Submission No. 18

Dear Professor Rees and Commissioners,

Re: **Guardianship and Administration Review.**

I welcome the opportunity to make a submission to the Commission in these matters. I appreciate the information paper provided (with summary), it was most useful.

We are all aware that aspects of the application of the *Guardianship & Administration Act* 1986 [G & A Act] are not working, and that it also requires adjustment in order to meet the requirements of the *Charter of Human Rights and Responsibilities Act* 2006.

I offer several positions, with a view to providing recommendations to the Commission as follows:

1/ The role of the Victorian Civil & Administrative Tribunal [VCAT] is a major factor in the way in which the law surrounding the G & A Act operates as at times its "Orders" over-ride established (and lawful) contract/agreement between consenting adults. This action in itself diminishes the respect for lawful agreements on one hand, and respect for courts/tribunals thus engaged on the other hand. Further, it diminishes the standard of law wherein properly performed agreements are arbitrarily over-ridden, which leads to gross uncertainty of future performance of other contracts/agreements struck in this society. The setting whereby VCAT over-ride agreements/contracts is contrary to common law.

Recommendation 1:

That VCAT be precluded from making Orders over-riding existing in good standing agreements (guardianship and/or administration) made between consenting adults.

Therefore change the VCAT Act.

Recommendation 2:

That when a guardianship or administration agreement is seen as unlawful in some regard then VCAT must be required to acknowledge aspects of the agreement/s with lawful merit, and which comply with the wishes of the represented party, thereby leaving room ONLY for correction to unlawful aspects with limited Orders.

2/ The issue of "capacity" of a party to an agreement to guardianship or administration is noted as part of the review in hand. I comment that it is of concern that the capacity of a person to make a power of attorney or guardianship agreement is not well respected by VCAT in my experience thus far. Obviously, this aspect links with the question of the "best interests of a person" as a guide, with the guardianship/administration law presently requiring the "wishes of the represented person" being well considered, and complied with where possible.

That capacity to make a considered statement/opinion is often a matter which is quite reasonable for a person to be ABLE to do, however, the same person might not be ABLE to manage their affairs – as they need assistance. However, to dismiss the person as one capable to make decisions through the use of the term "disability" is an error. This setting needs to be made more certain in law as expressions like "in the best interests of the person" are being abused, and unlawful Orders are coming forward from VCAT as a result of lack of respect for the capacity of a disabled person.

The issue of a person's human right to be involved with their personal and family issues, and right to be involved in their future, is starkly before us in these matters.

Recommendation 3:

That neuropsychological tests be required to assist in determining the "capacity" of a person to make a decision in relation to certain aspects of life, while they might be seen as incapable of management of their affairs. Eg, Making a will, or appointing a guardian or administrator over their affairs is an as-of-right human right. Capacity might also be seen as satisfactory if suitable/appropriate assistance is given.

3/ The role of the Office of the Public Advocate [OPA], as appointed (limited) guardian by VCAT, requires a process of scrutiny and/or accountability other than through VCAT.

I observe that complaint through VCAT (or the courts) is a trying experience for most people, and for the OPA to be brought to attention to rectify its mismanagement and/or unlawful action(s) in matters should not rely on obtaining rectification through VCAT.

Recommendation 4:

The OPA should be forced to have a less formal independent review process, which should be first port of call before a tribunal or court is asked to consider complaint.

Otherwise, the Department of Justice needs to become involved.

Recommendation 5:

Both VCAT and the OPA must be held accountable for any misdemeanours at law. When a VCAT Member, or OPA Delegate, acts contrary to law then there must be penalty in relation to the offence. Therefore, strengthen the *Crimes Act* 1958, s 320, with common law offences against the public interest and ensure liability for error or misdemeanour in specific matters is held to the OPA Delegate involved.

4/ The role of guardians and administrators is very open to abuse and inappropriate conduct occurs. It is noted that most vulnerable people cannot oversee the actions of others (done on their behalf), let alone manage their own defence when that might be necessary.

Experience leads me to say the respect provided by the OPA and/or Administrator towards some relatives close to the "represented person" in their particular situations (where the relative seeks to act to reasonably assist the vulnerable person) is often scant, if at all. I find that the OPA mis-manages its responsibilities to act "in the best interest of the person", and it is intransigent to any appeal by the relative to correct its performance in that regard.

I have seen it act as a bully, and I have seen it act *ultra vires*. This obviously happens to the detriment of the represented person on one hand, and to the abject frustration of the caring relative on the other hand – and, to be told to go to VCAT as the ONLY way to get the matter sorted out is another slap in the face by the OPA to the close relative.

I cite an instance where a family home was sold as consequence of arrangement between the OPA and Administrator contrary to the wishes (or best interests) of the represented person, **without** the consent of the elder son - who had original legal guardianship - and with no respect for the law wherein the best interest (wishes) of the represented person was to be upheld, which in the circumstances, would have been a reasonable position.

Recommendation 6:

That independent Advocates be appointed to act as intermediaries/mediators to seek resolution to problem issues caused by either the OPA or by an administrator. Then, if the matter cannot be resolved, the issue can then go to VCAT to mediate with the view to resolution through Appropriate Dispute Resolution there.

Recommendation 7:

That VCAT be precluded from making Order that Administrators be paid lump sums (or percentage of sale price) simply as a result of the sale of a property they administer .. as a conflict of interest with the administrator is seriously to the fore when that setting is provided.

5/ In relation to the functions, powers and duties of the Public Advocate, and also of appointed administrators, and the issue of privacy.

I cite the fact that the elder son (who was provided original legal guardianship) of an aged lady who broke her hand at the aged care facility was refused access to so-called "highly confidential x-rays, and medical reports" in the matter by the OPA. As was a second opinion refused! The OPA acted unconscionably by such refusal.

Further, I cite that the same old lady could not get the OPA to approve her a visit from a Christian minister, a matter which has gone to the Ombudsman. The as-of right she has as a Christian person pursuant to the *Charter of Human Rights & Responsibilities Act* 2006, is paramount and it is appalling that the OPA exercise in such power against her wishes.

Recommendation 8:

That the Public Advocate be subject to scrutiny from the independent Advocates available through recommendation 6, otherwise, the Secretary of the Department of Justice needs to become involved to correct and/or chastise the Public Advocate.

Recommendation 9:

That the OPA be required to communicate with the immediate next of kin, or other person approved by the represented person, in relation to matters being managed by the OPA under the VCAT Order/s for limited guardianship.

Recommendation 10:

That the OPA be required to respect the limit of its authority pursuant to a limited guardianship, and not assume that everything is embraced within the Order for a limited guardianship – leaving nobody else with capacity in this area. There should be an offence for breaking their bounds of given authority.

6/ In relation to substituted decision-making I refer to provisions in the *Mental Health Act* 1986 with serious concern as there is in effect entrappment occuring when a person is placed on a Community Treatment Order [CTO] by the MH system, with associated "hospitalisation" threatened each time a person might default in his/her "medication".

This substituted decision-makingby so-called "professionals" is unconsionable.

And, the so-called independent checks and balances provided through the Mental Health Review Board is totally inadequate as the MHRB has no way of checking the veracity of information provided to it by its own system on one hand, nor can it get to know the "patient" (or his/her background) to be able to make a wise decision (if it is familiar with that person's background) on the other hand. Huge mistreatment is occurring at present!

Recommendation 11:

That there be a wider responsibility placed upon the MH system, with appropriate funding, to ensure REHABILITATION of people entrapped in the MH system are adequately managed – with underlying issues and pressure points attended to at the first instance.

In this way there will be a shorter term of need for "psychiatric" attention (if there ever was a need in the first place), with according saving to the public purse.

Recommendation 12:

That the law provide for offences pursuant to any inappropriate action of the MH system in its various forms of "performance". Eg. If there is NO rehabilitation provided with the notion of "treatment and care" then that is a clearly specified misdemeanour/offence!

Recommendation 13:

That outside independent review of actions taken by the MH system be possible, and that such review processes do not rely upon psychiatrists – notwithstanding, the view of a so-called psychiatist may be taken into consideration.

I have made separate submission to the Department of Health in relation to the review

being carried out with a view to amending statute/legislation in the Mental Health Act.

I am willing to release that information to you if that is considered appropriate.

I trust that these positions and recommendations are clear, and that if there is need for clarity then I look forward to your contact. Further, I look forward to the end result as I am acutely aware that some of these matters as extremely out of order at present.

Yours sincerely,

Peter Olney

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