06.\_org\_Office of the Public Advocate (Vic)

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Name of organisation: Office of the Public Advocate (Vic)

Question 1:

The interpretative declaration has little operational effect but is pointed to as an indication of Australia’s less-than-total embrace of the Convention.

Question 2:

Under the National Disability Strategy Policy Area 2 (Rights protection, justice and legislation), Policy Direction 4 concerns people with disability being ‘safe from violence, exploitation and neglect’. OPA (Vic) would like to see greater emphasis in the strategy on steps designed to address this goal, which requires active steps to be taken in the areas of: criminal justice (including victim/witness support), health, mental health, and community services. This could also incorporate legislation designed to ensure that concerns about the abuse, neglect or exploitation of at-risk adults are able to be investigated by appropriate statutory authorities (where emergency services are unable or unwilling to investigate). This is an important matter given the rise of the federal NDIS, which will see greater variability in service provision, an increased number of service providers, and which may see an increased national regulatory presence. A Churchill Fellowship report has been written on the broad topic of adult protection by OPA (Vic)'s John Chesterman, which is available via this address: <http://www.publicadvocate.vic.gov.au/research/255/>.

Question 3:

No.

Question 4:

Yes, OPA (Vic) favours the UK *Mental Capacity Act* definition of capacity.

Question 5:

Supported decision making should be recognised as a key way in which people with cognitive impairments and mental ill health make and execute decisions. Section 4 of the NDIS Act contains some important principles on this score and is a good start, which could be replicated in other key Commonwealth legislation. It is worth thinking about other ways in which federal guidelines or practices can be developed in the supported decision-making realm. OPA (Vic) has produced information (including two discussion papers) on supported decision making (available via: <http://www.publicadvocate.vic.gov.au/research/132/>) and currently has a supported decision-making trial which is about to get underway. Other states and territories also have trials in progress or that have recently been completed. OPA's forum on supported decision making on 18 October looked at many of these, and the slides used on that day are available at this web address: <http://www.publicadvocate.vic.gov.au/research/133/>.

Question 6:

Question 7:

Question 8:

Question 9:

Question 10:

Question 11:

Question 12:

OPA (Vic) has advocated for the *NDIS Act* and Rules more clearly to allow participants with cognitive impairments or mental ill health to obtain support to make and implement their own decisions. Where it is decided that a nominee is required, OPA (Vic) has advocated that the participant’s preference of nominee should be respected unless there are very good reasons for not doing so (such a reason would be that the appointment of the person would jeopardise the personal and social wellbeing of the participant).

Question 13:

See response to question 12.

Question 14:

It is expected that state/territory-appointed guardians and administrators would be appointed as nominees under the NDIS where this would be appropriate, but a review is required to ascertain the extent to which this is happening in practice in the launch sites.

Question 15:

Question 16:

The term ‘unsound mind’ is not appropriate for federal electoral law. The test of voter eligibility should be whether the person has the capacity to make a decision about the relevant electoral question (e.g. casting a vote).

Question 17:

OPA has concerns about the limited extent to which potential voters with cognitive impairments and mental ill health are encouraged to vote and educated about their right to vote.

Question 18:

Question 19:

Question 20:

Question 21:

Question 22:

Question 23:

OPA (Vic) is keen for people with cognitive impairments and mental illness to receive greater support to bring their claims through the justice system. To that end, greater witness support should be provided. Thought should also be put into the provision and funding of litigation guardianship for people who are unable to instruct legal counsel.

Question 24:

Question 25:

Question 26:

Question 27:

Question 28:

OPA (Vic) would like to see increased national efforts to address the problem of financial abuse of people with disabilities, particularly the financial abuse of older Australians with age-related disabilities. Legislative and other regulatory reform concerning Australia's banks and other financial institutions is warranted, which could include the drafting of national guidelines on financial abuse recognition and response.

Question 29:

The extent to which a person’s disability may be used (on actuarial grounds) to deny the provision of insurance is problematic. For instance, a person’s history of depression can be used to deny the provision of life insurance, which is a clear instance of discrimination on the basis of disability.

Question 30:

See answer to Question 29.

Question 31:

Question 32:

Question 33:

Question 34:

Question 35:

OPA (Vic) is concerned about the high use of restrictive interventions on residents of aged care facilities and would like to see greater regulation and on-site auditing of this practice. OPA also believes that restrictions on the freedom of residents of aged care facilities to move about (including inside and outside) their residential facilities may constitute deprivations of liberty in contravention of various human rights norms (and Victoria’s *Charter of Human Rights and Responsibilities Act*). Please see further on this point: John Chesterman, ‘The future of adult guardianship in federal Australia’, *Australian Social Work*, 2013, vol. 66, pp. 26-38 (this article also calls for greater clarity in aged care legislation about when substitute decision-making appointments are required). A forthcoming article in the Journal of Law and Medicine (authored by Michael Williams, John Chesterman and Richard Laufer) will canvass OPA (Vic)'s concerns and reform recommendations about current 'compliant' deprivations of liberty in Australia.

Question 36:

As indicated above OPA (Vic) is concerned about the high use of restrictive interventions (particularly chemical restraints) on residents of aged care facilities and would like to see greater regulation and on-site auditing of this practice. The creation of a position of National Senior Practitioner (mirroring the role of Victoria’s Senior Practitioner, who regulates the use of restrictive practices by disability service providers) would be a good development here. OPA (Vic) believes that Professor Terry Carney may have been the person who originally suggested this idea. Such a person could monitor and audit the use of restrictive practices in aged care facilities.

Question 37:

Question 38:

Question 39:

Question 40:

OPA (Vic) takes the view that current family law provisions and practices discriminate unfairly against parents with disability, particularly parents with cognitive impairments and mental ill health. OPA (Vic) has just finished a report on this topic (written by Barbara Carter), which will be available in mid-December on this part of OPA's website: <http://www.publicadvocate.vic.gov.au/research/255/>. A copy will be forwarded separately to the ALRC.

OPA (Vic) also has concerns about the operation of the common law and relevant federal statutory provisions when 'special medical procedures' concerning children are proposed and where Family Court approval is sought. Cases here include situations where approval was sought to withdraw life-sustaining treatment from a baby, and where approval has been sought to enable children with gender identity disorder to undergo various stages of treatment to transition from one sex to the other. OPA (Vic)'s broad concerns here include the inappropriateness of the Family Court as a forum for these cases, uncertainty about when court authorisation is required for particular treatments, and the operation of the 'Gillick test' of competence for children in this field (and its compatibility with more routine assessments of 'capacity').

OPA (Vic) has produced one article on this topic (authored by Michael Williams, John Chesterman and Philip Grano), ‘Challenging Australia’s “closed” model of neonatal care: The need for reform following *Re Baby D (No. 2)*’, *Journal of Law and Medicine*, 2012, vol. 19. pp. 835-853. OPA is in the process of producing a further article concerning gender identity disorder, which will be forwarded to the ALRC when it is complete.

Question 41:

Other comments?:

In addition to the answers to the questions above, OPA (Vic) calls for additional federal developments in the guardianship field, in particular the development of national guardianship principles (derived from the Disabilities Convention), which would guide states and territories in their development of Convention-consistent guardianship laws and practices. See further John Chesterman, ‘The future of adult guardianship in federal Australia’, *Australian Social Work*, 2013, vol. 66, pp. 26-38.

File 1:

File 2: