3rd May 2011

Dear Victorian Law Reform Commission,

I am writing to make the following submission in response to the *Guardianship: Consultation Paper*. I welcome the attention you have given this rarely discussed, though vital topic.

I only plan to address a limited number of topics, where I have something objective to submit. They will be broadly around:

- Will making powers, specifically the appointment of the executor, after a person has become a *represented person.*
- Involvement in organ donation, medical research and express consent
- Federal Legislation - Australian Consumer Law - unconscionable conduct –

The overarching principle I feel we must make more explicitly is that education and self-reliance will be more potentially successful than reliance on Guardianship &Administration legislative interventions. This is something I am committed to doing every day, with everyone I meet in light of my experience

Our submission is from the direct personal experience of guardianship commenced around 17 years ago in G&A Board with a ill relative prior to the reforms that lead to VCAT coverage of this list, and as recently as six months ago with a second relative. However in between there has been much angst to our family.

Confidential

I have read both the consultation paper, and selected submissions including Submission 59 by State Trustees limited where paragraph 57 asserts " ... *an administrator should never be permitted to make a will on behalf of a represented person.*" This is not our recent experience of State Trustees Limited, where there are at least two occurrences where will has been drafted by STL, for a represented person appointing STL as the (joint) executor. Would you view this event to be sufficient as candidate for a reviewable decision, irregardless of the topic of ademption?

The absence of a will prepared prior to a person being a represented person is no policy failing, in the same way as the absence of an organ donation intention. Both would assist in future wishes guiding a decision, but competently legislation exists for both occurrences.

For most Victorias they will not know about this topic until they need it, or someone has opportunistically stepped into the breech. I authorise the publication of this letter and submission, after the removal of address/ contact details. I encourage you to complete your vital work and contribute to new legislation, as Nelson Mandela has said – "we shouldn't ever underestimate the powerful contribution of a committed small group of people.

J Mills.

Part 5: VCAT Appointments

Chapter 13: Powers of Guardians and Administrators

62. Should it be possible for VCAT to order that a guardian or an administrator have the power to make decisions about any of the following matters: • whether a represented person should continue to hold a driver licence • a will by the represented person • organ donation by the represented person? (also addressed in question 86. If the process is the same, what factors should the person responsible be required to consider before giving substituted consent to participation in a medical research procedure?)

Response:

First, do no harm, is the key guiding principle to assist people – from the Hippocratic oath in the *Zeitgest* or community expectation. So applying that principle, as medical research may have a risk attached, it can never become a surrogate decision of a guardian or administrator. It is fair for a parent to decide for a child, but ethically wrong for anyone else. We should just accept that represented persons cannot be medical guinea pigs. Using that principle organ donation is therefore excluded. Due to the seriousness of each topic, we should ONLY rely on express consent.

In making appointments the pre-condition of accepting an appointment is I would propose a pledge in accepting the role of Guardians is to pledge to "receive no benefit".

As we are essentially removing from a person their legal capacity to make formal decisions, a dramatic reduction of the rights and responsibilities. It is unconscionable conduct by an administrator to then posit that the represented person can have the right to appoint the administrator back as the executor once they pass away. This is not about testamentary capacity, just the "selection and engagement" of an executor through drafting a will

For consumer protections, the right to choose freely – forms the first of the six rights proposed by Kennedy speech to Congress in 1962 that heralded consumer protections as we know it today.

This façade of the right to choose freely, when the administrator is to make all other decisions, is something that STL now rightly acknowledges in the submission of November 2010 as being "never permitted" Lets now consider an apology from STL for the two incidences I know of, and ask are there more? How should this be remedied. One topic not covered is the absence of alternative mediation or dispute resolution by administrators. No once during a 15 year period did State Trustees meet with all family members and facilitate a decision jointly. Such an occurrence could be successful.

Drivers license should be outside this Act as it is already covered adequately in RTA, and I would ask what specifically is the point of difference here?

One matter that is surprising is the omission of discussion when a represented person should have the capacity to marry?

Part 7: Responsibility and Accountability under the Law

Chapter 17: Responsibilities

87. Does the law need to provide more guidance about the relationship between the wishes a person expresses at the time a decision is made, and any past wishes, views, beliefs and values the person has expressed? 88. Does the law currently strike the right balance between following the wishes of the person, including those that involve risk or danger, and other important considerations such as the right of a person to be protected from harm? 89. Do you think there should be a general set of decision-making principles that should apply to all types of substituted and supported decisions? 90. Do you agree with the Commission's proposal (Option C) that substituted judgment should be the paramount consideration for decision makers? Or, do you think that substituted judgment should be just one guiding principle to consider? 91. Is substituted judgment relevant to supported decision making? 92. Do you agree that new guardianship laws should specifically require substitute decision makers to act honestly and respond appropriately to conflicts of interest? (ALSO 105. Should VCAT be able to order administrators and financial attorneys to repay funds that have been misused? 106. Is there a need for more specific penalties for substitute decision makers who misuse or abuse their powers? 107. If yes, what types of conduct should warrant a specific penalty? 113. What should constitute a 'reviewable decision'?)

Response:

The Victorian Ombudsman has raised previous concerns, as well as earlier concerns from Victorian Audit Office makes the opacity of administration essentially too difficult to get sunlight on from our experience as family member. We know that :

- every letter from State Trustees had an error in it,
- each State Trustees transaction had late fees or interest being levied,
- even unclaimed monies weren't collect for the represented person, when it was a corporate function of State Trustees until they were stripped of these powers and recently transferred to the State Revenue Office today.

Sadly for our family it was truly, a comedy of errors.

Every policy area has a nominal 1% error rate, for example where Judicial Officers decisions are appealed, doctors treatment or decisions were rushed, or police misuses their powers. What is important is how we discover and remedy it. If State Trustees only has a 1/ 1000 error rate there are 27 cases over the past three years where they should be subject of a "reviewable decision", and stripped of the case due to mal-administration.

It is essentially impossible to get an apology from State Trustees when errors or a conflict of interest happened. Is this had happened the angst our family has experienced would be reduced today.

The ACCC already has very clear guidelines and legislation on "Dealing fairly with disadvantaged or vulnerable consumers" that should guide policy development and national consistency. I encourage their inclusion here.

As administrator are paid, it is illustrative to consider what consumer protection should apply here. Also it is sound to consider conduct towards consumers—s. 21 Australian Consumer Law (ACL) as an outline. From the ACCC we have this section applies to transactions between businesses and consumers, in daily / household use. It outlines a list of matters that the courts may consider when determining whether unconscionable conduct has occurred—although the court is free to include any factors it thinks are relevant. These included:

- the relative bargaining strengths of the business and the consumer
- whether the business required the consumer to comply with conditions that were not reasonably necessary to protect the legitimate interests of the business
- whether the consumer understood any documentation that may have been used
- whether the business used undue influence, pressure, or unfair tactics

- the price and terms on which the consumer could have acquired the same or equivalent goods elsewhere.

Using these principles clearly following wrong doing, administrators should re-pay funds, should also pay penalties. Also enforceable undertakings and public notices should be done for so consumers of administration services can have awareness of malfeasance or poor performance. Today we are well informed following actions from Victorian Ombudsman and Auditor previously, as well as ASIC for the recent Westpoint settlement that State Trustees made. We have no information from VCAT on Administrators performance, as well as no information of metrics or the underlying performance to guide policy development.

In retrospect at what point did our diaster become a suitable candidate for a reviewable decision:

- A guardian appointment and subsequent re-appointment
- The guardian moving in to live in the house with the represented person?
- A new will prepared by the administrator, if we learnt about this.
- Death of the represented person and the former guardian the new beneficial owner of my grandmother's home.

Part 8: Implementing and Regulating New Laws
Chapter 21: VCAT
151. Do you have any views about how VCAT Guardianship List hearings should be conducted?
152. Do you have any ideas about how to achieve better attendance of the represented person at VCAT hearings?

Response:

As VCAT receives administrator reports they clearly have a policy obligation to vet, respond and remedy, otherwise cancel this passive power as it has no policy contribution.

Also every order by VCAT should be supported by reasons, as a matter of course. If we allow a member to appoint a guardian or administrator to substitute for the represented persons decision making capability, it should ONLY be done with supporting reasons, to be published on the VCAT client file automatically. Where an applicant seeks a statement of reasons the delay in preparing the reason absorbs some of the review period of a decision.

I feel each order should also have some clear boundaries like practice rules or standing orders embedded in each order. For example an administrator cannot write a new will appointing themself the executor. A guardian "must receive no benefit".

Attendance of the proposed represented person at the hearings, or relocation of the hearing to the proposed represented persons current location are both complex topic in itself.

Part 4: Personal Appointments

Chapter 8: Personal Appointments

28. Should an online registration system be created for enduring powers? 29. Which organisation should hold the register? 30. Should registration be voluntary or compulsory? 31. If registration is compulsory, what effect should this have on unregistered appointments? 32. When is the best time for registration to occur? 33. Who should have access to the register? What safeguards could be put in place to protect an individual's privacy while allowing appropriate people to access it? 34. Should it be necessary to notify a public authority and/or various other people when a power of attorney is activated? 35. Should a donor be able to specify that certain people should be notified when a power of attorney is activated? Who should be notified and why? 36. How might notification work in a situation where a person's capacity is fluctuating? 37. Should a donor also be able to specify that people/bodies should not be notified when a power of attorney is activated?

Response:

I am uncertain that the scale of policy failing here is equal to the other matters being addressed here. I feel that existing powers of G&A act to appoint a new G&A, caters for any defect in the holder or operation of EPA.