

A new dawn

A NEW ACT ESTABLISHES A FRAMEWORK FOR GUARDIANSHIP AND ADMINISTRATION THAT ENCOURAGES AGENCY AND PARTICIPATION BY PEOPLE WITH DISABILITIES IN THEIR OWN AFFAIRS. BY NATALIE TALIA



The *Guardianship and Administration Act 2019* (the new Act) comes into operation on 1 March 2020. It will repeal and replace the *Guardianship and Administration Act 1986* (the 1986 Act). The new Act adopts many of the recommendations of the 2012 Victorian Law Reform Commission Guardianship Report.

The 1986 Act has governed the jurisdiction of the Victorian Civil and Administrative Tribunal (VCAT) to make orders appointing a “substitute decision maker” to make decisions on behalf of a person with a disability affecting their decision making capacity (“a represented person”). An administrator is appointed to make decisions about financial and legal matters and a guardian is appointed in relation to personal matters.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD)¹ requires that state signatories including Australia ensure that persons with disabilities enjoy “legal capacity on an equal basis with others in all aspects of life” and are provided access to any support required to exercise that legal capacity (CPRD article 12(4)). The appointment of a substitute decision maker impinges on the human rights of represented persons, and particularly their equality before the law,² as such an appointment excludes a represented person’s legal capacity to make decisions in relation to their affairs (eg, s75, new Act).

Over the years, relevant case law³ has clarified that the 1986 Act was augmented by significant developments in international human rights law, including the CPRD, and the *Charter of Human Rights and Responsibilities Act 2006* (Charter).⁴ In particular, relevant authorities applying the Charter⁵ in the context of the 1986 Act have emphasised that any limitation on human rights under the 1986 Act (such as the appointment of a substitute decision

maker) must be necessary and proportional to the circumstances of the represented person whose autonomy and dignity are paramount.

The new Act further develops the guardianship and administration laws in conformity with the CPRD and does more to embed these requirements of necessity and proportionality into the legislative regime. The hallmark of the new Act is its much greater emphasis on supporting those with a disability in the direct exercise of their own legal capacity and autonomy in relation to decisions affecting their lives, including in the VCAT process, and on tailoring any measures required to support that decision making to the individual’s circumstances.

Highlights of the new Act

The 1986 Act had three key principles:⁶

- giving effect to the wishes of a represented person where possible
- ensuring that measures limiting the freedom of a person are the least restrictive possible (the “least restrictive measures requirement”)
- promoting the best interests of the person (“best interests requirement”) (see eg, ss4(2), 28 and 49(2) of the 1986 Act).

The new Act introduces a framework of interrelated principles to underpin the law and procedures in guardianship and administration matters with the “primary object” to “protect and promote the human rights and dignity of persons with disabilities” (s7).

In summary, the new Act:

- sets out detailed general principles that must be considered in the exercise of all powers under the new Act (“General principles”) (ss7 and 8). These principles reflect the CPRD’s focus on the autonomy of people with a disability, supporting their decision making, adopting the least

SNAPSHOT

- The *Guardianship and Administration Act 2019* comes into operation on 1 March 2020.
- The new Act will change the processes and outcomes in the VCAT Guardianship List to reflect contemporary understanding of disability and human rights principles.
- People with limited decision-making capacity may soon have more options to manage their own personal and financial affairs under the new legislation.

restrictive measures to ensure that support, and safeguards against misuse of substitute decision making powers;

- detailed provisions for determinations about decision making capacity that reflect a more contemporary understanding of capacity (s5(2)) (“capacity principles”)
- includes decision-making principles that administrators and guardians must consider when making decisions for a represented person (s9) (“decision making principles”).

These principles are the foundation for some of the more significant changes introduced by the new Act.

Compared with the 1986 Act, the new Act shifts focus from imposing decisions on represented persons in their “best interests” to supporting decision-making of people with disabilities and giving effect to their wishes in all but limited circumstances.

The new Act places people with disabilities at the centre of the decision-making framework within VCAT. For example, VCAT must ensure that a proposed representative attends VCAT hearings in person except in limited circumstances (ss29 and 86).

Perhaps the most significant development in the new Act is the presumption of capacity. A person is presumed to have capacity to make decisions where they can make decisions with “practicable and appropriate” support, unless there is evidence to the contrary. A person can have capacity in relation to some matters and not others (s5). This will raise the threshold for VCAT to determine that a person lacks capacity and requires a substitute decision maker. Even if a substitute decision maker is appointed, a person who makes a decision for a represented person must give all “practicable and appropriate effect” to the person’s will and preferences and must only override those wishes “if it is necessary to do so to prevent serious harm to the represented person” (s9(1)(a)(e)).

Compared with the 1986 Act, the “least restrictive” measures requirement is given greater effect in the new Act which introduces additional measures to ensure that substitute decision making is a last resort. The new Act establishes a less restrictive option to support (rather than

exclude) decision-making for persons with disabilities who do have capacity with appropriate support – the appointment of a supportive guardian or attorney (discussed further below). There are no longer plenary substitute appointments under the new Act. Rather, the starting point is that substitute decision-makers are appointed only in relation to specific financial or personal matters where a person does not have capacity regarding those matters (even with support) and if it is not possible to resolve these challenges through informal means, negotiation or mediation (ss5 and 30-34).

The new Act imposes additional duties on substitute decision makers and introduces accountability measures, including offences for those who dishonestly use their position (Pt 3, Div 4 and 7; Pt 4; ss181-193).

The rest of this article summarises how an application to VCAT will proceed under the new Act. The starting point is the general principles which will guide all of the decisions made under the new Act’s operative provisions.

Primary object and general principles – ss7 and 8

The primary object of the new Act is to protect and promote the human rights and dignity of persons with a disability by:

- recognising the need to support persons with a disability to make, participate in and implement decisions that affect their lives (s7(1)(a))
 - where there is a need for a guardianship or an administration order, ensuring that VCAT can set safeguards and limitations on the powers of guardians and administrators, review orders regularly and provide guidance to those decision-makers (s7(1)(b)).
- The general principles in s8 are:
- all “practicable and appropriate support” must be provided to a person with a disability to enable the person to make and participate in decisions, express their will and preferences and develop decision-making capacity (s8(1)(a))
 - “the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person” (s8(1)(b))
 - powers, functions and duties under the new Act should be exercised in a

way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances (s8(1)(c)).

The object and general principles are paramount as they guide the interpretation and application of all other provisions of the new Act. The general principles in s8 must be considered by those who will exercise powers or perform a duty under the new Act including VCAT (s8(2)). The primary object in s7 is relevant to the interpretation of the new Act and the powers, functions and duties within it under s35 of the *Interpretation of Legislation Act 1984*. The object of the new Act, in turn, requires that regard be had to the CPRD.

Initiating an application to VCAT

Any person over the age of 18 is permitted to make an application to VCAT. For an appointment of a substitute decision-maker, the application must state the reasons for the application, the specific financial or personal matter in relation to which an order is sought (s24), and details of any person having a “direct interest” who is entitled to notice of applications and orders under s26. There is a separate application for appointment of a supportive decision-maker (see below).

Listing

Unless an application is urgent (s36) due to imminent risk of harm, a hearing must commence within 30 days of an application being received.

Decision-making capacity

Capacity is the threshold issue in any application to VCAT. The new Act departs from an assessment of capacity based on the language of “reasonable judgments” and “best interests”. Rather, capacity is determined according to the more modern principles set out in s5. These provisions mirror recent legislative change in the *Powers of Attorney Act 2014* and the *Medical Treatment Planning and Decisions Act 2016*.

Importantly, s5(2) establishes a statutory presumption of capacity. Unless there is evidence to the contrary, a person will be presumed to have decision-making capacity. A person has decision-making capacity if it is possible for the person

to make decisions with practicable and appropriate support (s5(4)(e)).

Decision-making capacity requires that a person can understand relevant information (or an explanation of that information (s5(3)), retain, use and weigh that information, and communicate their decision “in some way” (s5(1)).

Section 5(4) outlines the matters that must be considered and matters that must not be considered in VCAT’s assessment of capacity. VCAT must give consideration to the fact that capacity may fluctuate and may be impaired only in relation to specific matters. The new Act will, therefore, require that capacity is assessed in relation to specific “personal” and “financial” matters.

VCAT deliberations

Following an application for a substitute decision-maker, VCAT can make a range of orders – for a compulsory conference or a mediation (s28) or a hearing, appointing a substitute or supportive guardian or administrator, or no order at all (s30). This will allow VCAT to respond flexibly and continue to impose only those mechanisms which are the least restrictive and suited to a person’s specific circumstances.

Section 30 of the new Act sets out the matters VCAT must consider before appointing an eligible administrator or guardian, in addition to the object and general principles. VCAT must be satisfied that:

- the person does not have decision-making capacity in relation to the relevant personal or financial matter (s30(2)(a) and (b))
- the person is in need of a guardian or administrator (s30(1)(b))
- the order will promote “personal and social wellbeing” (as defined in s3) (s30(1)(c)).

The new Act raises the threshold requirements for the appointment of a guardian or administrator. VCAT is now expressly required to consider not only the will and preferences of the person but also interested parties, and whether decisions can more suitably be made by informal means or through negotiation or mediation (s31). The general principles also require consideration of whether the person can make decisions with support. VCAT must also consider the eligibility

and suitability of any person to be appointed (s32).

Supportive appointments

The new Act establishes a regime for supported decision-making for those who have capacity to make decisions with “practicable and appropriate” support and who consent to the appointment. Appointment of a supportive guardian or supportive administrator can occur after an application is made for a supportive appointment or for a substitute decision-maker (s87(1)) if it will promote the person’s personal and social wellbeing (s87(2)). The new Act contemplates the concurrent appointment of supportive and substitute decision-makers (s96) relating to different matters.

VCAT will confer specific powers on supportive decision-makers limited to collecting and communicating information and decisions, and giving effect to some decisions (ss 90-93) where this support will enable the decision-making capacity of a person with a disability.

Appointment of administrator/guardian

As noted above, the new Act will require orders for substitute decision-making to specify particular personal or financial matters (with new definitions of those terms in s3) in respect of which a person lacks decision-making capacity (ss5 and 30-34).

Subject to any restrictions imposed by VCAT, a guardian has power to act in relation to the relevant personal matters (s38), although the power to undertake legal proceedings must be specifically conferred. An administrator has “a power to make decisions about the financial matters in relation to the represented person specified in the order” (s46), although some powers required to give effect to those decisions must be specifically conferred by VCAT (ss51-52). VCAT can impose limitations or restrictions on any power and can prescribe additional powers but only where necessary or desirable to promote personal and social wellbeing (s46(2)).

The new Act now confers on administrators and guardians a means of enforcing their decisions against third parties in VCAT (s178).

Substitute decision-making principles

Under the 1986 Act, administrators and guardians were required to act so as to promote a represented person’s best interests, including taking into account their wishes and encouraging their participation in their affairs (ss28 and 49). Section 4 of the 1986 Act required that the person’s wishes were, wherever possible, given effect to.

As noted above, the new Act is more prescriptive in requiring substitute decision-makers to have regard to decision-making principles, including giving “all practicable and appropriate effect” to the will and preferences of a represented person (s9(1)(a)) and only overriding those wishes in limited circumstances where they will result in “serious harm” (a concept which is not defined in the new Act).

Duties and accountability

The new Act imposes additional duties on substitute decision-makers and introduces offences for those who dishonestly use their position, and compensation provisions (Pt 3, Div 4 and 7; Pt 4; ss181-193).

The duties of guardians and administrators are set out in mirror provisions (ss41 and 55) including a duty to act in accordance with the new Act’s principles as well the core fiduciary duties to avoid conflict (unless validated or approved (ss 57-58)), exercise reasonable skill and care, and act honestly and in good faith. Administrators have additional duties for financial matters (eg, to keep separate the property of a represented person). Both administrators and guardians are under a duty to protect represented persons from neglect and exploitation, a duty that applied only to guardians under the 1986 Act. Supportive appointees will have similar duties to administrators and guardians, as well as an additional duty not to coerce, intimidate or unduly influence the person.

The new Act provides for regular reassessments, generally within 12 months of the order being made and at least every three years thereafter (s159).

Quick reference table – applications under the new Act

| Phase | Relevant provisions/issues | Overarching principles |
|--|--|--|
| Application | Application and notice requirements (ss24-27) | |
| ADR | Mediation or compulsory conference or schedule hearing (s28) | |
| Hearing | Attendance by represented person (ss29 and 86) | |
| Assessment of decision-making capacity | <ul style="list-style-type: none"> Identify specific financial/personal matter (s3) Presumption of capacity (s5(2)) Four capacity elements (s5(1)(a)-(d)) Decisions with “practicable and appropriate” support (s5(4)(e))? s5(4) assumptions considered | <p>To protect and promote human rights and dignity of persons with disabilities, by:</p> <ul style="list-style-type: none"> supporting persons to make, participate in and implement decisions establishing safeguards in substitute decision-making measures (s7) <p>The general principles (s8):</p> <ul style="list-style-type: none"> provide “practicable and appropriate support” to enable decision-making and develop capacity the will and preferences of a person should direct decision as far as practicable adopt measures least restrictive of freedom of decision and action |
| Can an appointment be made? | <ul style="list-style-type: none"> Does the person have decision-making capacity in relation to the matter (s30(2)(a))? Is there a need for the appointment? (s30(2)(b)) or can the matter be resolved by informal means (s 31)? Will the appointment promote personal and social wellbeing (s30(2)(c))? Primary object and general principles are particularly relevant: consider the person’s will and preferences, least restrictive measures, supported decision making. | |
| Eligibility of appointee | <ul style="list-style-type: none"> Will the appointee act in accordance with their duties ((ss32(1)(a) & 32(2)(a)) and avoid conflict ((ss32(1)(b) & 32(2)(b))?) Are they suitable and known to the person (s32(1)(c) & ss32(2)(c) and 32(3) and (5)? Does the Administrator have sufficient expertise (s32(2)(d))? Consider any statement of wishes (ss35 and 32(6)) | |
| Orders | <ul style="list-style-type: none"> Under s30(1), orders for a supportive decision-maker, substitute decision-maker or no order at all Orders must specify particular personal or financial matters and any safeguards Orders state restrictions on guardian’s powers (s38) or legal proceedings (s40) Orders state the powers to be conferred on the administrator, as necessary or desirable for personal and social wellbeing (s46) Restrictions on power (s34) | |

Conclusion

The new Act establishes a framework for guardianship and administration in Victoria that encourages agency and participation by people with disabilities in their affairs, with additional safeguards where substitute decision-making is necessary. The legislative framework is built around core principles that reflect international and Victorian human rights instruments.

The new Act will provide a more modern framework for the law to try to strike a balance between the need to

empower and assist or protect people with limited decision-making capacity. Legal practitioners have an important role to play in helping to ensure that the processes and provisions introduced by the new Act can strike that balance effectively. ■

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1. CRPD, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). Australia ratified the CPRD in July 2008.
2. See, for example, *Charter of Human Rights and Responsibilities Act 2006* s8.

3. Eg, *PJB v Melbourne Health (Patrick’s case)* [2011] VSC 327; *Re BWV; ex parte Gardner* [2003] VSC 173; *XYZ v State Trustees Limited* [2006] VSC 444; *PBU & NJE v Mental Health Tribunal* [2018] VSC 564.
4. The Charter requires statutory provisions to be interpreted by courts and VCAT in a way that is compatible with human rights (ss1(b) and s6(2)(b)) and requires all public authorities to act in a way that is compatible with human rights (s1(c)), including the VCAT where it acts in an administrative capacity, as it does in applications for guardians and administrators (*PJB v Melbourne Health (Patrick’s case)* [2011] VSC 327, 405).
5. Section 7(2) applied, eg, in *Patrick’s case*, Note 3 above.
6. *Patrick’s Case*, at 378 per Bell J.