JacksonRyan Partners

Guardianship - A Best Interests Approach

Response to the Victorian Law Reform Commission's Guardianship Consultation Paper

20 May 2011

Response to the Victorian Law Reform Commission's Guardianship Consultation Paper

Part 1 The Submission in Perspective

1. Background

The title of this submission – A Best Interests Approach – is taken from the Law Reform Commission's Consultation Paper (the report). The reason the writers have used it as the catchcry title for their submission is to emphasise the fact that when one party is granted the legal authority to represent or make decisions on behalf of another party, no greater responsibility could be given to that person. Thus, first, foremost and always the best interests of the represented person must be front and centre.

The disability sector tends to be one of those areas of human service where everyone has an opinion, and everyone seems to know what is best for persons with disabilities. Indeed, it is the view of the writers that over the last three decades or so, with the proliferation of funded advocacy bodies and the creation of various statutory watchdogs, plus a smattering of latter-day ideologues, there has developed a "We know what's best" mentality. The interesting observation however about those who lead the charge on rights and knowing what is best, is that they are often the very same people who shun parents and other family members as having the ability or objectivity to promote the best interests of their family member with a disability.

While the writers generally agree with much of what has been detailed in the Consultation Paper, they nonetheless, submit that the best interests concept needs to be expanded. They also highlight particular proposals and concepts detailed in the report and argue for a greater emphasis to be placed on some and for a rethink on others.

Given this approach, the writers have therefore not attempted to address all the finite detail of the Paper. They do however; raise two particular matters not addressed in the Paper and which might be seen as being outside the brief given to the Law Reform Commission. Notwithstanding this, the writers nonetheless argue that given the type of reform proposed by the Law Reform Commission provides a once in a quarter of century opportunity, then these two matters do need to be tabled and addressed.

Joint Authors: Max Jackson & Margaret Ryan
JacksonRyan Partners

Part 2 The Challenge Factors

Having mentioned two matters that have not been addressed by the Commission that the writers want to highlight, these are considered as first order issues and as such they are detailed below.

2.1 The Title

The writers could find no comment in the Paper in relation to whether or not the title – Guardianship and Administration - is being questioned as to whether it is now the right title. As noted in the report the title Guardianship and Administration was first launched in the mid 1980s. It was a different era, had a specific focus and was target specific. Since then, and again as highlighted in the Paper, significant changes have occurred in the landscape, new directions established and new philosophies promoted.

However, for the writers the most significant issues to be considered in relation to questioning the title relate to:

(i) The range of other substitute decision-making processes other than guardianship and administration,
(ii) The laudable aim of creating greater efficiency and effectiveness in the law,
(iii) Modernising the terminology.

The writers argue that to meet these objectives the focus of the title of the legislation needs to be broadened. They submit that to simply maintain the existing title, particularly if the intent is to include all forms substitute decision-making and supported decision-making, would be a folly.

The writers therefore submit that in the best interests of all persons who may require some form of representation that the Law Reform Commission must amalgamate guardianship and administration with Powers of Attorney in a single piece of legislation.

In so doing, they also submit that there should be the creation of a new title such as - The Representative and Supported Decision Making Act.

Joint Authors: Max Jackson & Margaret Ryan
JacksonRyan Partners

2.2 National Legislation

The writers acknowledge that the review has been conducted by the Victorian Law Reform Commission and is a review of the situation existing in Victoria, with a focus on the future of guardianship and associated matters in Victoria. However, there is little doubt that many people interested in the review, and no doubt many who submit to it, will also be very much aware of the activities currently being conducted by the Commonwealth Productivity Commission in relation to a national insurance scheme for the care and support of persons with disabilities.

The notion of a nation-wide approach to the provision of individual funding to persons with a disability is an exciting and bold prospect. Significantly however, the provision of funds to many of those eligible to receive them, and the need also for many of those who will receive them to need the support of a substitute decision maker, cannot be overlooked or considered as a trifling issue. The reality is that guardianship and/or administration will be a necessary reality for many.

Questions therefore arises as to:

- What variations will exist across the various jurisdictions in these matters, despite the funding scheme having a national flavour?
- How will such variations be addressed?
- What arrangements ought exist in terms of vulnerable individuals in deciding who may represent their interests?

In a paper recently submitted to the Productivity Commission the writers noted the work currently being undertaken by the Victorian Law Reform Commission. They raised the question as to what, if anything is being done in other jurisdictions in the matters of guardianship and administration. They argued that the relationship between funding and decision-making, as will occur for many through the national funding scheme, therefore brings to the fore the matter of the desirability of developing a national approach to guardianship, administration and Power of Attorney.

The writers submit in the context of this submission that the Victorian Law Reform Commission should seek to expand their brief and initiate discussion with the Productivity Commission. They argue the intent of such an initiative must be to seek to bring about a single system approach for representation across the whole of Australia.

Part 3 Some Reflective Issues

3.1 Focus on capacity

The report makes reference to capacity and how the current law draws a sharp divide between capacity and incapacity. The report argues that this sharp distinction, applied through a single mechanism, does not take account of variable capacity where an individual's capacity may vary over time, or where the person can make his or her own decision with some assistance only.

The writers wish to make five points in relation to capacity and the associated factors as they might be proposed for new legislation.

(i) **Variable capacity** – While the writers acknowledge that capacity can vary over time, or that capacity can vary according the decision to be made, they argue that such variability should not constitute a reason for the appointment of a guardian or administrator. They suggest that a preferable approach is to maximise informal supports or supports that may be available through an individual's service system.

This position is established on the basis that variable capacity is not limited to persons who may have some form of disability, even where the disability may be of a temporary nature. The reality is that effective decision-making is not a natural prerogative of the non-disabled or those who never suffer from a temporary lapse in ability.

It would be a rare individual who may not from time to time have difficulty in making a decision about his or her life, or about their financial affairs. It would be a rare individual who has never sought advice from someone else when faced with a difficult decision.

The point of this example is to suggest that temporary incapacity, albeit of variable levels, should not be applied as a reason for the appointment of a guardian or an administrator. If it is, then the writers argue that it potentially opens the floodgates to go down the path of a catchall approach to guardianship and administration. They therefore argue that it is in the best interests of

people who experience variability not to be captured by the formal system.

(ii) **The concepts of alternatives –** Given the above, the writers submit that a process of establishing informal alternatives to guardianship and administration should be pursued, in order to ensure that those who might from time to time require, or seek what might be described as informal support, have an option. Thus ensuring that they do not inadvertently become caught-up in the more formal system.

(iii) **The disability factor** – The writers agree with the proposal that disability should not be a separate criterion for the appointment of a substitute decision maker. On this basis, they also support the view that it is the capacity or incapacity that must provide the basis of the decision, even though the incapacity might be because of a disability.

(iv) **The concept of incapacity –** Associated with the above is the writers' support of the proposition, as expressed by the Mental Health Legal Centre, that there should in the fist instance be a presumption of capacity and that it should be the test of whether or not to appoint a guardian or administrator is that of incapacity.

(v) **The concept of permanence** – Consistent with the point made in (i) above, the writers stress the importance for guardianship and administration being applied as a permanent status, and not to be exposed to an *on-again off-again* type of administrative decision.

3.3 Finding the balance in terms of scrutiny

The report makes reference to the matter of accountability and mechanisms to ensure substitute decision makers exercise their powers appropriately. The writers submit that there are three key factors to consider in addressing the accountability question.

(i) **The concept of protection** – First and foremost the writers acknowledge the necessity of ensuring the protection of represented persons. Clearly, when an individual is placed under the jurisdiction of another, it is essential that the rights of the represented person are protected and that person, as far as a capacity allows, is supported to be

involved in decisions about him or herself. Thus, the rules that underpin guardianship and administration must therefore ensure that the rights of represented persons are protected and not compromised.

(ii) **The concept of tight-loose accountability** – While noting the above, the writers nonetheless also argue that whatever processes are established to ensure the protection of the individual and the scrutiny of those appointed as guardians or administrators, must not be such that it makes being a guardian or an administrator untenable.

The writers support suggestions such as the concept of periodic reports and compliance statements, although they consider this should be no more than a minimum of annually, and a requirement to sign a compliance statement. They submit, however, that random audits should not be applied on the basis that a random approach to monitoring is hardly a basis for monitoring accountability.

Thus, while as a general principle the writers support the establishment of a monitoring process, they nonetheless argue that it would be folly to build a system around the small number of people who may seek to abuse it. If excessive checks and balances are considered necessary, then in the writers' opinion this must bring into question the broader issue of whether or not the system has trust in the people it appoints. The writers therefore argue what might be called a tight-loose approach to monitoring would be in the best interests of both represented persons and the person representing them.

(iv) **The concept of risk -** Several years ago the concept of the 'dignity of risk' was popularised as one that ought be applied to persons with a disability. The concept basically suggested, that although it was a recognised that some people with a disability present with a degree of vulnerability, to be overly protective of them would diminish their dignity.

The writers submit that in terms of monitoring and checking persons appointed as guardians or administrators, the concept of the dignity of risk

should be applied. Where, while it is recognised that by appointing people to act for others there may well be a risk factor, but that the risk factor will not necessarily diminish no matter how tight the checks and balances.

Additionally of course, the first point that must be acknowledged is that scrutiny commences first and foremost with the appointment process. Given this reality, the argument must be put that in making the appointment, it is VCAT in the first instance that must make the assessment of suitability. In making that assessment risk must be part of that assessment. Thus, the onus rests with VCAT to in effect 'get it right' in the first instance.

Therefore, rather than try and implement a cumbersome overly burdensome system of checks and balances, where there would be no guarantees of identifying those who might seek to abuse the system in any event, new legislation must allow both the represented person and those who represent them to be maintain dignity in their individual roles. The dignity of risk must prevail.

(iv) **The concept of longevity** - The writers note that the current period of appointment of a guardian or administrator while not limited in terms of tenure, a three-year review period is invoked. While the writers support the concept of not limiting the tenure of guardians and administrators, they argue that the review period should be extended to say five years for both guardians and administrators.

3.4 Changing the focus from restrictive to enabling

The writers note that the report makes reference to the importance of guardianship as being seen as an enabling, rather than a restrictive practice. This of course is supported by the concept of least restrictive. The writers hold the firm view that this concept of enabling needs to be highlighted in the new legislation. Under the existing legislation in the view of the writers guardianship has been promoted as a restrictive practice as though the represented person has in some way forfeited all rights.

The writers argue that this view is narrow and seems to lack understanding that through guardianship a person indeed has a greater likelihood of his or her rights being protected and advocated for. Thus, they argue the

protection of the rights of the individual and decisions made in his or her best interests as directed through his or her representative, is more enabling rather than less.

3.5 The qualities to represent

The writers note that Chapter 17 of the report details a number of elements related to 'responsibilities'. They also note however that this rather expansive chapter provides only one short paragraph (17.43) to the concept of skills required and training for guardians.

While the writers endorse the view expressed in the report that VCAT should be "rigorous in choosing who should be appointed as a guardian", they are disappointed that such an expansive report has failed to articulate what qualities VCAT should be assessing in appointing a guardian. The writers hold the view that the significant qualities that would make an appropriate guardian are:

- Knowledge of the person
- History of the relationship with the person
- Acceptance by the person
- Decision making ability
- Ability and willingness to undertake the role
- An awareness of rights principles

On the matter of training as referenced in the report, the writers are somewhat bemused by this. They argue that in the case of full guardianship the substitute decision maker is in law acting in loco parentis. They therefore wonder for two reasons why the training of guardians or indeed administrators is considered necessary.

In the first instance they argue that if VCAT is thorough in their appointments, then the right people should be approved. Secondly they argue that just as parents are not trained but generally acquire the expertise necessary to parent appropriately, then the same principal and expectations should apply for guardians. The writers also submit that the same arguments apply for administrators.

3.6 The significance of family

Associated with the matters addressed in 3.5 above is that of the significance of the family. From the writers' perspective the concept of the family has not been afforded the significance that should be applied in relation to the current approach to the appointment of guardians. Indeed, in part it appears to have arisen from an attitude

that has developed over the last two decades or so where the policy makers, funded advocates and bureaucrats have tended to regulate families, and in particular parents, as simply being part of that group known euphemistically as 'other significant individuals'.

The writers submit that the family, and in particular parents, should be considered as the principal group from which to appoint a substitute decision maker or administrator; unless of course exceptional circumstances prevail. They therefore submit a family member or members, in the case of joint guardianship, should in the first instance be appointmed.

The writers reject any notion of a conflict of interest and challenge those who might oppose family members being appointed as guardians or administrators, to show the evidence to support any such claim. In most instances family, and again in particular parents, play a significant role is the care, support and decision making for their family member with a disability right from the birth of the person. To seek to cut them off from a substitute decision making role, when the person with the disability requires guardianship or support in the administration of their funds, defies logic.

3.7 One representative

The writers note that the report makes reference to the potential for a represented person having more that one person representing their interests, as in guardianship, administration or medical matters. The writers oppose this suggestion. They argue that if the best interests of the represented person are to be facilitated, then to have a multiple of individuals, each with authority for particular parts of the represented person's life ignores the importance of stability and rapport.

The writers support the notion of plenary guardianship and is so doing argue strongly for minimising, rather than maximising, the number of people controlling an individuals' life. By maintaining the concept of plenary guardian as exists in the current legislation the option of single representative over guardianship and administration is preserved.

3.8 Person responsible and the significance of family

The writers support the notion of person responsible. They do however express concern about the descriptor 'primary

carer' and submit that this needs to be clarified in terms of its relationship with family members, be they parents or siblings. The writers express the very strong view that in terms of the proposed new legislation non-family primary carers should not take precedence over family members. While they acknowledge that there are circumstances, such as for example persons with a disability living in an accommodation and support facility, where the primary carer may well be a paid employee of the support agency. They argue that in such circumstances, in the first instance the primary and a family member should, where there is agreement to do so, be an automatic appointment.

Further on this matter, the definition of domestic partner needs further clarification in order to ensure that carers, who may be receiving social security allowances, are not excluded from consideration as being appointed as a guardian or administrator.

3.9 The role of the public advocate

The report recommends an expanded role for the Public Advocate and in doing so also advocates there should not, at this stage, be a separation of the Public Advocates' advocacy and responsibilities from the role's guardianship responsibilities.

While the writers are supportive of strengthening the Public Advocates investigative powers, for example, they are strongly opposed to the Public Advocate or that office having any guardianship or administration responsibilities. They argue that for such a position and office to carry such a dual role creates a conflict of interest that would be best served by the Public Advocate not having any role in terms of guardianship or administration.

3.10 Community education

The writers note the reference to community education in the report and applaud this. Through their experience as family advocates and learning and development facilitators in the disability field, they have experienced many situations where those who should know about guardianship and financial administration, in that they are actually dealing with represented persons, do not. The best interests of represented persons can be compromised on a day-to-day basis in those circumstances where those dealing with the represented person are not fully cognisant of the role and legal authority bestowed on guardians and administrators.

They suggest that just as there are mandated requirements imposed on particular categories of occupations in terms of the reporting of suspected child abuse, equally consideration should be given to imposing on similar categories a requirement to respect the authority of guardians and administrators. Categories might include police, teachers, medical practitioners and disability services staff.

PART 4 Concluding Comment

The writers repeat their support for the general thrust of what is being suggested by the Law Reform Commission. They have however submitted in the points above that there are matters that do require further refinement in order to ensure that the best interests of represented person are truly met.

They believe it cannot be stressed too much that families much be considered as the prime source of representation, that risk should not be smothered, and that monitoring while essential should not be unsustainable.

****

End of Submission

Max Jackson
Partner
JacksonRyan Partners

Margaret Ryan
Partner
JacksonRyan partners

20 May 2011

JacksonRyan Partners
A Business Unit of
Max Jackson & Associates

ABN 50 086 394 676

Head Office
63 Bridport St
South Melbourne
VIC 3205
Telephone: (61-3) 9077 4152

Online

Website: www.jacksonryan.com.au