



**Victorian Equal Opportunity  
& Human Rights Commission**

Submission No. POA/52

Received 28/08/2009

Law Reform Committee

[www.humanrightscommission.vic.gov.au](http://www.humanrightscommission.vic.gov.au)

28<sup>th</sup> August 2009

Mr Johan Scheffer MLC  
Chair - Law Reform Committee  
Parliament of Victoria  
Parliament House  
Spring Street  
EAST MELBOURNE VIC 3002

Dear Mr Scheffer,

### **Inquiry into Powers of Attorney**

Thank you for the extension of time granted to the Commission to make this submission to the Committee's current inquiry relating to powers of attorney.

The Commission has a particular interest in the framework governing enduring powers of attorney under the *Instruments Act 1958*, and the appointment of enduring guardians under the *Guardianship and Administration Act 1986*, given the relationship between these arrangements and ageing and/or disability. This submission does not, however, seek to provide definitive answers to the questions upon which the Committee is focused. Instead, the Commission has chosen to elaborate on the human rights framework within which the Committee needs to consider and resolve those matters, as a consequence of the *Charter of Human Rights and Responsibilities* ("Charter"). Accordingly, our submission examines the following:

- the role and relevance of the Charter in law reform;
- human rights considerations engaged in the development of a framework for powers of attorney;
- substitute versus supported decision-making; and
- safeguards.

### **LAW REFORM AND THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES***

As you will be aware, the Charter enacts a range of human rights derived from the *International Covenant on Civil and Political Rights* as part of the domestic law of Victoria. The preamble to the Charter recognises that the promotion and protection of these rights is "essential in a democratic and inclusive society that respects the rule of law, human dignity,

3/380 Lonsdale Street Melbourne VIC 3000 • DX 210161  
Advice Line (03) 9281 7100 • Telephone (03) 9281 7111  
Facsimile (03) 9281 7171 • TTY (03) 9281 7110  
Toll Free 1800 134 142 (Country Callers)

The VEO&HRC complies with Victorian privacy laws and the confidentiality provisions of the Equal Opportunity Act 1995. For a copy of the VEO&HRC's privacy policy, please go to [www.humanrightscommission.vic.gov.au/privacy](http://www.humanrightscommission.vic.gov.au/privacy) or contact the VEO&HRC.

equality and freedom”. The Charter employs a range of mechanisms to protect and promote human rights, namely:

- placing public authorities under an obligation to act compatibly with human rights and give proper consideration to relevant human rights when making decisions (section 38);
- requiring all Victorian statutory provisions to be interpreted compatibly with human rights, provided to do so is consistent with the purpose of the statutory provision (section 32); and
- providing for the scrutiny of new legislation for its compatibility with human rights, firstly by the Member presenting a Bill to Parliament (section 28), and separately, or independently, by the Scrutiny of Acts and Regulations Committee (section 30).

With regard to the obligation on public authorities to give proper consideration to relevant human rights when making decisions, the Commission notes that under section 4(1)(g) of the Charter, members of the Law Reform Committee are a public authority, and subject to this obligation, when acting in an administrative capacity. What constitutes the “administrative capacity” of Committee members has not been elaborated upon, however, even if the Committee is not compelled to consider relevant human rights in the course of finalising substantive recommendations for this inquiry, they are clearly still extremely relevant. Any legislative reforms implemented on the basis of the Committee’s recommendations will be scrutinised for their compatibility with human rights, and any new legislation governing powers of attorney would need to be interpreted in accordance with section 32 of the Charter.

Beyond this, the Commission is keen to foster an appreciation of the Charter as a valuable resource in the context of law reform. Firstly, the Charter identifies and articulates the rights that our community wants protected – the value of this should not be underestimated. Rights discourse is not new in Victoria, but having the rights that are protected as part of our domestic law clearly identified is, and in doing this the Charter provides a clear and transparent framework of values against which options for law reform can be assessed.

Furthermore, because the Charter recognises that sometimes individual rights might come into apparent conflict with each other, or individual rights may need to be balanced against other broad community objectives, it provides a mechanism for guiding our analysis of such scenarios to work out where the appropriate balance lies. This mechanism is the reasonable limitations framework set down in section 7, which does not prescribe particular outcomes, but rather directs our attention to the various considerations that can assist in identifying whether, and if so how far, the law can limit a particular human right. This is an extremely valuable framework for helping resolve what might initially appear to be intractable differences, including in the area of law reform.

## **HUMAN RIGHTS THAT ARE RELEVANT TO ENDURING POWERS OF ATTORNEY AND GUARDIANSHIP**

By potentially enabling fundamentally important life decisions to be made by one person on behalf of another, powers of attorney and enduring guardianship appointments can engage a number of human rights, particularly as the trigger for their enactment will usually be linked to permanent or temporary incapacity associated with ageing, disability or an accident. Relevant rights under the Charter include:

- recognition and equality before the law, including recognising the capacity of all persons, and ensuring protection from discrimination (section 8);
- freedom of movement (section 12);
- privacy and reputation (section 13);
- protection of families (section 17); and
- liberty (section 21).

Of course, it is critical to acknowledge that such arrangements are put in place in advance, at the free-will of the person for whom decisions might be made. However, the fact that such arrangements are voluntary does not automatically resolve all the human rights considerations that are relevant. With regard to those human rights considerations, rather than examining each of the above rights discreetly, this submission focuses on the core concepts of capacity and autonomy to highlight critical human rights matters the Committee needs to take into consideration in the course of this inquiry.

### ***Capacity and Autonomy***

The meaning of, and issues related to capacity and autonomy have been the subject of considerable focus following the United Nations' adoption of the *International Convention on the Rights of Persons with Disabilities* ("the CRPD"). Quite apart from the fact that Australia is a party to the CRPD<sup>1</sup>, it is relevant in the Victorian context given that section 32(2) of the Charter expressly permits international human rights law to be used to develop the meaning of rights protected in the Charter, and their implications for responding to local issues and interpreting statutory provisions.

Like other thematic instruments in international human rights law, the CRPD does not articulate a separate body of rights for people with disabilities. Rather, it is founded on an analysis of the historical denial or limitation of human rights experienced by people with disabilities, and uses that analysis to distil and highlight the disability dimension of universal human rights. Central to this distillation is the framing of disability as a construct that arises as a consequence of the attitudinal and environmental barriers encountered by people with impairments, and that genuine recognition of the autonomy of people with disabilities must be central to any strategy to dismantle that construct.<sup>2</sup>

A number of provisions in the CRPD are relevant to capacity and autonomy, however, for present purposes it is sufficient to focus on article 12, which is particularly important to developing the content of section 8 of the Charter, and states:

#### ***Article 12***

##### ***Equal recognition before the law***

*1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*

---

<sup>1</sup> Australia signed the Convention on 30<sup>th</sup> March 2007 and ratified on 17<sup>th</sup> July 2008.

<sup>2</sup> *International Convention on the Rights of Persons with Disabilities*, Preamble, paras (e) and (n).

2. *States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
3. *States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*
4. *States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*
5. *Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.*

Article 12 has triggered considerable debate and there is a range of views as to its full implications. Some argue that article 12 means that substitute decision making is prohibited, and that States Parties are required to dismantle such mechanisms, replacing them with a system or systems of supported decision-making. An alternate view is that while article 12 clearly requires a shift toward and primary reliance upon supported decision-making, it still contemplates an ongoing, albeit much more restricted role for substitute decision-making. The Australian Government clearly adheres to the later view, as reflected in its interpretive declaration that forms part of Australia's instrument of ratification:

*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. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;*

The renewed international focus and debate on decision making by as opposed to for people with disabilities is currently reflected in Victoria with the now Department of Health engaged in a comprehensive review of the *Mental Health Act 1986*, and the Attorney-General's referral of a review of the *Guardianship and Administration Act 1986* to the Victorian Law Reform Commission.<sup>3</sup> While the context is clearly very different, it is the view of this

---

<sup>3</sup> The reference was made on 19<sup>th</sup> June 2009 and the Commission has been asked to report by June 2011.

Commission that the Committee's consideration of issues related to powers of attorney and enduring guardianship also needs to be cognisant of this debate and clearly emerging emphasis on supported as opposed to substitute decision-making.

### *Articulating the difference between supported and substitute decision-making*

The overarching principle of supported decision-making is its presumption in favour of the person affected by the decision, and its emphasis on enabling the individual to exercise his/her legal capacity to the greatest possible extent and according to his/her own wishes. In contrast to traditional court authorised power which is given to guardians to make decisions on behalf of an individual without demonstrating that they accord with the individual's wishes, in a supportive system the individual with a disability always remains the decision maker, and the role of support person/s is to explain issues or interpret communications from the individual when necessary.<sup>4</sup>

Commentators have elaborated on what "support" encompasses and identified:

- assistance in decision making;
- assistance in expressing to others a person's will and intent; and
- assistance in communicating to others someone's personal identity.

Furthermore, it is the competence of the support network or strategy that is scrutinised more so than the capacity of the individual with a disability.<sup>5</sup>

## **SUPPORTED VERSUS SUBSTITUTE DECISION MAKING IN THE CONTEXT OF ENDURING POWERS OF ATTORNEY AND GUARDIANSHIP**

As noted above, a critical feature of enduring powers of attorney and guardianship is that they are arrangements put in place by a person at a time when they have capacity, to deal with a possible future scenario when they may not. Making such arrangements is clearly an important expression of personal autonomy, and the work of the Office of the Public Advocate over a number of years to encourage people to consider these issues is commendable from a human rights perspective, as it avoids the need for the state to develop and put in place an arrangement to deal with an individual's affairs in the event their capacity becomes impaired.

At the same time, it is important to appreciate that this does not completely resolve all the implications of the supported versus substitute decision-making debate for these arrangements. This is because the difference between supported and substitute decision-making is not just about who decides on such arrangements, but is equally about how the arrangements play out when circumstances require them to be enlivened. To put it differently, when an enduring power of attorney or guardian needs to perform the role that a

---

<sup>4</sup> *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities, Chapter Six: From Provisions to Practice – Implementing the Convention, Legal Capacity and Supported Decision Making*, available via <http://www.un.org/disabilities/default.asp?id=212> (21 August 2009).

<sup>5</sup> Anna Macquarie of the Canadian Association for Community Living, cited in *Expert Seminar on Freedom from Torture and Ill Treatment and Persons with Disabilities: Report*, Office of the High Commissioner for Human Rights, Geneva, 11<sup>th</sup> December 2007.

person has vested in them, what approach should they be required to adhere to – supported or substitute decision-making?

In the Commission's view the short answer, and one that is in line with Australia's interpretive declaration to the CRPD, is that the appropriate approach in a given scenario will fall on a continuum between supported and substitute decision making, with the precise point being dependant on the circumstances. In relation to this notion of a continuum a number of features need to be emphasised:

- the presumption must be in favour of supported decision-making – that is, it is always the starting point;
- departures from supported decision making – to partial or full substitute decision-making – must satisfy a test of being a reasonable limitation on the human rights of the individual who is the subject of the decision and would otherwise be the decision maker (the elements of such a test would be based on section 7 of the Charter); and
- one departure from supported decision-making does not mean substitute decision-making then becomes the norm for that person – when the need for a new or further decision arises an approach based on substitution must be scrutinised and justified.

### ***Implications of supported decision-making being the default approach for enduring powers of attorney and guardianship***

One of the primary consequences of requiring enduring guardians or those acting under a power of attorney to orient their role around a presumption in favour of supported decision-making, is the need to ensure resources are available to assist individuals understand what this means, and equip them with the strategies to implement such an approach. In the broadest terms, and following from the notion of a continuum described above, at least two types of resources would be required. The first, would be those that explain the principles of supported decision-making, and provide attorneys and guardians with information regarding the strategies they can employ to adhere to a supported decision-making approach, including sources of advice for the performance of their role. The second, would be those that provide guidance for the management of situations where an attorney or guardian believes substitute decision-making is necessary – these would need to articulate the considerations that are relevant to identifying when substitute decision-making is permissible<sup>6</sup>, and be supported by access to comprehensive advice and support.

Having identified the need for resources and support to facilitate adherence to a model of supported decision-making, it is important to emphasise that in certain respects, of all the scenarios where the law presently permits substitute decision-making, it is arrangements pursuant to enduring powers of attorney and guardianship that are arguably most effectively placed to make the transition from substitute to supported decision-making. This is because a relationship of trust and genuine understanding of the person whose capacity is diminishing or changing, is often the most fundamental ingredient in implementing a successful supported decision-making framework.

Where the person's likes and dislikes, plans and aspirations are previously known and understood, there is a firm foundation from which to facilitate supported decision-making.

---

<sup>6</sup> These considerations would be based upon section 7 of the Charter, which sets down a framework for identifying where it may be permissible to limit human rights. Section 7 is naturally expressed in broad, abstract terms, but is readily capable of tailoring and application to a range of scenarios.

This will usually be the case with those appointed to act under an enduring power of attorney or guardianship – not only will they be expected to know the person, their appointment in the relevant instrument (if the advice of bodies such as the Office of the Public Advocate is followed) should be preceded by a detailed discussion regarding how they should approach their role if the need arises. Accordingly, whilst overall the systemic shift from a focus on substitute to supported decision-making might be anticipated to involve a range of significant challenges, the arrangements under review by the Committee might legitimately be expected to lead the way.

## SAFEGUARDS

Whether it be founded on principles of supported or substitute decision-making, any regime that permits another person to influence or determine critical life issues for another requires significant safeguards. This is emphasised by the fact that the implementation of safeguards is a specific obligation under article 12 of the CRPD. In keeping with our approach throughout this submission, the Commission does not propose to articulate a definitive framework of safeguards, but rather identify broad principles or requirements that need to be considered and addressed. These include:

- **Preventative safeguards:** clarity at the time instruments are being drafted and executed is one of the best means of preventing difficulties and abuse. Those executing such instruments need to understand what they are doing (which should include access to free legal advice where needed), and those being nominated need to be clear about the expectations on them – both of the person nominating them, and under the general law. This is the point at which both parties should explore the notion of supported decision-making, as well as turn their minds to the possibility of scenarios emerging when substitute decision-making might need to be considered. The work of the Office of the Public Advocate provides a strong foundation for this.
- **Automatic and ad-hoc monitoring:** because arrangements under an enduring power of attorney or guardianship are decided upon by an individual exercising their free will and choice, it may be thought there is a lesser need for monitoring of such arrangements when they are enlivened. The Commission's view is that this assumption needs to be questioned and that a level of monitoring is required (including monitoring or review that can be initiated by a concerned third party). In this context the way in which monitoring is framed becomes important, and it needs to be emphasised that monitoring can in fact operate as a form of support and assistance for attorneys and guardians who are performing an extremely challenging role in circumstances that may often involve a level of crisis or grief.
- **Monitoring and review of the decision-making process and not just the substantive decision:** in light of this submission's focus upon how attorneys and guardians should approach their responsibilities, any system of safeguards needs to be as concerned with decision-making methodology in given scenarios as it is with the substantive decisions that are being made.
- **Resources and support:** as described above, those acting under an enduring power of attorney or guardianship need to have access to resources and support to assist them

perform their responsibilities. Critically, if the need arises, independent support should also be available to the person who executed the relevant instrument.

## CONCLUSION

The Commission commends the work of the Committee in examining powers of attorney. Alongside the reviews of both the *Mental Health Act* and *Guardianship and Administration Act*, it is a timely initiative to ensure the framework in place in Victoria for handling situations where a person's capacity is impaired complies with the human rights protected under the Charter, as well as internationally.

Enduring powers of attorney and guardianship are an important expression of individual autonomy, and a straightforward and robust framework to enable people to make such arrangements is vital. As has been brought into focus by recent developments internationally, it is essential that such a framework emphasise an obligation to adhere to supported decision-making, except where to do otherwise is reasonably justified. This needs to be supported by appropriate resources and support, as well as multi-faceted safeguards.

The Commission would be happy to address any questions the Committee may have about this submission. If that is necessary please contact my executive assistant, Jackie Lane, on 9281-7106 to make arrangements.

Yours sincerely,



per: **Dr Helen Szoke**  
**Chief Conciliator / Chief Executive Officer**