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Guardianship and Administration Bill 2018

1. Liberty Victoria is committed to the defence and advancement of human rights and civil liberties. We seek to promote Australia's compliance with the rights recognised by international law and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community.

2. The Guardianship and Administration Bill 2018 ('Bill') is a necessary reform to update and bring Victoria's personal guardianship and administration laws into line with modern expectations and human rights.

3. Guardianship and administration orders provide important protections for people with disabilities. Under these orders, a 'represented person' has a person or organisation assigned to make key decisions about their personal and financial circumstances. The current regime has come under some criticism for its conflict with the principles in the United Nations Convention on the Rights of Persons with Disabilities ('Convention'). In particular, the Convention mandates the elimination of all forms of substituted decision-

making. While the Bill does not go that far, we welcome its stated objective of moving away from a paternalistic model focusing on outdated 'best interests' principles, and towards one that seeks to promote and advance the autonomy of people with disabilities.

4. We particularly commend a more nuanced and individualised approach to decision-making and consideration of the ways in which suitable support may be given in informal ways. Providing supportive guardianship and administration orders is also a welcome change. These orders allow a person (called a 'supported person') to be supported to make their own decisions. This change brings Victorian law more closely into alignment with the purported aims of the Convention.

5. However, we have some concerns about a number of aspects of the Bill which seem to unjustifiably limit the rights of persons with disability and encroach on vitally important principles of procedural fairness.

Informal detention

6. Some decisions about a represented person's accommodation effectively result in their detention in places such as aged care facilities.

7. We are particularly concerned about the Bill's silence concerning informal detention arrangements at residential facilities, such as locked nursing homes or hospital wards.

8. Residential arrangements which effectively amount to informal detention are a clear interference with a person's right to liberty and security, freedom from arbitrary and unlawful detention, and freedom of movement. This was exposed in the Bournewood cases in the United Kingdom.[1] There, the European Court of Human Rights found the informal admission of a person to a hospital, and their subsequent detention, to be an unlawful deprivation of liberty and a violation of the European Convention. Given the similarities between the European Convention of Human Rights and the

[1] Following the decisions of the House of Lords in *R v Bournewood Community and Mental Health NHS Trust; Ex parte L* [1999] 1 AC 458 and later the European Court of Human Rights in *HL v United Kingdom* (2005) 40 EHRR 32.

Victorian Charter of Human Rights and Responsibilities Act 2005, it is arguable that detention without formal legal authorisation is unlawful.

9. The Bill's failure to address this issue is disappointing in light of the Victorian Law Reform Commission's ('VLRC') recommendations that informal detention issues be addressed in any new guardianship legislation. Without clear mechanisms for approval and review of informal detention, such arrangements effectively go unchecked. The VLRC recommended that any authorised restrictions on a person's deprivation of liberty and security should be clearly set out in guardianship legislation. Further, the VLRC recommended that any person with a genuine interest in the person and social wellbeing of a person living in a relevant facility should be permitted to apply for directions about whether a particular action is a restriction upon liberty that requires authorisation.[2]

10. In line with the recommendations of the VLRC, the Bill should clearly express if and when a guardian is to have the power to decide a represented person's living arrangements which effectively result in the deprivation of that person's liberty and security. The Bill should also permit interested people to apply for directions about whether an action is a restriction upon liberty that requires authorisation. The omission of this may result in continued unlawful detention of represented persons in residential facilities.

11. We note that the Bill already provides that a guardian or administrator can only exercise certain powers if specified in the order, such as the power to undertake legal proceedings (see clauses 38, 40, 46 and 51). A similar provision should exist concerning decisions about living arrangements which deprive a represented person's liberty.

Access to information

12. Our next concern is that the Bill limits access to information lodged with the Tribunal about an application. The proposed insertion of clause 37A into

[2] VLRC, Guardianship: Final Report (2012), 341.

Part 9 of Schedule 1 of the Victorian Civil and Administrative Tribunal Act 1998 allows a person to apply to Victorian Civil and Administrative Tribunal ('the Tribunal') to restrict a specified person or class of persons from accessing information lodged with the Tribunal. The Tribunal must decide such applications 'fairly' and 'according to the merits of the case'.

13. The brevity and vagueness of clause 37A is broad enough to allow the Tribunal to deny a (proposed) represented/supported person access to information about their case. This has the capacity to allow 'secret' evidence to be given to the Tribunal which, if access is denied, a represented/supported person cannot know and cannot challenge. At present, the only proffered justification of this restriction is that it may be "necessary to protect the rights of others, including the right to privacy and reputation." While this reason may justify restricting a non-party from accessing information, it is plainly insufficient to justify restricting a represented/supported person's access.

14. Appointing a guardian or administrator has significant impacts on a represented person's autonomy and rights including equality under the law, freedom of movement, freedom of association, freedom of expression, and right to property. Restricting a represented person's access to information that may be relied upon to make an order with such considerable impact is antithetical to a fair hearing. Procedural fairness demands that a (proposed) represented/supported person be afforded the opportunity to deal with information that is "credible, relevant and significant" to the decision being made. Any limitation on such a fundamental right must be supported by clear and cogent reasons.

15. Accordingly, we consider that clause 218 of the Bill should be amended to exclude represented/supported people from the class of people who may be denied access to information. In the alternative, clear criteria must be outlined for non-disclosure. Alternatively, rather than an absolute restriction, less restrictive limitations should be adopted such as supported access (for example, viewing the information in company with another), releasing the information to a person's representative, redacting

confidential information, and/or providing the substance or 'gist' of the information.

Reassessment hearings at the Tribunal's own initiative

16. The Bill proposes to allow reassessments to be conducted 'on the papers' on the Tribunal's own initiative if the Tribunal does not propose to amend, vary or replace the relevant order. A represented/supported person can effectively 'opt in' by filing written notice. We have concerns about this approach.

17. Firstly, this 'opt in' approach sits uncomfortably with the presumption of decision-making capacity which can only be displaced with evidence to the contrary (clause 5(2)) and the obligation to take into account that incapacity may only be temporary (clause 5(4)(b)).

18. The Bill does not presently define what evidence must be before the Tribunal when conducting a reassessment on its own initiative. An administrator is required to file accounts of transactions and dealings with the Tribunal annually. These reports may not have any input from the represented/supported person and may contain information adverse to that person. Other than that, there is no other information required to be before the Tribunal concerning the decision-making capacity of the represented/supported person.

19. Even though the provision requires reasonable steps to be taken to contact the represented/supported person to ascertain their wishes about how the reassessment should be conducted, this in no way effectively replaces a thorough examination of that person's decision-making capacity, or hearing evidence from the person about their views about continuation of an order.

20. If the presumption is to be properly applied, new evidence of continuing incapacity is required. That is not to suggest that historical evidence will have no present relevance. However, relying on that material alone without allowing for the meaningful contribution of the represented/supported

person (as a minimum requirement) would be clearly incompatible with enforcement of this presumption.

21. Secondly, the 'opt in' approach perpetuates criticisms expressed about the present system, namely that it fails to encourage participation by the represented/supported persons in hearings that directly affect their rights. In some instances, the reassessment may take place 3 years after the initial order was made. The VLRC stated "more effort should be made in the future to encourage some involvement by the represented person in the reassessment process because of the importance of the interests involved".

22. Accordingly, we consider it inappropriate to allow reassessments to be conducted by the Tribunal in an 'opt in' way. In our view, reassessment hearings act as an important oversight mechanism, ensuring that any limits placed on person's fundamental human rights are demonstrably justified and necessary. We consider that the current proposed approach would likely continue what the VLRC described as "an unstated statutory assumption" that the status quo remains unless the represented person proves a change in circumstances (an effective reverse onus).

23. While we acknowledge the resources that may be involved, a thorough review of a person's current circumstances, specifically one involving hearing from the person subject to an order, should take precedence over any limited administrative convenience. Additionally, given the impact affirming orders has on a represented person, it is inappropriate not to conduct these hearings in an open and transparent way.

24. We recommend that reassessment hearings initiated at the Tribunal's own motion should take place with the represented/supported person present. There is no justification for less scrutiny being applied upon reassessment than that applied at first instance. Accordingly, the language in clauses 29 and 86 (which relate to first instance assessments by the Tribunal) should be replicated for reassessment hearings. Namely, the represented/supported person should be required to attend a hearing unless the Tribunal is satisfied

that the person does not wish to attend, or that their attendance is impracticable or unreasonable.

25. In the alternative, the Bill should outline what evidence the Tribunal must have before it before conducting any 'on the papers' reassessment.

26. Lastly, if these recommendations are not supported, the requirement to opt in 'in writing' should be removed. Written requests may be unduly restrictive the ability of some people with disabilities to access the justice system, and discourage participation in hearings which affect their rights. Oral requests should be acceptable.

Other matters

27. We note some other matters which should also be addressed:

28. **Money paid to person with a disability**: Clause 179 replicates section 66 of the Guardianship and Administration Act 1986. A literal reading of the provision requires a court in civil proceedings to pay into court any money paid to a person with a disability. There is no reference to the disability having an incapacitating effect on the person. In other words, it applies to all persons with disabilities. Criticism to this effect was levelled against the provision by Kaye J in Smith v Reynolds [1988] VR 309 and Murphy J in Loft v McEwan (unreported, 25 August 1988, Supreme Court of Victoria).

    This provision replaced section 79B of the Supreme Court Act 1986 which expressly conditioned this power on the disability relevantly affecting a person's decision-making capacity. This condition should be reimposed to avoid blatant discrimination. Even if the provision could be interpreted in a non-literal way, it should be amended to remove any kind of discriminatory and paternalistic overtone.

29. **Merits review**: We note the Attorney General's statement that further work is required to address merits review of guardians' and administrators' decisions. Clause 78 enables a represented person to apply to the Tribunal about a matter arising out of a financial matter. This replicates section 56 of the *Guardianship and Administration Act 1986* (Vic) which operated as an

indirect way to challenge the merit of a decision. While this may not be a complete solution to providing merits review to a represented person, if this application is available, we believe that such applications should be extend beyond financial matters to include personal matters as well.

30. **Time limits for an application for compensation**: Clause 184 should be clarified. It presently provides a time limit for application based on the death of the represented person or administrator/guardian. It is unclear what the applicable time limit is (if one exists) for applications in circumstances where the administrator/guardian or represented person has not died.

31. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Jessie Taylor or Liberty Victoria Policy Committee member Gemma Cafarella or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.