

# Guardianship & Administration

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## "When a parent is not a parent : The legal bucket of worms"

The following is primarily intended to assist those having a family member with an intellectual disability such that he or she is unable to make reasonable judgements in respect of all or any matters concerning their personal circumstances and or estate.

*As a parent of a child with an intellectual disability, you are in-principle no longer legally able to make decisions for your family member after he or she reaches the age of 18 years. Your legal rights as a parent cease!*

Australian administrative law considers that upon reaching the age of 18 years a person is an adult - no longer under the influence or direction of parents. This may be fine for most neuro typicals, but not for those with limited capacity through having an intellectual disability. Those with a severe intellectual disability require credible support with both decision making and finance - this is often provided by their family.

Most families celebrate coming-of-age as a significant milestone in the young person's life. It is indeed morally correct that there should be a time limit when parents no longer have legal authority over their offspring, and that the young person has freedom of decision over their own life. Unfortunately, there are some young people who, for various reasons, are unable to responsibly handle their new found freedom.

The arbitrary figure of 18 years is basically just a line in the sand which is considered reasonable for neuro typical children - those without any recognised disability. The development of these children is reasonably predictable.

Although there is no fixed time-line point where all develop the necessary maturity to look after themselves responsibly, 18 years has been historically fixed as the age where this is taken to happen. Children with a severe intellectual disability, however, simply do not develop along the same time-lines, potentially placing themselves and others at risk, and themselves at a disadvantage.

Many parents of children with a severe intellectual disability, those who are totally unable to make reasonable judgements in respect of all or any matters concerning his/her personal circumstances and or estate, are concerned that after years of providing special care and protection, they are suddenly advised they have no legal rights after their son or daughter reaches the age of 18 years. And that anyone can challenge their decisions and actions, and restrict their access to information. It is therefore inappropriate and a nonsense to withdraw the parents guardianship at the arbitrary age of 18 years.

Family members who have been recognised since early childhood as having a severe intellectual disability, should not be taken out of their parents guardianship unless it can be established by professional analysis that he or she has developed to a stage sufficient to make their own

decisions.

Having clearly established the need for parents to retain guardianship, the focus should be on ensuring the continued suitability of parents to maintain the role of guardians. It is far more important for authorities such as VCAT to closely monitor the credibility of guardians, than to be so concerned about the person's need for a guardian. Need for a guardian should not be in question, where a person has a severe intellectual disability.

## **Guardianship laws to be reviewed!**

The laws and practices that protect Victorians with impaired decision-making capacity will be reviewed by the Victorian Law Reform Commission to ensure they reflect modern standards and a changing population.

Chair of the commission, Professor Neil Rees, welcomed the reference from the Attorney-General and said it was the first time a comprehensive review of Victoria's guardianship and administration laws had been undertaken in over twenty years.

There are a number of Victorians in a variety of circumstances who need important decisions made on their behalf, or assistance with those decisions. This group is expected to grow with an ageing population, Professor Rees said.

It is important to recognise the diversity of those people covered by this review for there are many reasons why a person may not be able to make important decisions. The commission will be consulting widely to ensure the different needs of these people are met.

Professor Rees said the commission is required under the terms of reference to be guided by principles of respect for dignity and individual autonomy and to advance, promote and protect the rights of people with impaired decision making capacity.

It is essential that this part of the community has adequate protection in line with contemporary views on guardianship and administration when a decision concerning personal and financial matters is made on their behalf, he said.

Both the current law and any changes proposed by the commission must be consistent with Australian human rights obligations and the Victorian Charter of Human Rights.

In particular the commission is to have regard to:

- the role of guardians and administrators
- the need to balance the protection of a person with impaired capacity by a guardian or administrator with the person's exercise and enjoyment of their human rights
- the alignment of guardianship and administration law with other relevant laws
- the role of informal decision-making for an adult with impaired capacity
- the functions, powers and duties of the Public Advocate
- the role and powers of the Victorian Civil and Administrative Tribunal and the appointment of guardians and administrators

- consideration of existing laws that deal with medical research, non-medical research, medical and other treatment of a represented person.

The terms of reference specifically state that issues associated with end of life decisions beyond those currently dealt with by the Medical Treatment Act 1988 are not within the scope of this review.

Professor Rees said the commission would begin initial extensive consultations ahead of publishing a Consultation Paper next year. A Final Report is due to the Attorney-General by June 30 2011.

## **Guardianship - Terms of Reference**

1. The Victorian Law Reform Commission is to review and report on the desirability of changes to the Guardianship and Administration Act 1986 (the Act), having regard to:

a) the principle of respect for the inherent dignity, individual autonomy including the freedom to make ones own choices, and independence of persons, and the other General Principles and provisions of the United Nations Convention on the Rights of Persons with Disabilities (the United Nations Conventions);

b) the introduction of the Victorian Charter of Human Rights and Responsibilities;

c) developments in policy and practice in respect of persons with impaired decision making capacity since the Act commenced;

d) the increase in Victorias ageing population and the changing demographic nature of the clients of the Office of the Public Advocate.

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

3. In particular, the Commission is to have regard to:

a) the role of guardians and administrators in advancing the represented persons rights and interests and in assisting them to make decisions;

b) the need to balance the protection of the interests of an adult with impaired capacity by a guardian or an administrator with the persons exercise and enjoyment of the human rights, such as the right to freedom of choice, association and movement, including consideration of whether the Act strikes the right balance between facilitating action in the best interests of an adult with impaired capacity and the persons rights as expressed in the United Nations Convention;

c) the alignment of guardianship and administration law with other relevant statutory regimes, including consideration of the appropriateness and feasibility of extending guardianship and

administration law to individuals who are 17 years of age and have impaired decision making capacity;

d) the validity and efficacy of informal decision-making for an adult with impaired capacity;

e) the need to ensure that the powers and duties of guardians and administrators established by the legislation are effective, appropriate and consistent with Australia's human rights obligations and the Victorian Charter;

f) the functions, powers and duties of the Public Advocate;

g) the role and powers of the Victorian Civil and Administrative Tribunal in relation to guardians and administrators and the efficacy of its processes for the appointment of guardians and administrators in the Act and the Victorian Civil and Administrative Tribunal Act 1998 and Rules;

h) the feasibility of introducing additional mechanisms for review of decisions made by guardians and administrators under the Act, including the scope of these review powers and the meaning of decision for this purpose and whether there should be a mechanism to address unconscionable conduct of a guardian or administrator;

i) the appropriateness of the current requirements for and criteria pertaining to, the treatment of a represented person under the Act, including a consideration of the existing provisions dealing with medical research, non-medical research, medical and other treatment, the appropriateness of the existing person responsible model in the Part 4 of the Act and a consideration of any area of overlap between the operation of the Act and the Medical Treatment Act 1988;

j) whether the language of disability is the appropriate conceptual language for the guardianship and administration regime and to what extent concepts such as capacity and vulnerability would be appropriate;

k) whether confidentiality requirements under the Act are sufficient to adequately balance the protection of the privacy of persons providing information or who are affected by or involved in a decision made pursuant to the Act, and the promotion of the principle of transparency.

In making its report, the Commission should consider the relationship and the appropriate boundaries between the Act and any other relevant Victorian or Commonwealth legislation, including the Instruments Act 1958, the Mental Health Act 1986, the Disability Act 2006, the Children, Youth and Families Act 2005, and the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and take into account the results of any other relevant, contemporaneous reviews or policies in these fields. Issues associated with end of life decisions, beyond those currently dealt with by the Medical Treatment Act 1988, are not within the scope of the review.

**The Commission is to report by 30 June 2011.**

**LISA Comment:** There are few factors available to parents and families to help them keep service providers, especially captive market service providers, accountable and transparent.

Those with an intellectual or multiple disability and their families are easily exploited.

Guardianship and Administration are factors which help families better monitor their member's quality of life care.

In Victoria, "Administration" is relatively easy to obtain through a VCAT (Victorian Civil and Administrative Tribunal) hearing. On the other hand, "Guardianship" is extremely difficult to obtain and retain. Yet it is vital to fully representing an adult who has no meaningful communications and/or is unable by reason of their disability to make reasonable judgements in respect of all or any matters concerning their personal circumstances and/or estate.

**Tony & Heather Tregale**

**LIFESTYLE IN SUPPORTED ACCOMMODATION (LISA) INC.**

**Tel: 03-9434-3810.**