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OPA submission to Access to Justice inquiry

Dear Commissioners

On behalf of the Public Advocate, Colleen Pearce, I thank you for this opportunity for OPA to present information to the Commission that may assist in its inquiry into Access to Justice.

About OPA

- 1.1. The Office of the Public Advocate (OPA) is a statutory office, independent of government and government services that works to protect and promote the rights, interests and dignity of people with disabilities.
- 1.2. OPA provides a number of services to work towards these goals, including the provision of advocacy, investigation and guardianship services to people with cognitive impairments or mental illnesses. In the last financial year, 2012–13, OPA was involved in 1,590 guardianship matters, 386 investigations and 394 cases requiring advocacy.
- 1.3. The largest disability-type group to have an OPA guardian are older people with dementia. During 2012/13, 57 per cent of OPA's guardianship matters were for people aged over 65 years of age. Approximately only one-quarter of new guardianship matters involved a person identified as having an intellectual disability. Very close to the same proportion of matters were for people with mental ill health. In Victoria, the most common issue in guardianship is an accommodation decision. In 2013, this was the issue in three-quarters of all cases. There were 781 new cases in total for that year.¹ These are now long established patterns.
- 1.4. OPA conducts detailed investigations under the Victorian Civil and Administrative Tribunal Act to assist VCAT in determining guardianship applications. In addition, OPA also conducts much briefer investigations into urgent matters ('temporary investigations') to establish whether there is a need for an urgent hearing or, indeed, whether the risks are so great that a temporary order should be made immediately and without an open hearing at which all parties can attend.
- 1.5. Under the *Guardianship and Administration Act*, OPA is required to arrange, coordinate and promote informed public awareness and understanding through the dissemination of information about these topics.
- 1.6. The OPA Advice Service offers information and advice on a diverse range of topics affecting people with a disability. During 2012–13, the Advice Service handled

13,835 enquiries, a 3.3 per cent increase from the previous year. The largest group of callers was family and friends (39.4 per cent), followed by health and community services (27.4 per cent). Most calls related to guardianship and administration (33 per cent) and enduring powers of attorney (25 per cent). The other significant category of calls related to medical consent and healthcare treatment (12 per cent).

- 1.7. OPA also operates a Legal Unit with two Legal Officers, a Duty Officer at the Victorian Civil and Administrative Tribunal and a Disability Act Officer. OPA is often involved in cases in the Children's Court, the Magistrates' Court and Supreme Court of Victoria.
- 1.8. OPA operates a policy and research unit, which seeks systemic improvements to the lives of people with disability.
- 1.9. OPA's advocacy was central to the establishment of the *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* by the Victorian Parliament Law Reform Committee.² OPA provided a written submission and gave oral evidence before the committee.
- 1.10. OPA is also interested in the *Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, Discussion Paper No 81* (2014).
- 1.11. The ALRC inquiry is focussed on laws and legal frameworks affecting people who may need decision-making support.³ The ALRC inquiry is undertaken in the context of the United Nations *Convention on the Rights of Persons with Disabilities* (Convention) with particular regard to article 12 which recognises the right of persons with disability to enjoy legal capacity 'on an equal basis with others in all aspects of life'.⁴ The inquiry also is very strong on the point that Australia, by ratifying the Convention, accepted the obligation to 'take appropriate measures to provide persons with disability access to the support they may require in exercising their legal capacity,' also providing for appropriate and effective safeguards to prevent abuse.⁵
- 1.12. OPA welcomes this opportunity to provide information to the Commission's inquiry. Due to current resource constraints, OPA is only able to make a brief submission in response to the Commission's Information requests below.
- 1.13. OPA's comments below relate entirely to the situation of people with disability and mental ill health, and particularly people with high supports needs due to significant cognitive impairment.

INFORMATION REQUEST 5.1

The Commission seeks feedback on the likely effectiveness and efficiency of extending the use of legal health checks to those groups identified as least likely to recognise problems that have a legal dimension. More vulnerable groups include people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support. Where greater use of legal health checks is deemed appropriate, information is sought on who should have responsibility for administering the checks. What role should non-legal agencies that have regular contact with disadvantaged clients play? Do these organisations need to be funded separately to undertake legal health checks?

- OPA supports the idea of legal health checks
- OPA is concerned that already stretched services may be ill-equipped without further resources and additional expertise to perform these checks
- Consideration also needs to be given to what occurs after a legal-health need is identified and prioritised through the check process.

- It is likely that performing legal health checks for people who have been isolated due to pervasive discrimination have a wide range of unmet legal needs. Examples could include disability discrimination complaints, possible torts for past mistreatment, victim-of-crime matters and financial exploitation.
- OPA notes that the Commonwealth and State Governments already fund disability advocacy programs provided by community-based organisations. These organisations perform an important role in acting with and for people with disability to access services and have issues of concern to them properly dealt with. This program includes some specialist legal advocacy services.
- Expansion of existing funded advocacy programs, conducted independently and with minimal conflict of interests with services systems, should be considered as a primary means for conducting and following up legal health checks.

DRAFT RECOMMENDATION 5.1

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template. Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

- OPA supports the thrust of this recommendation
- OPA notes that there is ever increasing scope and demand for self-serve access to information via information technologies and applications.
- While single point entry is generally desirable, there should also be alternative direct routes and providers for specialist areas of the law.
- Advance planning for end-of-life and serious health matters is a specialist area of the law that is not adequately catered for through existing arrangements.
- The specialised area of the law involving the most difficult of life matters is an example of a legal area that will likely require a long-term and serious commitment from a specialised, interested and informed party, such as OPA.
- Establishing single-gateways should not mitigate against more specialised and complimentary activities by properly resourced agencies such as OPA

INFORMATION REQUEST 7.5

In what areas of law could non-lawyers with specific training, or 'limited licences' be used to best effect? What role could paralegals play in delivering unbundled services? What would be the impacts (both costs and benefits) of non-lawyers with specific training, or 'limited licences', providing services in areas such as family law, consumer credit issues, and employment law? Is there anything unique to Australia that would preclude the adoption of innovations that are occurring in similar areas of law overseas? If so, how could those barriers be overcome?

- OPA cannot make specific comment on the merit of 'limited licenses'
- OPA refers to the point already made that governments already fund disability advocacy programs conducted by community-based organisations who provide support for people experiencing severe discrimination or other major life issues. These advocacy organisations support people to access the services they need,

including legal services. The expertise of advocacy organisations can assist services to provide appropriate and accessible services.

- The effectiveness and reach of these disability advocacy programs is currently curtailed by the inadequate resources provided for this program

DRAFT RECOMMENDATION 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

INFORMATION REQUEST 8.1

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to \$50 000). What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions? The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.

- The Children's Court has appointed the Public Advocate litigation guardian for a number of parents who have a disability to provide instructions in child protection matters. The court operates on an adversarial model of litigation, which is very different from the inquisitorial model of the Guardianship List at VCAT. From OPA's experience, this makes it more difficult to work collaboratively to reach solutions to the human problems that give rise to the matters being litigated.
- OPA has also attended the Magistrates' Court to appear in applications for intervention orders. On a number of occasions, it has faced not being able to provide the registry with all the information the computer system deems necessary to process the application and, thereby, proceed to the next step. For example, OPA was unable to provide the age of the defendants. Given that the laws regarding intervention orders are protective, OPA is perplexed that its access to the court is impeded when its clients need protection.
- Increasingly, bodies are looking to the Public Advocate to act as litigation guardian where the plaintiff or defendant has a cognitive impairment. This presents serious resourcing issues for OPA and, on two occasions, it has appeared before the Supreme Court of Victoria to advise that it does not have the resources to perform the role.
- Being a litigation guardian has heightened OPA's awareness that the role and responsibilities of the litigation guardian are not well articulated. Work is underway with the Law Institute of Victoria and the Public Interest Law Clearing House to examine the systemic issues regarding litigation guardianship.

Re ADR and Tribunal hearings

- OPA notes the following dot-point from Box 10.1 'Unpacking ADR use in VCAT', p. 314: 'Guardianship orders are not amenable to ADR as hearings are required to make protective orders ...'

- OPA further notes the following statement from page 260 of the draft report: ‘Wills and estates, elderly care and guardianship are three areas of civil law that may be amenable to greater resolution by ADR. ‘

- OPA’s also notes the following statements under the heading of ‘creeping legalism’ on p. 16 with our emphasis added:

Legal representation is already restricted in a number of tribunals and some stakeholders have advocated stronger enforcement of these restrictions. The Commission considers that some restrictions on representation in tribunals are appropriate and should be enforced more strictly. However, the Commission also accepts that some degree of **representation is inevitable and indeed desirable. For example, where representation would facilitate the identification and resolution of the issues, or where it might be required to facilitate fairness and equity, such as in specialist tribunals dealing with adult guardianship** and mental health issues.

- As noted earlier, OPA conducts investigations under the Victorian Civil and Administrative Tribunal Act to assist VCAT in determining guardianship applications and urgent matters
- OPA acknowledges the critical importance of affording natural justice during the course of an investigation
- OPA also acknowledges the importance of representation in legal proceedings
- It is OPA’s view that adversarial proceedings are rarely the best way of determining and promoting the best interests of the person who is the subject of the guardianship or administration application. Preserving the inquisitorial nature of guardianship proceedings in VCAT is of paramount importance for preserving the integrity of such proceedings. The person in the most precarious position at a guardianship hearing is the person with disability or mental ill health for whom guardianship or administration has been proposed.
- It is OPA’s experience that it is often other parties who initiate representation to promote their own interests, rather than the person who may be subject to orders.
- For these reasons, OPA agrees with the substance of the reform recommended by the Administrative Appeals Tribunal (AAT) which the Commission has supported at p.16

The AAT’s view is that there would be value in making explicit in its governing legislation not only the responsibilities of the AAT but also the responsibilities of parties and their representatives to help facilitate a review process that is fair, just, economical, informal and quick.

- OPA would also that representation must also respect the principles and objectives of the governing legislation for the particular application
- OPA also draws attention to the impact of the paradigm shift signalled in the Convention to recognise people with disability as persons before the law and their right to make choices for themselves.⁶
- The ALRC inquiry is investigating the implications of decision-making ability for access to justice, particularly in relation to court processes. This involves situations where persons with disability are defendants in criminal proceedings, parties to civil proceedings, witnesses in criminal or civil proceedings and potential jurors.⁷ This is done with a view to examine how a range of Commonwealth laws and legal

frameworks affecting people involved in court proceedings might be reformed to reflect the proposed National Decision-Making Principles.⁸

- These issues impact on how representation will be initiated and conducted in the future, as more and more people use formal and informal decision-making support that may or may not be formally regulated. The ALRC have noted the following issue

The National Decision-Making Principles require that people should be provided with the support necessary for them to make, communicate and participate in decision-making. In some cases, this support will include the appointment of a litigation representative. The barriers to obtaining this support may include solicitors' duties to their clients.⁹

- The ALRC has found that in relation to supported decision making the need to promote the dignity, equality, autonomy, inclusion and participation of all people involved in civil proceedings outweighs any concerns.¹⁰

OPA welcomes the opportunity for our principal legal officer, Phil Grano, to discuss these matters further with the Commission at an inquiry hearing.

Yours faithfully,

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Endnotes

¹ Office of the Public Advocate, "Office of the Public Advocate Annual Report 2012-13."

² <http://www.parliament.vic.gov.au/lawreform/article/1461>

³ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) 157 ('ALRC discussion paper').

⁴ United Nations *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12.

⁵ *Ibid*; ALRC discussion paper, 30.

⁶ ALRC discussion paper, 53.

⁷ ALRC discussion paper, 155.

⁸ The principles include: the right to make a decision; the right to decision-making support; the persons will, preferences, and rights to direct decisions; the right to safeguards. ALRC, chapter 3.

⁹ See, eg, Lauren Adamson, Mary-Anne El-Hage and Julianna Marshall, 'Incapacity and the Justice System in Victoria' (Discussion Paper, Public Interest Law Clearing House, 2013)

¹⁰ ALRC discussion paper, 173-4.