



**JacksonRyan Partners**

**Submission to the  
Victorian Law Reform  
Commission**

**Review of the *Guardianship  
and Administration Act 1986***

---

13 June 2010

**Submission to Victoria's Law Reform Commission**  
**Review of Guardianship and Administration**

---

**Guardianship and Administration Act 1986 Review**  
**Submission**  
**Margaret Ryan and Max Jackson**  
**Partners**

 JacksonRyan Partners

---

**1. Introductory Comment**

This submission is provided as a written follow-up to matters presented by the authors, Margaret Ryan and Max Jackson of JacksonRyan Partners, in a meeting with representatives of the Reference Team responsible for the Review of Guardianship and Administration Act 1986. This submission is made as a public submission.

The writers are supportive of this review and argue that in light of other legislative reforms including the Disability Act 2006 and the current review of the Mental Health Act 1986, as well as significant changes occurring in for example the disability sector, the review is timely.

The headings under which the submission is written reflect what the writers argue are factors that should be included among the more significant matters that should be considered by the review. The Information Paper provided by the VLRC has been a basis for the writers' considerations, and we look forward to being able to develop and refine our thinking as the review progresses.

**2. Some General Considerations**

- (i) **Public consultations** – The writers submit that while public consultation is an important and necessary requirement for such an important review, a degree of circumspection is required in assessing and applying the inputs established through such a process.

This view is based on the contention that depending on the process, an unintended consequence can be that some informants can easily give a biased view, which is based on a single perspective arising from their personal situation, and this is then extrapolated as if their experience is widely replicated. Equally, it is not uncommon for the views of those who purport to represent groups to be given greater weight, yet little effort has gone into the group leaders ascertaining an informed response from the membership.

## Submission to Victoria's Law Reform Commission

### Review of Guardianship and Administration

---

There must be great transparency to give integrity to the advice sought and received, and the opportunities afforded to people to give advice.

- (ii) **Statistics as entry information** - The writers express concern for the need to ensure the availability of more thorough statistics on guardianship and administration orders across all appointments. Currently, the writers are aware that at the time of writing only those where the Public Advocate has been appointed, have been made available. Good quantitative data is an important component of the integrity of the factual basis for the review.
- (iii) **The target cohort** - It is essential that more clarity provided as to whom the legislation is for, or in other words whose needs it is attempting to meet. Not to do so, or at least not to provide some guidance on this, opens the way for a 'catch-all' focus to prevail.
- (iv) **Families and the current approach** - The writers' experience suggest that regardless of the agency and regardless of the circumstances, any matter related to families where there is a person who requires additional supports including guardianship and financial administration, the process seems more designed to frustrate and add to the burden rather than facilitate and support. The writers contend that the frustrations are often caused by the requirement for repetitious form filling and providing the same information over and over again. But also, it is much more than this in that parents and siblings are frequently challenged to explain their credentials to represent their family member, where this is above and beyond what might be described as fair and reasonable.
- (v) **Legislation must provide the lead** - The writers are concerned at what appears to be a trend where legislation is not the driver, but where policy bureaucrats impose their own interpretation of the law and manipulate the policy not so much to reflect the legislative requirements, but more to represent a particular ideology or philosophical position.  
  
**The guardianship and administration laws should not be changed simply to reflect changes in policies and practices; rather, policies and practices should be changed to reflect the law.**
- (vi) **The UK Mental Capacity Act** - The writers submit that this is useful document to consider as it focuses on capacity rather than on diagnosis. They argue that diagnosis may not only be very difficult, but also it can lead to the imposition of views and decisions by those with the most power.
- (vii) **Emphasising the positive - not the negative** - the writers argue that the outcomes of the review must be careful not to build a system around the very small number of people who abuse it, which they argue is how the current guardianship and administration system seems to operate,

## Submission to Victoria's Law Reform Commission

### Review of Guardianship and Administration

---

with its excessive checks and balances. They therefore submit that the system should lean more towards being inclusionary rather than the exclusionary.

- (viii) **Guardianship must not be a bureaucratic threat** – The writers submit that based on their knowledge, circumstances have arisen whereby at times the Department of Human Services (DHS) has used the threat of guardianship against families as being a way to remove them from the decision-making process and to remove them from the life of their family member.

Given the above, a purist focus on rights of people with disabilities can sometimes become a means of sidelining families and ignoring their legislative and moral rights.

### 3. Substitute Decision Making

- (i) **The concept of substitute decision-making** - The writer submit that there will continue to be a need for substitute decision-making. Substitute-decision making should not be seen as necessarily restrictive, but as enabling
- (ii) **Wise appointments and trust** – The writers are concerned that the current system seems to be driven by a need for the authorities to check and check again those appointed as guardians and/or administrators. While the writers accept the need for circumspect monitoring, they oppose a system that seems to be driven by a lack of trust in those the system has appointed.

They argue that once a substitute decision-maker has been appointed, there should not be so many checks and balances in place so that their role becomes too restricted. Given this, there needs to be more trust in their ability to carry out the role and exercise judgement effectively. In the first instance the decision makers must be wise in their appointments.

- (iii) **What makes an effective guardian** - Qualities that must be considered as critical in appointing a guardian, and therefore the qualities that make an appropriate guardian include: knowledge of the person; skills to make the decision and to undertake the role; a history of a relationship with the person.

### 4. Person Responsible

- (i) **Primary Carer versus family member** – While the concept of carer is basically a good one and can of course be a family member, the writers argue that it is necessary that the definition of the primary carer and their place in relation to family members needs to be addressed. While

## Submission to Victoria's Law Reform Commission

### Review of Guardianship and Administration

---

primary carer is defined in the current Guardianship and Administration Act, the writers submit that where the primary carer is not a family member that person should not have precedence over family members in terms of guardianship appointment.

The writers suggest that the above may, in essence, be a good model to extend beyond medical treatment to other decision-making areas.

- (ii) **Definition of domestic partner** - The writers submit that this needs to be clarified so that carers receiving social security allowances are not excluded.

#### 5. Powers of Attorney

- (i) **Increasing community knowledge** - The writers argue there needs to be more community education about Powers of Attorney to ensure that there is a clear understanding as to how it differs from guardianship. They suggest that the role and importance of Powers of Attorney was not prominent enough in the Information Paper.

#### 6. Disability Act 2006

- (i) **Individual support packages** - These are provided for under the under the Disability Act and are increasing becoming the preferred method of support being approved by the Department of Human Services - Disability Branch. These packages can involve considerable amounts of money to fund service provision, yet the decision-making processes associated with them are often unsatisfactory and often an administrator has not been appointed for the individual receiving the package. The Disability Act fails to cover the financial aspects to the degree necessary. As such, the revision of the Guardianship Act must take account of these circumstances, and the imbalance of power which exists when a person does not have the mental capacity to self-direct.
- (ii) **Rights - Rhetoric or reality** - While the supports provided under the Disability Act are steeped in the rhetoric of rights, this is often negated through restrictive service policies and a command and control decision-making model. The writers argue that the guardianship review must acknowledge and understand this inconsistency and ensure departmental style is not able to override the individual's rights.

#### 7. Best Interest, Dignity of Risk and Rights

- (i) **Care and protection** - This must be seen as a factor in guardianship applications and therefore it should not be promoted as being inconsistent with upholding a person's rights, as seems to be suggested by the Terms of Reference 3(b), which requires the Commission to have

## Submission to Victoria's Law Reform Commission

### Review of Guardianship and Administration

---

regard to the need to balance the protection of the interests of an adult with impaired capacity by a guardian or an administrator with the person's exercise or enjoyment of the human rights, such as the right to freedom of choice, association and movement, including consideration of whether the Act strikes the right balance between facilitating action in the best interests of an adult with impaired capacity and the person's rights as expressed in the United Nations Convention.

- (iii) **Freedom of choice** – While this is also included in the rhetoric of what the writers suggest has become 'disability speak', the reality is that it is a difficult concept to apply to people who are unable to articulate their preferences. As such, it should not be used as a rationale for not granting guardianship.
- (iv) **The dignity of risk** – While risks are part of life and this applies equally to persons with a disability, it is important to ensure that the balance does not tilt so far that the person with the disability is put in danger, simply because their choice is seen as being denied if guardianship were to be granted.

Give the above any revision to the guardianship legislation must explain what we mean by 'risk' if indeed there is to be a reliance on the concept. The writers argue that it is one that is often misused by DHS

- (v) **Parents as guardians** – The writers argue that parents are used to making judgements about risk based on their child's level of maturity. As such, this becomes an important consideration when considering a guardianship application by a parent. Guardianship must not ignore the principle of *loco parentis*.

#### 8. Public Advocate

- (i) **Advocacy versus guardianship** – The writers submit that is a conflict of roles for the Public Advocate and staff of that office to be appointed as guardians. They therefore submit that the outcomes of the review should oppose the Public Advocate's Office being appointed or acting as guardian.
- (ii) **Strengthening the Public Advocate's voice** – The writers argue that the holder of the high office of Public Advocate must be more vocal than recent history has shown, and must be a strident advocate in order to ensure that government funding, policies and practice are responsive to unmet need in the disability sector. They further argue that by doing so this approach can act as positive adjunct to guardianship legislation.
- (iii) **The Community Visitors Program** – The writers argue that this program has really had its day and that very little has really changed for people with disabilities through community visitors. While acknowledging

## Submission to Victoria's Law Reform Commission

### Review of Guardianship and Administration

---

that it is not directly related to guardianship, nonetheless they argue that as a program whose inherent objective is to protect and represent there are better primary ways of meeting this objective.

#### 9. Victorian Civil and Administrative Tribunal (VCAT)

- (i) **Individual styles** - Based on their experience the writers are concerned that individual members hearing guardianship and administration applications demonstrate variable styles to the degree that some can at times demonstrate a style that can be perceived as unnecessarily aggressive and seen by families as dismissive of them.

The writers argue that what for families is usually a traumatic experience needs to at all time be handled in a sensitive and supportive manner by all members. Therefore, the guardianship list must not be seen as a dictatorial process that is pre-emptive of the outcomes.

- (ii) **The Residential Tenancies** - By contrast to the above it is the writers' experience that this list is managed in a more engaging manner. This could be partly because the Inspector capability available through Consumer Affairs has a degree of expertise, impartiality, and transparency not available in guardianship and administration, where VCAT gets reports via the Office of the Public Advocate.
- (iii) **Appointing guardians** - The writers believe that as a basic principle appointments should generally favour the appointment of family members as guardians and/or administrators.
- (iv) **Community Education** - Need to be encouraging people to make Enduring Powers of Attorney - cf number 5 above
- (v) **Review of decisions** - It was thought that a merits review of decision made by a guardian could be positive. However, it needs to be contained so that it is not just sought by anyone who has an axe to grind.

\*\*\*\*\*

**End of Submission**

**Maxwell J Jackson**  
JacksonRyan Partners

**Margaret Ryan**  
JacksonRyan Partners

13 June 2010

**Submission to Victoria's Law Reform Commission**  
**Review of Guardianship and Administration**

---

**JacksonRyan Partners**  
*A Business Unit of*  
*Max Jackson & Associates*

ABN 500 863 946 76

**Melbourne**  
63 Bridport St  
South Melbourne Melbourne VIC 3205  
Telephone: (61-3) 9682 1981  
Facsimile: (61-3) 9682 1981

**Online**  
Email: [info@jacksonryan.com.au](mailto:info@jacksonryan.com.au)  
Website: [www.jacksonryan.com.au](http://www.jacksonryan.com.au)

**Disclaimer:**

While JacksonRyan Partners endeavour to provide reliable analysis and believes the material it presents is accurate, it will not be liable for any claim by any party acting on such information.

© JacksonRyan Partners 2010