



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: ElderLawCommittee:VK:454042

8 July 2011

Guardianship Consultation  
Victorian Law Reform Commission  
DX 144 MELBOURNE

Also by email: [law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)

Dear Commissioner,

**Re: Guardianship Consultation**

The Elder Law and Succession Committee (the "Committee") represents the Law Society of NSW and its members in the areas of elder and succession law as it relates to the legal needs of people in NSW.

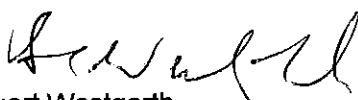
The Committee thanks the Commission for the opportunity to comment in relation to its review of Victoria's *Guardianship and Administration Act 1986*.

The Committee has not addressed every question in the Consultation Paper. Rather, it has focused on issues that may have an effect on justice and fairness; on the legal profession; and on the justice system workload. The Committee has taken the approach of either answering specific questions, or addressing the questions in a particular Part or Chapter as a whole in its responses.

The Committee provides its submission in the enclosed document.

Thank you for the opportunity to comment.

Yours sincerely,

  
Stuart Westgarth  
President

**Submission to the Victorian Law Reform Commission: GUARDIANSHIP  
Elder Law & Succession Committee, Law Society of NSW**

**Question 2. Do you agree with the Commission's draft statement of purpose for new guardianship laws?**

The Committee suggests that the draft statement of purpose be amended to read:

*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, and where necessary facilitate substitute decision-making.*

**Question 3. Do you agree with the Commission's draft general principles for new guardianship laws?**

The Committee agrees with the Commission's draft general principles for new guardianship laws; except in relation to financial matters. In relation to financial management matters, the Committee's view is that the principle of "best interests" should be preserved.

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

Yes.

**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 do you prefer?**

The Committee notes that the term "person responsible" is the term used generally in NSW, and to change that term would be to deviate from the NSW position. In the interests of harmonisation, the Committee suggests that terms used across jurisdictions should be considered.

**Question 8. Do you agree with the Commission's proposal that the term "administrator" should be replaced with "financial guardian"?**

The Committee's view is that the term "guardian" has such strong associations with personal guardianship that in order to avoid confusion, the term "administrator" should not be replaced.

**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?**

The Committee's view is that the term "attorney" should be retained.

**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?**

The Committee's view is that if the issues that arise under guardianship are societal issues, then it is proper for the Government to provide sufficient funding for public education campaigns.

**Question 14. Do you agree with the Commission's proposal to introduce new supported decision-making arrangements?**

The Committee notes that section 4 of the *Guardianship Act 1987* (NSW) requires that anyone exercising functions under that Act is to restrict as little as possible the freedom of decision and freedom of action of a person in need of or under guardianship. The Committee understands that the approach currently taken by the Guardianship Tribunal is to avoid making an order if possible; an approach which is, in a way, a form of assisted decision-making.

The Committee understands that this approach is working well in NSW, and the option of *not* making an order is one way of recognising informal arrangements. The Committee's concern in this respect is that a formal system of legalising informal family arrangements may degrade informal arrangements themselves. The Committee queries also how a practitioner might advise his/her clients on their exposure to liability in respect of the decisions they might make as a supported decision maker, as opposed to the decisions they might make as a substitute decision maker.

**Question 28. Should an online registration system be created for enduring powers?**

**Question 30. Should registration be voluntary or compulsory?**

The Committee's view is not unanimous on this point and the Committee is generally cautious about registration. However, there remains the possibility that, if the system of registration for enduring appointments is comprehensive and uses appropriate technology, clearly explained and low cost, then registration could add value as it would provide certainty and accountability, and would facilitate the search and monitoring of these appointments. However, it appears to the Committee that for a system of registration to work, the system would have to be set out in a Torrens-style register. If registration is available, then it should be compulsory in order to achieve the intended benefits.

**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 decisions because of a disability before it can appoint a guardian or an administrator?**

The Committee suggests that removal of the criterion of "disability" could potentially bring a range of applications for undefined categories of people; for example, alcoholics and gamblers. Further detail would be required for the Committee to support this proposal.

**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 raise the age limit of the *Children, Youth and Families Act 2005* (Vic) to 18?**

The Committee notes that the age limit in NSW is 16 years.

**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?**

The Committee's view is that the current distinction between "guardianship" and "administration" should be retained. The terms are now so closely associated with medical/lifestyle matters and with financial management that removing the distinction could cause unnecessary confusion.

**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 an administrator? If not, how could this issue of recognising existing family relationships be addressed?**

The Committee's view is that appointing guardians and administrators should be based on the ability of the appointee to carry out the requisite duties, and on the best interests of the person needing guardianship.

**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?**

The Committee's view is that codification of the decision-making powers available could unnecessarily limit courts and tribunals from making the best decision on a case-by-case basis. For example, it could mean that a court or tribunal would not be permitted to take into account the UN Convention on the Rights of Persons with Disabilities when making a decision.

The Committee understands that the approach taken in NSW is that the Guardianship Tribunal currently has the power to grant a plenary order, but this is rarely used (if ever). Rather, the Tribunal takes the "least restrictive" approach.

**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 the represented person
- organ donation by the represented person?

No. The Committee's view is that it ought to be a judicial body which has the power to make decisions about these matters.

**Question 66. Who should conduct litigation on behalf of a represented person?**

A financial manager in NSW can be appointed as a tutor, subject to the directions of the NSW Trustee & Guardian as a control and additional safeguard.

**Question 74. Do you think there should be specific laws about people being admitted to and remaining in residential care facilities in situations where they do not have capacity to consent to those living arrangements but are not objecting to them?**

**Question 75. If yes, do you agree with the Commission's Option E that new guardianship legislation should extend the automatic appointments scheme to permit the 'person responsible' to authorise living arrangements in a residential care facility in these circumstances if there are additional safeguards?**

While there could be merit in such an option (for example, this option would support informal decision-making arrangements), the Committee's view is that such an option would require appropriate safeguards.

The Committee notes also that it is important to consider the fact that there is a blurring between financial and legal decision-making in relation to this issue. The actual decision to move a person under guardianship into residential care facilities is a guardianship issue. However, because there are financial implications that arise as a result of the decision to move someone into residential care, the Committee's view is that the decision should remain within the Attorney framework. The Committee suggests that in exploring this option, the Commission should provide clarification in relation to the person responsible for making this decision and the person with financial control.

**Question 79. Do you think that the definition of medical treatment should be broadened?**

**Question 80. Should a broader definition include the prescription and administration of pharmaceutical drugs?**

**Question 81. Should it include paramedical procedures, such as physiotherapy? Should it include complementary health procedures, such as naturopathy and Chinese medicines? What else should it include?**

**Question 82. Do you think a distinction should be made between minor and other medical procedures when a person is unable to consent? If yes, how should the distinction be made between minor and other procedures?**

**Question 83. Do you agree that minor medical procedures should not require substituted consent if certain safeguards are met? Do you agree with the safeguards suggested?**

**Question 84. Do you believe the law should retain the requirement that a medical or dental practitioner must notify the Public Advocate where a person responsible does**

not consent or cannot be identified or contacted and the practitioner still wishes to carry out the procedure? If not, are there any other safeguards that might be more appropriate in these circumstances?

**Question 85. Do you believe the process for obtaining substituted consent to participation in medical research procedures should be the same as the process for obtaining substituted consent for medical treatment?**

**Question 86. If the process is the same, what factors should the person responsible be required to consider before giving substituted consent to participation in a medical research procedure?**

From a harmonisation point of view, the Committee suggests that the Commission gives consideration to the ongoing difficulties caused by cross-border issues such as the different powers available to decision makers, and different terminology used, such as the example of "person responsible" discussed at Question 6.

**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 section 101 of the *Guardianship Act 1988* (NSW) for dealing with misuse of confidential or private information?**

The Committee notes the tension between a person's privacy and the need for access to information, including information that may be confidential and private in order to make sound decisions. The Committee's concern in this regard is for the protection of the dignity and rights of the person under guardianship, consistent with the statement of purpose discussed at Question 2. A person under guardianship may regain capacity in the future and their privacy and dignity should be protected appropriately.

**118. Do you believe the Public Advocate's investigation function should extend beyond cases concerning guardianship and administration?**

**119. Do you think the Public Advocate's investigatory powers should be clarified so that she can require people and organisations to provide her with documents and attend her offices to answer questions?**

**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?**

**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?**

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

**123. Do you support clarifying the Public Advocate's individual and systemic advocacy functions in guardianship legislation?**

**124. Do you think that the legislation should include principles to guide the Public Advocate when undertaking her advocacy functions?**

**125. Do you think that the Public Advocate's functions in relation to community advocacy are necessary?**

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

**127. Should the Public Advocate be responsible for training and supporting private guardians?**

**128. Should the Public Advocate be responsible for monitoring the activities of all or some private guardians?**

**129. If so, how should any monitoring activities be performed?**

**130. Do you think the Public Advocate should play a role in designing a register of personal appointments?**

**131. Do you think the Public Advocate should be given responsibility for monitoring the activities of personally appointed substitute decision makers?**

**132. If so, what functions and powers should be given to the Public Advocate to undertake this responsibility?**

**133. Do you think the Public Advocate should be given any responsibilities to deal with possible misuses of power by a person who is automatically appointed by legislation to make decisions for another person?**

**134. Do you think the Public Advocate should be required to report annually to Parliament?**

The Committee acknowledges that it may be beneficial to extend the Public Advocate's powers. For example, the Committee understands that in NSW, there is no mechanism by which systemic neglect can be addressed, such as the situation with some boarding houses. The Committee's general view is that if the Public Advocate's powers are extended, these powers must be subject to judicial review, particularly if these powers extend to such things as accessing private premises.

**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?**

Yes.

**136. Should the Public Advocate be funded to undertake this role?**

The Committee's view is that it may not be appropriate for a body which can be appointed to be a guardian/decision-maker as a result of an investigation to also be an investigator of the matter as it would result in a conflict of interest. It would not be proper for the investigating body to have an interest in the outcome of the investigation. This can be a vexed question because it is clear that someone should be able to make preliminary investigations to ensure that the best interests of a party are being protected in the initial stages. The perception can work both ways in that even an investigating unit in a Tribunal which is hearing cases could give rise to a potential conflict based on the resourcing requirements of the Tribunal. The Committee notes that this is a contentious issue and that the Committee's view in this regard is not unanimous.

**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?**

The Committee understands that in NSW, the Guardianship Tribunal will make a separate representation order of its own motion where circumstances suggest that the provision of a legal representative will assist to protect rights and/or assist in obtaining the views of the person the subject of the application.

**142. Should VCAT advise a person who provides them with confidential information that the information may be made available to the proposed represented person and other parties?**

**143. Should a person who provides VCAT with confidential information be responsible for requesting and justifying the need to keep the information confidential?**

The Committee notes the tension between the need for procedural fairness and the reality of a Guardianship Tribunal dealing with people's most private medical and financial affairs. The Committee is aware that in some cases it is in the best interests of future relationships that confidential information remains confidential to the Tribunal members. The Committee agrees that justification(s) for keeping the information confidential should be provided to the Tribunal in order to balance this tension.

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

The Committee supports multi-member panels. In NSW, members are drawn from the legal profession, as well as doctors, psychologists, social workers or other professionals with experience in the assessment or treatment of people with disabilities, and from the community (people who have personal or professional experience of people with disabilities).

**152. Do you have any ideas about how to achieve better attendance of the represented person at VCAT hearings?**

The Committee understands that the Guardianship Tribunal conducts hearings throughout NSW, including in regional areas and in locations such as nursing homes.