state trustees
your interests at heart

Victorian Law Reform Commission
Guardianship Law Review

Submission in response to the
VLRC Consultation Paper 10 - Guardianship

by

State Trustees Limited

3 June 2011

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Abbreviations / Glossary

CALD	Culturally and linguistically diverse
Charter	*Charter of Human Rights and Responsibilities Act 2006* (Vic)
Consultation Paper	VLRC Consultation Paper 10 (Guardianship), February 2011
Convention	United Nations' *Convention on the Rights of Persons with Disabilities*
Corporations Act	*Corporations Act 2001* (Cth)
enduring powers	Collectively, those powers that are capable of continuing to be effective beyond the donor's loss of legal capacity: enduring power of attorney (financial), enduring power of attorney (medical treatment) and appointment of an enduring guardian, also known as an 'enduring power of guardianship', which term we will use in this submission.
G&A Act	*Guardianship and Administration Act 1986* (Vic)
Information Paper	VLRC Guardianship Information Paper, February 2010
NSW Act	Guardianship Act 1988 (NSW)
OPA	Office of the Public Advocate
Powers of Attorney Submission	State Trustees' Submission to the VPLRC *Inquiry into Powers of Attorney*, 7 September 2009
powers of attorney	Collectively, all four current types of powers under Victorian law: enduring power of attorney (financial), enduring power of attorney (medical treatment), appointment of an enduring guardian (also known as an 'power of guardianship, which term we will use in this submission), and general power of attorney
Private administrator	A non-professional individual appointed by VCAT to act as a administrator
Private appointment	The appointment by VCAT of private administrator

Queensland Act	*Guardianship and Administration Act 2000* (QLD)
State Trustees	State Trustees Limited
ST Act	*State Trustees (State Owned Company) Act 1994* (Vic)
STCV	State Trust Corporation of Victoria (the predecessor in law to State Trustees Limited)
STCV Act	*State Trust Corporation of Victoria Act 1987* (Vic)
Supreme Court Rules	Supreme Court (General Civil Procedure) Rules 2005 (Vic)
Victoria	The State of Victoria
VCAT	Victorian Civil and Administrative Tribunal, in its Guardianship-List jurisdiction (unless the context dictates otherwise)
VLRC	Victorian Law Reform Commission
VCAT Act	*Victorian Civil and Administrative Tribunal Act 1998* (Vic)
VPLRC	Victorian Parliament Law Reform Committee

A. Preface - State Trustees and Guardianship Laws

1. State Trustees welcomes the opportunity to provide our submission to this important review, which we believe gives Victoria the opportunity to build a framework that can serve as a model for future national uniform laws.

2. As Victoria's public trustee entity, State Trustees plays a central role in providing estate planning, administration and related services to members of the Victorian public, especially those who do not have the resources to obtain those services for themselves.

3. Our broad range of services means we are actively engaged with laws relating to supported and substitute decision-making in a number of ways, and as a result of a number of our roles.[1]

4. In particular, our services related to this submission include:

   (a) acting as:

      (i) administrator under appointment by VCAT (with more than 9,000 current administrations);

      (ii) appointed attorney under enduring powers of attorney (financial), (with more than 700 active attorneyship administrations);

      (iii) the trustee of continuing personal trusts, including those established for beneficiaries with a disability and those established for minors;

      (iv) examiner of private administrators' accounts;

   (b) preparing enduring powers (whether for immediate or later activation) and assisting individual attorneys in the fulfilment of their duties (we prepare approximately 1,800 enduring powers of attorney (financial) each year);

   (c) providing financial planning and estate planning advice;

   (d) acting in the recovery of property lost through third party negligence or abuse;

   (e) providing safe custody of original enduring powers (currently holding more than 30,000 enduring powers of attorney (financial)); and

   (f) providing associated legal services.

[1] Further information about these roles is set out in Appendix 1.

5. Accordingly, we welcome and encourage positive steps to improve the laws relating to supported and substitute decision-making. Those laws fundamentally affect the way in which we are able to meet the estate planning and administration needs of our clients.

B. Executive Summary

1 Principles of laws (Consultation Paper Questions 2-4)

State Trustees agrees with the VLRC's draft statement of purpose for new guardianship laws, namely: 'The purpose of this Act is to protect and promote the dignity and human rights of people with impaired decision-making capacity. To this end, the Act establishes mechanisms to support and assist people to participate in decisions that affect their lives, realise their rights and protect their inherent dignity.'

2 Clear and accessible laws (Consultation Paper Questions 5-9)

State Trustees strongly supports the VLRC's preferred option of consolidating all the substitute decision-making laws into an appropriate single Act, integrating the various substitute decision making processes, utilising commonly understood terminology and containing an appropriate universally applicable definition of impaired decision-making capacity.

3 Community Education (Consultation Paper Questions 10-13)

Community education is critical to the success of any changes to the legislation, especially where process changes are to be introduced.

State Trustees' experience is that policy-development bodies are not as well equipped to play the role of community educator, and that education is best and most practically delivered by the bodies that are responsible for implementing the solutions.

State Trustees' strategic role is to educate Victorians on estate management matters, and we combine this with a key advocacy role on behalf of our clients. Our experience has taught us that the burden of community education must fall on those who are equipped to cope with 'real life' enquiries from Victorians and who can respond at a very practical level, and not provide theoretical answers to real life issues.

As a critical element of any community education program, the division of responsibility between administrators and guardians should be clearly expressed. There is very poor community understanding of the separation of responsibilities, and this will be further confused if it is not specifically addressed.

4 Supported decision-making / co-decision making for financial appointments (Consultation Paper Questions 14-22)

State Trustees does not support the introduction of the two new appointment types for financial appointments. Their introduction would risk increasing community confusion by 'cluttering-up' an already complicated landscape. With minor changes to the law, existing types of appointments, e.g. general or enduring powers of attorney and

administration orders, can be adapted to meet the perceived need. However, if such appointments are to come in, there should be no prohibition on the appointment of a trustee company such as State Trustees fulfilling the role for financial decisions.

5 Personal appointments (Consultation Paper Questions 23-27)

State Trustees favours streamlining the existing personal appointments by reducing the number of enduring appointments from three to two by removing the option of appointing an agent under the *Medical Treatment Act 1988* (Vic) and by requiring people to use an enduring guardianship appointment for medical treatment matters.

6 Registration (Consultation Paper Questions 28-33)

State Trustees favours the creation of a central online registration system for enduring powers.

State Trustees does not wish to nominate any entity as the organisation that should hold the register; however, any entity selected to operate the registry must have the demanding qualities, skills and organisational competencies that such an agency would be required to demonstrate in order to appropriately run a 'dynamic' registry; for example, being able to respond quickly to urgent registrations. State Trustees considers that it has the requisite qualities, skills and organisational competencies to undertake such a role.

State Trustees' submission includes recommendations about elements of the proposed online register.[2]

7 Notification to interested parties when power of attorney is activated (Consultation Paper Questions 34-37)

Other than notification to the online registry which should be mandatory, whether others should be notified (or expressly excluded from notification) should be a matter of personal preference on the part of the donor as specified in the power itself. The challenges of fluctuating capacity could be managed by only requiring notification when the power is first activated.

8 Documenting wishes about your future (Consultation Paper Questions 39-49)

State Trustees supports the introduction of a statutory requirement that instructional directives made as part of a hybrid directive are binding on personally appointed

[2] See the responses to Questions 28 to 33.

decision makers, but are displaceable in certain circumstances. However, the circumstances where an instructional directive is displaced need to be clearly outlined, especially where financial decisions are being made. If an electronic registration system is to be established for enduring powers, it should also extend to advance directives. Unlike personal appointments, failure to register an advance directive should not render the document ineffective.

9 VCAT Appointments (Consultation Paper Questions 50-67)

State Trustees supports:

(a) The VLRC's proposal that disability should no longer be a separate criterion for the appointment of a substitute decision maker, but that it should be necessary for VCAT to find that a person is incapable of making their own decision because of a disability before it can appoint a guardian or an administrator.

(b) The provision of legislative capacity principles and a legislative definition of capacity.

(c) Allowing appointments of a guardian or an administrator in anticipation of future need.

(d) Lowering the age limit of the G&A Act to 16 and raising the age limit of the Children, Youth and Families Act 2005 (Vic) to 18.

(e) Continuing the current separation of powers between administrators and guardians, allowing dual appointments for private administrators and guardians only. State Trustees does not support only allowing dual appointments.

(f) Articulating guidelines to assist the process of selecting the most appropriate guardian or administrator in any given application before VCAT.

(g) Including in legislation non-exhaustive lists of decision-making powers and restrictions on those powers, provided:

  (i) there is a sufficiently clear description of an administrator's **general** powers;

  (ii) the list of specific powers is not exhaustive; and

  (iii) the option of a de facto plenary administration order is retained in a relatively simple form.

(h) Clearly expressing in legislation the delineation between administrators' powers and duties and those of guardians, to make it clear that the administrator's role is addressed to property, finances and related affairs, and the guardian's is concerned with all other matters for which a substitute decision maker can be engaged.

(i) Replacing the anti-ademption provisions in the G&A Act.

(j) Putting beyond doubt that where an administrator is empowered to bring and defend actions and other legal proceedings in the name of the represented person, the administrator is not required to become litigation guardian when conducting those proceedings.

(k) Clarifying in legislation that a guardian can bring and defend legal proceedings on behalf of a represented person in relation to matters not falling within the scope of an administrator's role.

10 'Substituted judgment' replacing 'best interests' (Consultation Paper Questions 87-91)

State Trustees opposes adoption of 'substituted judgment' as the paramount consideration for financial decisions, because:

(a) it would be difficult and unclear how to measure the evidentiary basis for such decision-making;

(b) it would be open to abuse; and

(c) it could lead to individuals being deemed incapable of ever changing a pre-existing 'mindset'.

(d) Instead, State Trustees would support a revision of the current definition of 'best interests' to enable financial decisions to be made that are directed to 'promoting or maintaining the well-being' of the individual.

11 Confidentiality (Consultation Paper Questions 97-98)

New guardianship laws should clarify, and improve on, the current complex overlapping statutory and general law rules around information that is accessed, collected, used, disclosed and withheld by administrators and attorneys. In particular, for regulated corporate administrators, there needs to be the equivalent of the protection that applies to a trustee in relation to not being required to disclose its own internal documents (file notes, minutes and records of third party discussions).

12 Accountability and review of substitute decision-making (Consultation Paper Questions 99-100)

In general, private guardians and attorneys should be required to lodge periodic reports about their activities with a public official and to provide periodic declarations of compliance with their responsibilities.

13 Merits Review (Consultation Paper Questions 111-116)

State Trustees does not support the introduction of merits reviews in relation to an administrator's decisions, as such reviews will create risk of uncertainty for third parties in their financial dealings with the administrator (to the financial detriment of the client). Some minor improvements could be made to the current avenues for having an administrator's actions scrutinised through VCAT. If a form of merits review is to be introduced for financial decisions, it should apply to all administrators (not just State Trustees). All represented persons should be treated equally by the law.

14 Training requirements for guardians and administrators (Consultation Paper Question 117)

VCAT should have the discretionary power to appoint a guardian or administrator on the condition that they complete any training requirements specified in the order.

15 Implementing and regulating new laws (Consultation Paper Questions 118-155)

In this submission, State Trustees provides insights from its experience, and makes numerous suggestions including, in relation to:

(a) functions of the Public Advocate;

(b) personal and automatic appointments;

(c) VCAT hearings and orders;

(d) access to VCAT files;

(e) rehearings and reassessments; and

(f) skills and training for VCAT members.

16 Civil-proceeding monies payable to persons with a disability (Appendix 3)

To be comprehensive, the present review of Victoria's guardianship laws must include consideration of the civil proceeding monies provisions (also known as the "Funds in Court" regime).

The current situation results in:

(a) confusion for vulnerable individuals;

(b) fragmentation of decision-making;

(c) the individual being deprived of an holistic approach being taken in relation to their affairs; and

(d) uncertainty for the client's case managers and other professionals.

There should be a strong presumption articulated in legislation that monies recovered in litigation on behalf of a represented person should be paid to the represented person's administrator who will ordinarily be best placed to manage those funds. Legislation ought to confirm that the practice of keeping the money in Court should not be maintained except in limited, exceptional circumstances warranting the exercise of the Supreme Court's inherent jurisdiction.

It is anomalous that a Court, without being required to meet the rigours of an externally monitored statutory governance and risk management regime, such as applies to a statutory trustee company or an entity subject to the financial services regulatory regime, holds and manages a considerable pool of funds on behalf of represented persons and other persons with a disability..

C. History, Current Law and Change (Part 1)

1. Victoria's guardianship laws will have an impact on most Victorians at some stage in their lives. State Trustees has long been an advocate of bringing about considered and practical improvements to this very important area of the law.

2. Personal appointments can provide a flexible, low-cost, personal and relatively simple way to allow others to act for you. They can also be extremely powerful, and their misuse, whether deliberate or unwitting, can have disastrous personal and financial repercussions for the individuals involved, as has been shown through the *Protecting Elders Assets Study* research project conducted by Monash University and commissioned by State Trustees.[3]

3. Substitute and supported decision making are important today, and they will become increasingly important with the ageing of the population. On current trends, rising life expectancy will lead to a doubling of the number of Victorians living with dementia within the next 20 years.[4] Financial sophistication and geographic mobility will also increase the demand for uniformity of laws across the eight Australian regional jurisdictions. Uniformity should not, however, be at the expense of sensible and appropriate laws.

4. The challenge is to shape a model framework that regards protection of the individual's interests as central, whilst giving appropriate weighting to a range of other, sometimes competing, considerations, such as:

   (a) accessibility, to minimise factors that may discourage individuals from putting their own personal appointments in place or using the processes of OPA and VCAT;

   (b) flexibility, to meet the needs of the particular individual;

   (c) durability, to make it possible for individuals and those supporting them to put measures in place in advance to allow for possible future changes in their circumstances;

   (d) clarity, simplicity and certainty, to help individuals, those appointed to act for them and those dealing with the appointees to know where they stand;

   (e) efficacy of the powers granted, to enable the appointees to effectively deal with and, where required, protect the individuals' interests;

   (f) accountability, to ensure that appointees and those involved in the appointment process (e.g. witnesses) are appropriately monitored;

[3] Reports available for download from http://www.statetrustees.com.au/advocacy/financial-elder-abuse

[4] Access Economics study commissioned by Alzheimer's Australia Vic., author Lynne Pezzullo (issued August 2009).

(g) confidentiality, to protect individuals' confidential information, to the extent practicable; and

(h) efficiency and cost minimisation, to make the process of accessing appointments and other support as inexpensive and straightforward as possible.

5. The Charter has some importance in the context of the framing of new guardianship laws. Whilst the protection of a person's autonomy and liberty are rights which are protected under the Charter, State Trustees notes that the protection of property is also a relevantly protected human right under the Charter. This is especially important for the purpose of guardianship and administration laws, as such laws need to be framed so as to protect persons with diminished decision-making capacity from having their property rights interfered with. In a similar vein, long standing common law human rights, including property rights and doctrines relating to capacity, form an important part of the landscape. From this perspective, new guardianship laws will need to be robust in how they balance the encouragement of autonomy and rights to make decisions, with the necessary safeguards for the proper management of property and assets, which are inherent in the roles of financial substitute decision makers.

6. The VLRC recognises in the Consultation Paper that some of the criticism levelled at the current guardianship laws relates to the level of complexity of the legislation and the processes involved. State Trustees supports the creation of a new regime characterised by an appropriate level of simplicity and user friendliness. This will increase the level of engagement from decision-makers, individuals needing the protection of the guardianship system and the general community. To this end, an increased level of community education and awareness is also essential.

D. The Direction of New Laws (Part 2)

1. Structure of New Laws (Chapter 4)

Question 1	Do you have any general comments about the matters identified by the Commission as influencing the need for change? Are there any other important matters that should affect the content of future guardianship laws?

1.1 State Trustees' concerns are focused on ensuring that any proposed changes to the law assist in:

(a) encouraging people to understand the risks that arise from diminished decision-making capacity, and to put in place (to the extent practicable) measures that address those risks;

(b) protecting the property and other rights of persons who require, or may at some point require, substitute decision-makers;

(c) maintaining and improving the overall viability of the framework of supported and substitute decision-making laws; and

(d) ensuring that any structures and mechanisms implemented are workable.

1.2 We also make submissions on some areas of the current law that are not directly dealt with in the Consultation Paper: See Appendix 3.

1.3 Given State Trustees' roles, the contents of this submission focus primarily on aspects pertaining to financial administration and estate planning. Accordingly, our comments on other aspects, such as guardianship orders, are generally restricted to those circumstances where there are also implications for financial administration or estate planning. We are not responding to questions 1, 38, 68 to 86, 92 to 96, 101 to 110, and 156 to 159 as these relate to topics outside State Trustees' core responsibilities. Where appropriate, we have responded to questions under broad topic groupings, rather than as stand-alone questions.

2. Principles of New Laws (Chapter 5)

Question 2:	Do you agree with the Commission's draft statement of purpose of new guardianship laws?
Question 3:	Do you agree with the Commission's draft general principles for new guardianship laws?

Question 4:	Are there principles you think should be added or removed from these general principles?

2.1 State Trustees agrees with the VLRC's draft statement of purpose of new guardianship laws.

2.2 We generally also support the draft general principles for guardianship laws. We note however, the principle that a substitute decision maker must use a 'substituted judgment' approach **as far as possible**. This would be the effect of the principle at dot point five (in paragraph 5.101 of the Consultation Paper). As stated elsewhere in this submission, the phrase 'as far as possible' is vague and open to a wide spectrum of interpretation in a context where a substitute decision maker is balancing competing imperatives. A preferable approach is to specify, for example, that the substituted judgment approach should be followed 'as far as possible without unreasonably exposing the person to harm'. Similarly, the parameters of reasonable risk need to be more clearly defined, particularly in a financial setting.

3. Clear and Accessible Laws (Chapter 6)

3.1. Structure of Laws

Question 5:	Do you agree with the Commission's proposal that Victoria's various substitute decision-making laws be consolidated into one single Act?

(a) State Trustees strongly supports the VLRC's preferred option of consolidating all the substitute decision-making laws into an appropriate single Act.

(b) State Trustees considers that the current plethora of legislation is complex and confusing, a situation which hinders the ability of people with impaired decision-making capacity (or their families) to make use of an appropriate mechanism of substitute decision-making relating to the individual's property and personal welfare.

(c) A single, appropriately drafted Act should integrate the various substitute decision-making processes into a uniformly consistent style, which utilises commonly understood terminology and which contains an appropriate definition of impaired decision-making capacity applicable across the whole spectrum of substitute decision-making appointments.

3.2. Terms used for substitute decision making

Question 6:	Do you agree with the Commission's proposal that the term 'medical decision maker' or 'health decision maker' should replace 'person

	responsible' in legislation? If so which one do you prefer?
Question 7:	Do you agree with Commission's proposal that the term 'guardian' should be replaced with 'adult guardian'?
Question 8:	Do you agree with the Commission's proposal that the term 'administrator' should be replaced with 'financial guardian'?
Question 9:	Should the terminology used for powers of attorney be better integrated with the terminology for guardianship and administration? What terms should be used?

(a) State Trustees submits that the overall question of what terminology is appropriate needs to be considered in the context of the following considerations:

(i) Any proposed changes in terminology should be measured against the following, namely whether:

(A) they would help reduce confusion between the various roles;

(B) they are sufficiently simple and straightforward; and

(C) they will be accepted in the various contexts where they need to be applied.

(ii) Accordingly, the decision as to what terminology should be adopted is dependent on whether additional new types of appointments are to be introduced, and the nature and scope of each of the roles within the revised framework.

(iii) Some value should be placed on moving to greater national uniformity in terminology, but this should not be the decisive factor.

(b) In the above context, State Trustees is not in a position to propose definitive new terminology appropriate to all the various appointments. It is not yet clear what that spectrum of appointments will be. We will, however, set out some of our further views on terminology.

(c) The proposed replacement of the term 'person responsible' with either 'health decision maker' or 'medical decision maker' may cause this role to be confused with an enduring guardian or a VCAT-appointed guardian. A term such as 'health referee', a person of some authority to whom medical staff would 'refer' questions and decisions relating to the person's health, may more closely reflect the role.

(d) In the financial sphere, the terminology should reflect the legal distinction between an administrator and an attorney. The Consultation Paper implies the term 'power of attorney' is generally misunderstood and deters people from putting appropriate arrangements in place. This may need to be addressed by improved initiatives for community education.

(e) In State Trustees' view, 'attorney' is an adequate descriptor for those appointed under the current enduring powers. There would also be some risk in moving away from an established term such as 'power of attorney'; for example, financial institutions, especially those based in other jurisdictions may be reluctant to recognise the efficacy of a power of attorney if it is called something else.

(f) In practice, we encounter many instances where an attorney appointed under a general power of attorney does not understand that it cannot be used if the donor has lost capacity. This suggests that there may be some merit in having a greater terminological distinction between the two types of appointment. Again, this would need to be assessed in light of whether additional personal-appointment roles are to be created.

(g) In relation to the proposals for the two current VCAT appointed roles:

  (i) The term 'adult guardian' is ambiguous: The term 'guardian' is preferable. It has achieved reasonable acceptance in the community.

  (ii) The term 'administrator' should be changed. It is not well understood in the community, and it does not communicate the nature of the role. It is associated with commercial law, in the sense of the person appointed to administer a business or company. However, State Trustees has strong reservations about 'financial guardian' as a replacement term. It would be confused with the existing terms 'guardian' and 'enduring guardian', which have attained a reasonable degree of acceptance in the Victorian community. We note that 'financial manager' has attained some recognition across the various Australian jurisdictions.

(h) We suggest market research be conducted into the terminology used in this area of law to maximise the efficiency of any proposed changes. Public education about any new terminology will be crucial to the effectiveness of changes to the guardianship framework.

(i) Once it is clearer what the nature and scope of all the roles to be proposed for the new laws will be, State Trustees would welcome the opportunity to make more specific comments to the VLRC on terminology.

3.3. Community Education and Collection of Data

Question 10:	Do you have any specific ideas about how to better target education about guardianship laws towards: • people with disabilities • family, friends and carers of people with disabilities • CALD groups • Indigenous communities • older people • young people • health and community sector professionals • lawyers?
Question 11:	Should the Public Advocate play a greater role in producing community education materials and educating the community about substitute decision making? What other bodies could play a role?
Question 12:	Would an educational and awareness campaign assist the community to better understand and make use of guardianship laws?
Question 13:	What type of data do you think needs to be collected and made available and from what bodies?

(a) Community education is critical to the success of any changes to the legislation especially where process changes are to be introduced.

(b) State Trustees experience is that policy development bodies are not as well equipped to play the role of community educator and that education is best and most practically delivered by the bodies that are responsible for implementing the solutions.

(c) Community education ideally involves those who are equipped to cope with 'real life' enquiries from Victorians and who can respond at a very practical level, rather than providing theoretical answers to real life issues.

(d) There is very poor community understanding, for example, of the separation of responsibilities. This should be specifically addressed.

(e) State Trustees believes that there would be benefit from a state-wide educational awareness campaign to help the community better understand and make use of guardianship laws, particularly around any new measures dealing with the 'decision-making continuum'.

(f) Community education needs to emphasise the risks around the use of 'do-it-yourself' power of attorney kits and will kits. The proposed more stringent

attestation requirements for enduring powers of attorney (financial), and the introduction of mandatory registration may lead to a greater number of invalid appointments.

(g) We believe that there would be a range of existing information available about how to best communicate complex issues from government, commercial and community organisations, particularly in the ageing and disability sectors. For example, Victoria University has conducted financial literacy information sessions for Victorian seniors over the past 12 months. The university will have data available from participants from July 2011, which will provide potentially helpful insights into what terminology to use. Other useful insights could be available from this and other initiatives conducted as part of the Victorian Government's Elder Abuse Prevention Strategy.

(h) The five reports from the Protecting Elders Assets Study[5] have some insights into the most effective ways to communicate about financial issues with older people. (Monash University have previously provided information to the VLRC.)

(i) The fourth report, *Diversity and financial elder abuse in Victoria* (February 2011)[6] provided recommendations about communicating with older Victorians from CALD groups, which may be applicable to raising awareness about guardianship laws. For example, the report highlighted that variations in cultural values be taken into consideration when communicating with older people about financial protection, and noted that:

'...it is not sufficient to put in place systems that support English speaking members of the dominant culture'. It noted further that 'the widespread reliance on family for support in old age and the way culture frames intergenerational responsibilities are also factors to consider in future strategies to prevent financial elder abuse'.[7]

(j) The report found that senior citizens and migrant resource centres are valuable places for information and training.

(k) To assist the process of evidence-based law reform, Monash University's research into financial elder abuse points to the Victorian government's Family Violence Database as a useful model for data collection.[8]

(l) State Trustees regularly conducts education sessions on administration, guardianship, powers of attorney, wills and financial elder abuse for service providers, non-government organisations and the public. We provide such

[5] Reports available for download from http://www.statetrustees.com.au/advocacy/financial-elder-abuse.

[6] Wainer J, Owada K, Lowndes G and Darzins P (2011) *Diversity and financial elder abuse in Victoria*, *Protecting elders assets study*, Monash University, Eastern Health Clinical School, Melbourne.

[7] Ibid p 11

[8] Wainer J, Darzins P and Owada K (2010) *Prevalence of financial elder abuse in Victoria*, *Protecting elders assets study* Monash University, Melbourne.

education on our own and jointly with the OPA, VCAT and various other service providers, including Senior Rights Victoria and Primary Cause Partnerships. There is consistent demand for such community education, indicating a level of community interest that we believe cannot currently be met with existing resources.

(m) We recommend that appropriate distribution channels for increased community education should include OPA, Citizens' Advice Bureaus, health providers and State Trustees.

E. Supported Decision Making (Part 3)

1. Supported Decision Making (Chapter 7)

1.1. New supported decision-making mechanisms

Question 14:	Do you agree with the Commission's proposal to introduce new supported decision-making arrangements?
Question 15:	Do you agree with any or all of the proposed roles of supporters and co-decision makers?
Question 16:	What steps would need to be taken in order to ensure that these appointments operated fairly and efficiently?

(a) State Trustees does not support the introduction of new 'stand-alone' formal supported decision-making or co-decision making options for **financial** appointments. Introduction of such options would risk increasing community confusion by further 'cluttering-up' an already complex estate-planning and Guardianship-List landscape.

(b) In State Trustees' view, the rationale for adopting the two new types of appointment (supported and co-decision-making appointments) in a financial context rests on two shortcomings of the present system, namely:

(i) perhaps due to lack of understanding of the instruments involved, people would generally be reluctant to put in place a limited general or enduring power of attorney for the purposes of supported financial decision making, and are possibly intimidated by the term 'power of attorney'; and

(ii) there is currently an inability for VCAT to put in place limited administration orders under which the person is not deemed to be deprived of capacity in all relevant circumstances.[9]

(c) Supported financial decision making can be facilitated by minor changes to the law, that permit existing appointments under general or enduring powers of attorney to be adapted to meet the perceived need. A general or enduring power of attorney can be made, with appropriately limited scope, where a person requires a person to support them in their financial decision-making. Some minor changes to the law may be desirable to help facilitate such appointments.

[9] See the current scope of the deeming provision in s 52 of the G&A Act.

(d) Co-decision making in a financial context, could only be viable where the legislation deems that the individual does not have full decision-making capacity in certain defined circumstances. Otherwise, whenever there was a disagreement, the person for whom the arrangement was set up would simply rescind the arrangement. This can be achieved by VCAT being empowered, ideally with the consent of the individual, to make a variant of an administration order, under which the individual would only be deemed incapable of making his or her own decisions where the administrator (co-decision maker) actively notifies the relevant third party that a particular transaction or type of transaction does **not** have the administrator's approval.

(e) If new supported or co-decision making appointments are to be introduced in the financial sphere, there should be no prohibition on appointing a trustee company such as State Trustees to fulfil the role.

(f) In light of the position set out above, State Trustees does not propose to comment in detail on the other questions relating to supported and co-decision making (questions 17 to 22). We would, however, note that it is unlikely that OPA's current skill set would be sufficient to enable it adequately to act as, train, or monitor a supported or co-decision maker in **financial matters**.

F. Personal Appointments (Part 4)

1. Personal Appointments (Chapter 8)

1.1. Activation of enduring powers

Question 23:	Should all enduring powers be activated at the same time? If so, when should this occur?

Question 23 response: No.

It is not appropriate that all enduring powers be activated at the same time. In relation to enduring powers of attorney (financial), State Trustees supports retention of the donor's freedom to specify in the document, either immediate activation, or activation from a given time, in a given circumstance or on a given occasion.

1.2. Succession planning for parents of adult children with impaired decision-making capacity

Question 24:	Should parents and carers of children with disabilities be able to file a document with VCAT that states their wishes about future guardianship and administration arrangements?
Question 25:	Should these wishes be a factor VCAT is required to consider when it appoints a substitute decision maker or supporter?

Question 24 response: Yes.

Question 25 response: Yes.

VCAT should be required to consider these wishes (and any wishes set out in a deceased person's will, if submitted to VCAT), but should not be bound to follow the wishes.

1.3. Streamlining existing personal appointments

Question 26:	Should the number of enduring appointments be reduced from three to two by removing the option of appointing an agent under the *Medical Treatment Act 1988* (Vic) and by requiring people to use an enduring guardianship appointment for medical treatment matters?

Question 27:	Should there only be one type of appointment with a range of possible powers?

Question 26 response: Yes.

The law would, however, need to continue to recognise the efficacy of an enduring power of attorney (medical treatment) made prior to the proposed legislative change.

Question 27 response: No.

The most commonly used enduring power, an enduring power of attorney (financial), should be retained as a 'stand-alone' document. However, State Trustees is not opposed to an individual having an **option** to appoint the same person as attorney under an enduring power of attorney (financial) and as enduring guardian under an enduring power of guardianship within the same amalgamated document.

1.4. Registration

Question 28:	Should an online registration system be created for enduring powers?
Question 29:	Which organisation should hold the register?
Question 30:	Should registration be voluntary or compulsory?
Question 31:	If registration is compulsory, what effect should this have on unregistered appointments?
Question 32:	When is the best time for the registration to occur?
Question 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?

Question 28 response: Yes.

(a) In addition to the advantages identified in the Consultation Paper, other potential benefits of online registration include:

(i) reducing the risk of persons relying or acting on invalid documents;

(ii) being able to verify whether an enduring power exists and is current;

(iii) providing the ability to ascertain the scope of the power, and whether it has been activated;

(iv) providing scope for monitoring and imposing accountabilities on appointees; and

(v) providing the ability to determine at a later date whether financial transactions were made by the donor themselves, or by the relevant appointee (see the response to question 64 below).

(b) In addition to the difficulties identified by the VLRC, perceived (or actual) complexity and costs may deter individuals from executing a power of attorney at all or from registering a revocation. As a result, there is a concern that individuals may take up informal arrangements with the potential risk of abuse, misappropriation and a lack of an 'audit trail'. The model and specifications of the register will therefore need very careful consideration to ensure it is as inexpensive and 'user-friendly' as possible.

Question 29 response:

(c) State Trustees does not wish to nominate any entity as the organisation that should hold the register. However, before selecting an entity to operate the registry, there should be careful examination of the demanding qualities, skills and organisational competencies that such an agency would be required to demonstrate in order appropriately to run a 'dynamic' registry; for example, being able to be responsive to urgent registrations.

(d) In this context and understanding the sensitivities surrounding the day-to-day implications of organisations and individuals needing to access a register, State Trustees wishes to place on the record its interest in being considered as a possible provider of this service. Significant due diligence would be required to understand whether this is a practical solution; however, State Trustees firmly believes managing such a register aligns with its core competencies and that it possesses the qualities, skills and organisational competencies to undertake such a role.

1.5. Nature of the online register

State Trustees makes the following recommendations about the proposed online register:

(a) The registration system should be user-friendly, simple, easy to access and reasonably priced.

(b) The registration system should be compulsory and, ideally, be 'mirrored' in legislation in all States for possible national accessibility.

(c) The objective of registration should be to capture the existence of all VCAT appointments and enduring powers irrespective of whether they are activated or dormant.

(d) Registration should ideally occur as soon as reasonably practicable after the relevant instrument is executed to promote awareness that registration is a necessary step in the creation of a valid enduring power. If registration has not occurred within a specified timeframe after the date of execution (e.g. within six months), it should still be possible to register, but only after an additional procedure to elicit the reasons for the delay (which could also involve an additional fee component).

(e) If registration is a condition precedent to the efficacy of an enduring appointment, then an efficient registration process will be crucial, particularly in urgent cases where any delay could be detrimental to the donor.

(f) If there is a hiatus between submitting the document and the issue of a registration certificate, it would be desirable to have a mechanism so that enduring powers of attorney executed and activated for immediate use can be registered and an 'interim' certificate of authority issued.

(g) Incentives should be built into the system to encourage registration of pre-existing appointments as well as protections to ensure pre-existing dormant enduring powers are not deemed ineffectual by virtue of non-registration.

(h) The registration system should record whether the appointment is 'active', however, the act of registration should not mean the appointment has been 'activated'. The register could also capture loss of capacity notifications but the presumption of capacity must prevail until it is determined that a donor is deemed to have lost capacity.

(i) In this regard, State Trustees' experience of powers of attorney under management include:

    (i) Enduring powers made for future need – Enduring powers of attorney (financial) are a powerful estate planning tool that puts choice in the hands of the individual because the enduring power of attorney is not 'activated' until either specified by the donor or from a time, in a circumstance, or on an occasion, specified in the document. In these circumstances, the power would not be 'activated' at registration.

    (ii) Temporary circumstances – An enduring power may be made for temporary purposes e.g. due to a period of personal crisis (e.g. injury or grief) or physical absence (e.g. overseas holidays). The donor may require the attorney to assist in co-decision making, or for the attorney to manage a specific function associated with their personal circumstances. In these circumstances, the power would be 'activated' and 'deactivated' at the donor's request.

(iii) Fluctuating capacity – Enduring power of attorney (financial) clients frequently have fluctuating capacity. In such cases, the service provided by State Trustees is often, in effect, a form of supported decision making.

(iv) 'Enduring' circumstances – State Trustees' practice of ensuring (wherever possible) that there is medical evidence of loss of capacity should be reflected in the registration system. There should also be powers provided to VCAT to make a determination where such evidence is not able to be produced.

(j) Registration ought to include validation of the instrument in accordance with the requirements for a valid enduring power under the relevant Act.

(k) Registration should be the means of determining whether or not an appointment is current, and has not been revoked, so that the attorney can be contacted in relation to the donor. Automatic access to limited information held on the register could be provided to authorised organisations and certain approved third parties (e.g. the Public Advocate, police, banks, professional trustee organisations, health professionals and legal professionals), although access arrangements need to be designed on clear 'need to know' principles.

(l) Appropriate information technology security mechanisms would be required to facilitate authorised access to the register and notifications of activation or cancellation.

(m) An attorney should not be able to act under an enduring power unless the appointment has been registered and activation has been notified. A crisis service is likely to be required of the registering organisation for emergency situations.

(n) The new registry should ideally be designed in such a way that there is no duplication with the current process for filing of powers of attorney (including enduring powers of attorney) with the Registrar of Titles at Land Victoria.

1.6. Notification to interested parties when power of attorney is activated

Question 34:	Should it be necessary to notify a public authority and/or various other people when a power of attorney is activated?
Question 35:	Should a donor be able to specify that certain people should be notified when a power attorney is activated? Who should be notified and why?
Question 36:	How might notification work in a situation where a person's capacity is fluctuating?

Question 37:	Should a donor also be able to specify that people/bodies should not be notified when a power of attorney is activated?

Question 34 response: No, other than to the online registry.

State Trustees recommends that there should be a requirement that donors notify the relevant online registry when activation occurs. Depending on the scope of the appointment, such notification could trigger a VCAT or OPA monitoring process.

Question 35 response: Yes.

(a) Other than notification to the online registry, which should be mandatory, others to be notified should be a matter of personal preference on the part of the donor as specified in the power itself. The donor could decide to direct the attorney to notify a specified party, e.g. a close family member or friend, who may be familiar with the donor's wishes, beliefs and requirements, so as to assist the attorney when making decisions on the donor's behalf.

(b) Notification (as far as notification to the 'world at large' is concerned) should be to the organisation that maintains the register. The overall advantage of notification in both cases is that it would increase general oversight, thereby reducing the opportunities for abuse of the enduring power.

Question 36 response:

(a) Notification of action should be required only when the enduring power is first activated, or re-activated following a subsequent notice of de-activation from the donor.

(b) Fluctuating capacity may place an onerous burden on the attorney. Decision-specific enduring powers may require multiple activations, and potentially multiple certificates of incapacity. These are factors that must be considered by an attorney when accepting the appointment.

Question 37 response: Yes.

However, a donor ought not be able to exclude notification to the online registry. To assist attorneys, the current provisions for applications for directions to VCAT could be expressly extended to address situations where non-notification adversely affects the donor's interests.

2. Documenting Wishes About Your Future (Chapter 9)

In this section we are responding to questions 39 to 45.

2.1. Lifestyle instructional directives and Hybrid Directives

Consultation Paper Options	
Option A:	No change - Allow people to provide instructions or wishes when appointing an enduring guardian or an enduring attorney (financial).
Option B:	Introduce a statutory requirement that personally appointed decision makers consider and provide reasons for departing from instructional directives.
Option C:	Introduce a statutory requirement that instructional directives made as part of a hybrid directive are binding on personally appointed decision makers, but are displaceable in certain circumstances.

Question 39:	Do you think it should be possible to make statutory instructional directives about things other than medical treatment?
Question 40:	What types of things should it be possible to include in an instructional directive?
Question 41:	Should the wishes expressed in a document making a personal appointment be binding, or should they merely be matters that the personally appointed decision maker must consider?
Question 42:	If the wishes are merely one of the matters that the personally appointed decision maker must consider, should that person be required to provide written reason for departing from them?
Question 43:	If the wishes are binding upon a personally appointed decision maker, should it be possible to override them in some circumstances? Do you think VCAT should perform this role and (if so) in what circumstances?
Question 44:	Should the same rules apply to both enduring guardians and enduring attorneys (financial)? If not, in what circumstances should they differ?
Question 45:	Should there be sanctions for overriding an instructional directive in a way that does not comply with the law? What should these sanctions be?

Question 39 response: Yes, subject to our further comments below.

To most people the concept of an advance directive relates to medical treatment but there is no reason in principle why the concept of an instructional directive cannot relate to guardianship or financial matters as well.

Question 40 response: Any matter relating to the person's estate or welfare (including health).

Questions 41, 42 and 44 responses:

(a) State Trustees supports a variant of Option C (as described below).

(b) At least two forms of personal appointment capable of containing a statutory instructional directive (referred to by the VLRC as a 'hybrid directive') already exist in Victoria, linked to specific appointments under enduring powers. The current enduring power of attorney (financial) allows the inclusion of 'conditions', 'instructions', and 'limitations'. In the case of enduring power of attorney (financial), whilst a 'condition' or 'limitation' should bind the attorney beyond the donor's loss of capacity, a change to the law is needed to clarify that the same is not always true of 'instructions'. Similarly an enduring power of guardianship permits the inclusion of 'limitations' and 'wishes'.

(c) The circumstances where an instructional directive is displaced need to be clearly defined, especially where financial decisions are being made. If stand-alone statutory instructional directives are introduced, they should not be binding on an attorney or administrator in respect of financial matters.

(d) An attorney should not be made liable for anything done or omitted in following a directive contained in an enduring power, unless it is done or omitted in bad faith or without reasonable care.

(e) An attorney under an enduring power of attorney (financial) should be required to record his, her or its reasons for departing from 'instructions' following the loss of legal capacity of the donor. These reasons should be required to be provided, upon request, to OPA, VCAT, or a Court.

Question 43 response:

VCAT should continue to have the broad power to oversee the operation of an enduring power, including to vary its effect.[10] If such a power is not retained in VCAT, inappropriate conditions, limitations or instructions with respect to financial matters may be 'locked in' under the enduring power indefinitely and the more restrictive option of an administration or guardianship order may need to be imposed unnecessarily on the donor.

[10] See, for example *Instruments Act 1958* (Vic), s 125Z.

Question 45 response:

(a) Sanctions already exist under general law (e.g. actions for breach of fiduciary duty) and the legislation (e.g. the power to revoke an enduring power of attorney).

(b) If further sanctions for unlawfully overriding an instructional directive are introduced, this might discourage personal appointments as there will be a reluctance to take on the role of appointee.

2.2. Registration of advance directives

Question 46:	Should there be an electronic registration system for advance directives?
Question 47:	Should registration extend to medical and lifestyle instructional directives?
Question 48:	Should registration be voluntary or compulsory?
Question 49:	Are there issues that arise in relation to the registration of advance directives that differ from those that are relevant when considering the registration of personal appointments?

Question 46 to 49 responses: State Trustees has a number of comments on this topic.

If an electronic registration system is to be established for enduring powers, it should also extend to advance directives. However, unlike personal appointments, failure to register an advance directive should not render the document ineffective: a person who has to hand a valid but unregistered advance directive should be required to give the document as much weight as a registered document. A more recent document should outweigh an earlier one, to the extent of any inconsistency.

G. VCAT Appointments (Part 5)

1. VCAT Appointments and Who They Are For (Chapter 10)

1.1. In this section we are responding to questions 50 to 52.

Consultation Paper Options	
Option A:	Provide legislative capacity principles.
Option B:	Provide a legislative definition of incapacity.
Option C:	No change.

Question 50:	Do you agree with the Commission's proposal that disability should no longer be a separate criterion for the appointment of a substitute decision maker, but that it should be necessary for VCAT to find that a person is incapable of making their own decision because of a disability before it can appoint a guardian or an administrator?
Question 51:	Do you agree with the Commission's suggestions for capacity principles (Option A) and a legislative definition of incapacity (Option B) in order to provide legislative guidance on how to determine when a person is unable to make their own decisions? Are there additional or other ways to provide this guidance?

Question 50 response: Yes.

Question 51 response: Yes. State Trustees supports Options A and B.

In a financial context, State Trustees is all too familiar with the sometimes irreversible harm that can occur when an individual who does not possess capacity is treated as capable. It is a well established legal principle that an individual must understand the nature and effect of a particular transaction, in order to be capable of validly entering into that transaction. Any legislative definition must retain this fundamental principle at its core.[11]

[11] *Gibbons v Wright* (1954) 91 CLR 423

1.2. Assessing the need for a guardian or administrator

Consultation Paper Options	
Option A:	Remove the criterion of need.
Option B:	Allow appointments to be made in anticipation of future need (preferred).
Option C:	No change.

Question 52:	Do you agree with the Commission's proposal (Option B) that the new guardianship laws should allow VCAT to appoint a guardian or an administrator for a person when it is satisfied that the person is unable to make their own decisions because of a disability—and is unlikely to regain or achieve that capacity—and might have some future need for a guardian or an administrator?

Question 52 response: Yes.

Effectively these would be 'dormant' VCAT appointments. Consideration would need to be given to how such appointments would be monitored whilst they are 'dormant', and to the notification process that should apply upon their becoming 'active'. We refer also to our response to question 14 above in relation to use of a variant of a limited administration order for co-decision making purposes.

2. Age (Chapter 11)

2.1. Closing the gap between the child protection and the adult guardianship systems

Consultation Paper Options	
Option A:	Increase the age jurisdiction in the Children, Youth and Families Act 2005 (Vic) to people up to the age of 18.
Option B:	Lower the age jurisdiction in the Guardianship and Administration Act 1986 (Vic) to 17 years and over.
Option C:	Lower the age jurisdiction in the Guardianship and Administration Act 1986 (Vic) to 16 years and over and increase the age jurisdiction in the Children, Youth and Families Act 2005 (Vic) to 18 (preferred).

Question 53:	Do you agree with the Commission's proposal (Option C) to lower the age limit of the *Guardianship and Administration Act 1986* (Vic) to 16 and to raise the age limit of the *Children, Youth and Families Act 2005* (Vic) to 18?

Question 53 response: Yes.

(a) This change will be helpful, for example, in circumstances where children with decision-making impairments have interests in a deceased estate. Having an administration order already in place may assist in planning for the point at which such beneficiaries receive their inheritance.

(b) Further, the appointment of an administrator under the G&A Act may be preferable for 16 and 17 year olds in appropriate circumstances, given that individuals over the age of 16 can receive Centrelink income support and can be employed.

3. The Distinction Between Guardianship and Administration (Chapter 12)

3.1. The distinction between guardians and administrators

Consultation Paper Options	
Option A:	Retain the distinction between guardianship and administration: i. Allow dual appointments for all guardians and administrators ii. Allow dual appointments for private administrators and guardians only iii. Allow dual appointments for public bodies only iv. Do not allow dual appointments v. Only allow dual appointments.
Option B:	Remove the distinction between guardians and administrators—have one type of order with a range of powers available.

Question 55:	Should the current distinction between guardianship and administration be retained? If so, do you agree with any of the options (A(i)-(v)) described by the Commission?

(a) State Trustees endorses a continuation of the current separation of powers between administrators and guardians, as it is apparent from our experience that each role requires a different skill set. Accordingly we do not support Option B.

(b) State Trustees supports permitting dual appointments for private administrators and guardians only Option A(ii), as this would no doubt be appropriate in some

circumstances where the dual appointee is a close family member of the represented person and has appropriate skill sets. The dual appointment, in circumstances that justify it, would allow one appointed person to be flexible and responsive to changing circumstances. However, such dual appointments should be made with caution, as not every close family member will necessarily have the appropriate skills to competently assume both roles.

(c) It would be necessary to set slightly different legislative criteria for such appointments than those that apply to standard administration orders.

(d) State Trustees does not support only allowing dual appointment (Option A(v)).

3.2. Managing overlap between guardians and administrators

Question 56:	Do you agree with any of the suggested ways to manage the overlap between the powers of guardians and administrators? Are there any other ways to manage this overlap?

(a) State Trustees notes that each of the VLRC's suggestions as to addressing the issue of overlap of powers between administrators and guardians has some merit.

(b) However, State Trustees does not support the proposition that the legislation should prescribe whose decision should prevail in the event of conflict. Investing one or the other party with a 'trump' card is not conducive to creating a co-operative environment, and will instead lead to a heightened potential for conflict, which can only be to the detriment of the represented person. However, in recognition that decision in this area can become very vexed, an administrator should be permitted to act in accordance with a decision of a guardian that is notified to the administrator in writing, without the administrator being liable for so acting.

(c) There should be a legislative duty for guardians and administrators to consult on major decisions.[12] There should be articulated formal processes to assist both administrators and guardians to reach the most favourable outcome for the represented person. Where conflicts are not capable of being resolved through those processes, VCAT can be requested to determine the matter (as occurs currently under, for example, s 55).

[12] The Australian Guardianship and Administration Committee plans to release later in 2011 its 'National Standards For Financial Managers', which documents minimum levels of service expected of administrators, including consulting with key people on major decisions.

3.3. Who can be a guardian and administrator

Question 57:	Should new guardianship laws guide VCAT about how to choose between family members and the Public Advocate when appointing a guardian or between family members and State Trustees (or some other professional administrator) when appointing of administrator? If not, how could this issue of recognising existing family relationships be addressed?

(a) There is merit in articulating guidelines to assist the process of selecting the most appropriate guardian or administrator in any given application before VCAT.

(b) A primary consideration in selecting a guardian or administrator should be to maintain existing positive relationships in the person's life. Unfortunately, it is a reality that some existing relationships are inherently detrimental to the proposed represented person. In such cases it is generally necessary for VCAT to consider an appointment outside the existing constellation of personal and family relationships in order to minimise the scope for damaging conflict.

(c) Due to the increasing complexity of the financial, taxation investment and social security environments, the role of guardian generally is less likely to require professional skills and experience than the role of administrator.

4. Powers of Guardians and Administrators (Chapter 13)

4.1. Powers of guardians and administrators

Consultation Paper Options	
Option A:	Abolish plenary guardianship orders: i. List available decision-making powers in the legislation ii. Specify restrictions on decision-making powers in the legislation iii. Include non-exhaustive list of decision-making powers and restrictions on those powers in the legislation (preferred).
Option B:	Retain plenary guardianship orders but provide a clearer explanation of the available decision-making powers.
Option C:	Introduce plenary and limited administration orders.
Option D:	No change—retain plenary guardianship orders in their current form.

Question 58:	Do you agree with the Commission's proposal Option A (iii) that new guardianship laws should contain comprehensive lists of the decision-making powers that can and cannot be given to a guardian and an administrator?
Question 59:	If yes to Q58, what decision should a guardian be able and unable to make?
Question 60:	If yes to Q58, what decision should an administrator be able and unable to make?
Question 61:	Do you believe that any of the other options are a better way of dealing with the decision-making powers that a guardian or an administrator could or could not be given?

Question 58 response: Yes, subject to our further comments below.

(a) State Trustees supports the VLRC's preferred option, Option A(iii) (at paragraph 13.114), so long as:

(i) there is a sufficiently clear description of an administrator's **general** powers;

(ii) the list of specific powers is not exhaustive; and

(iii) the option of a de facto plenary administration order is retained in a relatively simple form.

(b) It should continue to be possible to make an order in relatively simple terms granting a de facto plenary administration order, rather than VCAT having to list the full powers in the order. In this regard, State Trustees also supports formalisation of the concept of a plenary administration order (as flagged in Option C, paragraphs 13.115-122).

(c) In State Trustees' experience, 'limited' administration orders can hinder the ability of the administrator to properly investigate an issue as there may be no authority to access the represented person's monies to fund the investigation. This can mean that, in practice, no tangible benefit is achievable under the appointment, and the administrator is forced to return to VCAT to seek additional powers.

Questions 59 and 60 response:

(a) The divide between administrators' powers and duties and those of guardians should be clearly expressed, to make it clear that the administrator's role is addressed to property, finances and related affairs, and the guardian's is concerned with all other matters for which a substitute decision maker can be engaged.

(b) This will require, amongst other things, the replacement or clarification of the words 'estate' and 'affairs' in the new legislation.

(c) The demarcation between the powers of guardians and administrators is a complex area. We have set out in Appendix IV a number of issues we consider should be addressed.

4.2. Clarifying powers of guardians and administrators

Question 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 represented person • organ donation by the represented person?
Question 63:	Should new guardianship legislation extend or clarify the provisions in s50A of the *Guardianship and Administration Act 1986* (Vic) which permit and administrator to make small gifts on behalf of a represented person in limited circumstances?

Question 62 response: See Appendix 4.

Question 63 response: Yes.

The gifting provisions in the G&A Act warrant minor review. The administrator should have to report gifts made to a wider class of individuals including the administrator's spouse or domestic partner, parent or remoter lineal ancestor, child, or remoter issue (including step-issue), and sibling (including step and half-sibling). However, an appointed administrator should be wholly precluded from making non-charitable gifts to non-individuals (e.g. to a non-charitable incorporated association) without the express sanction of VCAT. There should be no change to the dollar value currently expressed in the Act but it may be reasonable to permit that figure to be adjusted over time via regulations, rather than fixing it in the legislation itself.

4.3. Clarifying anti-ademption provisions

Question 64:	Should new guardianship legislation alter or clarify the anti-ademption provisions in s 53 of the *Guardianship and Administration Act 1986* (Vic)?

Question 64 response: Yes.

(a) The current anti-ademption provisions in s 53 of the G&A Act are unclear and should be replaced.

(b) In summary, new provisions should permit a remedy from the estate to third parties for inequitable succession-law consequences of the substitute decision-maker's actions, and should not just cover wills, but also other situations such as intestacies and joint assets.

(c) Further, relief should not be dependent upon the knowledge or actions of the administrator and should be identical whether decisions are being made pursuant to the enduring power of attorney (EPA) or administration order, although the extent of any knowledge and consent of the donor/represented person should be a relevant factor.

4.4. Enable State Trustees to be given same powers as other administrators

Question 65:	Should new guardianship legislation enable State Trustees to be given the same powers as those of other administrators?

Question 65 response: Yes.

(a) Other than under s 51 of the G&A Act, there is currently no legislative impediment to State Trustees' being given the same powers as those of other administrators. State Trustees' exemption under s 51 is merely an anomaly that arose from a legislative oversight. [13]

(b) Whilst s 58B clearly grants sufficient powers for an administrator to invest the represented person's estate, the effect of s 51 is actually to give administrators some scope to act in accordance with 'substituted judgment' principles: by s 51(1)(a)-(b), the administrator is expressly permitted to keep in place investment arrangements made by the represented person prior to the commencement of the order. This ability should be extended to State Trustees by removal of the current exemption.[14]

(c) A further residual express reference to State Trustees relates to the issue of notification of certain appointments. The provision requiring expedited notification to State Trustees of a 'limited administrator' appointment (s 47(4)) serves no practical purpose. State Trustees, now stands on an equal legislative footing with other potential administrators under s 47(1)-(2). In this context, it warrants noting that State Trustees like any other eligible appointee can only be appointed if it consents to act as administrator.

[13] As stated in our previous submission, State Trustees' submission of 29 October 2010 in response to the Information Paper.

[14] To briefly restate the legislative history of this anomaly: Section 34(2) of the STCV, before it was repealed by the ST Act, gave the STCV the same powers of investment as now appear in s 51 of the Act. When the STCV Act was repealed, there was a failure to transfer an equivalent provision into the new ST Act, or to amend s 51 of the Act to omit the exception that was by that time contained in the *Guardianship and Administration Board Act 1986*, as it then was.

4.5. Conduct of litigation on behalf of a represented person

Question 66:	Who should conduct litigation on behalf of a represented person?
Question 67:	Should it be possible for a court or tribunal to order that an administrator or guardian who conducts litigation on behalf of a represented person is personally liable for some or all of the costs of that litigation?

(a) VCAT often grants an administrator all the powers and duties referred to in Divisions s 3 and 3A of Part 5 of the G&A Act. (The Consultation Paper has referred to such an order as a 'de facto plenary administration order.) Where that is the case, the powers of the administrator include the power to 'bring and defend actions and other legal proceedings in the name of the represented person'.[15] In bringing an action on behalf of a represented person, any adverse costs order is ordinarily made against the represented person, and funded out of the represented person's estate.

(b) This can be contrasted with the position of a litigation guardian appointed pursuant to the Supreme Court Rules, who may be liable personally to meet an adverse costs order. Rule 15.02(1) of the Supreme Court Rules provides that:

> *'[e]xcept where otherwise provided by or under any Act, a person under disability shall commence or defend a proceeding by his or her litigation guardian'.*

(c) An administrator would be extremely reluctant to be appointed as litigation guardian because this would involve assuming personal liability for the represented person's costs in the proceeding.

(d) Similarly, if courts require an administrator to be appointed as litigation guardian where a proposed represented person is already involved in a proceeding, candidates for appointment as administrator will be reluctant to consent to act.

(e) In many cases, a litigation guardian's ability to be indemnified out of the represented person's estate for an adverse cost orders is severely limited, especially where the litigation arises out of circumstances of alleged misappropriation of estate assets.

(f) Recent decisions in the Victorian Supreme Court and the Court of Appeal have raised the prospect that an administrator may be compelled to obtain appointment of a litigation guardian when seeking to commence or defend proceedings on behalf of a represented person. This shift would significantly curtail the ability of an administrator to conduct proceedings on behalf of a represented person, and would thereby limit the represented persons' access to

[15] G&A Act, s 58B(2)(l).

justice. As stated in our prior submission to the VLRC,[16] State Trustees has determined at this point, as a matter of policy, that it will not conduct proceedings as litigation guardian of represented persons, or otherwise expose itself to adverse costs orders in this regard.

(g) The law should make it clear that, where an administrator is empowered to bring and defend actions and other legal proceedings in the name of the represented person, the administrator is not required to become litigation guardian when conducting those proceedings.

(h) Section 55 of the G&A Act should be amended to make it clear that an administrator who has received the direction or advice of VCAT to proceed with a civil action cannot be personally liable for the costs arising from those proceedings. Section 47B of the G&A Act should be amended accordingly. This would create an approach that is consistent with the ability of a trustee to obtain the advice of the Supreme Court as to whether or not it should bring a proceeding as trustee. This would assist in cases where there is the prospect that the estate of the represented person will be insufficient to meet a costs order in favour of a third party as it should be open in such cases for the Court to award costs against VCAT, to the extent of any shortfall from the represented person's estate.

(i) New legislation should also clarify that a guardian can bring and defend legal proceedings on behalf of a represented person in relation to matters not falling within the scope of an administrator's role. An example would be a proceeding in respect of an intervention order. (See also Appendix 4.)

[16] State Trustees' submission of 29 October 2010 in relation to the Information Paper.

H. Responsibility and Accountability Under the Law (Part 7)

1. Responsibilities (Chapter 17)

1.1. 'Substituted judgment' replacing 'best interests'

In this section, we are answering Questions 87 to 91, and 94 and 95. (Questions 92 and 93 are dealt with later.)

Consultation Paper Options	
Option A:	Retain 'best interests'.
Option B:	Promotion of the personal and social wellbeing of the person.
Option C:	'Substituted judgment' as the paramount consideration (preferred).

Question 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 expressed?
Question 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?
Question 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?
Question 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?
Question 91:	Is substituted judgment relevant to supported decision-making?
Question 94:	Should new guardianship laws contain the same decision-making principles for financial decision and personal decisions?
Question 95:	If no, how could financial decision makers be guided to balance the need for sound financial management with the principle of substituted judgment where these considerations might conflict?

Question 87 response: Yes.

Question 88 response: Generally, yes.

However, on its face, the current law is unclear about the extent to which it is permissible to follow the represented person's wishes where that would involve 'unreasonable' risk.

Question 89 response: Yes, subject to their being some additional separate principles specific to, on the one hand, lifestyle decisions, and, on the other hand, financial decisions (see the response to Question 94 below).

Question 90 response: No.

(a) State Trustees does not support adoption of 'substituted judgment' as the paramount consideration for financial decisions. Instead, the promotion or maintenance of the person's well-being could be the new primary consideration, informed by clearer guidance about encouraging independence and acting consistently with the person's expressed wishes, views, beliefs and values.

(b) State Trustees opposes making substituted judgment paramount in a financial setting because,

  (i) it would be difficult and unclear how to measure the evidentiary basis for such decision-making;

  (ii) it would be open to abuse; and

  (iii) it could lead to individuals being deemed incapable of ever changing a pre-existing 'mindset'.

(c) State Trustees would support a revision of the current definition of 'best interests' to enable financial decisions to be made that are directed to 'promoting or maintaining the well-being' of the individual.

(d) For financial decisions, it would neither be feasible nor desirable to implement a 'pure' substituted judgment scheme, because of the risk of harm to the represented person. However, it could be included as a guiding principle to assist the substitute decision-maker in their conduct. (We do not wish to express a view as to whether substituted judgment is appropriate to a guardian's decisions.)

(e) In terms of priority, a represented person's current wishes should (provided they are sufficiently well evidenced) be given more weight than their past wishes. However, before wishes are capable of being meaningfully considered, there must be a sound means of establishing those wishes. The greater the 'objective' risk posed by a given proposed course of action, the greater the need for clarity of evidence that the represented person would have wanted that course to be taken.

(f) See also our comments on Case Study 3 in Appendix 2.

Question 91 response: Yes.

Question 94 and 95 response: No.

State Trustees prefers retention of the current approach under which the guiding principles are tailored to the specific role.[17]

1.2. Conflicts of Interest and a Duty of Good Faith

Question 92:	Do you agree that new guardianship laws should specifically require substitute decision makers to act honestly and respond appropriately to conflict of interest?
Question 93:	Do you agree that new guardianship laws should specifically require guardians and administrators to treat the represented person and important people in their life with courtesy and respect at all times?

(a) State Trustees supports in principle measures to improve standards of honesty, management of conflicts of interests (and conflicts of duty), courtesy and respect.

(b) Particularly in financial matters, avoidance of conflicts of interest is fundamental to the fiduciary role performed by a substitute decision maker. This should be set out in legislation and rigorously enforced.

(c) Duties of honesty, courtesy and respect can have a strong subjective element, especially in a context of disabilities affecting perception. Breaches of such duties may therefore be difficult to objectively assess and even harder to enforce. They should therefore be part of the guiding principles, rather than stand alone duties.

2. Confidentiality (Chapter 18)

2.1. Access to confidential and private information

Consultation Paper Options	
Option A:	Detail a substitute decision maker's authority to access confidential and private information in VCAT orders and personal appointments.
Option B:	Detail a substitute decision maker's authority to access confidential and private information in the legislation (preferred).

[17] Contrast ss 28 and 49 of the G&A Act.

Question 97:	Do you agree with the Commission's proposal that new guardianship legislation should authorise all substitute decision makers, including automatic appointees, to have access to confidential and private information about the represented person on a 'need to know' basis?
Question 98:	Do you believe that new guardianship legislation should contain a provision similar to the section 101 of the *Guardianship and Administration Act 1988* (NSW) for dealing with misuse of confidential or private information?

Question 97 response: Yes, subject to the further comments below.

(a) Of the options proposed in the Consultation Paper, State Trustees believes Option B is preferable. However, the proposed threshold for access to information — 'need to know' — may be open to a variety of interpretations. In practice, some institutions may interpret it narrowly. This could impede the proper administration of the affairs of the represented person.

(b) For example, sensitive information relating to the family history and other personal circumstances of the represented person may be vitally relevant to a proceeding under Part 4 of the *Administration & Probate Act 1958* (Vic). If such information is held by an organisation or Department, that body may decide that the administrator does not 'need to know' some of the relevant information, which may in turn make it more difficult for the administrator to obtain the best or indeed any positive financial outcome for the represented person involved in such a proceeding.

(c) Where the substitute decision-maker has 'plenary' powers, they should be able to put themselves in the position to act for the represented person as effectively as the represented person would have been able to, had the represented person not been under a legal disability.[18]

(d) The legislation needs to clearly state that an appointed administrator (or guardian) is by law entitled to access certain defined information without such access being regarded as a breach of privacy.

(e) This issue will be accentuated if 'substituted judgment' is given greater weight as a guiding principle for substitute decision-makers.

(f) Accordingly, where disputes arise, there should be a straight forward mechanism for applying to VCAT that enables VCAT to:

[18] G&A Act, s 48(3).

(i) compel the disclosure of the required information; and

(ii) exonerate the discloser from any potential liability arising from the disclosure.

(g) The provisions of the VCAT Act dealing with publication of reports of proceedings also need clarification (Schedule 1, cl. 37). In State Trustees' view, the 'public interest' in the identification of parties to Guardianship List proceedings should be very narrowly construed. It should be made clear that this prohibition does not restrict the manner in which a guardian or administrator carries out his, her or its duties.

Question 98 response: Yes, subject to the further comments below.

(a) Any amendment should entail the repeal of the 'secrecy' provision in s 17 of the ST Act. In its place, there should be a clear replacement that applies with equivalent effect across all administrators.

(b) The expression 'other lawful excuse', as used in the NSW Act is too vague and potentially too restrictive.

(c) As stated, there should be a hybrid option where an individual could apply to VCAT for confirmation that they are able to disclose information to the administrator, and to absolve the person from liability if they act in accordance with VCAT's order to disclose (compare s 55).

2.2. Other Confidentiality Issues (Including Rights and Duties of an Administrator if a Person Ceases to be Represented Person)

(a) New Guardianship laws must more clearly articulate the legal position relating not just to the authority to access and disclose information (dealt with in questions 97 and 98), but should codify in simpler form the current complex overlapping statutory and general law rules around information that is accessed, collected, used, disclosed and withheld by administrators and attorneys needs wholesale revision.

(b) As regards use and disclosure, there needs to be a revision of the current plethora of sometimes-contradictory provisions relating to what information an administrator is compelled to disclose (and to whom), what information it is permissible for the administrator to disclose, and what information the administrator is forbidden to disclose.

(c) In particular, at least for regulated corporate administrators, there needs to be codification of the administrator's rights in respect of its own documents (equivalent to the protection's that apply to a trustee in relation to not being required to disclose its own internal documents, etc. file notes, minutes and records of third party discussion) as well as codification of appropriate protections for persons communicating confidential material to the administrator.

(d) The need for more adequate protection of confidential or sensitive information in the possession of the administrator is key to the due performance of their functions, as the administrator or persons dealing with them, should be comfortable that documents, communications or financial records made or received are protected from unwarranted disclosure.

(e) When a represented person dies, or ceases to be a represented person, a number of disclosure obligations apply to the administrator: see ss 58D and 58E of the G&A Act. The scope of these obligations is uncertain.

(f) The obligations should be restated in clearer form, bearing in mind that it will rarely if ever be appropriate for a corporate administrator to be compelled to hand over its 'entire file', given the likelihood it will contain third party information of a sensitive and confidential nature.

(g) Especially in the case of a corporate administrator, there is a need to create and receive a variety of highly complex and sensitive documents and communications during the course of the performance of the role. The post revocation obligations should be reworded to clarify that the only documents and records required to be handed over are those that belong to the estate or are necessary for the proper further management of the person's estate/affairs.

(h) A further question is whether codification of such matters should be contained in the applicable privacy legislation, rather than in guardianship legislation.

3. Accountability and Review of Substitute Decision Making (Chapter 19)

3.1. New accountability mechanisms for substitute decision makers

Consultation Paper Options	
Option A:	No change—keep current reporting requirements for administrators.
Option B:	Introduce reporting requirements for private guardians and attorneys.
Option C:	Introduce annual declarations of compliance with responsibilities.
Option D:	Introduce a requirement that guardians and administrators make an oath or declaration upon undertaking responsibilities.
Option E:	Introduce random investigation and auditing of guardians, administrators and attorneys.
Option F:	Give VCAT the power to order administrators or attorneys to repay funds that have been misused.
Option G:	Introduce increased and more specific penalties for all substitute decision makers who misuse or abuse their powers.

Question 99:	Do you think that private guardians and attorneys should be required to lodge periodic reports about their activities with a public official?
Question 100:	Should people exercising substitute decision-making powers be required to provide periodic declarations of compliance with their responsibilities?
Question 101:	Who should receive and monitor declarations?
Question 102:	Do you think that substitute decision makers should declare an oath or sign a statement agreeing to comply with their responsibilities before they undertake their roles?
Question 103:	Should there be random audits of the way substitute decision makers perform their responsibilities?
Question 104:	Who should carry out these random audits?

Questions 99 and 100 response: Yes, subject to the comments below.

(a) Unless a separate regulatory framework already applies,[19] a person exercising substantial financial substitute decision-making powers should be required to provide periodic declarations of compliance with their responsibilities and file accounts. This would be a significant deterrent to financial abuse. To prevent avoidance, such measures should also be considered in respect of some types of general power of attorney.

(b) Where the appointee is an unregulated individual, personal appointments currently have no formal accountability framework: only VCAT-appointed administrators are required to submit to regular formal scrutiny and assessments of their financial management.

Question 101 response:

(a) VCAT should receive the declarations and reports, but a mechanism such as exists under s 58 of the G&A Act could be adapted to assist VCAT in the role of vetting the documents received.

(b) State Trustees is currently appointed by VCAT to examine accounts in relation to private administrator appointments. OPA should retain general oversight of health and welfare matters, if these are to be subject to additional reporting.

[19] For example, the regimes applicable to authorised or licensed trustee companies.

Questions 102 and 103 response:

It would assist compliance if individuals that are not already subject to separate regulatory oversight were to swear on oath or give an affirmation in relation to their compliance with the duties imposed by the role given to them. However, neither this measure nor the requirement for a declaration of compliance, would be of significant benefit unless there is a requirement of filing of accounts in appropriate cases, together with random spot examinations or audits. Again, a mechanism such as currently exists under s 58 could be used for the appointment of an appropriately qualified agency to perform this role.

3.2. Penalties for substitute decision makers

Question 105	Should VCAT be able to order administrators and financial attorneys to repay funds that have been misused?
Question 106:	Is there a need for more specific penalties for substitute decision makers who misuse or abuse their powers?
Question 107:	If yes, what types of conduct should warrant a specific penalty?
Question 108:	Should penalties for substitute decision makers who misuse or abuse their powers be increased?
Question 109:	Should penalties be the same, regardless of whether the substituted decision makers have been personally appointed or appointed by VCAT?
Question 110:	Should civil penalties be introduced for substitute decision makers who misuse or abuse their powers?

Question 105 response: Yes.

(a) State trustees believes that one of the current shortcomings in the financial substitute decision-making framework is the absence of cost-effective remedies for those represented persons who have suffered unjustifiable loss at the hands of a substituted decision maker. Currently the only remedy is civil action either in the Magistrates' Court, the County Court or the Supreme Court. Usually these matters must be brought in either the County Court or the Supreme Court, because the value of funds misappropriated generally falls outside the jurisdiction of the Magistrates' Court.

(b) State Trustees can confirm that there have been alleged misappropriation matters abandoned only because the represented person did not have sufficient financial resources to fund ongoing litigation. Unfortunately these types of matters do not usually attract the engagement of a 'no-win no-fee' law firm competent in this jurisdiction and, in the absence of a clear public interest

element, the Public Interest Law Clearing House (PILCH) is reluctant to act. In such cases of misappropriation, VCAT should be empowered to hear the matter itself and, if appropriate, to order restitution or compensation to remedy the represented person's losses.

Question 106 response: Yes.

State trustees believes that legislative amendment should clearly articulate that substitute decision makers will be exposed to specified penalties for defined breaches of their powers.

Question 107 response:

(a) The type of conduct that should incur a penalty is conduct that causes a represented person substantial financial loss and results in a benefit to the substitute decision maker or his or her family or associates. In addition, substantial loss resulting from wilful default or from actions undertaken in bad faith should attract the penalty provisions.

(b) However, as in the Queensland legislation, State Trustees would support a defence of having acted honestly and reasonably.

Question 109 response: Yes.

In the case of personal appointments, however, it is open to the donor to formally sanction, in advance, actions that would otherwise constitute a breach of fiduciary duty, such as receiving a benefit from the role.

Question 110 response:

State Trustees endorses a legislative framework that discourages breach and assists to reinstate a represented person to the position they were in prior to any breach by the substitute decision maker. A legislative structure that more clearly states to the community that abuse by substitute decision makers will not be tolerated, would be welcomed. (See also our response to Question 122 below.)

3.3. Merits review of decisions of guardians and administrators

Consultation Paper Options	
Option A:	No change – no merits review.
Option B:	Allow review of decisions of the Public Advocate and State Trustees (preferred).
Option C:	Allow review of decisions of both public and private appointments.

Question 111:	Do you agree with the Commission's proposal (Option B) that new guardianship laws should permit merits review of decisions made by the Public Advocate as a guardian and by State Trustees as an administrator?
Question 112:	Who should be entitled to apply for merits review of a guardian's or administrator's decision?
Question 113:	What should constitute a 'reviewable decision'?
Question 114:	Are there any additional steps that need to be taken to limit trivial, vexatious or repeated application for merits review of a guardian's or administrator's decision?
Question 115:	Should merits review of decisions by administrators be treated differently to merits review of decisions by guardians?
Question 116:	Who should conduct merits review of decisions of public guardians and administrators?

Question 111 response: No.

(a) State Trustees does not support the introduction of merits reviews in relation to an administrator's decisions, for a number of reasons, including those already noted in the Consultation Paper (19.106).

(b) Apart from potential added expense and delay in an administration, a key concern is the creation of uncertainty for third parties in their financial dealings with the administrator. This could be to the financial detriment of the represented person. For example, potential purchasers of a represented person's property may be more reluctant to deal with the administrator for fear that any contract may be overturned upon a merits review; this would effectively lower the value of the property.

(c) As noted in the Consultation Paper, the current legislation contains a number of legislative avenues for concerns about the actions of an administrator to be raised at VCAT. (There are, of course, also avenues to appeal against a decision of VCAT.) The current ability of VCAT, on its own initiative, to direct an administrator concerning any matter facilitates a high-level form of 'merits review'.[20] In the drafting of any new guardianship legislation, the wording and scope of all such provisions could be revised to ensure they are aligned with current community expectations. For example, it would appear anomalous that the current s 56 permits an application to VCAT by, amongst others, creditors, but not by the represented person him- or herself.

[20] G&A Act, s 55(4A).

(d) In relation to grievances about State Trustees' decisions as administrator, State Trustees already has in place a well-established internal dispute resolution process for clients and interested parties. Complaints about State Trustees' administrative decisions may also be raised with, and dealt with by, amongst others, the Victorian Ombudsman, and its processes and systems are reviewed by the Victorian Auditor General.

(e) State Trustees is also concerned that the apparently low rate of merits reviews brought in respect of financial matters in New South Wales would not be replicated in Victoria, where rights under stand-alone guardianship legislation have a longer history. If this concern is justified, a merits review system may place further resourcing strains on VCAT. (State Trustees suggests that VCAT is the logical place for any such reviews to be heard and determined, and for ease of administration it would be sufficient for them to be dealt with by a different and/or more senior tribunal member than the one who appointed the administrator.)

(f) If a more formal mechanism of merits review is to be introduced for financial decisions, it should apply to **all** administrators (not just State Trustees as administrator), so that all represented persons subject to an administration order are treated equally before the law. Any such mechanism should, however, expressly exclude review of a decision that has been made, or an action taken, affecting the rights of a third party, such as the entering into of a contract. A clear minimum criterion of financial materiality (potentially set at a particular dollar value) should also be set.

(g) Due to the 'private' nature of personal appointments, however, decisions of attorneys under an enduring power of attorney (financial) or under a general power of attorney should not fall within a 'merits review' regime (contrary to what appears to be being proposed by Option C.[21]

(h) Due to its in-principle opposition to merits review for administrators, State Trustees has not sought to respond fully to questions 112 to 116. However, in the event such a proposal is to proceed we would have further detailed comments to make as to how such a process might be set up so that unintended negative consequences are kept to a minimum.

3.4. Training requirements for guardians and administrators

Question 117:	Should VCAT have the discretionary power to appoint a guardian or administrator on the condition that they complete any training requirements specified in the order?

[21] See paras 19.87-90.

Question 117 response: Yes.

Where appropriate, the appointee could commence his or her role subject to an undertaking to complete the training requirements within a set period (e.g. 12 months).

I. Implementing and Regulating New Laws (Part 8)

1. The Public Advocate (Chapter 20)

1.1. Investigation

Question 118:	Do you believe the Public Advocate's investigation function should extend beyond cases concerning guardianship and administration?
Question 119:	Do you think the Public Advocate's investigation powers should be clarified so that she can require people and organisations to provide her with documents and attend her offices to answer questions?
Question 120:	Do you think the Public Advocate should have the power to enter private premises with a warrant issued by a judicial officer when there are reasonable grounds for suspecting that a person with a disability who has been neglected, exploited or abused is on those premises?
Question 121:	Do you think it is necessary to protect the anonymity of people who provide the Public Advocate with information about the possible abuse, neglect or exploitation of people with a disability?

Questions 118, 119, 120 and 121 responses: Yes.

(a) In general, OPA currently only investigates a matter bought before them if ordered by VCAT to do so. Without an independent party being resourced and prepared to follow through the entire VCAT application and hearing process, many investigations do not take place.

(b) At times OPA investigations about misappropriations and the misuse of general powers of attorney and enduring powers of attorney (financial) are scant on detail. There is also scope for a greater role for police in such matters.

(c) Having the proposed additional powers regarding access to documentation compelling attendance for questioning and accessing premises would improve the effectiveness of OPA's investigative re function.

(d) New guardianship laws should contain a means of protecting the anonymity of persons wishing to report cases for investigation, subject to appropriate safeguards. It is common for the person wanting to make a referral to OPA (and to VCAT) not to do so once they discover their identity would likely be disclosed to the alleged perpetrator. Moreover, most referrals would come from close family members and caseworkers who do not want to jeopardise their relationship with the proposed represented person and therefore accept the risk of continued abuse rather than initiate investigations or applications for a protective order.

(e) If the Public Advocate is unwilling to be granted all or any of these powers, consideration should be given to a formal investigative unit attached to the VCAT Guardianship List, as is found in interstate jurisdictions.

1.2. Penalties

Question 122:	Should the Public Advocate be able to take civil penalty proceedings against people who have allegedly breached guardianship legislation?

(a) As stated earlier (Question 110), State Trustees supports the introduction of a civil penalty regime.

(b) Such a regime would be of benefit where the wrong committed falls short of criminality, especially if financial penalties extracted could be passed on to the wronged individual by way of compensation or restitution.

(c) State Trustees is concerned that the role of bringing such proceedings may sit uncomfortably with the Public Advocate's other roles, especially where she may be, or become, the 'victim's' appointed guardian (an inherently partisan role).

1.3. Advocacy

Question 123:	Do you support clarifying the Public Advocate's individual and systemic advocacy functions in guardianship legislation?
Question 124:	Do you think that the legislation should include principles to guide the Public Advocate when undertaking her advocacy functions?
Question 125:	Do you think that the Public Advocate's functions in relation to community advocacy are necessary?

Questions 123, 124 and 125 responses: Yes.

1.4. Public Guardianship

Question 126:	Do you agree that the Public Advocate should continue to be both the guardian of last resort and an advocate?

Question 126 response: Yes.

(a) Due to current resource issues at OPA, they are less likely to offer advocacy services, as their efforts are primarily devoted to actual guardianship issues.

(b) Again, a separate investigative unit within VCAT may assist in clarifying the nature of OPA's role as advocate and potential guardian.

1.5. Personal and Automatic Appointments

Question 130:	Do you think the Public Advocate should play a role in designing a register of personal appointments?
Question 131:	Do you think the Public Advocate should be given responsibilities for monitoring the activities of personally appointed substitute decision makers?
Question 132:	If so, what functions and powers should be given to the Public Advocate to undertake this responsibility?

Question 130 response: Yes.

However, given that the Public Advocate's authority to date does not extend to financial matters it would be prudent to obtain formal input from other agencies, such as State Trustees, on the ultimate design to ensure that both financial and personal issues are properly addressed in any register model.

Question 131 response: Yes, subject to the further comments below.

(a) The Public Advocate could be empowered to monitor conduct under personal appointments relating to lifestyle issues (enduring powers of guardianship). However, the Public Advocate would need to acquire a new skill set, through employment or engagement of appropriately qualified financial expertise, if the office is to monitor financial personal appointments.

(b) It is envisaged that a viable monitoring role would include authority to review registered personal appointments, authority to initiate an audit or examination of the performance of registered personal appointments and the authority to compel compliance by the personal appointee with a request for audit or examination.

(c) A question to be addressed is what, if any, weight ought to be given to an express direction by the donor in the personal appointment document that the appointee not subject him or herself to such monitoring.

2. VCAT (Chapter 21)

2.1. Preparation for Hearings

Question 135:	Should the Guardianship List be supported by a body such as the New South Wales Guardianship Tribunal's Coordination and Investigation Unit so that it can take a more active role in preparing cases for hearing?
Question 136:	Should the Public Advocate be funded to undertake this role?

Questions 135 and 136 responses: State Trustees has an open mind on these proposals.

The engagement of an Investigation Unit would more often than not ensure that VCAT was better informed about those matters presented for consideration. We understand such a unit can also assist in better 'triaging' of cases, so that urgent matters are expedited. It is also arguable that a unit that is (unlike OPA) not a candidate for appointment under the legislation can take a more considered and objective stance on particular matters requiring VCAT's attention.

2.2. Representation of the person with a disability

Question 137:	Do you agree with any of the options proposed by the Commission to improve legal assistance and advocacy support for people in Guardianship List matters at VCAT?

Question 137 response: Yes.

State Trustees supports all of the options suggested to improve legal representation in the Guardianship List. While it should be emphasised that the Guardianship List is not an adversarial jurisdiction, legal representation may be desirable in certain matters. However, we would not endorse any proposition that sought to make legal representation mandatory.

2.3. Requirement to consider alternatives to guardianship and administration

Question 138:	Should VCAT be required to consider making supported and co-decision-making orders before appointing a substitute decision maker?

Question 138 response: Not applicable (in light of State Trustees' position on these orders).

(a) As noted above (Questions 14 to 16), State Trustees does not support the models for new supported and co-decision making options as currently proposed by the VLRC. The current law already embeds the principle of acting in the 'least restrictive' manner possible in the circumstances.

(b) However, clearer statutory criteria to guide an appointment decision by VCAT would result in greater certainty for the community and participants in the VCAT process.

(c) VCAT should be guided to consider whether to make an appointment that is broader in scope, or 'plenary', where there are indications that there are underlying complex legal or financial issues to be investigated or resolved, or where there is a likelihood that such issues will arise within the course of the presently contemplated appointment.

2.4. Duration of Orders

Consultation Paper Options	
Option A:	No change.
Option B:	Restrict the duration of Guardianship List orders.

Question 139:	Do you think that new guardianship legislation should specify a maximum period for all guardianship and administration orders?
Question 140:	If so, what should that maximum period be?
Question 141:	Following the expiry of an order, should it be possible for VCAT to reassess or make a new guardianship or administration order in the absence of the parties, with their consent?

Question 139 response: No.

State Trustees supports the status quo (reflected in Option A). This option does not preclude an order being made for a limited period. An indefinite order is in any case required to be assessed within three years.

2.5. Providing information to VCAT to determine the need for a substitute decision maker

Consultation Paper Options	
Option A:	Require VCAT and the Public Advocate to advise people that the information they provide to assist VCAT may be disclosed to others and made available on VCAT's file.
Option B:	Onus is on the person providing confidential information to VCAT to justify why it should not be available to the parties.

Question 142:	Should VCAT advise a person who provides them with confidential information that the information may be available to the proposed represented person and other parties?
Question 143:	Should a person who provides VCAT with confidential information be responsible for requesting and justifying the need to keep the information confidential?

Questions 142 and 143 response: Yes.

(a) State Trustees supports adoption of both Option A and Option B.

(b) A large proportion of the material submitted to the VCAT Guardianship List is provided without the source having actually considered that a third party may access that information. A person being asked to provide material should be clearly and expressly alerted to the possibility of future disclosure of that information.

(c) In terms of the person requesting that a document be treated as confidential, however, it should be sufficient that they have expressly marked the document 'confidential' or requested that it not be disclosed. VCAT should then be required to assess the relative merits of making the material accessible to a third party.

(d) Making such confidential documents too readily accessible would, in State Trustees' view, have a catastrophic impact on the functioning of the Guardianship List. Disclosure of sensitive, yet vital material would be likely to drop away markedly if it were generally perceived that such material is readily accessible by third parties. At the earliest opportunity, this perception should be displaced by informing persons that they can request that their confidential information not be disclosed and that the merits of that request will be duly considered.

(e) State Trustees recommends that the format for submission of all material to VCAT be amended such that all parties are aware of possible disclosure and encouraged to provide argument up front as to why the material should not be disclosed. It is unfair to expect the general community to be aware of confidentiality issues and their implication and they should not have a burdensome onus imposed upon them.

2.6. Access to VCAT files

Consultation Paper Options	
Option A:	No change—maintain open VCAT files (with restrictions).
Option B:	Close VCAT Guardianship List files to the public (with exceptions).

Question 144:	Should VCAT Guardianship List file remain open to the public, with some restrictions about who can gain access or should the files be closed to the public, with only the parties having a right of access?

Question 144 response: Neither Option A nor Option B reflect State Trustees' preferred position.

(a) Notwithstanding that legal proceedings should be as transparent as possible, the Guardianship List should be exempted from public access due to the very personal and private dimension of the matters heard by the Tribunal.

(b) Of course, VCAT should retain its discretion to overrule this general exemption in certain defined circumstances,[22] such as where access to a file is considered to be in the represented person's best interests.

(c) It is also vital in this 'protective' jurisdiction, that the Guardianship List continue to have the right to deny access to a proceeding, and to the proceeding file, even to persons who are parties to the proceeding.

2.7. Rehearings

Question 145:	Should the period in which an application for a rehearing can be made be extended beyond the current 28 day limit?
Question 146:	Should VCAT be required to inform parties of the right to seek a rehearing?

Question 145 response: Yes, except for parties other than the 'represented person'.

Question 146 response: Yes.

State Trustees can see no valid reason for not requiring that VCAT be obliged to inform parties of the right to seek a rehearing even if such parties are legally represented at the hearing.

2.8. Reassessments

Consultation Paper Options	
Option A:	Reassessment hearings are always an 'opt out' rather than 'opt in' process
Option B:	The represented person has a right to at least one reassessment hearing during the period of the order

Question 147:	Should a represented person be requested to opt out of, rather than opt in to, a reassessment hearing?

[22] In this respect, State Trustees refers to the VCAT Act, s 146, clause 37 of sch 2.

Question 148:	Should a represented person be entitled to at least one unscheduled reassessment of the order during the period of the order?

Question 147 response: No.

State Trustees is concerned about the likely resourcing implications this option would create for VCAT.

Question 148 response: No.

(a) State Trustees does not support adopting Option B. The purpose of a reassessment hearing should be to reassess and, either upon receipt of some evidence of a change in circumstances, or at the scheduled point in time, the need for the continuation of the appointment of an administrator or guardian.

(b) However, the existing avenues for raising issues with VCAT should be clarified (as stated above in our response to Question 111).

(c) VCAT should continue to have the power to order that a reassessment need not occur within the three-year period after the making of the order.

2.9. Enforcement of Decisions Against Third Parties

Consultation Paper Options	
Option A:	No change — maintain the status quo, which does not provide any direct enforcement mechanisms against third parties.
Option B:	Allow VCAT to order third parties to comply with decisions of guardians and administrators, with penalties for failure to comply with these orders.

Question 149:	Should the legislation allow guardians and administrators to seek a VCAT order to enforce decisions they make which a third party refuses to accept?

Question 149 response: Yes.

State Trustees' efforts to investigate and resolve complex issues can often be frustrated by non-compliance with requests for information from third parties. Sometimes the non-compliance is merely an agency's restrictive interpretation of privacy legislation, but more often it is evidence of a third party's perception that an administration order has no real 'weight' and that non-compliance does not attract any sanction.

2.10. Skills and Training - Multi Member Hearing

Consultation Paper Options	
Option A:	No change—single member hearings used for initial applications.
Option B:	Initial hearings to consist of multi-member panels drawn from a range of backgrounds.

Question 150:	Should multi-member panels, with members drawn from a range of backgrounds, be the standard practice for initial guardianship and administration applications?

Question 150 response:

While State Trustees would not discourage multi-panel members where appropriate, including at initial applications, we do not consider that it needs to be a mandatory requirement. We do, however, strongly endorse VCAT's Member Competency Framework: we anticipate that improved training and periodic assessment of Member competencies will produce greater consistency in decision making throughout the jurisdiction.

2.11. Guardianship List Hearings and Accessibility for Culturally and Linguistically Diverse Groups

Question 151:	Do you have any views about how VCAT Guardianship List hearings should be conducted?
Question 152:	Do you have any ideas about how to achieve better attendance of the represented person at VCAT hearing?
Question 153:	Do you have any ideas about how to make the Guardianship List more accessible to Indigenous people?
Question 154:	What can be done to make the Guardianship List more accessible to users who come from culturally and linguistically diverse backgrounds?

(a) State Trustees supports any proposal that will promote and reinforce the non-adversarial nature of Guardianship List matters. State Trustees suggests that one way to achieve better attendance is to actually take the hearing to the represented person. This is not wholly impractical for persons residing in accommodation facilities; however, it may be more problematic and unreasonable for persons residing in remoter locations.

(b) It is likely that many potential represented persons do not attend hearings due to a lack of understanding of the purpose of the hearing or a lack of interest in the outcome. It may even be that some do not attend as they regard the hearing as one more external interference in their life that they have no power to influence.

(c) State Trustees suggests that there be wider education awareness campaigns conducted with the CALD groups and the indigenous.

2.12. Accessibility of VCAT for Regional Victorians

Question 155:	What can be done to make the Guardianship List more accessible to users in regional areas?

State Trustees supports VCAT's consideration of a strategy to invest greater resources within regional communities. In addition to the regionalisation process which VCAT has proposed, State Trustees suggests that it may be appropriate for VCAT to 'go on circuit' in a similar manner to current practices of the Magistrates and County Courts, in order to improve the accessibility of the Tribunal to Regional Victoria.

J. Appendix 1

Further Background to State Trustees

State Trustees has been providing estate planning and administration services for Victorians for over 70 years. It began its existence in 1940 as the Public Trustee for Victoria.

It is now a public company under the Corporations Act, having become an authorised trustee company and Victoria's first State owned company in 1994. The State of Victoria, through the Victorian Treasurer, is State Trustees' sole shareholder.

State Trustees provides a range of services, including administration, estate management and trustee services, to individuals, charities, and government and corporate entities:

1. State Trustees acts under appointment by VCAT as administrator of the financial and legal affairs of approximately 9,000 represented persons. It has also been engaged by VCAT to examine the accounts of private administrators.

2. State Trustees is often required to be appointed as administrator under the G&A Act where VCAT has found evidence of neglect, negligence or abuse in relation to a person's finances. For example, VCAT may revoke an enduring power of attorney (financial) and appoint State Trustees in circumstances where the appointed attorney has failed to act in the best interests of the donor.

3. We act for members of the public as their appointed attorney under enduring powers of attorney (financial). We are currently administering the affairs of over 700 Victorians who have appointed State Trustees as their attorney under enduring power of attorney (financial).

4. As a provider of estate planning, financial planning and taxation services to the public, we advise people on the appropriate use of enduring powers as part of their overall estate planning arrangements or to meet particular immediate needs, and we also prepare enduring powers for members of the general public as part of that service.

5. In our role as either attorney or administrator, we may be required to take legal action for the recovery of monies or property misappropriated from a vulnerable individual by a third party, such as an attorney acting under a general power of attorney or an enduring power of attorney (financial).

6. We provide Community Services, including acting for individuals as their administrator or attorney under power of attorney, under an agreement with the Victorian Minister for Community Affairs.

7. As well as being an authorised trustee company, State Trustees holds an Australian Financial Services Licence (AFSL) covering the range of financial services and products the organisation provides, in particular, the provision of financial product advice to retail clients and the operation of five common funds that are retail managed investments schemes (registered under Chapter 5C of the Corporations Act).

K. Appendix 2

Selected Case Studies from the VLRC's online forum[23]

1. Would an Arrangement like Supported Decision Making be Helpful?

(a) Ricky is 24 years old and has an acquired brain injury. He lives and works independently, but struggles to manage his money by himself. He finds it difficult to understand money matters, especially when they are explained to him by bank staff or financial advisers, and, in most situations, he is unsure about what information to ask for anyway.

(b) Ricky has a very good relationship with his parents and talks with them about this. He says that he would like them to help him with his money, but to do this his parents need to get information about Ricky's financial situation from his bank. Whenever his parents try to get this information, they are told that they are not entitled to it unless they have an administration order. Ricky does not want to have an administrator, because he feels this would mean too much of a loss of his control over his money.

(c) Under current guardianship laws, the only legally enforceable options available for Ricky would either be for an administrator to be appointed by VCAT, or for Ricky himself to appoint an enduring attorney—if he was able to understand what the appointment meant. In both cases, the person appointed would have full legal authority to make decisions about Ricky's finances.

(d) Under the VLRC's proposals for supported decision-making agreements, Ricky could set up an agreement with his parents that would formally empower them to get financial information on his behalf and provide him with more assistance to make his own decisions.

State Trustees' comments: Ricky need not give his parents 'full legal authority' under a general power of attorney or enduring power of attorney (financial). The appointment could be appropriately limited to permit his parents access to the information needed to support him in his own decisions.

2. Is Co-Decision Making a Good Idea?

(a) Jenny has bipolar disorder and lives with her sister Sophie. Jenny is able to make her own decisions most of the time, but needs more support when she is unwell. When she is unwell she can become reckless, particularly when

[23] http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Newsroom/LAWREFORM+-+Guardianship+forum+now+open+for+comments+(news)

spending money. Jenny likes to go to the pokies. When she is well, she spends money on the pokies moderately but when she is unwell, typically, she loses quite a bit of money.

(b) This concerns Sophie because it often means that Jenny no longer has money for other things. Though she acknowledges the problem when well, Jenny can become quite angry when Sophie tries to suggest that she should not go to the pokies. However Sophie does not want to stop her sister from going to the pokies altogether because she knows how much she enjoys it. She just wants Jenny to moderate her gambling when she is unwell.

(c) Sophie seeks legal advice, and is told that the only way she can stop Jenny from spending money at the pokies is to become her administrator and restrict her access to her funds. Sophie is reluctant to do this, because she believes that Jenny is able to understand about money and that her only problem is moderating her spending when she is unwell.

(d) Under current guardianship laws, the only legal option available would be, as suggested by her legal advice, to apply for an administration order to prevent Jenny having access to her money.

(e) However, under the co-decision making agreements proposed by the VLRC, Jenny would retain some legal authority, but she would share this with her sister. The agreement could be tailored so that both Jenny and Sophie must agree to the release of funds for visits to the pokies whenever Jenny is unable to make her own decisions about money because of her illness. They would then make the decision together rather than Sophie making the decision solely on Jenny's behalf.

State Trustees' comments: If Jenny can impose on herself the limitation that Sophie's co-decision making entails, she can just as easily unimpose it. There would need to be a consensually imposed statutory mechanism – a variation of an administration order – such that Jenny could not simply walk away from the arrangement.

3. What principles should guide a person when they are making decisions for someone else?

(a) Barry, who is 47 years old, has recently had a stroke, leaving him with a major brain injury and severely impaired decision-making abilities. Prior to his stroke, Barry was a proudly reckless spender—buying very expensive clothes, going to expensive entertainment, indulging in expensive food and wine—often resulting in little money for bills and no money for savings. Shortly after his stroke, Barry inherited a large sum of money following the death of his parents, and his best mate Steve was appointed as his administrator.

(b) Steve is unable to tell what Barry wants. While he thinks it is likely that Barry would still enjoy his former luxuries, he is also conscious that his inheritance will

dwindle away quite quickly if he, Steve, continues to make the same sorts of financial decisions that Barry made before his stroke. This might mean that soon Barry would no longer be able to afford the quite expensive supports and services he now has. On the other hand, he is aware that Barry has a long history of giving a greater priority to luxury than to more routine needs.

(c) Steve is unsure what to do. He believes that it would be in Barry's best interests to spend his money prudently, so that his needs can continue to be met, but he is also mindful of trying to do what Barry would want in the same circumstances. He also wonders whether Barry might make a different kind of decision if he turned his mind to all his current circumstances, including the risk he will be pension dependent if the money is squandered.

(d) Under current guardianship laws, Steve would be required to make a decision that is in Barry's best interests. While there may be many different views on what Barry's best interests are, it is likely that Steve would interpret this as requiring a more prudent approach to Barry's finances than what Barry himself exercised before his stroke. But if Steve uses the principle of substituted judgment, he might be more inclined to continue spending Barry's money in the same ways that Barry did.

State Trustees' comments:

We set out some further observations in relation to evidence, abuse and 'locking-ing' a pre-existing mindset.

1. If substituted judgement were to be the paramount consideration, Steve, as Barry's administrator, would need to be able to keep and, potentially, produce to VCAT some documented evidence (even if it is solely in the form of an affidavit from Steve as to what Barry has previously done and said) about Barry's previous reckless behaviour. It may be hard to state beyond doubt that it was not something about which Barry himself harboured regrets or misgivings. Problems may also arise in relation to conflicts of interest. Steve may believe, for example, that Barry would have wanted to pay for Steve and himself to go on an all expenses paid overseas holiday together twice a year. What, if any, evidence of such a wish on Barry's part would suffice to permit Steve to implement such a course without risk of liability to account to Barry's estate? A high evidentiary burden may deny Barry his wishes, a low one may permit too broad a leeway for abuse.

2. A substitute decision-maker should also be capable of taking into account the possibility that a person's views and wishes could potentially have changed in light of new circumstances. It should not be the case, for example, that an administrator is compelled to 'lock in' to their decision-making the past mindset of the represented person.

3. That mindset might well be objectively irrational, or malicious: e.g. the represented person may be a parent who for no apparent good reason has been completely estranged from and hostile to one of their children. If after the making of an

administration order there were a change in the relationship between the two individuals, but the represented person could not communicate any change in their views, it would seem inhumane to compel an administrator to continue to substitute, in the financial decision-making, a hostile judgment against a child that is taking substantial and genuine steps to 'reconcile' with their parent.

4. There are of course particular types of substituted judgment decisions which, on their face, are always inappropriate for a substitute decision-maker to make, e.g. the represented person may have spent a lifetime engaging in criminal activity. But even this line in the sand can lead to some challenging outcomes: if a person is addicted to cigarettes and the administrator can continue to enable funds to be made available for them to be purchased substituted judgement would most likely compel the administrator to do so. Yet if the same person is addicted to a prohibited substance, like marijuana, an administrator could only follow a 'pure' substitute-judgment rule at their own peril.

L. Appendix 3

Other matters not addressed in the Consultation Paper

1 Funds in Court – Guardianship & Administration Act 1986 (Vic) (The Act), s 66

1.1 Consultation Paper

State Trustees notes that the Consultation Paper does not address the current anomalous situation in relation to money payable to a person with a disability in a civil proceeding, the situation presently dealt with in section 66 of the G&A Act (also known as the "Funds in Court" regime).

1.2 Current situation

(a) Currently, money payable to a person with a disability in a civil proceeding must be paid into Court and, unless the Court orders otherwise, it is then to be paid out to the administrator (if any) of the estate of the disabled person, or to State Trustees.[24] However, notwithstanding the prima facie intention of this section, it has in many circumstances been the Court's general practice to order that such monies be retained by the Court to be managed, not by the person's administrator or State Trustees, but by the Senior Master who is an Associate Judge of the Supreme Court.

(b) The Supreme Court does on occasion determine that it is appropriate to transfer funds to State Trustees under s 66, for example where the relevant client presents with challenging behaviours that the Court does not consider it is capable of managing. Such orders have effect as if they were an administration order,[25] but the procedural elements of which VCAT would need to be satisfied prior to making an administration order are not present.

(c) From a practical perspective, if the funds are ordered to be held by the Court, State Trustees (or such other administrator) must make an application to the Court if it requires any of the funds for the represented person. The cost of doing so on every occasion when funds are required far outweighs the benefit of Court supervision.

(d) Where there is no appointed administrator, the individual must navigate the requirements of making a Court application to access their own funds. In the absence of an administrator, this can be a considerable challenge for a person with a disability.

[24] G&A Act, s 66(3)

[25] G&A Act, s 66(8)

(e) Civil proceeding monies held by the Court may never be accessible fully by the represented person because, typically, the Associate Judge requires such funds of the represented person as are managed by the person's administrator to be depleted before Court held funds will be released.

(f) Furthermore, even in circumstances where an administration order is revoked and the represented person resumes control over his or her own affairs, funds held by the Court are not automatically accessible by the represented person, who may remain beholden to the Court for years, or indeed, may never be able to access fully his or her own funds.

1.3 State Trustees' position

(a) To be comprehensive, the present review of Victoria's guardianship laws must include consideration of the civil proceeding monies provisions (the Funds in Court regime). It would be a considerable defect if the short-comings of those provisions were not addressed in the VLRC's current review and in any new guardianship laws arising from the review.

(b) The placing of such funds under the administration of an Associate Judge has a number of systemic negative consequences, including:

(i) confusion for vulnerable individuals who become " 'beneficiaries' of the Court"[26] in respect of their own funds;

(ii) fragmentation of decision-making because, in addition to the individual's administrator, there is a Court Trust Officer and an Associate Judge of the Supreme Court involved in the person's affairs over an indefinite period, despite resolution of the litigation in which the individual was involved, often long ago;

(iii) the client being denied the benefits of having as holistic an approach taken in relation to the handling of their finances and property-related affairs as would be the case were the funds managed wholly by the client's administrator; and

(iv) uncertainty for case managers and other professionals involved in providing services to the client about which decision-maker they should engage on various issues.

(c) In addition, because the Funds in Court regime is underpinned by the Supreme Court's inherent parens patriae jurisdiction, yet operates in parallel with guardianship laws, there is no obligation for the Court to have regard to the precepts and philosophy around which Victoria's guardianship laws are framed, irrespective of:

[26] http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/Supreme+Court/Home/Practice+and+Procedure/Funds+in+Court/How+we+Work/

(i) the evolution of such laws due to societal changes in attitudes; and

(ii) the intention of the Legislature as expressly set out in guardianship legislation.[27]

(d) The factors identified in the two preceding paragraphs (namely, paragraphs (b) and (C) are undesirable in the context of the current G&A Act with its embedded principles around the promotion of autonomy.

(e) State Trustees is strongly of the view that, other than in extraordinary circumstances, civil proceeding monies due to a person with a disability should be paid to the Court in the first instance (to ensure that the other party to the proceeding complies with the approved settlement or Court Order, as applicable) and then immediately paid out to the represented person's administrator. This is because generally the administrator will be best placed to know the individual's full circumstances and manage the funds accordingly. In any event, it would be prudent to require VCAT to review the person's circumstances to determine whether the person's current administrator remains appropriate in the changed circumstances, or, in the absence of an appointed administrator, to appoint an administrator.

(f) VCAT has been determined by the Legislature to be the most appropriate body to appoint an administrator (among other things). Where VCAT has exercised its authority to appoint an administrator, only in exceptional situations should the Court effectively override that VCAT decision by ordering that funds be retained in Court.

(g) Finally, it is anomalous that a Court, without being required to meet the rigours of an externally monitored statutory governance and risk management regime, such as applies to a statutory trustee company or an entity subject to the financial services regulatory regime, holds and manages a considerable pool of funds on behalf of represented persons and other persons with a disability.

1.4 Reform

(a) Under any new guardianship legislation, there should be a strong express presumption that monies recovered by a represented person in civil proceedings should be paid to the represented person's administrator.

[27] See for example G&A Act, s 4 (see concepts of "least restrictive", "best interests" and giving effect to the wishes of the individual wherever possible"); s 49 (Administrator must exercise power "in best interests of represented person", "encourage and assist represented person to become capable of administering the estate" and "in consultation with the represented person take into account as far as possible the wishes of the represented person".)

(b) The practice of directing monies payable to a person with a disability to be held in Court should not be maintained except in limited, exceptional circumstances warranting the exercise of the Supreme Court's inherent jurisdiction.

(c) Instead of a Court, it is more appropriate for an entity that is subject to the rigours of an externally monitored statutory governance and risk management requirements, such as a statutory trustee company or an entity subject to the financial services regulatory regime, to administer funds on behalf of people with disabilities.

2 Missing Persons — Part 5A of the G&A Act

For ease of use and accessibility, the missing-person provisions of the G&A Act should be more comprehensively expressed in a stand alone part that does not require cross referencing to provisions currently applicable under Part 5 administration orders.

The missing-persons provisions were hastily inserted into the G&A Act in 2010. They piggy-back awkwardly on other provisions in the G&A Act that are applicable under Part 5 administration orders. Creating a 'stand-alone' Part will assist persons using the provisions to appreciate the very different nature of this type of appointment.

3 Exclusion of Certain Trustee Company Provisions

To avoid unintended consequences, any new Victorian guardianship legislation should expressly exclude the application of the fee, dispute resolution and information handling provisions of Chapter 5D of the Corporations Act. Those provisions give to, or impose on, prescribed 'trustee companies' powers and obligations that are potentially incompatible with the proper performance of the role of an administrator, and with the supervisory role of VCAT in the guardianship jurisdiction. To this end, it will also be necessary to procure Federal Treasury's prescription of any new guardianship legislation under Schedule 8AC of the Corporations Regulations 2001.

M. Appendix 4

Powers of administrators and guardians: Further State Trustees comments:

	Matters that should be the province of a **guardian**	Comment
1.	Matters relating to the **minor children** of the represented person (other than maintenance payment, and gifts, from the represented person's estate), including custody and access issues	
2.	Legal proceedings not relating to the represented person's estate, property, finances and related affairs.	For example, intervention orders
	Matters that should be the province of an **administrator**	
3.	Legal proceedings relating to the represented person's estate, property, finances and related affairs.	
4.	Loan contracts and credit facilities	Loans can be an important component of the proper management of a person's affairs.
5.	Decisions currently within the scope of s 58C	The provision requires updating and clarification.
	Matters that should be the province of neither a guardian nor an administrator	
6.	Decisions that the represented person can, or could (but for his/her disability) have made, as personal representative of a deceased estate	Where appropriate these should be dealt with via the Supreme Court.
7.	Decisions in respect of criminal proceedings (other than in relation to the payment of legal accounts)	
8.	The power to make a will for the represented person	The Wills Act deals with this.
9.	Voting at Parliamentary and Local Council elections	Contrary to public policy.
10.	A decision as to whether or not to "opt out" of attendance at a VCAT Guardianship List hearing (if such a provision is introduced)	

Other matters:

1. The area of privacy, data protection, and protection of reputation is a difficult, and increasing complex area. Although often complicated, it is generally still be possible to delineate which areas fall within a 'property/estate-related' (administration) sphere, and which fall within a 'lifestyle' (guardianship) sphere.

2. The questions of organ donation and holding of licences, if they are to be capable of being dealt with under a VCAT order, should be within the province of a guardian.

3. The ability of an administrator to hold, and withhold from the represented person, should be clarified in light of s 32(4) of the Australian Passports Act 2005 (which makes it an offence to have control of another person's passport without reasonable excuse.

4. The power to pay funeral expenses (currently in s 58B(2)(l)) from moneys forming part of the represented person's estate, should be a stand-alone provision. It is intended to apply **after** the death of the represented person, and therefore after the lapse of the administration order. It is therefore not a power of an administrator in the strict sense.

5. The powers in respect of interstate appointments are unwieldy, cumbersome and often ineffectual. This should be addressed to the extent practicable in any new guardianship legislation.