Southwest Advocacy Association

Submission to Victorian Law Reform Commission

Review of Guardianship and Administration Legislation

April 2010

Introduction

Southwest Advocacy Association ("SWAA") is an independent, not-for-profit, community-based organisation that has been funded by the Department of Families, Housing, Community Services and Indigenous Affairs to provide advocacy and information for people with all types of disabilities and all ages throughout southwest Victoria since 1993.

SWAA provides advocacy casework for 150 - 200 individuals each year and engages in systemic advocacy on regional, statewide and national issues relevant to people with disabilities. SWAA is commonly asked to assist or represent people with disabilities in hearings of the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT) and regularly liaises with staff from the Office of the Public Advocate (OPA) where OPA is conducting investigations in relation to SWAA clients. SWAA also provides advocacy for people who are treated as involuntary patients under the Mental Health Act 1986 and people with disabilities who are subject to the Disability Act 2006.

Due to the competing demands and resource constraints that SWAA faces, we are unable to devote the time to develop a comprehensive submission. SWAA would, however, like to submit the following comments for the Victorian Law Reform Commission's consideration. The following points are based on our experience as an advocacy organisation for people with disabilities in south west Victoria.

SWAA response to general questions

1. **We would like to hear your views about -**
   - **what parts of the law work well?**

In SWAA's view the current emphasis on utilising the least restrictive option and only appointing substitute decision makers as a last resort are principles that must be retained to ensure that peoples' rights and autonomy are protected. SWAA believes that the existing Act strikes an appropriate balance between the protection of people with disabilities who are vulnerable and the importance of upholding their rights, freedoms and dignity. The last thing that SWAA would want to see in terms of reform would be the emergence of more paternalistic guardianship legislation or less emphasis on the pre-eminence of the human rights and the autonomy of people who are already disadvantaged and vulnerable.

Another feature that SWAA would like to see retained as far as possible in any new legislation relates to the fact that the current legislation is relatively easy to read, uses quite straightforward language and is not too unwieldy.

- **what parts of the law don't work well and why?**

In SWAA's experience as an advocate for people with disabilities it is quite difficult for represented persons to obtain unscheduled reviews of VCAT Orders (particularly Administration Orders) because VCAT requires a medical report to be submitted that indicates that the represented person's circumstances have changed. This would appear to be a matter of VCAT policy rather than a requirement of the legislation. SWAA would like to see this issue addressed because, while a represented person may continue to have a disability, there may not be an ongoing need for the involvement of a substitute decision maker and in SWAA's view a substitute decision maker should only be involved for as long as necessary. SWAA believes that it should be easier for a represented person to obtain an unscheduled review of guardianship and administration orders.

- **your ideas to improve the law.**

SWAA thinks that the introduction of the following in any new guardianship legislation would be particularly useful:

- complete consistency with the UN Convention on the Rights of People with Disabilities (UN Convention) and the Victorian Charter of Rights and Responsibilities (Victorian Charter);
- a greater emphasis on and a strengthening of supported decision making principles and requirements;
- a requirement that that 'best interests' decision-making always include consultation with the represented person, careful consideration of their expressed wishes and incorporation of their wishes as far as possible;
- the capacity to have disputed decisions of substitute decision makers reviewed by VCAT quickly and easily;
- enhanced capacity for represented persons to request unscheduled reviews of VCAT Orders appointing a substitute decision maker; and
- an adequately funded community education strategy designed to raise awareness of the rights of people with disabilities and the purpose of guardianship legislation.

2. **Is a system of guardianship and administration the best way to ensure the needs of people with impaired decision-making ability are met and their rights are protected? What other approaches might better achieve these goals?**

SWAA certainly believes that there needs to be legislation in place that caters for the needs of people with impaired decision-making ability and ensures that their rights and interests are protected. SWAA does not have sufficient knowledge of

alternative systems and approaches to comment in further detail, but would suggest that the VLRC look at successful international approaches in countries that are similar to Australia.

3. **Is there an adequate understanding of guardianship laws in the community? What could be done to improve this?**

In SWAA's experience there is a very poor level of understanding of guardianship law and substitute decision making principles, both in the general community and amongst the vast majority of staff employed by service providers. There needs to be an ongoing and systematic education campaign to address this lack of understanding. SWAA believes that community based advocacy organisations would be well placed to undertake this task in regional areas if they were adequately funded to do so.

4. **How should developments in policies and practices for people with disabilities be reflected in guardianship and administration laws?**

In SWAA's view it is vital that guardianship and administration laws are consistent with the UN Convention and the Victorian Charter. At the same time guardianship and administration laws need to be consistent with other relevant legislation. Needless to say, the introduction a new Mental Health Act, the development of new guardianship legislation and any necessary amendments to other relevant legislation must be carefully co-ordinated and should complement one another.

5. **People with age-related disabilities and acquired brain injuries are now the main users of guardianship and administration. Do you think the system needs to change to reflect this situation and prepare for the future? If so how should it change?**

While the system needs to deal with each individual case according to the specific circumstances that apply, the over-arching principles that apply are the same, regardless of the reason why a person may be in need of protection. In SWAA's view it is essential that the guardianship and administration system is sufficiently comprehensive and flexible to cater for all people with impaired decision-making ability, regardless of the nature of their disability. Specialised streams within the system may only complicate things unnecessarily.

SWAA response to specific questions from terms of reference

Disability

6. **Should it be necessary for 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'?**

SWAA believes that it would be preferable and less discriminatory and stigmatising to rely on concepts such as lack of 'capacity' or 'vulnerability'

rather then ‘disability’ to ensure that the rights of all people in need of protection are catered for.

7. What are the best ways of assessing whether a person’s decision-making capacity is impaired?

Given that such an important issue as the autonomy of the individual is at stake in guardianship and administration matters, it is SWAA’s view that specialist professional assessment relevant to the individual case would be the best way of determining whether a person’s decision-making capacity is impaired.

In some cases there may be conclusive existing documentary evidence in relation to capacity, but in others an up to date assessment will be required. One issue that inevitably arises is who should pay for such assessments. As it would be neither fair nor (in the majority of cases) practicable to require people who are subject to applications to meet the cost, it would either have to be up to the applicant or the State to do so.

Best Interests

8. Is ‘best interests’ a useful or appropriate guide for substitute decision-makers? Are there better approaches?

The concept of substitute decision-making based on a person’s ‘best interests’ is useful and SWAA would not like to see it abandoned altogether, but it can be subjective and tainted by a substitute decision maker’s personal value judgements.

SWAA believes that creation of a legislative capacity for represented persons and other sufficiently interested parties to request a formal review of a decision of a substitute decision maker would address the inherent flaws in the ‘best interest’ principle. In order for any such review provision to be an effective mechanism it would, however, be crucial that it be able to be activated and dealt with by VCAT quickly.

Additionally SWAA believes that guardianship and administration legislation should require that ‘best interests' decision-making always include consultation with the represented person, careful consideration of their expressed wishes and incorporation of their wishes as far as possible.

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?

If guardianship and administration legislation required that 'best interests' decision-making should always include consultation with the represented person, careful consideration of their expressed wishes and incorporation of their wishes as far as possible, it should inevitably follows that 'best interests' decision-making would allow for the right of a person to take risks.

Allowing a person to make what a ‘reasonable person’ would clearly consider to be a ‘bad decisions’ may be another matter, but the introduction of legislative capacity for represented persons and other sufficiently interested parties to obtain a prompt VCAT review of a decision would address disputes between substitute

decision makers and represented person's about the appropriateness of particular decisions.

10. To what extent should a guardian or administrator be required to try to identify the represented person's wishes and follow them wherever possible?

SWAA believes it should be mandatory for substitute decision makers to try to identify the represented person's wishes and to follow those wishes where there is no clear conflict with an assessment of their best interests. See SWAA response to questions 8 and 9 above.

Substitute Decision-Making

11. Is there a continuing need for substitute decision-making laws?

SWAA believes that there is a continuing need for substitute decision-making laws in order to protect the rights and interests of people who lack capacity and/or are vulnerable to exploitation and abuse.

12. Do we need to have two types of substitute decision-makers (administrators and guardians) for financial and personal decisions? Would it be preferable for VCAT to have a range of different financial, medical and lifestyle powers it could provide to one decision-maker?

It is SWAA's view that it would clarify and simplify matters if VCAT had a range of different financial, medical and lifestyle powers it could delegate to one substitute decision-maker. At the same time VCAT should, however, retain the discretionary authority to appoint more than one substitute decision-maker, as there may be good reasons to separate powers in some cases.

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?

In the vast majority of cases substitute decision-making orders should be specific and tailored to the individual circumstance in accordance with the 'least restrictive option' principle. If plenary orders are to be retained, the legislation should establish some criteria for such orders and specify that plenary orders are only to be used as a last resort.

14. Are there any decisions substituted decision-makers cannot make at the moment that you think they should be able to? Are there some decisions that substituted decision-makers should not be able to make?

Substitute decision makers, represented persons and other sufficiently interested parties should be able to apply for a Hearing to obtain a determination or direction from VCAT where a decision is particularly significant, complex, controversial or disputed.

15. Is there a need for new laws that formally recognise supported decision-making? How should any supported decision-making laws operate?

SWAA is in favour of the concept of supported decision making, as it would appear to be more respectful and empowering for represented persons and consistent with human rights principles, however SWAA does not have sufficient knowledge to comment on how any supported decision-making laws should operate. SWAA would suggest that the most successful international model be adapted to suit the Victorian context.

Review

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 a decision?

To make substitute decision making more accountable VCAT should definitely have the power to review individual decisions made by guardians and administrators. Represented persons, substitute decision makers and any other party deemed to have a genuine and relevant interest should be able to request a review of a decision.

17. What powers, if any, should VCAT have to deal with substitute decision-makers who abuse their power?

In order to better protect the rights and interests of represented persons, there should be a range of appropriate penalties that VCAT can use to deal with substitute decision-makers who deliberately abuse their power. These penalties could include revocation of substitute decision-making authority, monetary fines, and referral to law enforcement authorities for investigation.

Public Advocate

18. Should there be any changes to the functions and powers of the Public Advocate?

The Office of the Public Advocate (OPA) has a huge and varied role and cannot operate a comprehensive statewide service from a central metropolitan office. In SWAA's experience OPA does not have a strong presence in regional and rural Victoria and struggles to provide services outside metropolitan Melbourne. To address these inadequacies SWAA believes that some of the functions of OPA (e.g. information and advice, community education, etc) could be provided by community based, regional advocacy organisations if adequate funding was made available.

There should also be better communication and more collaboration between OPA and community based advocacy organisations generally.

VCAT

19. Should there be any changes to the functions, powers or procedures of VCAT?

Both the administrative and judicial 'arms' of VCAT should be made more 'user friendly' and transparent. At present, some VCAT Hearings are still conducted in a far too formal manner, which is intimidating for participants. People who are involved in hearing should be encouraged to ask questions and the aim should be to ensure that they leave the Hearing with a very clear understanding as to what has happened and the reasons why.

At the same time the administrative arm of VCAT is far too bureaucratic and impersonal. VCAT should place a greater emphasis on providing good 'customer service' rather than on simply fulfilling its' administrative functions efficiently.

As stated in response to previous questions, VCAT should also be empowered to review individual decisions by substitute decision makers and impose penalties upon substitute decision makers who deliberately abuse their powers.

Age

20. Should VCAT have the power to appoint a guardian or administrator for a person under 18 years old?

In order to address the current legislative 'gap' between the Children, Youth and Families Act and guardianship legislation, SWAA believes that it would be preferable for substitute decision makers to be able to be appointed for people of 17 years of age and older.

Confidentiality

21. Should there be any changes to the way the law operates to ensure the right balance is struck between privacy and transparency?

While rights to privacy are important and should never be disregarded, in SWAA's experience privacy constraints can certainly be time consuming to deal with and can sometimes work against the interests of the disadvantaged people that SWAA represents. Formal Freedom of Information (FOI) processes are generally slow and can be difficult to use, while FOI fees can act as a barrier to obtaining information.

There needs to be a sensible working balance between principles of privacy, transparency and rights to information. At present SWAA is generally able to obtain information pertaining to its' clients from VCAT and service providers upon presentation of an appropriate signed authority. It is important that this remains the case to ensure that people have access to adequately informed advocacy support.

As a general rule there should be a presumption that people who are subject to applications to VCAT have a right to know what material is submitted in support of an application that may result in the loss or restriction of some of their most fundamental rights and freedoms. Information should only be withheld where there is very good reason and whether information should be withheld should have to be determined by VCAT on a case by case basis.

Terminology

22. Should the terms 'guardian' and 'administrator' be retained? If not, what term or terms should replace them?

SWAA does not have a strong view in regards to this question. On the one hand, the fact that these terms have been in use for a number of years has created some degree of familiarity with their meaning. On the other hand, a simple and more generic designation to signify the role of a substitute decision maker may be desirable in any new legislation.

Medical treatment

23. Do the 'medical treatment' provisions in the G&A Act work effectively?

SWAA has limited experience in this area and so does not feel it is able to comment, except to say that the hierarchy of persons who are designated to act as Person Responsible under current guardianship legislation seems to work quite well.

Interaction of Laws

Medical treatment

24. Do the medical treatment provisions in the G&A Act and the MT Act work together effectively? If not, how could the law be improved?

SWAA is in favour of any amendments to the relevant acts that simplify and clarify questions as to who has the authority to consent to and refuse medical treatment. Inconsistencies certainly create the potential for confusion and it would be preferable if the matter were dealt with in one piece of legislation.

Enduring powers

25. Do the laws concerning enduring powers of guardianship, enduring powers of attorney (financial) and enduring powers of attorney (medical treatment) work effectively? Do these powers operate in harmony with VCAT appointments of guardians and administrators?

In SWAA's experience these laws do, on the whole, work effectively and complement the system of VCAT appointments of substitute decision makers. There is, however, often confusion in the minds of members of the public about the distinctions between the various types of Power Attorney and the difference between Powers of Attorney and Administration Orders. SWAA would like to see the various types of Power of Attorney streamlined and simplified as far as possible and some community education work done in relation to these instruments.

26. Directions provided by people in enduring powers or other documents are generally not legally binding. Should 'advance directives' about personal, medical or financial matters have more authority?

SWAA believes that 'advance directives' made when a person has capacity should be legally binding but should also be subject to challenge or review by parties with a sufficient interest.

Crimes (Mental Impairment and Unfitness to be Tried) Act

27. What role should guardians have for people who may be affected by this Act?

SWAA has limited experience in this area and does not feel that it is sufficiently qualified to comment.

Mental Health Act

28. Should there be separate mental health and guardianship laws?

As an organisation that regularly advocates for people who are subject to the provisions of the Mental Health Act & the Guardianship and Administration Act, SWAA does believe that there needs to be separate laws, however the two pieces of legislation should be consistent, complimentary and clear in their applications and demarcations.

29. How should mental health and guardianship laws overlap?

The overlap between mental health and guardianship legislation is a complex area. In SWAA's experience the current balance works reasonably well.

Notwithstanding this, SWAA believes that when a represented person is treated as an involuntary patient under the Mental Health Act, the treating mental health service should be required by legislation to keep an appointed substitute decision maker or the 'person responsible' for health care informed of significant treatment decisions and that an appointed substitute decision maker or the 'person responsible' should be able to activate any relevant review or complaint procedures that apply to the represented person.

30. Should guardians be able to consent to psychiatric treatment in some circumstances?

SWAA cannot see that people lacking capacity would have anything to gain if substitute decision makers were to be allowed to consent to psychiatric treatment. At present, the treating mental health service can authorise what it considers to be appropriate treatment whether a patient consents to the treatment or not.

If substitute decision makers were to be allowed to consent to psychiatric treatment, SWAA believes that such consent must be subject to review by appropriate bodies, such as the Mental Health Review Board, the Chief Psychiatrist and VCAT, upon application by the person to be subjected to the treatment or any sufficiently interested party.

Disability Act

31. Is the law clear about when to seek a Supervised Treatment Order and when to seek a Guardianship Order?

SWAA has limited experience in this area at this point in time and does not feel that it is sufficiently qualified to comment.

32. What do you think is the best legislative approach for people who are a serious risk to themselves or others but are not covered by the involuntary treatment provisions of the *Mental Health Act 1986*, or the compulsory treatment provisions of the *Disability Act 2006*?

SWAA has limited experience in this area in this area at this point in time.