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GUARDIANSHIP AND ADMINISTRATION LAW REVIEW VICTORIA

**SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION
GUARDIANSHIP INFORMATION PAPER
MAY 2010 (sent 14 May 2010)**

About the Victorian Aboriginal Legal Service Co-operative Limited

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled Co-operative Society in 1973. VALS was established to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. VALS plays an important role in providing referrals, advice, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Solicitors at VALS specialise in one of three areas of law, being Criminal Law, Family Law and Civil Law. VALS maintains a strong client service focus which is achieved through the role of Client Service Officers (CSOs) who act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.

VALS is actively involved in community education, research and advocacy around law reform and policy development. VALS strives to:

- a) Promote social justice for Aboriginal and Torres Strait Islander peoples;
- b) Promote the right of Indigenous Australians to empowerment, identity and culture;
- c) Ensure that Indigenous Australians enjoy their rights, are aware of their responsibilities under the law and have access to appropriate advice, assistance and representation;
- d) Reduce the disproportionate involvement of Indigenous Australians in the criminal justice system; and
- e) Promote the review of legislation and other practices which discriminate against Indigenous Australians.

The Victorian Aboriginal Legal Service Cooperative Limited (VALS) welcomes the opportunity to make comment on the Victorian Law Reform Commission' (VLRC) review on the desirability of changes to the *Guardianship and Administration Act 1986* (Vic) outlined in the *Guardianship Information Paper*. It is important to note that VALS does not take on guardianship matters. Our Civil Law Solicitor refers enquiries relating to guardianship matters to other specialist services, such as the Mental Health Legal Centre, the specialist Community Legal Centre practicing in the area of Guardianship and Administration.

However, due to our involvement with reforms relevant to the current inquiry, such as submissions to the VLRC review of Victoria's Child Protection Legislative Arrangements and the Department of Justice's *Mental Health Act 1986* Review, it is incumbent on VALS to make comment on the Guardianship Information Paper as it relates to these areas.

National data suggests intellectual disability is more than three times as prevalent for Aboriginal and Torres Strait Islanders (7.5%) than for non-Aboriginal and Torres Strait Islanders (2%) and when the rates of any disability, or long term health condition, that limits core activities were measured, Victoria data revealed an Aboriginal and Torres Strait Islander rate of 25% - double that observed for non-Aboriginal and Torres Strait Islander members of the population.¹

Research further indicates the over-representation of people with a cognitive disability in the criminal justice system, with difficulties in identifying such cognitive disability in offenders being further compounded for those who are of Aboriginal and Torres Strait Islander descent:

The problem of disability being masked by other factors of disadvantage is perhaps most evident when it comes to contact with the criminal justice system. If a brain injury is acquired early in life, and is never properly assessed, there is the potential that behaviours that are a consequence of that brain injury will never be properly attributed. During contact with police, behaviour is much more likely to be connected with the immediate influence of drugs and alcohol, or perhaps implicitly linked to the fact of Aboriginality rather than a brain injury. A lack of response to questions may be viewed as being the consequence of language and cultural barriers, rather than reflecting a lack of understanding.²

Submitting to the *Mental Health Act 1986* Review, VALS highlighted the linkages between cognitive impairment, mental illness and mental health and wellbeing factors and the criminal justice system. VALS considers that some of these concerns are relevant to the *Guardianship and Administration Act 1986* Review. For instance, issues around institutionalisation, consent and involuntary treatment were highlighted as major areas of concern, especially in light of Aboriginal and Torres Strait Islander people's negative historical experiences involving similar issues.

¹ Jones R and Day A (2008) *Indigenous mental health in the criminal justice system : a review for the Justice Mental Health Strategy, Justice Health and Indigenous Issues Unit : final report* Melbourne: Department of Justice www.aic.gov.au/crime_community/communitycrime/mental%20health%20and%20crime/mental_health_cjs.aspx

² Simpson J and Sotiri M (2004) *Criminal justice and Indigenous people with cognitive disabilities: Discussion paper* Sydney: Beyond Bars Alliance: 11 www.beyondbars.org.au/Full%20Paper.doc

VALS notes the vast difference in the reporting cycle for the current Guardianship Information Paper and the recent Review of Victoria's Child Protection Legislative Arrangements. In our submission in respect of the latter, VALS argued that the timeframe with which to consult, the time afforded to individuals, communities and organisations to respond, and the supply of a scant Information Paper is not reflective of the importance of the issues under consideration. The current inquiry, which VALS argues should be operating in concert with the Child Protection review, has far more time to consult and report.

As VALS does not deal with the general operation of guardianship and administration matters, some of the questions in the Information Paper are unable to be answered. The following responses to questions will therefore not be sequential.

Human Rights Approach to Guardianship

VALS is pleased to see the Information Paper give weight to the consideration of the *Guardianship and Administration Act* and its relationship with the Victorian Charter of Human Rights and Responsibilities as a primary term of reference. However the consultation questions within the Information Paper do not seek feedback as to how the Act can not only incorporate, but embody Charter considerations. VALS looks forward to an extended discussion of the Charter as it relates to the *Guardianship and Administration Act* in the future consultation/options paper.

Terms of Reference

With reference to terms of reference 1 (a) and (b), VALS makes the following comments:

Recent human rights developments in Victoria such as the introduction on the *Charter of Human Rights and Responsibilities* and the ratification of the *International Convention on the Rights of Persons with Disabilities* have created much needed momentum for review of Acts, such as the *Mental Health Act 1986*.

Charter issues:

- Recognition and equality before the law;
- Protection from torture and cruel, inhuman and degrading treatment;
- Be free from treatment without full and informed consent;
- Freedom of movement;
- Privacy and reputation of person;
- Enjoy one's own culture;
- Humane treatment when deprived of liberty; and
- A fair hearing.

Convention issues:

- Equality and non-discrimination (Article 5);
- Equal recognition as persons before the law (Article 12);
- Effective access to justice on an equal basis with others (Article 13);
- Liberty and security of person on an equal basis with others and freedom from unlawful or arbitrary deprivation of liberty (Article 14); and
- Equal access to health services on the basis of free and informed consent (Article 25).

Victoria's Equal Opportunity Act (1995) makes it unlawful to discriminate against anyone because of their disability/impairment. The Victorian Equal Opportunity and Human Rights Commission's 2008 submission to the *National Disability Strategy* argues that systemic discrimination is manifested in the over-representation of young Aboriginal and Torres Strait Islander people with an intellectual disability in contact with the justice system.³ Also, our institutions, policies and practices can create or perpetuate a position of disadvantage. In applying a human rights framework to any disability, a strategy will need to identify different groups amongst the community to target responses explicitly.⁴

Tarantola (2007) highlights the insufficient understanding of the reciprocal interactions between health and human rights and mental health and human rights. In *The interface of mental health and human rights in Indigenous peoples: triple jeopardy and triple opportunity*, Tarantola expresses how even definitions of health that are considered holistic in their encompassing of social wellbeing, such as that endorsed by the 192 Member States of the World Health Organisation (WHO), are qualified by some as 'reductionist when applied to Indigenous peoples as it fails to encompass spiritual dimensions or the degree of harmony that exists between the individual and the community' (11).⁵ This reflects the tension between Western concepts of mental health and the holistic vision on emotional and social wellbeing expressed by some Aboriginal and Torres Strait Islander communities:

Health disparity is one of the most convincing manifestations of the lack of fulfilment of human rights. In turn, human rights principles and instrument are well suited to link health disparity to its societal roots and provide grounds and mechanisms for redress ...

...Not only does the deprivation of certain human rights directly influence mental health – for example, in situations where the right to security or health is challenged by insufficient structures and services – but the very denial of these and any other human rights, including equality, participation, employment, and housing, have a

3 Australian Human Rights Commission (2008) Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues

www.hreoc.gov.au/social_justice/publications/preventing_crime/cog_disr.pdf

⁴ See <http://www.humanrightscommission.vic.gov.au/pdf/submissionnationaldisabilitystrategy.doc>

⁵ As sighted in: Brady M 2004 *Indigenous Australia and Alcohol Policy: Meeting Difference with Indifference* Sydney: University of New South Wales Press; and Brady M, Kuniz S and Nash D 1997 'Who's Definition? Australian Aborigines, conceptualisations of health and the World Health Organisation, In L Marks, M Worboys (eds) *Migrants, Minorities and Health: Historical and Contemporary Studies* London: Routledge.

*negative impact on self-perception in relation to society , and on dignity, and ultimately on health.*⁶

It can therefore be argued that the fulfilment of all human rights is necessary for the protection of mental health outside of the mainstream Western medical response or a “normative” concept of health – concept of health shaped by State authorities and professional groups that tends to focus on health outcome and notions of risk behaviour and overlooks the holistic view of health in a way that it encompasses spiritual, cultural and emotional wellbeing (Tarantola 2007).

The passing of the Victorian Charter of Human Rights and Responsibilities creates a great opportunity to broaden the research agenda by applying a health *and* human rights framework to build the evidence of the negative impact of human rights violations on health as well as other human rights such as housing, employment, education and so on. The important task is then to translate this knowledge into policy and action.

General Questions

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

VALS is unable to comment on the level of understanding of guardianship laws within the Victorian Aboriginal and Torres Strait Islander community due to VALS’ lack of expertise in this area. However, we are aware of the barriers to accessing adequate and appropriate legal assistance in cases where mental illness or impairment is an issue.

Consultations operated through the Law and Justice Foundation of New South Wales identified legal issues from failings under mental health and guardianship systems where serious financial and personal consequences were sighted as avoidable through resolution through accessing legal assistance.⁷ Consultations revealed that people with a mental illness face a number of barriers to accessing legal assistance, including, inter alia:

- *A lack of awareness of their legal rights.* Individuals do not realise that their problem has a legal element and a potential remedy.
- *Being overwhelmed,* and therefore too frightened, or lacking the motivation, to seek legal assistance.
- *Being mistrustful,* or frightened of, divulging personal information to legal service providers which may prevent the service provider from adequately assisting the client.
- *Difficult behaviour.* Some individuals with mental illness may exhibit difficult behaviour that makes it challenging for service providers to assist them.

⁶ Tarantola D (2007) ‘The interference of mental health and human rights in Indigenous peoples: triple jeopardy and triple opportunity’ *Australasian Psychiatry* 15(1): 12-4

⁷ Karras M, McCarron E, Gray A and Ardasinski S (2006) *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW, Volume 4* Sydney: Law and Justice Foundation of New South Wales.

In addition to these individual barriers, this research project argued that there are also systemic barriers experienced by people with mental illness accessing legal services, including, inter alia:

- *The limited availability of affordable legal services*

Given that people with a mental illness tend to have lower levels of income, they are likely to be reliant on increasingly stretched services such as Legal Aid and Community Legal Centres (CLCs).

- *Time constraints placed on legal service provision*

While people with a mental illness often require longer appointment times with lawyers, the limited resourcing of CLCs and Legal Aid make this extremely difficult.

- *Remote, rural and regional issues*

The lack of affordable legal services is even more pronounced in rural and regional areas. The organisation and cost to travel long distances to access services can create additional barriers.

- *Difficulties in identifying mental illness*

Legal service providers may not always be able to identify that a client has a mental illness. This may result in a person not receiving the time, assistance and understanding they need to resolve a legal issue.

Specific terms of reference questions

6. *Should it be necessary for a person to have a ‘disability’ before a guardianship or administrator is appointed or is it preferable to rely on concepts such as lack of ‘capacity’ or ‘vulnerability’?*

In our submission to the aforementioned *Mental Health Act 1986* review, VALS was very mindful of definitional questions regarding what constitutes capacity.⁸ While it was found that the *Mental Health Act 1986* did not adequately deal with the idea of capacity (to consent etc), contemporary handling of this issue internationally was noted. For example, Scotland’s *Adults with Incapacity Act 2000* moved away from an “all or nothing” notion of capacity (i.e. a person either had full capacity to make a decision or none at all). Instead, the contemporary Act recognises that:

- Capacity is decision-specific and that someone may be capable of making certain types of decisions but not others and this may depend on the complexity of the decision made;
- A person’s capacity may remain stable, improve, fluctuate or deteriorate.⁹

⁸ VALS found that there was no definition in the *Mental Health Act 1986* of what constitutes capacity. This was identified as a huge gap in the legislation that required urgent attention.

⁹ The Scottish Government (2007) www.scotland.gov.uk/Publications/2007/08/29112925/0

The *Adults with Incapacity Act 2000* (Scotland) represents legislation that reflects an understanding of the nature of mental impairment as complex, changing, and requiring flexibility. In an everyday context, this Act defines mental capacity as the ability to make decisions or take actions affecting daily life, and in a legal context refers to a person's ability to do something, including making a decision which may have legal consequences for the person themselves or for other people:

The law says an adult lacks legal capacity to make a particular decision when there is evidence that he or she is unable to:

- *Understand the information relevant to the decision; or*
- *Make a decision based on the information given; or*
- *Act on the decision; or*
- *Communicate the decision; or*
- *Retain the memory of the decision.*¹⁰

VALS strongly argues for revised mental definitions pertaining to the nature of what is considered capacity.

8. Is 'best interests' a useful or appropriate guide for substitute decision-making laws?

VALS considers 'best interests' an appropriate guide for decision-making in some cases. The best interest principle suffers from vagueness and implementation difficulties.¹¹ The importance of the best interest principle is in that it creates a duty to make an individual examination of the interest of each individual instead on relying on general assumptions about people in certain situations. However, when applied without understanding the individual's views and experiences, it can be used to contradict the person's wishes and can potentially lead to 'over-paternalism' and 'authoritarianism'.¹²

The best interest principle as it applies to children focuses heavily on participation rights and creating procedural obligations to invite input and opinion from the person which decisions are being made over. Furthermore, this participation right should have appropriate legal representation made available to ensure and protect this right. VALS recognises that the focus of the current review deals mainly with adults, however the best interest principles as they have been examined with reference to child protection matters is highly relevant as they consider the role of the person who the decision is being made for. This is the voice that has traditionally been ignored due to assumptions that others know best. It is pleasing to see that the current review strongly recognises the importance of the input by the person who requires the authority of others

¹⁰ Ibid.

¹¹ Bessell S and Gal T (2007) 'Forming Partnerships: The Human Rights of Children in Need of Care and Protection' Crawford School of Economics and Government, Policy and Government Discussion Paper pp1-21 www.crawford.anu.edu.au/degrees/pogo/discussion_papers/PDP07-06.pdf

¹² Bessel and Gal (2007) op cit, p. 8.

to make decisions for them. This idea is articulated in the passage below. It is easy to see how these considerations can be applied to the current review.

A deeper understanding of the participation right, however, calls for the involvement of children not as adversaries to the process, outsiders who are invited in to provide their input and the wait for professionals to make decisions regarding their own lives. Rather, the participation right as crafted in the CRC can mean regarding children as partners in decision making processes.¹³

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?

Traditional notions of best interest decision-making does not allow the right of a person to take risks and make bad decisions. VALS argues that there should be as much room as possible for input into decisions by those with a mental disability/impairment, and this input should be seriously considered with reference to that person’s individual human rights as enjoyed by all other members of the community.

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

VALS’ *Mental Health Act 1986* Review submission argued in support of moves towards a ‘supported’ decision making model in place of a substituted decision making model as the former takes the patient’s preferences and opinions into account. This is an area where advanced statements or advance directives could be useful (please refer to discussion on advance statements for further comment).

Each consumer knows best about the lived experience of their “illness”. Therefore, decisions made by others on their behalf will never act adequately as a substitute for the decisions people make for themselves when it concerns their own life.

This position points to considerations of self-determination. Far from being a political catch phrase used to give impressions of Aboriginal and Torres Strait Islander consideration, self-determination is a crucially important issue to anybody’s ongoing wellbeing.

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?

VALS considers review of decisions and administrators essential for the protection of the best interest, rights, and safety of the people the system is designed to assist. Facility to request from VCAT a review of a decision should be broad and indiscriminating.

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

¹³ Ibid, p25-26.

VALS would like to see the community education arm of the Public Advocate role extended to specifically assist the members of the Aboriginal and Torres Strait Islander community in awareness of the law and their rights under the Act.

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

It is VALS understanding from the Victorian Law Reform Commission that there are attempt to make VCAT more culturally appropriate and accessible to the Aboriginal and Torres Strait Islander community. It is felt that VCAT is still experienced as culturally alienating. VALS therefore advocates for further attention to be paid to the accessibility of VCAT on a cultural level.

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

VALS is concerned that a 17-year-old person in need of a substitute decision-maker falls in a gap between the *Children, Youth and Families Act* and the *Guardian and Administration Act* as they are too old to have a guardian appointed by the Children's Court and too young to have one appointed by VCAT under the *Guardianship and Administration Act*. VALS questions the suggestion that the *Guardianship and Administration Act* be changed to apply to people under 18 is the best course of action. While this would cover the gap for some people in need of a substitute-decision maker, consistency with other legislation in Victoria that considers the division between juvenile and adult matters at the age of 18 should be noted. It may be beneficial to consider whether the gap is more appropriately covered by the *Children, Youth and Families Act*.

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?

A written statement setting out a person's wishes and preferences for future treatment and care in the event that a person becomes unable to make such decisions can act as a safeguard as well as an indication of a person's preferences that can therefore remove treatment and decision dilemmas of a significant nature.

Advance statements, sometimes referred to as advance directives, also have the potential to provide legal protection for individuals and families against certain measures as circumstances change along with the patient's condition. Enforceable rights through this mechanism would encourage and signal an improvement in the recognition of the rights of people with a mental impairment. An advance statement could also prove useful when a patient moves between services. This brings to mind the possibility of a state or national register of advance statements.

In Victoria common law regarding advance directives or statements suggests that when a person is deemed to be 'competent' their advance statement will be respected (Federation of Community

Legal Centres 2009).¹⁴ Once a person is deemed ‘incompetent’ however, the directive is in a much weaker position. VALS encourages the inclusion of this consideration in the review of the *Guardianship and Administration Act 1986*.

VALS thanks the VLRC for the invitation to provide the above comments and looks forward to the VLRC options paper following the current consultation process.

¹⁴ The Federation of Community Legal Centres express that consumers are doubtful about this. They suggest that ‘perhaps it is better to suggest that this is respect-in-principle rather than respect-in-practice’ (2009).

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