



# The Guardianship & Administration Act 1986, and the Charter of Human Rights & Responsibilities Act 2006

## The concept of ‘best interests’ in the *Guardianship and Administration Act 1986*

The ‘best interests’ of the person is the key concept underlying the *Guardianship and Administration Act 1986*. VCAT may not appoint a guardian or an administrator even if all the criteria set out in sections 22(1) – (2) and 46(1) – (2) are met unless the appointment is in the best interests of the proposed represented person<sup>1</sup>.

The concept is found in the objects of the Act where “every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act” must be exercised or performed so that “the best interests of a person with a disability are promoted”. In this context the concept of best interests stands alongside two other objectives of the Act –

- ✦ that the wishes of a person with a disability are given effect to wherever possible; and
- ✦ the means which is the least restrictive of a person’s freedom of decision and action as is possible in the circumstances is adopted.

The concept grounds the various roles set out in the Act.

- ✦ The Public Advocate may seek assistance in the best interests of any person (section 16);
- ✦ VCAT may only appoint a person as guardian where that person will act in the best interests of the proposed represented person (section 23);
- ✦ The health care and access to persons powers of the guardian can only be exercised in the best interests of the represented person (section 23);
- ✦ The exercise of a guardian’s powers under section 26 cannot be impugned where the guardian believes it is in the best interests of the represented person;
- ✦ Section 28 requires a guardian to act in the best interests of the represented person and sets out what may constitute this;
- ✦ VCAT may remove an enduring guardian who has not acted in the appointor’s best interests (section 35D);
- ✦ The person responsible must act in the patient’s best interests when consenting to medical and dental treatment (section 42H and section 38), and must not act contrary to the patient’s best interests when consenting to a medical research procedure (sections 42S and 42U);
- ✦ VCAT may only authorise a special procedure where that procedure is in the patient’s best interests (section 42E);
- ✦ VCAT may only authorise medical or dental treatment on a patient who is likely to recover in a reasonable time where the treatment is in the patient’s best interests (section 42HA);
- ✦ A registered practitioner may only perform a medical treatment under section 42K if they consider the treatment is in the patient’s best interests, and may only challenge a decision by a person responsible not to consent to treatment where the practitioner considers the treatment to be in the patient’s best interests (section 42L);

<sup>1</sup> See sections 22(3) and 46(3). Morris J, in the case of RCS, stated “the existence of [disability, incapacity and need] are preconditions for appointment; but such an appointment is still discretionary” and “the discretion is confined by [the] section ... it must not be exercised unless the tribunal is satisfied that the order would be in the best interests of the disabled person.” Public Advocate v. RCS (Guardianship) [2004] VCAT 1880

- ✦ A registered practitioner may not use the section 42T process of procedural authorisation of a medical research procedure unless the procedure is not contrary to the best interests of the patient;
- ✦ VCAT may only appoint an administrator where that is in the proposed represented person's best interests (section 47); and
- ✦ An administrator must act in the represented person's best interests (section 49).

## Guidance as to what is in a person's best interests

The Act provides guidance as to what is in a person's best interests.

*Firstly*, as note above, the objectives of the Act set out two principles that must guide a determination about what is in a person's best interests –

- ✦ that the wishes of a person with a disability are given effect to wherever possible; and
- ✦ the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted.

*Secondly*, specific guidance is given to guardians in section 28 –

(2) Without limiting sub-section (1), a guardian acts in the best interests of a represented person if the guardian acts as far as possible—

- (a) as an advocate for the represented person; and
- (b) in such a way as to encourage the represented person to participate as much as possible in the life of the community; and
- (c) in such a way as to encourage and assist the represented person to become capable of caring for herself or himself and of making reasonable judgments in respect of matters relating to her or his person; and
- (d) in such a way as to protect the represented person from neglect, abuse or exploitation; and
- (e) in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person.

*Thirdly*, guidance is provided to persons responsible when consenting to medical and dental treatment, registered practitioners (eg: doctors and dentists) and to VCAT when making a decision about a special procedure: -

- (a) the wishes of the patient, so far as they can be ascertained; and
- (b) the wishes of any nearest relative or any other family members of the patient; and
- (c) the consequences to the patient if the treatment is not carried out; and
- (d) any alternative treatment available; and
- (e) the nature and degree of any significant risks associated with the treatment or any alternative treatment; and
- (f) whether the treatment to be carried out is only to promote and maintain the health and well-being of the patient.<sup>2</sup>

*Fourthly*, a medical research procedure cannot be performed if it is contrary to a person's best interests.

The Act provides guidance in these terms (section 42U) –

- (1) In this Division, for the purposes of determining whether a medical research procedure would or would not be contrary to the best interests of a patient, the following matters must be taken into account—
  - (a) the wishes of the patient, so far as they can be ascertained; and
  - (b) the wishes of any nearest relative or any other family members of the patient; and
  - (c) the nature and degree of any benefits, discomforts and risks for the patient in having or not having the procedure; and
  - (d) any other consequences to the patient if the procedure is or is not carried out.

*Fifthly*, specific guidance is given to an administrator as follows –

<sup>2</sup> See section 38(2).

- (2) Without limiting sub-section (1) an administrator acts in the best interests of the represented person if the administrator acts as far as possible—
- (a) in such a way as to encourage and assist the represented person to become capable of administering the estate; and
  - (b) in consultation with the represented person, taking into account as far as possible the wishes of the represented person.<sup>3</sup>

## The Charter and the *Guardianship and Administration Act 1986*

### How will the Charter affect the best interests of people?

The *Charter of Human Rights and Responsibilities Act 2006* (the Charter<sup>4</sup>) expands the sorts of things decision-makers must consider when acting in a person's best interests.

Apart from the specific guidance provided by the *Guardianship and Administration Act 1986* noted above, OPA staff must have regard to the 20 rights set out in the Charter. The rights have been categorised under 4 headings -

**F**reedom

**R**espect

**E**quality, and

**D**ignity

In schedule 1 you will find a list of all the Charter rights grouped under these headings.

*The purpose of the Charter is that these rights will be protected and promoted*<sup>4</sup>. OPA's vision is that Victorian society will be just, celebrate diversity, and in which the human rights, dignity and safety of people with a disability are promoted and protected. Therefore, when OPA staff members are doing their work, their endeavour is to protect and promote both the OPA vision and the charter rights for all persons.

So, alongside the promotion and protection of rights as expressed as best interests in the GAA, OPA staff members also protect and promote the rights of the person as set out in the Charter.

### Case Study 1

Lazlo has dementia and developed some paranoid ideas that his neighbours are attempting to poison him. He refused to eat all meals. VCAT appointed the PA Lazlo's guardian. The guardian placed Lazlo in a secure psychiatric unit for the elderly.

When the guardian visited Lazlo she learned that Lazlo was being regularly picked upon by another resident and that he had become depressed and isolated within the facility. The guardian had no other accommodation options to place Lazlo.

Lazlo has a right to humane treatment when deprived of his liberty and a right to security of the person (Charter sections 21 and 22 respectively). Under the GAA a guardian acts in the represented person's best interests when they advocate for them. The guardian advocated that Lazlo was being deprived of his right to humane treatment and to security of the person and that the facility must ensure that these rights are met.

The guardian has acted in the best interests of Lazlo both in terms of the GAA and by the promotion of Lazlo's rights under the Charter.

---

<sup>3</sup> See section 49(2)

<sup>4</sup> The Charter - section 7(1)



## What happens if it is not in a person's best interests to promote a particular right in the Charter?

The Charter contemplates the possibility that the rights in the Charter may have to be limited. Such limits must be

- ✚ reasonable, and
- ✚ justified in a free and democratic society based on human dignity and equality.<sup>5</sup>

There is a long-standing tradition in Australian (and English) law that people who have a disability and who lack capacity to make decisions for themselves are entitled to protection. If such protection were not provided these people would be subject to abuse and exploitation, or they may be neglected either by themselves or by others. Victoria, as a free and democratic society and through its Parliament, has provided protective mechanisms such as guardianship and administration.

If a guardian or an administrator considered that it was not in a person's best interests to exercise their rights, then the limitation placed on the person must be the least restrictive possible to achieve the desired outcome for the person. This principle of 'least restrictive' is set out both in the Charter (section 7(2)(e)) and in the *Guardianship and Administration Act 1986*. The Charter sets out some other things to consider when a right is being limited –

- ✚ what is the nature of the right affected (eg: is it about freedom, dignity etc)?
- ✚ what is the importance of the proposed limitation (eg: how important is it to the person)?
- ✚ what is the nature of the limitation (eg: what will the limitation do)?
- ✚ what is the extent of the limitation (eg: is it a major / minor limitation)?
- ✚ what is the relationship between the limitation and its purpose (is the limitation no greater than is necessary to achieve its purpose)?

### Case Study 2.

Vera lives in a nursing home. She is moderately wealthy. She executed an EPA (financial) to one of her sons, Marvin. Marvin then used the EPA to buy himself a new car with Vera's money. VCAT revoked the EPA. Whenever Marvin visited his mother he pestered her for money. Staff at the nursing home caught him threatening Vera who was scared. The PA was appointed Vera's guardian to make decisions about access to Vera. Vera said that she wanted to see Marvin despite his threats.

Vera has rights under the Charter such as freedom of association and protection of the family (see sections 16 & 17). Vera also has a right under the Charter to security of the person (see section 21).

The guardian made a decision to restrict Marvin's access to his mother so that he was only able to visit her when supervised by a third person or in a public area within the nursing home. In making her decision, the guardian had regard to the best interests of Vera as set out in section 28 of the GAA and also to the rights set out in the Charter.

The purpose of placing restrictions on Vera's rights under the Charter to see Marvin is to protect Vera from Marvin's threats. The guardian considered that Marvin will not threaten his mother when there is a third person supervising them or when he will be seen by others at the nursing home. The limitation did not prevent Vera from seeing Marvin at all and so was proportionate to the purpose of the limitation (to protect Vera). The limitation is therefore reasonable and justified, accordingly it is lawful.

The decision of the guardian also affected Marvin's rights under section 16 and 17 of the Charter. The same reasoning applies as to the lawfulness of the limitation as applies to Vera.

In restricting Marvin's access to Vera the guardian has promoted and protected Vera's right to security.

---

<sup>5</sup> The Charter – section 7(2)

In Case Study 2 some of the Charter rights conflict with each other, the right to security of the person is opposed to the right that families be protected and the right of a person to associate freely with those they choose. Where there is conflict between the right, there must be a purpose to the limitation and that purpose will be the promotion of another right.

## **How can I be assured that I have considered all the person's rights under the Charter?**

You need to keep a checklist of the rights near you so that you can refer to this readily.

It is important to regularly read the rights themselves. The title of the right does not reveal the full story of the scope and meaning of the right. A copy of the Charter can be found on the G Drive in the Legislation folder.

In schedule 2 you will find a chart referring to each of the 20 rights and the areas of OPA's work where these rights may be relevant.

## **If I believe that it is in the best interests of a person to limit their rights, what should I do?**

It is important to think through a decision carefully so that you can be assured that you are acting lawfully in restricting someone's rights.

1. You could start with the —BestInterests' Check List document on the G Drive to see what issues you need to take into account.
2. Remember that, as well as the guidance provided by the *Guardianship and Administration Act* 1986 as to best interests, it is also in the person's best interests to have their Charter rights protected and promoted.
3. It is not necessarily contrary to a person's best interests if limits are placed on a person's rights. If a limitation is required, ask yourself if it is –
  - a. Reasonable (having regard to the circumstances of the person)
  - b. Justified (having regard to the aspiration of the Charter that rights be promoted and protected rather than limited)
  - c. Necessary (that there is no other way of achieving the best interests of the person), and
  - d. Proportionate (the means adopted is the least restrictive of the person to achieve the purpose of the limitation).
4. Keep a written record of your decision and how you arrived at that decision.

## **To whom does the Charter apply?**

The Charter applies to public authorities, of which OPA is one.

- ✚ VCAT, when acting in an administrative capacity, is a public authority. VCAT is also bound by the Charter when it is interpreting laws.
- ✚ State Trustees Limited is a public authority.
- ✚ Trustee companies, when acting as administrators, may be public authorities.
- ✚ Private guardians and private administrators are probably not public authorities.