Guardianship Submission

1 In March 2011 the Victorian Law Reform Commission released a Guardianship Consultation Paper. Submissions have been invited to this paper. The following material is in response to that invitation.

2 For several years I was a joint administrator for an adult who was unable to look after his affairs. When a friend of 30 years became unable to manage he was placed under State Trustees care. I was involved in some aspects of this. I have had many dealings with State Trustees, VCAT, and to a lesser extent, the Public Advocate.

3 I have observed and been required to manage a great many shortcomings in the current system, which I believe to be inadequate.

4 I am in general agreement with much of the Consultation Paper, in particular consolidation into a single Act. There are several areas where improvements are greatly warranted.

5 Question 14. Provision should be made for supported decision-making. State Trustees was managing the affairs of my friend X , 84 years of age. He went to hospital, and then to supported residence. It was known that he would not be going home. His residence was empty, and State Trustees took over six months before acting, and then only after I had requested a VCAT hearing to do so. I have known X for 30 years, and have property investing experience, and I knew what needed to be done. State Trustees did not know, and would not take my advice. Manifestly dangerous conditions in the residence were not fixed, including illegal wiring and windows that were rotted and ready to drop out. Provision should be made for family and friends to have input into decisions. See also point 16.

6 Questions 18 and 19. It would be useful if the Public Advocate or another entity provides training or guidance for supporters. Volunteers would be most useful, especially in rural Victoria. Such persons could be those with experience in this area, including current or former substitute decision makers. There must be just one or two people making decisions, with input from others as necessary and available, which relates somewhat to question 14. These decisions should be quickly reviewable.

7 Question 28. I am not in agreement with an online registration for enduring powers: the internet and email are not secure, and there is a limited paper trail. A central record of enduring powers is a good idea. It may be useful to have a centralised registry of wills. The date and name of the legal practitioner or the location of the will is all that is required.

8 Question 50. Disability should no longer be a separate criteria. A balance is needed between dignity and human rights, and the needs of those unable to manage. It is relatively easy where someone clearly has a condition that prevents them managing adequately, but less so when the condition fluctuates. That is, one day the condition may be present, and the next day not. It is also problematical when the degree of the condition fluctuates, from, say, mild to very severe.

9 Question 50. Mental problems, substance abuse, gambling or the like means that some people are very clearly unable to manage money. I have seen this, with all Centrelink payments gone on such activities in a matter of hours. It would be useful to recognise this and have Centrelink payments paid to the landlord, utility company, chemist or the like direct, without the Centrelink client able to change this payment structure. This is a tough call, but the alternative is unpaid rent, utility and chemist. The latter may mean no funds for drug treatment. Allowing for direct payment without admitting a mental condition would be useful. A person with a psychiatric condition came into a large sum of money, and is losing a great deal of it through poor decisions. It is arguable that this person should have someone to look after his finances. Manifestly poor decisions should be sufficient reason for appointing an administrator, which may include limiting some aspects of "standard" administration.

10 Question 55. Dual appointments should be allowed and be the default. However, VCAT should be given discretion to act as they see fit.

11 Question 56. The overlap between guardians and administrators needs to be made as distinct as possible. Dual appointees should be required to liaise.

12 Question 73. Scrutiny should be undertaken when there is reasonable evidence of wrongdoing, or the sums involved are significant. Such scrutiny must be possible after the guardian or administrator function ceases for any reason, including the death of the person under guardianship or administration. I am aware of instances where administrators have made appalling decisions costing the person a great deal of money and there have been no remedies. VCAT does not presently have the power to look at such cases. See point 21 below.

13 Question 89. A general set of decision-making principles would be most useful.

14 Question 90. On balance, in most instances substituted judgement is appropriate. However, decision makers must be mindful that the person under administration may not make the "right" decisions, which is perhaps the reason for the administration in the first place. For example, the person may wish to spend all the money, but some must be set aside for rent, food, and the like.

15 Question 92. New guardianship laws should specifically require decision-makers of any kind to act honestly and respond appropriately to conflicts of interest. This may be hard to enforce or monitor. Perhaps a threshold could be determined, above which independent outside review and approval is mandatory. Some transactions are clearly very small for all persons, but others could depend on the assets of the person. Mandatory review of major decisions such as selling a residence could be considered.

16 Question 94. If the represented person lacks the capacity to make appropriate decisions, then the administrator should decide. After all, this is what the administrator does. That said, some balance may be needed. It may assist if administrators could seek assistance in person, by phone or online from an agency that has some knowledge of the represented person. A second opinion is always useful. As joint administrators we found that our skills were complementary, and that neither could have done as good a job alone as we did together. Also, knowing that there is readily available advice for important decisions should give administrators peace of mind. See point 5 above.

17 Question 99. Reports should be lodged every six or 12 months, within a month or so of the end of the reporting period. Working on a financial year is customary, but this would lead to a lot of reports to review at the same time. It may be more useful to work on a year from the end of the month in which any substitute decision makers are appointed, or from the appointment date.

18 Questions 100 and 101. I see no point in a declaration without evidence. The Public Advocate should receive and monitor this sort of information.

19 Question 102. An oath or declaration will assist if remedies are required. More importantly, guidelines should be developed to ensure that only suitable people are appointed. To assess suitability, a central registry could be maintained of complaints regarding appointees. The Public Advocate seems best suited for this task.

20 Questions 103 and 104. Random audits may be useful. There needs to be a sense among substitute decision makers that there is a high chance of detection. For example, there is a perception that there are many ticket inspectors on public transport, booze buses at peak times, and visible police presence. If it is possible give substitute decision makers a similar perception, with suitable guidance and penalties for breaches, then the system will work. This should be coupled with appointing suitable qualified people in the first place, volunteer support and other help readily available, as detailed above.

21 Question 105. VCAT should have the power to order repayment. See point 12 above.

22 Question 106. There should be more specific penalties for abuse.

23 Question 107. Conduct that warrants a specific penalty should include all actions that are not in the interests of the represented person. A distinction should be made between acting badly in good faith and with intent. As mentioned above, appointing the right sort of person and providing support is useful. Funds that are not kept in a specific account for the represented person warrant penalty. In particular, unless there are exceptional circumstances, I see no need to have any funds go to an account of the substitute decision maker.

24 Question 109. Penalties should not be the same for all substitute decision makers. Professionals have or should have a higher knowledge and experience in such matters compared to, say, a family member, who make have acted improperly though lack of knowledge or experience. There should be provision for poor decisions by professionals to include significant penalties, especially repeat offences. Poor decisions could include doing nothing, which may lead to loss. I have seen this, but could not have the matter reviewed as the person under administration had died. Such penalties could be based on percentage and not dollars. For example, if a property is left empty for six months then the substitute decision maker should have to repay the rent forgone and (say) 20% extra, and be progressively higher for repeated offences. It would be good to allow any decision or inaction to be reviewed.

25 Question 111. There should be review of decisions, but not by State Trustees. My experience of seeking advice and action from State Trustees is not happy, and I very much question their capacity to manage or conduct a review. And *independent* agency is needed, something like an ombudsman, an office of last resort.

26 Question 112. Anyone with an interest in the represented person should be able to seek a review. This could include a family member, friend, banker, physician, carer, or the like.

27 Question 113. A reviewable decision should be something of substance, or a series of relatively small decisions that collectively show a pattern, or failure to take action when a reasonable person could have taken action.

28 Question 114. The ombudsman-like review should only be considered after all other avenues have been exhausted. In exceptional and urgent instances an approach to this office should be possible. For example, suppose that a family member finds out that the represented person's property is to be sold. It was known that the represented person wanted to give the property to a family member, and had so advised in writing. An urgent order to halt the sale process is indicated, and should be quickly obtainable as an interim measure until a more formal hearing or process can be undertaken. I am aware of instances where lack of response to reasonable questions has dragged on for some time. If there was a response then there would be a clear admittance of failure to comply with reasonable steps, so there was prevarication, dissembling and lack of responses. In this case there were many requests for a response which could be viewed as vexatious, but the number of requests is only so due to failure to reply. There should be provision for mandatory responses to all questions in a certain time, say 14 days.

29 Question 116. VCAT or the Public Advocate could conduct such a review. With the number of extra tasks that I have suggested above, it may be useful to have either a new office of one that is part of Ombudsman Victoria.

30 Question 117. Guardians and administrators should be trained. However, there may be an urgent need to have someone in place. Under this scenario, appointees could start with written and oral advice, followed up with training. This could be worked in with volunteers who could assist for a while, and be available for advice.

31 Question 118. The Public Advocate's role should be extended. This could include instances where the matter is not of sufficient import to warrant a VCAT hearing.

32 Question 119. The Public Advocate should have powers such that it is a requirement for people and organisations to answer questions and supply documents. It may not be practical for people in places distant from Melbourne to attend the Public Advocate.

33 Question 120. The Public Advocate should have the power to enter private premises with a warrant, subject to the same sort of safeguards as apply to Police warrants.

34 Question 121. Anonymous supplying of information should be allowed, similar to CrimeStoppers.

35 Question 133. The Public Advocate should be given the responsibility to deal with possible misuses of power.

36 Question 134. The Public Advocate should report annually to Parliament, with only the most serious breaches named.

37 Question 135. Pre-hearing actions would be useful.

38 Questions 142 and 143 These are very hard to answer. In general, information should be shared to assist with decision-making, and should not be made available to persons not involved in the process or who do not have a professional interest.

39 Question 144. The reasoning in questions 142 and 143 above applies to having lists open to the public. Those who need to know should have access, but beyond this I do not see the need. VCAT should make a value judgement on a case by case basis.

40 Question 150. VCAT members hearing guardianship matters should have expertise in this area. I have seen a wide range of skills.

41 Question 151. VCAT hearings should continue to be relatively informal.

42 Question 152. It is sometimes very hard to have someone with an age-related or mental condition attend.

43 Question 155. Video links as used by some courts may be possible. A coverage so that most people do not have to travel more than about 100 kilometres would be good.

Stephen Lake
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