needed, keeping in mind the person's wishes and any less restrictive means), in our experience, this is not necessarily the case.

VCAT members reassessing guardianship or administration orders should be required to genuinely reconsider whether the prerequisites for substituted decision-making are still present in the person's life. Importantly, it should not be presumed that capacity has not been re-gained unless proven otherwise; a genuine reassessment that properly contemplates the potential for improved capacity and increased access to less restrictive means should be carried out.

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[64] John Billings, 'The ABC and XYZ of Guardianship and Administration' (VCAT) [2007] Victorian Judicial Scholarship 13.

[65] Villamanta Disability Rights Legal Service and the Mental Health Legal Centre, above n 57, p 10.

[66] Fogarty, above 63, p 6.

Again, the assistance of a case management services, the involvement of a professional advocate and the use of trial periods (see parts 4.3, 4.5 and 5.2) in the reassessment process will assist in ensuring that section 61 of the Act provides the protection from "once and for all" orders that it is intended to.

Recommendation 15

The reassessment of orders under sections 61 to 63 of the Act should be carried out in a way that genuinely contemplates the potential for changes in the circumstances of the represented person, including the potential for improved capacity and increased access to less restrictive means of support.

4.7 Obtaining supporting documentation

The HPLC submits that, in our experience of working with clients in relation to guardianship and administration matters, the documentation required to support an application for reassessment is extremely difficult to obtain, particularly for marginalised clients with limited financial means.

People with mental illnesses, intellectual disabilities or brain injuries who are homeless experience additional barriers to accessing mental health and medical services, including financial barriers, lack of transportation, competing needs, lack of documentation (including proof of identity and medical records), lack of a Medicare card, lack of contact details, reluctance to engage with services due to previous negative experiences, inability to access services and navigate the service system, difficulty keeping appointments, disconnection from supportive social networks and stigma and prejudice arising from homelessness. Homeless people may also face discrimination from providers of mental health care and treatment on the basis of their homelessness, and are less likely to have access to resources and support systems to assist them in asserting their rights.[67] In a practical sense, being homeless makes it harder to maintain contact with service providers, to keep appointments (including medical appointments) and to provide necessary documentation.[68]

Case Study – inaccessibility of supporting documentation

Margaret, who first approached the HPLC in 2002, is under an administration order with State Trustees Limited as her administrator. She has an acquired brain injury, which means she has trouble budgeting. The HPLC has represented Margaret in two VCAT reassessment hearings. In both cases, there were significant difficulties in obtaining medical reports. While the HPLC lawyers have access to a neuropsychological report from some years ago, this is dated and inadequate. The waiting period for a neuropsychological assessment is approximately six weeks and the quoted cost was $847. The HPLC called various institutions that offered neuropsychological reports, but found they only offered them to existing patients.

Due to the expense, difficulties with the client's participation and lack of support from the client's case workers, the HPLC lawyers have been unable to obtain the expert report required to have the administration order properly reassessed. Instead, although Margaret wishes for the order to be revoked, she has instructed her lawyer to liaise with State Trustees Limited to negotiate a degree of independence under the existing order.

[67] See Chris Povey, Senior Lawyer, PILCH Homeless Persons' Legal Clinic, 'HPLC Submission to the Review of the Mental Health Act 1986' (27 February 2009).

[68] Ibid.

As is clear from Margaret's case, the inaccessibility of supporting expert reports is a major obstacle to represented persons being able to have their case fairly heard which, in this case, resulted in Margaret giving up on her attempts to have the order revoked. VCAT members need to recognise the practical difficulties people will face in obtaining the reports required to support a represented person's application for reassessment. In the short term, VCAT members who are aware of this difficulty should adjourn hearings until the relevant supporting documentation is able to be obtained.

In the longer term, however, measures should be taken to make the required supporting expert reports easier to obtain. One initiative which would help this process would be the creation of a template expert's report which addresses specific issues that are relevant to the reassessment of a person's guardianship or administration order. We acknowledge the Medical/Psychological Report template provided on the VCAT website, however, we do not accept that this is appropriate or adequate for the purposes of reassessing an administration order. In our view, this form encourages a protectionist approach to the medical assessment, including through the statement: "The information that you provide in this form will help VCAT decide whether to make an order to protect the [relevant] person".[69]

The form provides 2 to 4 lines for the GP, specialist or other health professional to comment. It is essentially a "tick a box" style document by which VCAT "requests your opinion as to whether the person's disability makes the person unable to make reasonable decisions" in respect of the very broad categories of health care, general living circumstances (including accommodation) and financial and legal affairs. Not only is this form not adequate for the purposes of reassessment, it should not be used for the purposes of applying for guardianship or administration orders. Any such form should be redeveloped with a focus on the need for the medical or health professional to balance any need for protection with the person's right to individual autonomy and freedom of choice.

The minimal evidentiary requirement for obtaining a guardianship or administration order, which requires only that an application form is accompanied by a medical report stating that there is a disability, effectively prevents guardianship and administration orders from being a last resort. This situation is exacerbated by the higher evidentiary requirement that is imposed on people seeking to have the order reassessed with a view to revocation. This inconsistency means that, particularly for people experiencing homelessness and its concomitant social and financial hardship, a guardianship or administration order risks being a "life sentence" rather than a temporary last resort during a time while other options are not available.[70]

The HPLC submits that, if a template document is developed for experts to use when preparing reports for the purposes of applications and reassessments, this document should contain questions specifically directed to assessing the person's capacity and whether or not, because of their incapacity, they are unable to manage their lifestyle or financial affairs. Health professionals and community service providers should be engaged in developing this template medical report. Such a document has the potential to minimise the burden on mental health professionals preparing these reports, therefore, making them more accessible to the people who need them. It will also result in a level of consistency in the information that VCAT members are receiving and considering.

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[69] See The Guardianship List VCAT – Medical/Psychological Report available at http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/guardianship/$file/medical-psychological_report-guardianship_list.pdf.

Also in relation to evidence, the HPLC notes the importance of VCAT considering lay evidence and evidence from the represented person (with the assistance of a professional advocate if necessary), in determining whether or not the person is able to manage their own decision-making as required by their specific lifestyle or financial circumstance. This is discussed further above in part 4.2 in relation to capacity.

Recommendation 16

When necessary, VCAT members should grant adjournments to allow a person that is opposing an application or applying for a reassessment to obtain the necessary supporting documentation.

Recommendation 17

New documentation should be developed by VCAT, in co-operation with mental health and disability support service providers, to assist experts providing reports in relation to guardianship and administration order applications and reassessments.

4.8 Empathy of VCAT members and "best interests" decisions

Poor decision making, different lifestyle choices or irresponsible spending do not themselves mean that a person is unable, by reason of their disability, to manage their lifestyle or estate and so are in need of a guardian or administrator. Recognising that it is often difficult to see past evidence of such patterns, particularly when combined with behavioural issues such as yelling or becoming distressed in a VCAT hearing, the HPLC recommends that VCAT members should be trained so as to avoid confusing such factors with incapacity.

We support the Commission's consideration of “best interests” based decision-making: "It is unclear whether a best interests decision can take account of the fact that all independent adults have the right to take risks and sometimes make 'bad' decisions"; and its consideration of the extent to which protection should override freedom of decision and action when a substitute decision-maker has the responsibility of making a decision in the best interests of a represented person.[71] We further note the comments of the Villamanta Disability Rights Legal Service and the Mental Health Legal Centre:

> "VCAT is not a vehicle for interference in the affairs of people who simply make errors of judgment or are unwise decision makers. Service providers and family members might apply for an administrator, in order to limit the person's income, to stop them drinking, using drugs or gambling. Such applications are not appropriate unless the person by reason of their alleged disability is making unreasonable decisions".[72]

The role for professional advocates is also important here, because the preparation and presentation of information and arguments which disprove assumptions that might otherwise be formed will be of great importance at the hearing. By way of example, a professional advocate might be able to present evidence of

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[70] See John Poulsen and Kelly Shore, ‘Guardianship and Administration, Impaired Capacity and Homelessness: An Indefinite Sentence of Dependence?’ (2009) 2(2) *Queensland Law Student Review*.

[71] Information Paper, above n 21, p. 51.

[72] Villamanta Disability Rights Legal Service and the Mental Health Legal Centre, above n 57, p 14.

the person's lifestyle or activities prior to the alleged disability, thus proving that the person's disability is not the cause of those choices.

In relation to this issue, the HPLC notes the Commission's consideration of whether concepts such as lack of "capacity" and "vulnerability" would be more appropriate than the current reference to "disability" in the Act. The Information Paper also states that the Commission will consider whether, if a lack of "capacity" is used as the trigger for the operation of new guardianship laws, a range of different people, including those with various additions, could fall within the amended laws. The HPLC strongly reiterates the comments of the Villamanta Disability Rights Legal Service and the Mental Health Legal Centre above and cautions against an overly protectionist approach at the expense of individual autonomy.

Case study – protective jurisdiction

James was in his forties. He had an intellectual impairment from birth and had been under an administration order for all of his adult life. His mother was his original administrator and, when she became too elderly, his brother was appointed.

James recognised that, when he was younger, the administration order was necessary as his behaviour was erratic and he lacked the capacity to manage his own money. Now, though, he had stable employment, was living independently and had put a great deal of effort into getting his life back on track. He wanted the administration order revoked to reflect this progress and his regained capacity.

A neuropsychological report was eventually obtained, which noted that, with adequate support and carefully maintained routines, James was capable of managing his own finances. In recognition of this expert report, as well as James's employment and demonstrated ability to save and budget with the allowance his administrator provided and his nominal income, the VCAT member granted James a "trial period" of financial independence where James would manage his income but a lump sum that had been saved on his behalf would remain under his administrator's control. During this nine month period, James managed his entire Disability Support Pension (**DSP**) – he paid his bills, saved for a microwave and television set and budgeted for and organised an overseas and interstate holiday.

When it came time for the success of the trial period to be assessed, however, the VCAT member who had followed James's progress and who had ordered that the trial period be undertaken, was not scheduled to preside over the hearing (despite a written request that this be the case).

In preparation for the hearing, James's HPLC lawyer had compiled his bank statements from the trial period to show consistent patterns of spending and saving, including, for example, a consistent routine of carrying out grocery shopping on Thursdays immediately after his DSP was deposited. These bank statements also showed a number of ATM withdrawals at a casino. In addition to the withdrawals, the statements showed a number of significant deposits, which appeared to be the winnings from the casino.

While there was no evidence to indicate that James's disability was still a cause of him being unable to manage his finances – he had not had to seek assistance from his administrator, he had saved significant amounts of money, he had paid his bills and shopped regularly for groceries – the VCAT member held that the administration order should remain in place.

It was the "best interests" decision making model that was used to justify this decision, rather than a consideration of the evidence, James's wishes or evidence of any causal link between James's disability and his capacity to manage his money. The "best interests" model for decision-making encouraged a protectionist approach and, in this case, meant that James was not given the autonomy to make his own decisions, including if he wished, to gamble at the casino on occasion. The decision was detrimental to

James's self-esteem and independence – he saw it as a rejection of the progress and effort he had made in terms of rebuilding his own capacity and learning to manage his affairs.

Recommendation 18

The concept of "best-interests" should be removed from the Act, both in relation to the decision to make a guardianship or administration order and the obligations of the guardian or administrator under the order.

4.9 Rehearing and appeals

Under section 60A of the Act, a party to the hearing (or someone entitled to notice of the application) can apply for a rehearing of an application in relation to which a guardianship or administration order has been made within 28 days of the order being made.[73] This option is not available in certain cases, including where the order was made by the President of VCAT, was an interim order or was an application for a rehearing.[74]

A person can request written reasons for the decision to make the order within 14 days of the order being made (under section 117 of the VCAT Act). If these written reasons are requested, the 28 day period to lodge the application for rehearing starts running from the date the written reasons are provided.[75]

At the rehearing, VCAT may affirm, vary or set aside and replace the order at first instance.[76]

If a person does not apply or is unsuccessful under section 120 of the VCAT Act or section 60A of the Act, their only other option for review of the decision is an application to the Supreme Court of Victoria under section 148 of the VCAT Act in relation to "a question of law". If there is no identifiable error of law, it is not possible to appeal the VCAT decision.

In order to exercise this right of appeal, a person must make an application for leave to appeal under the *Supreme Court Act* 1986 (Vic) and an originating motion, supporting affidavit and notice of appeal must be filed and served. It is a complicated and legalistic process, which must be completed within 28 days of VCAT's initial order. As noted by Poulsen and Shore, "inexperienced litigants may not fully comprehend or appreciate the consequences of the time limits involved in bringing an application and may still be struggling to deal with the difficult ramifications of the original decision".[77]

In addition, while generally each party to an appeal will be required to bear its own costs, there is also a risk that the Court will order the party to pay the other party's costs.

In practice, the right of appeal to the Supreme Court is not a right that is accessible to homeless clients – it is complicated and expensive and it has been described as akin to "using a proverbial sledgehammer to crack a nut".[78]

[73] *Guardianship and Administration Act* 1986 (Vic) s 60A(1) and (4).

[74] *Guardianship and Administration Act* 1986 (Vic) s 60A(6).

[75] *Guardianship and Administration Act* 1986 (Vic) s 60A(5).

[76] *Guardianship and Administration Act* 1986 (Vic) s 60C(2).

[77] Poulsen and Shore, above n 70, p 134.

[78] Ibid citing Terry Carney, 'Challenges to the Australian Guardianship and Administration Model?' (2003) 2 *Elder Law Review* p 8.

Written reasons and transcripts

Transcripts and reasons are critically important to a person's ability establish an error of law before the Supreme Court as required by the appeals process under section 148 of the VCAT Act. Without this material, it will be difficult for a person to establish that there was and error of law in the decision which they seek to challenge.

The process for obtaining reasons is not clear and accessible. Section 117 of the VCAT Act provides that VCAT must give reasons for any order it makes in a proceeding (other than an interim order), within 60 days after making the order (unless otherwise specified by the President). If VCAT gives oral reasons, which is common in the Guardianship List, the person may request written reasons, but this request must be made within 14 days of the order. VCAT can take up to 45 days to provide these written reasons.[79] We note that, under the *Guardianship Act* 1987 (NSW), the Guardianship Tribunal must provide each party to the proceedings with formal written reasons for the decision as soon as practicable after making the decision.[80]

We further note that the Guidelines for Obtaining Transcripts of VCAT Proceedings state that only proceedings at the King Street hearing rooms will be recorded; hearings at other locations, which are often more accessible to low income clients than inner-city Melbourne, are rarely recorded.[81] Even where hearings have been recorded, it can be both time consuming and expensive for an individual to obtain a transcript. The person must first make arrangements with an approved transcription service, before requesting the recordings be provided by VCAT. This is an unfamiliar and complicated process which, in addition to the expense of obtaining transcripts, increases the cost and complication of appealing to the Supreme Court so that it is prohibitive for people experiencing homelessness or other marginalised Victorians.

The HPLC is regularly contacted by clients who did not receive legal advice or representation prior to their hearing and were subsequently unsuccessful. They seek advice on their options to appeal the decision, but too often it is the case that these clients have no options before them because they do not have the written reasons or a transcript which would be needed to establish an error of law.

In addition to leaving open the door to a person's limited appeal options, the provision of written reasons for all decisions in the Guardianship List would promote consistency, quality and confidence in the decisions handed down. The HPLC has previously argued for the creation of an appeals board within VCAT,[82] which was supported by the previous President of VCAT[83] but rejected by the current President. While beyond the scope of this submission, the HPLC notes that there is significant scope to improve the consistency, quality and confidence in VCAT decisions, and providing appropriate and accessible appeals mechanisms may be a suitable vehicle.

Recommendation 19

[79] *Victorian Civil and Administrative Tribunal Act* 1992 (Vic) s 117.

[80] *Guardianship Act* 1987 (NSW) s 68(1B).

[81] Victorian Civil and Administrative Tribunal, 'Guidelines for Obtaining Transcripts of VCAT Proceedings' available at http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/application_forms_miscellaneous/$file/transcript_application_form_and_guidelines.pdf.

[82] Homeless Persons' Legal Clinic and Seniors Rights Victoria, *Submission to the VCAT Review* (June 2009), pp 1–26.

[83] Hon. Justice Kevin Bell, *One VCAT: President's Review of VCAT* (November 2009), pp 55–60.

Recording facilities should be installed and operated at all VCAT hearing locations and transcripts should be provided free of charge to clients who satisfy the "special circumstances" criteria discussed in part 4.3 above.

Recommendation 20

An appeals board within VCAT should be created.

5. Working with an order in place

5.1 Content and types of orders – plenary and limited

The Information Paper recognises that "for VCAT, making the least restrictive decision involves resorting to substitute decision-making as a last resort and limiting the scope of the powers of a substitute decision-maker and the length of time those powers can be used".[84] However, the current structure of the Act in relation to plenary and limited guardianship orders and general administration orders means that these orders are not genuinely the least restrictive option available.

The Act sets out a clear distinction between limited and plenary guardianship orders. A plenary guardianship order can only be made when VCAT is satisfied that a limited guardianship order would be insufficient to meet the needs of the represented person.[85] Under a plenary guardianship order, the guardian has "all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person were his or her child".[86] The HPLC supports the Commission's statement that this provision is "outdated and unclear."[87] The powers of a plenary guardian include (without limitation), making decisions for the represented person in respect of:

- medical treatment, including dental treatment or other health care;
- accommodation, including the type of housing they need, and where that is located;
- employment, including the nature and type of work and the person's employer; and
- access to the person, including restricting and allowing particular people to have contact with the represented person. [88]

Section 25 of the Act provides that a limited guardian will have one or more of the above powers, as is specified in the order *i.e.* if it is not stated in the order, it is not within the scope of the limited guardian's power.

[84] Victorian Law Reform Commission, Guardianship Information Paper [date] p. 16.

[85] Guardianship and Administration Act 1986 (Vic) s 22(4).

[86] Guardianship and Administration Act 1986 (Vic) s 24(1).

[87] Commission Information Paper, above n 21, p 19.

[88] *Guardianship and Administration Act* 1986 (Vic) s 24(2).

By contrast, while VCAT can make limited administration orders, in our experience, administration orders are rarely prescriptive in terms of the scope of the administrator's duties. In the absence of clearly worded orders setting out what the administrator's duties and obligations are, and what they are not, the order becomes plenary by default. This is inconsistent with the principle set out in the Act which requires the order to be the least restrictive of the person's freedom of decision and action as is possible in the circumstances.[89]

Furthermore, without any guidance as to what the administrator's powers are, and what they are not, it is difficult to satisfy the requirement under section 49(2)(a) of the Act that the administrator must exercise power in such a way as to encourage and assist the represented person to become capable of administering his or her estate.

With a view to preserving or encouraging a person's independence to the greatest degree possible, the HPLC recommends that plenary guardianship orders be abolished and, for both guardianship and administration, only limited orders should be available. These orders should clearly set out what the powers of the guardian or administrator are. For example, in the case of an administration order, the order could provide that the person or entity is appointed as limited administrator of the represented person with powers and duties to:

- receive the represented person's fortnightly Disability Support Pension (**DSP**);
- make payments of rent and health care from that DSP; and
- deposit any remaining amount from the fortnightly DSP into the represented person's personal account fortnightly.

In this example, the represented person's independence will be preserved in terms of their payment of bills, grocery shopping and leisure spending; he or she will also have the opportunity to save any amounts they do not spend, at his or her own discretion.[90]

Importantly, this process of developing guardianship and administration orders will mean the way in which the order will operate in practice will be thought about and discussed between the parties and VCAT at the hearing, before the order is made or varied. Justice Cavanough referred to the importance of this in XYZ when he stated:

> "The Tribunal needed to determine exactly what likely challenges and risks lay ahead of the plaintiff. If incapacity were found, did it extend to all or only some parts of the plaintiff's affairs? Should any administration order be moulded accordingly?"

The existence of plenary guardianship orders and the lack of guidance as to the proper scope of administration orders remove any impetus for express consideration to be given to what decisions the represented person still has capacity to make once the order is in place. The requirement to specify the particular responsibilities of the guardian or administrator in the order will:

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[89] *Guardianship and Administration Act* 1986 (Vic) s 46(4).

[90] See New South Wales Government, above n 47, p 19 which explains that capacity is decision-specific: "It is very rare for a person not to have capacity for any decisions … More often, people lack capacity only in making one sort of decision. For example, a person might be able to decide where they want to live (personal decision), but not be able to decide whether to sell their house (financial decision). They can do their grocery shopping (make a simple decision about money), but not be able to buy and sell shares (make a more complex decision about money)".

- assist VCAT in its decision-making process as it will necessitate proper consideration of the person's capacity to make specific decisions in their everyday life and genuine contemplation of less restrictive means available to support that decision-making; and
- if a guardianship or administration order is made, ensure that the scope of the encroachment on the represented person's independence and autonomy is as limited as possible and is properly tailored to that person's decision-making capacity.

While the HPLC recognises that this may be seen to curtail the power of the guardian or administrator in the event that circumstances change, it would simply be a matter of applying to VCAT for a variation of the order in the event of such a change. Under the Act as it currently stands, this would need to be done by applying for a reassessment under section 61(4)(b); the Commission should consider whether it would be appropriate to amend the Act to expressly provide for amendment of existing orders in light of the proposed higher level of specificity of those orders.

Given the protection this proposed process would provide against the already serious intervention in a person's lifestyle being given broader scope than necessary, a slightly increased administrative burden is not unreasonable. We note that these proposed changes will increase the importance of legal representation for people facing guardianship or administration order applications.

Recommendation 21

The concept of plenary guardianship orders should be removed from the Act and both guardianship and administration orders should be limited to those powers set out in the order.

Recommendation 22

Training and practice guides should be issued to VCAT members presiding on the Guardianship List to assist them in formulating orders that are appropriately moulded to the particular represented person's decision-making capacity and lifestyle.

5.2 Use of trial periods

In recognition of the potential difficultly of itemising what a guardian's or an administrator's role will be at the time of making or reassessing an order (see part 5.1 above), the HPLC endorses the practice of some VCAT members on the Guardianship List of ordering a "trial period". This period can be used to assess (a) the need for a guardianship or administration order; and (b) in the event that an order is required, what powers, duties and obligations the guardian or administrator should have under the order and what aspects of the represented person's independence can be expressly preserved.

By way of example in the context of administration, while the administration order technically remains in place, the represented person is given a significant degree of financial independence (for example, receiving all of their fortnightly Centrelink benefit, but not being given access to any sum of money that has been saved on their behalf by the administrator) and is given time to show whether or not they are ready to manage their own finances. Alternatively, in the case of a person who is the subject of an application for a guardianship or administration order, VCAT could direct that person to seek the assistance of a case worker, financial counsellor and/or a housing support worker (a process that could be greatly assisted by the case management support services recommended in part 4.5 above) and to return to VCAT in a specified period to assess the success of this less restrictive means of support.

These simple steps give effect to the notion that the imposition of a guardianship or administration order is meant to be a measure of last resort; taken only once it is clear that less restrictive means have been properly explored and have been unsuccessful.

Recommendation 23

Where possible, in response to an application for a guardianship or administration order, VCAT should order a trial period be carried out to determine (a) whether the order is needed; and (b) if an order is needed, the specific powers that the guardian or administrator should have under the order (with all non-specified powers remaining with the represented person).

5.3 Obligations of guardians and administrators and review of their decisions

Obligations of guardians and administrators

The HPLC recommends that guardians or administrators should be required to attend a training and support session on their roles and obligations. While we recognise that courses are currently run, we understand that they are optional in nature. Given the significance of the role of guardians and administrators and their complex obligations, including encouraging the represented person to become independent, the HPLC believes that these courses should be a condition of assuming the role of guardian or administrator.

While it is our recommendation that the concept of "best interests" be removed from the Act because it encourages a protectionist approach, the HPLC supports the obligations identified as part of the "best interests" provisions in the Act and recommends that these are retained under a different label. Under section 28 of the Act guardians are required to (as far as possible):

- act as an advocate for the represented person;
- encourage the represented person to participate as much as possible in community life;
- encourage and assist the represented person to become capable of caring for themselves or of making reasonable judgments in respect of maters relating to his or her lifestyle;
- protecting the represented person from neglect, abuse or exploitation; and
- act in consultation with the represented person, taking into account as far as possible, the wishes of the represented person.

For administrators, the parallel requirements in section 49 of the Act require the administrator to (as far as possible):

- encourage and assist the represented person to become capable of administering their estate; and
- act in consultation with the represented person, taking into account as far as possible, the wishes of the represented person.

Further, while being cognisant of the burden on guardians and administrators, many of whom are family members rather than professional service providers, in light of the significant implications for the represented person's independence, civil liberties and general well being, we recommend that guardians and administrators should be required to keep records about decisions made under guardianship and administration orders. Such record keeping should be used to ensure that processes are transparent and subject to independent or judicial review.

We also recommend that the power of VCAT under section 58(2) of the Act to exempt an administrator from their obligation to provide annual accounts (including a full statement of the assets and liabilities of the estate and all receipts and disbursements) to VCAT or an auditor, be used only in exceptional circumstances. We see this role of financial reporting to be central to the accountability of the administrator, as well as to the represented person's right to be consulted in decision making and treated in a way that encourages the represented person's financial independence.

Review of guardian's or administrator's decisions

The Act does not contain a mechanism for the decisions of guardians or administrators to be formally reviewed. A represented person can complain directly to the guardian or they can apply to have the entire order reassessed under section 61 of the Act.

In our view, this gap in the Act accentuates the inherent power imbalance between the guardian or administrator and the represented person – although there are requirements about how to make decisions, the represented person is voiceless in holding their guardian or administrator accountable for those decisions.

The HPLC notes that, under the *Guardianship Act* 1987 (NSW), decisions made by the public guardian are subject to review by the Administrative Decisions Tribunal.[91] We submit that a provision allowing represented persons to seek review of decisions made by their guardian or administrator is necessary to improve accountability of guardians and administrators, give represented persons a degree of empowerment in relation to decisions made about their lives and, more generally, improve public confidence in the guardianship and administration regime.

Recommendation 24

All guardians and administrators should be required to attend annual training on their duties and obligations as a condition of taking on the role.

Recommendation 25

Guardians and administrators should be required to keep records of all decisions made under the order.

Recommendation 26

The requirements that are currently identified under the "best interests" provisions in sections 28 and 49 of the Act should be relabelled in recognition that the notion of "best interests" encourages a protectionist approach rather than a focus on autonomy.

[91] *Guardianship Act* 1987 (NSW) s 80A (review by ADT of guardianship decisions of Public Guardian) provides that an application can be made to the Administrative Decisions Tribunal (**ADT**) for a review of a decision of the Public Guardian that: (a) is made in connection with the exercise of the Public Guardian's functions under the Guardianship Act as a guardian; and (b) is of a class of decision prescribed by the regulations for the purposes of section 80A. The application can be made by: (a) the person to whom the decision relates; (b) the spouse of the person; (c) the person who has the care of the person to whom the decision relates; or (d) any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.

Recommendation 27

A mechanism for review of the decisions of guardians and administrators should be included in the Act.

5.4 Section 52 of the Act

In addition to providing legal representation to people seeking to challenge their guardianship or administration orders, the HPLC also provides legal assistance to people under guardianship or administration orders in respect of other legal matters, including credit and debt.

In relation to this area of our practice, we note that section 52(1) of the Act provides that, where a person is under an administration order, that person is "deemed incapable of dealing with, transferring, alienating or charging her or his money or property or becoming liable under any contact" without an order of VCAT or the written consent of the administrator. Under section 52(2), if this happens, the transfer or contract will have no legal effect.

However, section 52(4) provides that the dealing or transfer will not be invalid if the third party proves that "she or he acted in good faith and did not know or could not reasonably have known that the person was not a represented person".

Keeping in mind the above recommendations which seek to make sure that administration orders are made only as a last resort, are limited in scope and are subject to regular and genuine reassessment, the HPLC notes that, when an administration order is legitimately in place, section 52(4) presents an unreasonably high barrier to people without the capacity to enter legal arrangements being able to avoid the consequences of such arrangements. Section 52(4) of the Act effectively renders the rest of section 52 useless.

Recommendation 28

The Commission should consider section 52 of the Act in relation to the unreasonably high barrier it presents to people under administration orders being able to avoid the legal and financial consequences of entering into contracts.