

## PROPERTY MANAGEMENT ORDERS IN THE MENTAL HEALTH CONTEXT: PROTECTION OR EMPOWERMENT?

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States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

— UN *Convention on the Rights of Persons with Disabilities*<sup>1</sup>

### I INTRODUCTION

Control over personal property is something most citizens take for granted. Yet historically, such control was automatically and indefinitely denied to people involuntarily detained in mental institutions.<sup>2</sup> Adult guardianship reforms in the 1980s established multi-disciplinary guardianship tribunals to replace resort to the inherent protective jurisdiction of superior courts. The new guardianship legislation introduced presumptions favouring orders involving minimal restrictions on liberty.<sup>3</sup>

A presumption of incapacity for citizens who are involuntarily detained in mental institutions partially survives under New South Wales legislation dealing

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2 As early as the 5<sup>th</sup> century BC, Roman law made provision for management of the personal estate of adults deemed incapable of managing their property independently. Australian superior courts inherited the English approach, originating in the 13<sup>th</sup> century *parens patriae* powers of the Crown, in the exercise of the royal prerogative. This approach permitted appointment of a person, called the ‘committee’ of the person or estate, to manage property or personal affairs. Alternative statutory schemes of automatic administration of property by the Public Trustee either on involuntary committal, or on application, were also copied in most jurisdictions: Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 24; Terry Carney, ‘Civil and Social Guardianship for Intellectually Handicapped People’ (1982) 8 *Monash University Law Review* 199.

3 Terry Carney, ‘The Limits and the Social Legacy of Guardianship’ (1989) 18 *Federal Law Review* 231.

with property management, the *Protected Estates Act 1983* (NSW) ('PEA'). The PEA requires automatic consideration of the need for an administration order for people detained in mental health facilities pursuant to the *Mental Health Act 2007* (NSW) ('MHA') by a Magistrate, or the referral of this question to the NSW Mental Health Review Tribunal ('MHRT').<sup>4</sup> In addition, the only orders that can be made are plenary administration orders, transferring complete control to the Office of the Protective Commissioner ('OPC'). Administration orders made pursuant to the PEA are often indefinite, yet are not subject to regular mandatory review by an independent body. While the appointment of an administrator can benefit some people who are too mentally unwell to manage their property,<sup>5</sup> the PEA's plenary approach triggered by a presumption of incapacity involves unjustifiable discrimination against mental health service users and abuse of their human rights.<sup>6</sup> While the term 'administration order' is used in this article, different terms are used across jurisdictions.<sup>7</sup>

The central argument in this paper is that the PEA regime, as it applies to mental health service users, requires immediate overhaul. The preferable short term solution, in our view, is to repeal the relevant sections of the PEA, such that adult guardianship laws cover the field as in most other Australian jurisdictions.<sup>8</sup> While a powerful tool to prevent abuse of rights, property management for those deemed incapable of managing their property remains highly restrictive of individual freedom, and administration orders may severely narrow life choices.<sup>9</sup> Property management laws should therefore be drafted and implemented in a way that respects the rights and preferences of the person, in line with relevant human

4 The MHA provides for the care and treatment of people with mental illnesses, including treatment on a compulsory basis; it replaced the *Mental Health Act 1990* (NSW) ('MHA 1990') in November 2007.

5 Julia Frank and Deborah Degan, 'Conservatorship for the Chronically Mentally-Ill: Review and Case Series' (1997) 20(1) *International Journal of Law and Psychiatry* 97; Yuval Melamed, Robert Kimchi and Yoram Barak, 'Guardianship for the Severely Mentally Ill' (2000) 19(2) *Medicine & Law* 321.

6 Terry Carney, 'Protection, Populism and Citizenship' (2000) 17 *Law in Context* 54.

7 See, eg, 'Financial Management Orders' under Pt 3A of the *Guardianship Act 1987* (NSW); 'Orders for Management of the Estate' of the person under Pt 3, Div 1 of the *Protected Estates Act 1983* (NSW); 'Protection Orders' under s 11 of the *Aged and Infirm Persons' Property Act 1979* (NT); 'Managers' under s 8 of the *Guardianship and Management of Property Act 1991* (ACT); 'Administration Orders' under Pt 5 of the *Guardianship and Administration Act 1986* (Vic), Pt 7 of the *Guardianship and Administration Act 1995* (Tas), Pt 4, Div 3 of the *Guardianship and Administration Act 1993* (SA) and s 64 of the *Guardianship and Administration Act 1990* (WA); and finally, 'Administrators' under s 33 of the *Guardianship and Administration Act 2000* (Qld).

8 However, some reform of guardianship legislation might be needed to suit the particularities of the mental health context.

9 Maria Karras et al, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW* (2006) Law and Justice Foundation of New South Wales <<http://www.lawfoundation.net.au/report/mental>> at 21 August 2008.

rights principles such as those laid down in the United Nations *Convention on the Rights of Persons with Disabilities*.<sup>10</sup>

This article draws from data collected by an ARC study by the principal authors comparing the operation of Australian mental health tribunals from June 2005 to the present,<sup>11</sup> focusing on New South Wales, Victoria and the Australian Capital Territory.<sup>12</sup> It considers the intersection of the *PEA* and the *MHA* in providing for a unique property management regime for people detained in mental health facilities. Although the *MHA* is cited throughout, it should be noted that the relevant data was gathered for the most part when the *Mental Health Act 1990* (NSW) ('*MHA 1990*') was still in operation. The study itself involves a broad evaluation of the workings of mental health tribunals and lived experiences of their processes. The majority of fieldwork data explores the dominant matter types of the MHRT – involuntary patient reviews and community treatment order applications.<sup>13</sup> A subset of 18 hearings observed for the study involved Protected Estate Orders ('*PEOs*'). It was striking, then, when interview and focus group participants in NSW volunteered strong and predominantly critical views about the *PEA* regime without being prompted.

Focus groups and interviews carried out in NSW to date as part of the present ARC study include: one focus group with Legal Aid employees; two focus groups with members of the MHRT; one focus group with clinicians; one focus group with social workers; three interviews with lawyers and one interview with a social worker. Extensive field notes were also recorded based on fieldwork observations and informal discussions with a range of professional and lay participants. Together, this subset of the study's data allows for the presentation of a reasonably accurate picture of the workings of the *PEA* regime. This article's criticisms of the *PEA*, however, have been developed primarily by considering the regime's compliance with contemporary human rights principles.

10 Opened for signature 13 December 2006, 46 ILM 443 (entered into force 3 May 2006) ('*Disability Rights Convention*'). The first principle in article 3 of the *Disability Rights Convention* is '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'. Article 12(5), enshrining the presumptive right to self-management of finances, is quoted at the beginning of the article.

11 This Australian Research Council Linkage project is headed by Sydney University's Professor Terry Carney: see Terry Carney et al, 'Mental Health Tribunals: "TJ" Implications of Weighing Fairness, Freedom, Protection and Treatment' (2007) 17(1) *Journal of Judicial Administration* 46.

12 The Mental Health Tribunals in these jurisdictions are industry partners on the project (the MHRT, Victorian Mental Health Review Board and the Australian Capital Territory Mental Health Tribunal), as is the NSW Law and Justice Foundation.

13 These comprised ten magistrates' enquiries and eight MHRT hearings.

## A Human Rights, Disability Rights and Justified ‘Resistance’ to the *PEA* Regime

The articulation of human rights principles for people with disabilities is relatively recent.<sup>14</sup> However, an early example of disability law in practice suggests the transcendent nature of the ethical values underlying these principles. Under the lunacy laws of 18<sup>th</sup> century England, juries deciding whether a person was an ‘idiot’ or a ‘lunatic’ became unwilling to return a verdict of ‘idiocy’.<sup>15</sup> This was because findings of idiocy allowed the sovereign to use any surplus income after providing for the needs of the person and his or her family, on the basis that ‘idiocy’ rendered a person permanently incapable.<sup>16</sup> A verdict of ‘lunacy’, however, recognised that sanity might be restored. In a display of ‘popular justice’, juries consistently began to make only findings of ‘lunacy’, circumventing the unjust treatment resulting from being found to be an ‘idiot’. This has been described by Justice Powell (then head of the Protective division of the NSW Supreme Court) as a ‘*humanely* perverse refusal’ to comply with legal dictates.<sup>17</sup> Justice Kirby (then President of the Supreme Court of NSW) similarly characterised such resistance as ‘a desire of their fellow subjects to protect the property interests of the disabled and their families’.<sup>18</sup> The data collected by the present study revealed that the *PEA*’s discriminatory and abusive effect is to some extent mitigated by the ‘resistance’ it inspires among many of those who work with the legislation, comparable to that of 18<sup>th</sup> century juries described above. In particular, two 2006 decisions of the NSW Administrative Decisions Tribunal (‘ADT’) have inspired criticism amongst a range of professionals who work with the *PEA* on a daily basis. These decisions serve as a springboard for a critical assessment of the *PEA* regime.

The views of professional participants about the *PEA* regime revealed through fieldwork conducted by the study and presented below are not statistically representative. The study is mainly concerned with MHRT decisions about involuntary and voluntary treatment under the *MHA* and the data is accordingly slanted to that extent. Rather, our argument is that the unease felt by many of those who work with the *PEA*, conveyed strongly in the relevant subset of interviews and focus groups, is well justified on a human rights-based analysis. Notably, article 12(3) of the *Disability Rights Convention* provides:

State parties shall ensure that all measures that relate to the exchange of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with International human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and

<sup>14</sup> Rob Gordon and Simon Verdun-Jones, ‘Privatisation and Protective Services for the Elderly: Some Observations on the Economics of the Aging Process’ (1986) 8 *International Journal of Law and Psychiatry* 311.

<sup>15</sup> See Philip Powell, ‘Mental Health Law: The Development of the Law & Changes in Context’ (Paper presented at the Madness in the Law, Coercive Intervention & The Mental Health Bill 1989 (NSW), Sydney, 1990) 2.

<sup>16</sup> Ibid.

<sup>17</sup> *Protective Commissioner v D* (2004) 60 NSWLR 513, 529 (emphasis added).

<sup>18</sup> *David v David* (1993) 30 NSWLR 417, 421 (Kirby P) (‘David’).

preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.<sup>19</sup>

Part II of this paper compares the ethos of adult guardianship legislation and the *PEA* respectively, focusing on the *Guardianship and Administration Act 1986* (Vic) ('*GAA* (Vic)'), in order to emphasise the overly protective approach taken by the *PEA*. It also briefly reflects on the day-to-day experience of those patients subject to an administration order. The next section turns attention to the intricacies of the *PEA*, in light of the two 2006 ADT decisions. The following two sections elaborate on the *PEA*'s flaws, using examples from data collected by the study. Part IV concentrates on the substantive laws and types of orders that can be made, and Part V on the processes for making, reviewing, terminating and administering PEOs. The final two sections look to the future and summarise our recommendations.

## **II PROTECTION OR EMPOWERMENT: COMPARING THE LOGIC OF THE GUARDIANSHIP ACT AND THE PROTECTED ESTATES ACT**

This section discusses distinctive features of the emergence of guardianship legislation in Australia. The exclusive use of adult guardianship legislation in most jurisdictions is contrasted to the two-track system in NSW, where adult guardianship legislation and the *PEA* govern property management concurrently. One fundamental difference between the *PEA* and guardianship law concerns the choice of a 'protective' stance of assuming incapacity, versus an 'empowering' one favouring the retention of capacity and support for development.

### **A The Development of Adult Guardianship Regimes**

It is argued that the appointment of property administrators for NSW mental health service users should be governed by guardianship laws, as in most other Australian jurisdictions, because these laws have a more 'empowering' ethos than the *PEA*. Adult guardianship regimes are not perfect. NSW and Victorian adult guardianship laws, for instance, do not always go far enough in protecting the autonomy of people with disabilities. For example, the default position in these jurisdictions tends towards ongoing rather than temporary administration orders, subject to optional or mandatory periodic review. This approach is ill-suited to the mental health context, where people's capacity to make health,

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19 Opened for signature 13 December 2006, 46 ILM 443, art 12(3) (entered into force 3 May 2006).

financial and lifestyle decisions, if impaired, often fluctuates rapidly over time.<sup>20</sup> Adult guardianship laws nonetheless offer a preferable immediate solution to the issue of financial substitute decision-making for mental health service users than the *PEA*.

Guardianship laws permit appointment of: (1) a guardian to make decisions about personal affairs and health; and/or (2) an administrator to make decisions about management of finances and property. In 1986, Victoria introduced an innovative new model for appointing substitute decision-makers,<sup>21</sup> overseen by a Guardianship Board rather than the courts.<sup>22</sup> These reforms were inspired in part by the 1970s disability rights movement, calling for recognition of equal citizenship rights for people with disabilities and an end to institutional care.<sup>23</sup> In Victoria, as in most Australian jurisdictions, appointment of administrators is exclusively governed by guardianship legislation. Administration orders may be made pursuant to guardianship legislation where a person lacks the capacity to manage his or her property themselves, irrespective of whether the apparent incapacity stems from intellectual disability, mental illness or another disability.

Victoria abandoned both the original jurisdiction of the Supreme Court and the historic ‘presumption of incapacity’ for involuntary patients, based on recommendations made by parliamentary reviews of legislation governing guardianship for people with intellectual disabilities and services for people with mental illnesses respectively.<sup>24</sup> The *GAA* (Vic) instead granted the Guardianship and Administration Board exclusive original jurisdiction over all guardianship applications, regardless of the source of the alleged incapacity.<sup>25</sup> The Victorian Civil and Administrative Tribunal (‘VCAT’)<sup>26</sup> now hears such applications in the

20 ‘A person’s capacity may change over time. The ability to make decisions may be affected by factors that are pre-existing or acquired, temporary episodic or chronic. For example, a person with a mental illness may not be able to make particular decisions during periods of their illness where they are acutely unwell, but may have capacity at other times’: Office of the NSW Privacy Commissioner, *Best Practice Guide: Privacy and People with Decision-Making Disabilities* (2004) 6 <[http://www.lawlink.nsw.gov.au/lawlink/privacynsw/l1\\_pnsw.nsf/vwFiles/bpg\\_disability\\_2004\\_updated%202005.pdf/\\$file/bpg\\_disability\\_2004\\_updated%202005.pdf](http://www.lawlink.nsw.gov.au/lawlink/privacynsw/l1_pnsw.nsf/vwFiles/bpg_disability_2004_updated%202005.pdf/$file/bpg_disability_2004_updated%202005.pdf)> at 30 August 2008.

21 The *GAA* (Vic) was assented to on 3 June 1986 and was fully operational by 8 July 1987.

22 Carney and Tait, above n 2, 18–20.

23 Ibid 17; Carney, above n 6.

24 The council reviewing mental health legislation rejected continuation of automatic administration of involuntary patients’ affairs by the Public Trustee: Consultative Council Review of Mental Health Legislation, Parliament of Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 135–6 (‘the Myers Report’). It was recommended that the Guardianship Board cater to any protection needs of involuntary patients (as for other people lacking decision-making capacity, but be cross-referenced in the mental health statute).

25 The Myers Report recommended that a Review Panel (later the Mental Health Review Board) review the detention of involuntary patients, along with a separate Guardianship Board to hear applications for guardianship orders for people considered incapable of managing their health, safety or affairs ‘by reason of mental illness’. The Review Panel was envisaged to hear appeals from Guardianship Board orders, but the Mental Health Review Board was not given this function.

26 Established in 1998, the VCAT is an amalgamation of a number of former specialised boards and tribunals: Stuart Morris, ‘The Emergence of Administrative Tribunals in Victoria’ (Paper presented at the Annual General Meeting of the Victorian Chapter of the Australian Institute of Administrative Law Incorporated, Melbourne, 13 November 2003) 4.

Guardianship List of its Human Rights division.<sup>27</sup> Recent Queensland reforms have introduced an innovative model encouraging the use of preventive and alternative measures. The *Guardianship and Administration Act 2000* (Qld) provides for advance directives, decision assistants or enduring powers of attorney and prefers extra-legal social arrangements, such as informal support networks or services, rather than formal guardianship orders.<sup>28</sup>

## B The NSW MHRT and Magistrates as Gatekeepers for Administration Orders

NSW operates a two-track system for people who are mentally unwell.<sup>29</sup> For proceedings initiated under the *Guardianship Act 1987* (NSW) ('GA (NSW)'), decisions about administration orders are entrusted to the Guardianship Tribunal. However, a separate set of procedures is provided for under the *PEA*, invoking the jurisdiction of the MHRT and Magistrates under the *MHA*. The *PEA* retains a parallel, original jurisdiction in the NSW Supreme Court to appoint administrators for adults lacking capacity to manage their personal estates. These provisions apply specifically to people with a mental illness.<sup>30</sup> People involuntarily detained on the basis of mental illness continue to be singled out under the *PEA*, presumed, as was the case historically, to be incapable of managing their property.<sup>31</sup>

The relevant provisions of the *PEA* are triggered when a person is involuntarily detained under the *MHA*.<sup>32</sup> Following involuntary admission to a mental health facility in accordance with the *MHA*,<sup>33</sup> the patient must first receive

27 Stuart Morris, 'The Experience of the Victorian Civil and Administrative Tribunal in relation to the Victorian Medical Treatment Act' (2005) 24 *Australasian Journal on Ageing* S36. One consequence is that the multi-disciplinary composition of panels has largely been lost: Beverley Ferres, 'Personal Reflections of a Tribunal Member: The Interface between Medical Practice and Legal Decision-making in Guardianship' (2007) 26(1) *Medicine and Law* 15.

28 *Guardianship and Administration Act 2000* (Qld) ss 6, 7, 9.

29 The Northern Territory replicates some of these difficulties. Section 16 of the *Adult Guardianship Act* (NT) allows appointment of the adult guardian as estate manager, where competent to do so. Otherwise the Public Trustee or other appropriate person must apply under the *Aged and Infirm Person's Property Act 2004* (NT) (the equivalent of the *Protected Estates Act 1983* (NSW)).

30 *PEA* ss 16–19.

31 *PEA* ss 16–17. The term 'patient' in the *PEA* has the same meaning as in the *MHA*: *PEA* s 4.

32 While the *GA* (NSW) makes concurrent provision for the appointment of administrators for such patients, resort is frequently had to the *PEA*, which includes a compulsion to assess their capacity and offers a speedier means of obtaining an order. Further, the Guardianship Tribunal does not have jurisdiction to make an administration order for a person if an administration order made under the *PEA* or *MHA* is in force: *GA* (NSW) s 25K(2). In 2007, approximately 45 per cent of the estates managed by the default guardian (the OPC) were classified as involving people with a psychiatric disability (mental illness). However, of the 1647 new orders made during 2006–7, 82 per cent (1344) originated with the Guardianship Tribunal. A total of 18 per cent were made under the *PEA*, with 10.6 per cent made by the MHRT (175), 4.1 per cent by magistrates (67), and the balance (3.7 per cent) by the Supreme Court: Office of the Public Commissioner and Public Guardian, Attorney-General's Department of NSW, *Annual Report 2007* (2007) 11

<[http://www.lawlink.nsw.gov.au/lawlink/office\\_of\\_the\\_protective\\_commissioner/opc\\_ll.nsf/pages/OPC\\_annualreports](http://www.lawlink.nsw.gov.au/lawlink/office_of_the_protective_commissioner/opc_ll.nsf/pages/OPC_annualreports)> at 30 August 2008.

33 See, eg, *MHA* Ch 3, Pt 2, Div 1.

the requisite medical assessments, followed by a magistrate's inquiry to decide whether the person should be detained involuntarily.<sup>34</sup> If detention is ordered, the *PEA* requires the magistrate to either: (1) consider whether the person requires an administration order;<sup>35</sup> or (2) refer this question to the MHRT.<sup>36</sup> Separate applications can also be made to the MHRT for administration orders for any 'patient' as defined in the *MHA*.<sup>37</sup>

Whereas adult guardianship laws insist on both incapacity and a functional 'need' for an order which cannot be satisfied in a less restrictive fashion, the *PEA* positively encourages the making of orders. If the magistrate or MHRT is not satisfied that the person is capable of managing their affairs, the *PEA* mandates the making of one of two orders: (1) a continuing order; or (2) if it appears 'necessary or convenient', an interim order placing their estate under the management of the OPC.<sup>38</sup>

### C Is there a Need for Administration Orders? What is the Problem? Whose Problem is it?

The above discussion about the contrasting philosophies of the *PEA* and guardianship legislation needs to be set against an understanding of the day-to-day experience of being subject to an administration order. Regardless of whether property management legislative frameworks are 'empowering' or 'protective', subjection to an administration order is often an extremely disempowering experience.

This is because administration orders often involve strict rationing of a person's finances.<sup>39</sup> The OPC is a self-funding body that charges clients a percentage fee for managing their estates. Once an administration order is made for a person detained in a mental health facility, the OPC holds all of their money and pays out a sum to them on a regular basis for basic living expenses. Separate requests must often be made for 'treats' such as a new pair of shoes:

*PEO recipient:* I think they're going to send me money for shoes but I wasn't sure 'cause I drank for a little while and I don't drink any more. Used to spend money on myself or spend it on someone to buy a meal or go to the movies, just can't do it.

*Interviewer:* Because you're restricted with the finances?

<sup>34</sup> *MHA* s 34.

<sup>35</sup> *PEA* s 16(1). Hospitals must notify the person detained and their nominated primary carer of the pending magistrate's inquiry, which must be held 'as soon as practicable' following the medical practitioner's final examination: *MHA* s 34. In practice an inquiry generally takes place within a week of admission.

<sup>36</sup> *PEA* s 16(2). Factors such as the passage of time, or reluctance to make plenary orders may contribute to the MHRT declining to make orders on every referral.

<sup>37</sup> *PEA* s 19. In *David*, Sheller J explained that a 'patient' within the meaning in the *MHA* (referring to the *MHA* 1990) was *any* person in hospital following admission under that Act: *David* (1993) 30 NSWLR 417, 440. This covers both voluntary and involuntary patients; see *MHA* s 4; *PEA* s 4.

<sup>38</sup> *PEA* s 20.

<sup>39</sup> See Karras, et al, above n 9.

*PEO recipient:* Very restricted. They tell me the other day I got \$60 a week. My social worker is no good.<sup>40</sup>

A social worker's explanation of the processes for seeking and approving additional money beyond the regular payments suggests that the OPC regime can indeed be experienced as rigid, inaccessible and unfair:

If someone wants to go on a holiday, so they need extra money, they have to prove that ... One ... client had to pay for someone to go with them on a holiday to make sure that they spent the money on the correct things. So they had to pay for a carer or someone to make sure they didn't blow the money on anything else.<sup>41</sup>

Service-providers and family members might be motivated to apply for an administration order for a range of reasons. For many people with mental illness, living in the community means surviving on the meagre support of Centrelink payments and living on the margins of poverty and homelessness. They must often live frugally and exercise extreme caution with budgeting, far beyond a level required for other citizens to live comfortably.

An administration order may assist to stop a person drinking or using drugs or gambling, as well as simply limiting their income. In particular, in the context of involuntary hospitalisation, social workers may strive to secure stable accommodation for a person so that they can be safely discharged, and an administration order ensures that the bond and rent or board will be paid. It makes it more likely that a person will remain in their chosen housing situation.

The comments of a number of solicitors who participated in a focus group suggested that, in some circumstances, what is effectively an 'accommodation order' (controlling where a person lives) may be made under the guise of an administration order. In particular, they considered it problematic where an administration order was sought to assist in securing a specific housing placement, but the person had made a legitimate lifestyle choice to live elsewhere or even be itinerant.<sup>42</sup> The focus group with legal advocates also involved the following exchange:

And to then try and put their head around the process of applying to have [the order] lifted which is a difficult process.

It's a reverse onus.

It is. They have to establish having regained capacity. I mean the onus is on them to prove that they have managed.

And it's really hard.

And the test is beyond how all of us manage.

It's not necessarily but it just doesn't apply ... They can still do some considerable managing but it's just not enough really to prove that that they've regained [capacity] ...

But you know, the fact is that these are people who are ill and who have some difficulties, but you're hoping that they're going to get better. And when they come

40 Interview with PEO Recipient (15 August 2007).

41 Focus group with social workers (28 February 2007).

42 Focus group with legal advocates (30 October 2006).

out they are going to have, you know, no control over their money. And they haven't got much anyway.<sup>43</sup>

The 'dignity of risk' principle, a hallmark of early reports exploring the development of guardianship and administration law, acknowledges people's right to make mistakes and bad choices.<sup>44</sup> For people subject to administration orders, however, occasional over-indulgences may be characterised as misdemeanours and cited as evidence of inability to manage finances. It can be very difficult for a person to prove they have regained the capacity to manage their finances when they have no control over them.

### **III THE DAY-TO-DAY WORKINGS OF THE NSW *PROTECTED ESTATES ACT* IN THE MENTAL HEALTH CONTEXT**

Fieldwork revealed that professionals who work with the *PEA* frequently implement this piece of legislation for mental health clients in a fashion more consistent with contemporary human rights principles – such as the least restrictive alternative or a presumption of capacity – than the law itself requires.

First, the *PEA*'s presumption of incapacity is offset to some degree by the approach taken to 'mandatory' consideration of the need for an administration order on a magistrate's inquiry. This trigger is often transformed into a pseudo-application process, launched only if it appears that the involuntary patient is *unable* to manage his or her finances.

In practice, magistrates are strongly guided by the views of service-providers regarding whether an administration order is necessary.<sup>45</sup> If the treatment team positively seeks an order, then a representative, usually a social worker, prepares supporting documentation and comes to the hearing prepared to make submissions in favour of making the order.<sup>46</sup> If the matter is not pushed by service-providers, it may not be discussed at all or disposed of in a cursory fashion. For example, the magistrate commonly asks, 'and what about a protected estates order?' If there is a negative (or nil) response, the issue may be taken no further.<sup>47</sup>

Secondly, service-providers in the past often sought interim rather than continuing administration orders. Even though interim orders can be made, the *PEA* regime evinces a general preference for continuing orders, which is discordant with the often fluctuating capacity of people with mental illness. This is particularly anomalous at the point of involuntary hospitalisation, since acute episodes of mental illness at admission often stabilise relatively quickly. A

43 Ibid.

44 See, eg, Errol Cocks (Chairman), Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982).

45 'Some [magistrates] will do a PEO without any social work report [sic], others will not do that at all ... Yeah. Magistrates that I know used to do it if there was no PEO information or no form. One, he wouldn't do the thing. So they all have a different [approach] ... None of them do all of it': Focus group with legal advocates (30 October 2006).

46 Ibid.

47 Fieldwork observations of NSW Mental Heal hearings, May–June 2006.

preference for interim orders represents an attempt to avoid the injustice associated with indefinite orders that are not subject to mandatory review. For example, during the focus group with legal advocates, one solicitor commented:

Well there's an issue with PEOs where people should be able to get temporary orders which last from a date to a date, because we're dealing with people with mental illness and a lot of the time their mental illness resolves or they become stable. And they find it very excessive to have complete control of their money taken away indefinitely.<sup>48</sup>

Section 21(2) of the *PEA* deems interim orders revoked if a further order is not made before the expiry date. However, two appellate ADT decisions handed down in 2006 – *Vu v Miles*<sup>49</sup> and *WP v Protective Commissioner*<sup>50</sup> – narrowly construed the power to make an interim order and, as a result, appear to have curtailed any push for interim rather than continuing orders.

#### A Continuing Orders or ‘Interim’ Orders, not ‘Temporary’ Orders: the Decisions in *Vu* and *WP*

*Vu* and *WP* address the discretion to make an ‘interim order’ for a mental health ‘patient’.<sup>51</sup> *Vu* involved an appeal from a *PEA* administration order of the MHRT placing the appellant’s estate under management for six months.<sup>52</sup> In setting aside the order, the ADT looked closely at the language of section 20 of the *PEA*, providing that a magistrate or the MHRT may make an interim order for a specified period ‘if it appears … necessary or convenient to do so … pending further consideration of the patient’s capability to manage his or her affairs’.<sup>53</sup>

The ADT ruled that the MHRT had effectively made an unlawful *temporary* order, rather than the *interim* order contemplated by section 20, by failing to set a date for reconvening. The panel considered that the phrase ‘pending further consideration of the patient’s capability’ to manage their affairs imposes an obligation to set a further review date.<sup>54</sup>

In *WP*, an administration order made by a magistrate was set aside for similar reasons to those in *Vu*.<sup>55</sup> It is suggested that this interpretation is overly restrictive and discounts inferences drawn from other provisions, such as those providing

48 Focus group with legal advocates (30 October 2006); Interview with Legal Advocate (5 August 2006).

49 [2006] NSWADTAP 19 (‘*Vu*’).

50 [2006] NSWADTAP 37 (‘*WP*’).

51 The ADT hears appeals against administration orders made by the MHRT or a magistrate: see *PEA* s 21A(1) and *Administrative Decisions Tribunal Act 1977 (NSW)* s 118A.

52 The proceedings at first instance were initiated by the application of a social worker pursuant to section 19 of the *PEA*.

53 The *GA (NSW)* contains a similar provision as the *PEA*, allowing an interim financial management order for a specified period not exceeding six months to be made, ‘pending the Tribunal’s further consideration of the matter’, which expires if not completed within the specified period: *GA (NSW)* s 25H.

54 *Vu* [2006] NSWADTAP 19, [14].

55 *WP* [2006] NSWADTAP 37. In addition, it was found that a statement by the magistrate that the decision was not able to be appealed amounted to a denial of natural justice.

for interim orders to lapse on expiry of their terms in the event that no review takes place.<sup>56</sup>

The ADT has since been inconsistent in its construction of the interim order provision. Another 2006 decision affirmed the *Vu* interpretation.<sup>57</sup> But earlier this year an appeal against a six month ‘temporary’ order as described in *Vu* was not upheld.<sup>58</sup> Even though decisions of the ADT are not binding on other decision makers, *Vu* and *WP* have had significant repercussions on the determination of *PEA* matters in the mental health context.

On one hand, the practice of magistrates and the MHRT of making so-called finite ‘temporary’ orders can be seen as an attempt to avoid unnecessarily prolonged intrusion on the freedom of involuntary patients. On the other, the making of 12 month interim orders potentially involves injudicious use of the discretion conferred by section 20, as the ADT points out in *WP*. The ADT is mindful of legal principles favouring shorter orders for involuntary patients under the *MHA*. In justifying its finding that finite ‘temporary’ orders were precluded by section 20, the ADT in *WP* was apparently attempting to encourage use of the *PEA* in a manner more consistent with contemporary human rights principles, requiring coercive orders to be as short as possible and subject to regular periodic review, as explained below.

The magistrate at first instance in *WP* purported to make a 12 month temporary order. Part of the ADT’s reasoning expressed discomfort with interim orders exceeding the person’s period of detention for a prolonged period, in this case by 11 months.<sup>59</sup> The Panel stated:

The two-step approach contemplated by section 20 is one that fits in, as we see it, with the practice evident in both the mental health and guardianship laws of regular review of the appropriateness of orders. In this instance the Magistrate should have ensured that a follow-up inquiry was held – as we see it, either by a Magistrate or, following referral, by the MHRT.<sup>60</sup>

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56 Given that section 20(2) of the *PEA* provides that interim orders expire unless reconsidered within the period specified in the order, general canons of statutory interpretation requiring legislation to be read to preserve individual freedom absent a clear statutory intention, support an argument that the further review contemplated by section 20 is not as essential as the ADT concluded in *Vu* [2006] NSWADTAP 19 and *WP* [2006] NSWADTAP 37. However such inferences are complicated because the *PEA* sets up a three-cornered tension between micro-level rules such as section 20(2), the statutory objectives of protective legislation such as the *PEA*, and ordinary principles of statutory construction – and there is no simple formula as to the relative weight accorded to these various considerations: see also, *David* (1993) 30 NSWLR 417, 423 (Kirby P).

57 *SC v Protective Commissioner* [2006] NSWADTAP 64.

58 *EK v Culver* [2008] NSWADTAP 19. It should be noted that the grounds of appeal did not include the interim versus temporary order argument.

59 The Panel stated: ‘This seems to defeat the objective of the provision, which, as we see it, is not to have orders of any great length or finality made at the first stage of inquiry’: *WP* [2006] NSWADTAP 37, [30].

60 *Ibid* [31].

Despite these good intentions, however, these decisions appear to have increased the pressure to make continuing orders.<sup>61</sup> Fieldwork interviews indicated that this pressure stems from practical barriers to scheduling a further review date.<sup>62</sup> For example, during a focus group with social workers, it was stated that ‘in a rehab setting or in the forensic setting, we stand a better chance of being able to get it reviewed, but once they’re discharged there’s no review mechanism.’<sup>63</sup> Therefore, the difficulty in guaranteeing that a further review will eventuate once a person is no longer detained in hospital has in part fostered a disinclination to make interim orders.<sup>64</sup>

The *Vu* and *WP* decisions have created uncertainty amongst those responsible for seeking administration orders under the *PEA*. The majority of social workers who participated in the focus group expressed some unwillingness to use the *PEA* regime, because it contradicted the rehabilitative and autonomy-encouraging spirit of both contemporary laws and best clinical practice, even prior to *Vu* and *WP*. They said that post-*Vu* and *WP*, they were even more hesitant about seeking PEOs for fear that continuing orders would be made. While understandable and indeed admirable, this reluctance risks neglect of genuine needs for guardianship services in some cases, a dilemma recognised by service-providers. One social worker who was interviewed stated:

I was in a situation a while ago where I sought an extension of a PEO for a young lady, and I applied for an interim order and they said, ‘no, we have to make an enduring one.’ And I said I wanted it made known on the record that I didn’t intend for that to be the case and if that was going to be the case I’d rather her not be on a PEO because I don’t agree with enduring orders … they made an enduring order.<sup>65</sup>

This resistance to continuing orders is effectively a protest against archaic notions that someone involuntarily detained in hospital on account of a mental illness will lack the capacity to manage his or her property *indefinitely*. It is an ironic echo of the preference of 18<sup>th</sup> century English juries to make findings of ‘lunacy’ – precisely because the Crown was obliged to preserve ‘lunatics’ estates on the basis that their sanity might be restored.

## B The Lack of Regular Review and Viable Appeal Mechanisms

*Vu* and *WP* further expose the failure of the *PEA* to provide for regular external review of administration orders, in contravention of article 12 of the *Disability Rights Convention*. Article 12 provides that measures relating to the

61 Advocates and social workers interviewed for the study were concerned that these decisions would, by default, result in over-use of continuing orders due to the difficulties in making interim orders: Focus group with legal advocates (30 October 2006); Focus group with social workers (28 February 2007); Interview with legal advocate (5 August 2006).

62 Fieldwork Interviews 28 February 2007; Interview with social worker (October 2006); Interview with legal advocate (1 August 2006).

63 Focus group with social workers (28 February 2007).

64 One legal advocate commented: ‘Following the ADT decisions [in *Vu* and *WP*], the Tribunal and magistrates are not making interim orders if the person is going to be discharged’: Interview with legal advocate (1 August 2006).

65 Interview with social worker (October 2006).

exercise of legal capacity must be ‘subject to regular review by a competent, independent and impartial authority or judicial body’. By highlighting that the *PEA* envisages orders extending indefinitely beyond discharge from hospital, these decisions also lay bare the inconsistent approach taken by the *PEA*: it contains a presumption that people who are ‘patients’ lack the capacity to manage their personal estate, yet does not contain the opposite presumption for once they become well. Orders can only be terminated through lodging an appeal, revocation request or application for review,<sup>66</sup> or alternatively at the discretion of the OPC.<sup>67</sup> No provision is made for revocation of, or mandatory reassessment of the need for, an order once the person ceases to be a ‘patient’.<sup>68</sup>

A number of participants in the present ARC study were especially concerned about possible overuse of continuing administration orders because applicants face such an onerous task in appealing or seeking revocation of a PEO, as indicated by the following comment:

[T]he worst part about it for me was that they said, ‘Oh well she has the right to appeal this’, and because I know this client ... who’s gonna believe her ...? No one would believe her ... People should be able to walk up to the ADT and have the hearing and the ADT will say, ‘Right, you know you’ve proved it’. But in reality it wouldn’t work. And so people can say as much as they like, ‘Look you can appeal this and that’ ... How are we trying to rehabilitate people by having an enduring order which deprives someone of their rights?<sup>69</sup>

Ultimately, the response of magistrates and the MHRT to the ADT’s interpretation in *Vu* and *WP*, that interim orders must be accompanied by definite arrangements for a further review, may lead to an increase in continuing orders that exceed the person’s period of detention indefinitely, rather than for a finite period.<sup>70</sup>

We now discuss additional flaws of, and dilemmas raised by, the *PEA* regime identified through analysis of fieldwork data.

#### **IV THE NEED FOR FLEXIBLE ORDERS WHICH ENCOURAGE AUTONOMY**

The central flaw of the *PEA* discussed in this section is its inflexibility due to:

- failure to require and allow the least restrictive options tailored to individual circumstances; and

66 *PEA* ss 21–21A, 35–6.

67 Div 5 of Pt 3 of the *PEA* deals with the various circumstances in which orders may be suspended or terminated.

68 The OPC only has a discretion to end management once the person ceases to be a ‘patient’ ‘if satisfied that the protected person is capable of managing their affairs’: *PEA* s 38. However, if not satisfied of this, there is a requirement to inform the person of their appeal rights and that orders continue at the Commissioner’s discretion: *PEA* s 41(1).

69 Interview with social worker (October 2006).

70 The Panel in *WP* suggested that s 20(2) contemplates that a further (continuing) order will usually be made before the interim order ends: *WP* [2006] NSWADTAP 37, [27].

- the one-size-fits-all model, restricting magistrates and the MHRT to orders appointing the Protective Commissioner as property manager in respect of all property.

The fieldwork observations in the case of Mrs 'A' provide an example of this deeper substantive lacuna.<sup>71</sup> Two applications were heard concurrently by the MHRT in A's case; a request for a further involuntary detention order and consideration of an administration order.<sup>72</sup> Present were A, her mother, her Legal Aid lawyer, the resident doctor on her treating team, a registered nurse and a social worker. A worked for a bank for 16 years but had recently been made redundant. In support of the administration order application, the doctor stated that A had chronic schizophrenia and had shown lack of ability to handle her finances, referring to the social worker's report and an account deficit in January. He said that her husband was not able to monitor her finances. The social worker also referred to a gambling problem (gambling \$50 at a time) and debts, including a credit card debt.

A's lawyer asked whether the MHRT had received up-to-date information, suggesting that procedural fairness had not been afforded if so, because A had not received such information.<sup>73</sup> The Panel replied that two recent financial statements, divorce papers and letters from the Australian Taxation Office were before them and handed the documents to the lawyer.

The following is an edited extract from the proceedings:

Legal member (on the MHRT Panel): Have you got any other debts?

A: I'm not sure. My husband knows.

Legal member: It's suggested that you've been gambling.

A: I don't know. I was sick, but I'm not gambling any more.

Lawyer: Her husband has taken out a huge mortgage and A was the major contributor to the repayments. He then complained about her gambling but it was *him* who had taken out the mortgage without her knowing and he since went ... [overseas]. Since the last hearing she's agreed to give power of attorney to her mother and has already made some repayments ...

Legal member: So I take it A is opposing the order?

Lawyer: She is. She's quite willing now to put the permission in the hands of her mother, which she wasn't last week. And she has started her credit card repayments.

Because A and her husband were embroiled in divorce proceedings, the Panel expressed concern about her ability to instruct a lawyer in these proceedings. Her lawyer explained that A proposed that her mother be the guardian for that purpose. The MHRT asked whether this would be formal or informal substitute decision-making by the mother, leading to the following exchange:

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71 Fieldwork observations, December 2005.

72 The hearing was conducted as a video conference.

73 A previous hearing was adjourned to seek more recent evidence about her finances.

Community Member: So are you saying she would be able to instruct a lawyer on her own?

Lawyer: I'm not indicating that. She's doing well. Between her and her mum they'd be OK.

Community Member: So you're suggesting she needs her mother's assistance?

The psychiatrist member suggested that an administration order could include the provision of legal representation through the OPC. Her lawyer replied that A specifically wanted to avoid an administration order, so that money was not unnecessarily drained from her estate to pay for legal representation under such an order. A was eligible for Legal Aid representation which would not incur costs. Some discussion between members of the treating team followed. Whilst the doctor suggested that an administration order was not essential if another involuntary detention order was made, the nurse argued stridently in favour of an order for day-to-day community management purposes.<sup>74</sup>

The lawyer then made a critical submission, raising consideration of less restrictive options, prompting a discussion, involving X, about her preference for her mother to manage her finances under a Power of Attorney:

Lawyer: It's my understanding that if there is a capable person in the family, that should be tested before a restrictive order is put in place, and that has not been tested.

A: I don't understand – If my mum takes over my finances I'll be able to keep making repayments.

Psychiatrist member: The problem is that your mother will have control and your mum may disagree with your views. Otherwise a government organisation will be in control –

A: (interrupting): I'd rather my mum.

Lawyer: I think the psychiatrist member is trying to explain that if you disagree with your mum that could cause conflict.

A (firmly): No it wouldn't.

Other member: But A can revoke the Power of Attorney at any time?

Lawyer: That's right.

It is questionable whether the panel gave sufficient consideration to the alternative arrangements proposed by A. As explained by Justice Campbell in *Re GHI*, at common law, even when management is considered for someone with an established level of incapacity, the question should be posed whether they are likely to seek and follow appropriate advice; if the answer is in the affirmative, the need for an order is lessened.<sup>75</sup> Neither this common law principle, the 'least

<sup>74</sup> The nurse stated: 'Where she's staying the rent is not so high, but she won't be able to stay there forever. So there are many concerns there as she may not get a big payout from the divorce proceedings ... I'm arguing for a PEO to ensure she's not exploited in case of relapse.' He also said that even if a three month involuntary detention order was made, when it expired the same alleged risks of relapse and mismanagement of finances would still exist.

<sup>75</sup> *Re GHI (a protected person)* [2005] NSWSC 581 ('*Re GHI*').

'restrictive alternative' principle found in most guardianship statutes, nor other flexible planning tools such as enduring powers of attorney are readily at the disposal of the MHRT.

By contrast, the *GAA* (Vic) acknowledges that, even though someone appears to be incapable of managing their estate in a 'social vacuum', there may be a less restrictive option than a formal administration order considering his or her unique social context.<sup>76</sup> Decision-making with the informal or formal assistance of family members, as proposed by 'A', is one such less restrictive alternative.

### A Is the Protective Commissioner Always the Most Suitable Administrator?

Under the NSW *PEA*, magistrates and the MHRT are unable to appoint family members or others as property managers. This contrasts with adult guardianship, where the appointment of ordinary citizens is statutorily preferred. Both the Victorian and NSW guardianship statutes encourage appointment of a 'suitable person' as manager of the estate in preference to the relevant public manager.<sup>77</sup> Indeed this preference already applies under the *PEA* outside the mental health context. As Kirby J has observed, making the OPC the second string or default administrator 'is a sensible hierarchy of choices':<sup>78</sup>

In many estates of modest size it will be appropriate where there is no risk of conflict of interest and duty, and where a relationship of love or affection is established, to reflect in the statutory appointment the form of management which for millennia, in primitive societies as in civilized communities, has been followed when a family member is found to be incapable of managing his or her affairs. It is normal then for the family to step in. The courts conserved their intervention [for] where there is no family or where no family are willing to act.<sup>79</sup>

The *GAA* (Vic) offers clear guidance about whether a proposed administrator is a 'suitable person', requiring consideration of both the wishes of the proposed represented person and the compatibility of the proposed administrator with the person.<sup>80</sup> Thus if A's case was being decided under general guardianship laws, and her mother was the proposed administrator, A's ability to interact effectively with her mother in having input into decision-making about her estate would be a

<sup>76</sup> The third criterion, in addition to showing the requisite incapability, is that the person 'is in need of an administration order of her or his estate': *GAA* (Vic) s 46(1). Sections 46(2)–(3) of the *GAA* (Vic) expand this to require consideration of less restrictive options, the wishes of the person and the person's best interests. Similarly, the NSW Guardianship Tribunal can decline to make an order even if satisfied the person is incapable of managing their affairs in certain circumstances, taking into consideration the person's best interests and the real world need for such an order: *GA* (NSW) s 25G.

<sup>77</sup> Section 25M of the *GA* (NSW) allows the Guardianship Tribunal to 'appoint a suitable person as manager of [the] ... estate, or commit the management of [the] ... estate to the Protective Commissioner'. Section 47 of the *GAA* (Vic) allows similar flexibility. In addition it contains more expansive guidelines regarding selection of suitable administrators.

<sup>78</sup> *Holt v Protective Commissioner* (1993) 34 NSWLR 227, 238 (Kirby P) ('Holt').

<sup>79</sup> *Ibid* 238–9 (Kirby P).

<sup>80</sup> Kirby P similarly stated in *Holt* that some conflict between the person and their family should not necessarily be considered an absolute bar to appointment of a family member as administrator: *ibid* 242.

relevant and quite favourable consideration.<sup>81</sup> Applying general guardianship law principles, proper consideration should have been given to the informal substitute decision-making arrangements proposed by A, acknowledging that a person's capacity to manage their affairs should not be considered in isolation from their social and cultural circumstances, such as whether they will seek and accept the advice of others.<sup>82</sup>

### B The Scope of Administration Orders: Plenary or Limited?

The *PEA* is similarly inflexible as regards the scope of administration orders that can be made by magistrates and the MHRT. During A's hearing her lawyer suggested restricting any administration order to certain aspects of A's estate. In particular, it was sought to avoid appointment of the OPC in respect of the divorce proceedings, to prevent dissipating her finances as a result of the above-mentioned legal fees. The MHRT explained that it was only empowered to make 'all or nothing' orders.<sup>83</sup> The NSW Guardianship Tribunal, on the other hand, may exclude a specified part of the person's estate from a financial management order,<sup>84</sup> and the *GAA* (Vic) requires administration orders to be 'the least restrictive of that person's freedom of decision and action as is possible in the circumstances'.<sup>85</sup>

Sometimes a person may be capable of responsibly managing their weekly income, such as from a disability support pension, but need assistance in relation to their estate and savings. The *PEA* does not facilitate such individualised management. In practice, even though magistrates and the MHRT can only make plenary orders appointing the OPC as administrator, orders can be crafted into less restrictive options through consultation between other decision-makers,

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81 A potential advantage stemming from the 'ingredient of love and affection and unquestioning devotion to the person', is that a family member with requisite knowledge and motivation is likely to better perform the tasks of administrator so as to contribute positively to the person's quality of life. The role of administrator extends beyond effectively dealing with property and financial matters, and family members are 'more likely than a general trustee or receiver to become involved in decisions which affect the protected person's quality of life': *ibid* 242 (Kirby P).

82 See, eg, *Re GHI (a protected person)* [2005] NSWSC 581. Justice Campbell stated that 'a rigorous practice of seeking and following appropriate advice can remove the risk that the lack of the abilities will cause the person to be disadvantaged in the conduct of his or her affairs, or lose money or other property': at [120].

83 See, eg, *WP* [2006] NSWADTAP 37, [5]; *David* (1993) 30 NSWLR 417.

84 *GA* (NSW) s 25E. However, the Guardianship Tribunal must comply with certain notice requirements prior to taking this course of action.

85 *GAA* (Vic) s 46(4). It was stated in *Moore v Guardianship Board* [1990] VR 902, [25] that: 'Plainly enough, the Board Act recognises that administration orders may be designed to vary in their reach and their intrusiveness; and it is expected that any administration order made will be tailored to the circumstances, being privative only to the extent actually required'.

recipients and interested persons involved in their administration.<sup>86</sup> This offers an immediate and practical way of better tailoring outcomes to individual circumstances, but it is unclear how frequently this actually happens in practice.

After an adjournment lasting five minutes, the Panel sitting on A's hearing returned and justified making an administration order as follows:

We're not clear on a number of issues: (1) whether she can give instructions to a lawyer; (2) the history of gambling and the overdue credit card; (3) the power of attorney which can be revoked; (4) who signed the mortgage and whether it's in A's name; (5) we're unclear about what the sum would be from the divorce proceedings – a lump sum may be placed in jeopardy if an order is not made.

In short, contrary to virtually every principle of modern guardianship legislation, an interim administration order to be reviewed in 12 months time was made as insurance against the state of uncertainty in which the panel found itself at the end of the hearing.

## V PROCESSES FOR MAKING, REVIEWING AND ADMINISTERING ORDERS

This section turns from substantive to process-related features of the *PEA* in the mental health context. The processes for making, reviewing and administering administration orders are found to be inconsistent with human rights principles owing to:

- a lack of due process often characterising *PEA* matters heard by magistrates and the MHRT;
- inadequate provisions and practices for reviewing orders; and
- failure to mandate ongoing consultation with recipients and respect for their wishes as far as possible.

### A Lack of Due Process and the Reverse Onus of Proof

Sections 16 and 17 of the *PEA* reverse the usual onus of proof, requiring magistrates and the MHRT to make an administration order 'unless satisfied that the person is capable of managing his or her affairs'. This reverse onus of proof establishes a very high threshold test, which is nearly impossible to satisfy given day-to-day administrative arrangements and the social reality of involuntary hospitalisation.<sup>87</sup> The unfairness of this procedural rule is compounded by the

<sup>86</sup> Section 23A of the *PEA* permits a person being authorised to deal with a portion of their estate, although such permission can be withdrawn at any time and authorisation is subject to review by the ADT. Section 24 contemplates confining administration orders to one and not necessarily all of the powers listed. In addition, the Supreme Court may make orders as it thinks fit concerning the management of estates subject to administration orders and can issue directions about the exercise of functions by managers: *PEA* s 33.

<sup>87</sup> One legal advocate commented: 'Protected Estates matters are the main area where you'd need more time. There's a reverse onus. Most of the time patients haven't had time to prepare any evidence showing they have capacity': Interview with legal advocate (1 August 2006).

lack of prior notice, opportunity or assistance to gather the required information for the person who is the subject of the hearing in most cases,<sup>88</sup> as indicated by the following comment of a duty lawyer:

Protected estates matters are the main area where you'd need more time. There's a reverse onus. Most of the time patients haven't had time to prepare any evidence showing they have capacity.<sup>89</sup>

*PEA* matters heard by magistrates in particular are very cursory. Although free representation is provided by Legal Aid for magistrates' inquiries, there is rarely sufficient time to take instructions for *PEA* matters and prepare supporting documentation. These matters are heard within a week of the person's involuntary hospitalisation amongst a list of up to about 25 hearings.<sup>90</sup> If an administration order is sought, this matter is often tagged onto the end of a 10–30 minute hearing dealing predominantly with the question of the person's need for further involuntary mental health care.<sup>91</sup>

MHRT hearings on average last longer than magistrates' hearings, although they are quite short in comparison to their English counterparts. Half an hour is allocated for most matters, although the hearings may not last that long. Up to an hour may be allocated for more complex hearings and some hearings last longer than the scheduled time frame.<sup>92</sup> The MHRT sometimes adjourns proceedings and requests additional information<sup>93</sup> –options not necessarily available to magistrates, who may only see the person once. After the magistrates' inquiry, the MHRT exclusively conducts regular reviews of involuntary detention. Some magistrates, however, tend to refer *PEA* matters to the MHRT to allow for more

88 See, eg, Fleur Beaupert, 'Mental Health Tribunal Processes and Advocacy Arrangements: "Little Wins" are No Small Feat' (2008) forthcoming, *Psychology, Psychiatry and Law* (copy on file with author).

89 Interview with legal advocate (10 October 2006).

90 Interview with hearing coordinator, health service employee (5 July 2006).

91 Regarding magistrates' inquiries, a solicitor commented: 'I'm not sure what ... the Magistrate at Rozelle does, but you know if you've got 30 people to see on a day, and you've got CTO applications as well as PEOs ...': Focus group with legal advocates (30 October 2006).

92 These are systemic weaknesses in Australia: Terry Carney and Fleur Beaupert, 'Mental Health Tribunals: Rights Drowning in Un-“chartered” Health Waters?' (2008) 13(2) *Australian Journal of Human Rights*, 181. Due partly to resource constraints, short mental health tribunal hearings are common in Australia. Two thirds of hearings in Swain's pilot study of the Victorian Mental Health Review Board lasted for 15 minutes or less: Phillip Swain, 'Admitted and Detained: Community Members and Mental Health Review Boards' (2000) 7(1) *Psychiatry, Psychology and Law* 79, 83. Prior to the full impact of human rights laws, British hearings averaged 75 minutes: Elizabeth Perkins, *Decision-Making in Mental Health Review Tribunals* (2003), 53. Currently, hearings average two hours or more: Claire Dibben, Mai Luen Wong and Neil Hunt, 'Mental Health Tribunals: An Issue for Clinical Governance' (2005) 10(4) *Clinical Governance: An International Journal* 300, 301 (2 hrs 40 mins); John Lesser, *Review and Decision Making for Persons with a Serious Mental Illness: Achieving Best Practice* (2007) 38 [http://www.churchilltrust.com.au/res/File/Fellow\\_Reports/Lesser%20John%202006.pdf](http://www.churchilltrust.com.au/res/File/Fellow_Reports/Lesser%20John%202006.pdf)> at 30 August 2008 (in excess of 2 hrs in England and Scotland).

93 A's hearing, discussed above in Section IV, had been adjourned once by the MHRT.

time to gather and consider relevant documentation.<sup>94</sup> At the outset then, it may be difficult to sift through the complex issues raised by *PEA* matters in the time usually spent on them, especially during magistrates' inquiries.

The case of Mr 'B' before the MHRT, involving both a *PEA* matter and review of an involuntary detention order as in A's case above, is suggestive of the process-oriented dilemmas arising in everyday implementation of the *PEA*.<sup>95</sup> The hospital was trying to find supported accommodation for Mr B, but was unwilling to continue without the backing of a PEO. B was receiving Centrelink income support payments. Together with his lawyer, a barrister commissioned by Legal Aid, B and two members of his treating team, a medical registrar and a social worker, attended the hearing. After reviewing the involuntary detention order, the MHRT Panel questioned the social worker about the need for an administration order.

The main justification advanced by the social worker was that 'there was a lot of evidence from the unit that B had demonstrated no capacity to save money, obliging his mother to pay his rent. However, the worker conceded that she had not talked about the application with B because she had not seen him for 'some time'. Only a bare minimum had been discussed with him regarding financial planning, mainly because the hospital did not have enough occupational therapists to attend to this.'

The lawyer, who questioned the medical registrar about the connection between his client's alleged incapacity to manage his finances and mental illness, then prompted a fairly adversarial exchange. In reply, the registrar referred to his/her 'belief' about B's condition, adding: 'there is no hard and fast proof'. The Panel questioned B directly for some time about his spending and saving patterns and plans upon discharge. At one point he became very angry and started to reveal possible delusions relating to sponsorship he had received from Nike and the radio station Today FM. B's lawyer made submissions about accommodation options, including a recent public housing application, saying that B was opposed to living in a boarding house with a shared bedroom as planned by the treating team. The lawyer conveyed his client's instructions that he was able to manage his finances and was aware of his limitations, but had not had an opportunity to prove himself.

The lawyer member of the MHRT then addressed B, saying: 'Maybe it would be a role for the Protective Commissioner to pay some bills ... what do you think about this idea?' B did not seem inclined to argue anymore, replying: 'Whatever you think'. After a five minute adjournment the panel re-entered and the legal member announced the decision that they were making an order to continue his

94 One legal advocates' focus group participant stated: 'Last Friday Magistrate X referred all those matters to tribunals under s 2 [of the *PEA*]: Focus group with legal advocates (30 October 2006). Another highlighted the advantage of this approach: 'Really the ideal thing would be to have the matter adjourned, to have, the client to have time to consider the report. Give proper instructions for the whole thing. But there was this sense of urgency because she had money unlike most of our clients who are on full pension': Focus group with legal advocates (30 October 2006) (referring to a magistrate's inquiry).

95 Fieldwork observations, December 2005.

involuntary detention and were appointing the OPC to be a financial manager for him under a continuing order. The hearing lasted 20 minutes in total; a figure that compares unfavourably with the minimum of 45 minutes scheduled by VCAT for initial hearings of guardianship applications in Victoria.<sup>96</sup>

Lack of time to properly assess the matter, lack of information supporting the making of an administration order, and inadequate assistance for the respondent to prepare information to prove capacity to manage his finances were among the potential shortcomings in this example. While second-hand information about B's alleged incapacity was relayed to the Panel, primarily the fact that his mother paid his bills, the accuracy of this claim was not probed further through questioning.<sup>97</sup>

During the focus group with legal advocates, when the discussion turned to the *PEA* regime, there was a sense that the *Vu* and *WP* decisions had exacerbated such process-related problems:

[N]ow that they're indefinite orders, you get the application on the morning and a one page social work report which contains very little information ...<sup>98</sup>

In terms of an immediate practical solution, the legal advocates who participated in the focus group and interviews suggested that the preferable approach is to seek referral of the mandatory *PEA* matter heard by magistrates to the MHRT. The matter would then be heard within a couple of weeks on the next scheduled visit of the MHRT to the relevant hospital, allowing some additional time to get instructions and for more thorough preparation for the hearing.<sup>99</sup>

## B The 'Practice' of Administration of *PEA* Orders

The OPC has the discretion to end an administration order at any time.<sup>100</sup> To test whether administration of *PEA* orders moderate any effects of overly liberal granting of orders or inflexibility in their construction, OPC statistics for the period 2002–3 to 2006–7 were analysed.<sup>101</sup> Over that five year period, a total of 7423 new orders were made, and 5501 came to an end due to death or discontinuance (74 per cent of the additional stock of admissions over the

<sup>96</sup> Ferres, above n 27, 16.

<sup>97</sup> In *Holt*, Kirby P discussed the importance of OPC's limited duty to consult (relevantly) with family members when administering a person's estate, but also canvassed the relevance of family members views to decision-making generally: *Holt* (1993) 34 NSWLR 227 [39]-[41]. And in *XYZ v State Trustee*, Cavanough J stated that the tribunal would need to consider lay as well as expert evidence, noting that VCAT needs to be careful not to inappropriately delegate the 'ultimate issue' to experts: *XYZ v State Trustee* [2006] VSC 444, [45], [55] ('XYZ').

<sup>98</sup> Focus Group with legal advocates (November 2006).

<sup>99</sup> 'Really the ideal thing would be to have the matter adjourned, to [give] the client ... time to consider the report, give proper instructions for the whole thing. But there was this sense of urgency because she had money unlike most of our clients who are on full pension ... But also Magistrate X is quite keen to make these decisions. [But] I've pushed him a couple of times and said, "Look, these last minute PEOs [protected estates orders] are a real problem)": *ibid*.

<sup>100</sup> Provision is made as to the appropriate course of action following a person's discharge, depending on whether OPC believe a further order is needed, suggesting that it should turn its mind to whether the order should continue: *PEA* ss 38, 41.

<sup>101</sup> Data kindly provided by the OPC (Assets Corporate & Legal), Tuesday, 15 April 2008.

period). The bulk of terminations were due to death (77.6 per cent) rather than discharge, with discharges representing the equivalent of 16.6 per cent of the new orders made over the five year period. Some of the 'discharges' may have represented administrative actions within OPC, and some decisions by the MHRT. One critical test of how flexible the regime is in practice is the number of reviews of such orders carried out by the NSW Guardianship Tribunal relative to those carried out by its Victorian counterpart.

While the overall rate of discharge from management orders may have been low, it might be expected that those made by the NSW Guardianship Tribunal would be somewhat higher given the less restrictive philosophy of the guardianship legislation. In 2005–6, the Tribunal made some 1927 financial management orders;<sup>102</sup> in the same period it carried out 530 reviews of such orders, a ratio of initial orders to reviews of 3.6:1.<sup>103</sup> During the same year, the Guardianship List of VCAT, which has exclusive jurisdiction over Victorian administration orders, made 2500 administration orders, fairly similar to the total number made in NSW once the 347 MHRT, Magistrates' and Supreme Court orders are added to the 1927 made by the Guardianship Tribunal.<sup>104</sup> However, in the same period the Guardianship List of VCAT also held some 3,900 reviews of administration orders, a ratio of initial orders to reviews of 2:3. A comparison of the two ratios suggests that a person in Victoria under an administration order is about five times as likely to have their status reviewed than their counterpart in NSW.

A stark indicator of the 'permanence' of orders made under the *PEA* is the absolute number of discharges. In 2005–6, the NSW Guardianship Tribunal revoked only 75 orders, in a period in which it made 1927 orders. This analysis suggests that, once made, property management orders tend not to be terminated in significant numbers, other than as a consequence of death.

### C     Reviews of the 'Administration' of *PEA* orders

In its favour, the *PEA* does provide for formal review of prescribed decisions of the OPC concerning management of individual estates, irrespective of whether the administration order was made under the *PEA* or otherwise.<sup>105</sup> If a private citizen is appointed manager of the estate, discharge of their duties is subject to

<sup>102</sup> This estimate is higher than that provided by the OPC for the number of orders made by the Guardianship Tribunal (1290). Part of the discrepancy may result from the fact that individuals may have more than one order made in respect of them during a year, and may have been counted more than once in the Guardianship Tribunal statistics.

<sup>103</sup> NSW Guardianship Tribunal, *Annual Report 2005–06* (2006) 24  
[http://www.gt.nsw.gov.au/information/doc\\_156\\_gt\\_anrep\\_0506.pdf](http://www.gt.nsw.gov.au/information/doc_156_gt_anrep_0506.pdf) at 30 August 2008.

<sup>104</sup> Victorian Civil and Administrative Tribunal, *Annual Report 2005–06* (2006) 26  
[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual\\_report-2005-06/\\$file/2005-06\\_complete\\_annual\\_report.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report-2005-06/$file/2005-06_complete_annual_report.pdf) at 30 August 2008.

<sup>105</sup> *PEA* s 28A. Research by the NSW Law & Justice Commission demonstrated that review processes were sorely needed: see Karras, et al, above n 9; Terry Carney, 'Challenges to the Australian Guardianship & Administration Model?' (2003) 2 *Elder Law Review* 1.

OPC control,<sup>106</sup> and relevant decisions of the OPC regarding private managers' duties are similarly subject to review.<sup>107</sup> In this respect, the *PEA* is more progressive than the *GAA* (Vic), which only provides for review and reassessment of administration orders and not the specific decisions made by the appointed property manager.<sup>108</sup>

Even though it may be difficult to mount successful challenges to OPC decisions using these review mechanisms,<sup>109</sup> they nonetheless provide an important safeguard.<sup>110</sup> In the year 2005–6, OPC received 199 complaints and 16 applications to review OPC decisions were lodged with the ADT.<sup>111</sup> Many of these complaints were dealt with through internal review mechanisms. The development of systems and cultures facilitating responsiveness to the concerns of those impacted by administration orders is necessary if real life outcomes are to be improved and contemporary disability rights principles favouring participation in substitute decision-making processes are to be honoured.

#### D Substitute Decision-making and Consultation with the Person

A final disadvantage of the *PEA* is that it contains only a weak mandate to encourage ongoing consultation with (potential) recipients of orders and their relatives.<sup>112</sup> In contrast, the *GAA* (Vic) requires the wishes of a person with a disability to be given effect in the exercise of all functions under the Act.<sup>113</sup> This leaves no doubt that the duty to consult exists in relation to both: (1) decision-making regarding appointment of administrators; and (2) substitute decision-making by administrators. Of course, as canvassed above, practices can go some way to achieving just outcomes. The absence of legal rules requiring consultation does not prevent the OPC from consulting its clients, and the OPC's policy is to

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106 *PEA* s 30.

107 *PEA* s 30A.

108 *PEA* Pt 6, especially s 60. Unless the Tribunal orders the contrary, reviews occur routinely after 12 months and then every three years. They can occur earlier on request or at the initiative of the Tribunal.

109 Courts are reluctant to second guess financial managers and displace their decision unless an error of law or substantial unreasonableness is established: *Holt* (1993) 34 NSWLR 227, 237 (Kirby P).

110 The Victorian Office of the Public Advocate recently recommended following NSW, stating that: 'Any decision (outside the criminal justice system) that can have the effect of imposing treatment or restricting movement or restricting movement or otherwise limiting the exercise of individual freedoms should be reviewable by an independent external body': Office of the Public Advocate, *Annual Report 2007* (2007) 8 <<http://www.publicadvocate.vic.gov.au/media/docs/OPA-Annual-Report-07-8639373b-51f2-4493-b0ec-8e0fc246545f.pdf>> at 30 August 2008. The *GA* (NSW) provides for review by the ADT of prescribed decisions of the Public Guardian: *GA* (NSW) s 80A.

111 Office of the Protective Commissioner and Office of the Public Guardian, *Annual Report of the Protective Commissioner and Public Guardian* (2006) 8–9 <[http://www.lawlink.nsw.gov.au/lawlink/office\\_of\\_the\\_protective\\_commissioner/opc\\_ll.nsf/pages/OPC\\_annualreports](http://www.lawlink.nsw.gov.au/lawlink/office_of_the_protective_commissioner/opc_ll.nsf/pages/OPC_annualreports)> at 30 August 2008.

112 *PEA* s 50. There is also a meagre requirement that the administrator must preserve any personal items that the person or their relatives wish to be preserved: *PEA* s 51.

113 *PEA* s 4(2)(c).

closely consider the views of the person and give effect to them 'if at all possible and appropriate'.<sup>114</sup>

In 2006 the OPC adopted a new policy, effectively replacing individual managers of a person's estate with a network of specialists, on the basis that a 'generalist model', where one manager is assigned to one client and knows everything needed in relation to their estate, is unsustainable.<sup>115</sup> The first point of contact for clients is now the Client Liaison Team, which refers matters on to relevant specialist units. This structural change substantially depersonalised the services provided by OPC, arguably further compounding some of the PEA's weaknesses. Many clients expressed frustration with the changes,<sup>116</sup> which precluded continuity in the relationship between managers and their clients.

A number of social workers also expressed concerns about the restructure:

In the past I have encouraged clients to contact the Protective Office themselves. But in the last few months, I have stopped doing that. The reason is that there's a long waiting time over the phone when they try to get someone. It's so frustrating. It's frustrating for us because you're transferred to the liaison team and you're talking to a new person every. It's a difficult decision social workers have to make to take someone's money off them. We actually are then exposing them to a very dysfunctional service that they have to deal with for the rest of their lives.<sup>117</sup>

Another social worker was critical of the new structure because it could reduce the opportunity for a person to be assisted to revive or develop better management skills, through lack of an ongoing relationship with a single manager:

But now they've got rid of estate managers, so the person doesn't have an individualised case manager for their finances anymore. So who exactly is meant to be teaching this person financial management skills? ... And so in ten years they're still going to be on a PEO.<sup>118</sup>

These issues relate to the adequacy of everyday substitute decision-making by administrators. Unlike the OPC, administrators operating under the *GAA* (Vic) have a clear responsibility to assist the person develop skills towards independent money management as part of their broader duty to act in the person's best interests.<sup>119</sup> A fundamental aspect of 'acting in the person's best interests' as defined in that Act is engaging in consultation with the person and taking into account their wishes as far as possible. As Kirby J explained in *Holt*, when considering who should be appointed as an administrator, one possible advantage of appointing a relative is that this arrangement may facilitate rather than stifle the ongoing capacity of the recipient to interact with the proposed administrator and thereby more effectively ensure that 'so far as possible, within the disability

114 Trevor Lester, 'It's My Money and I'll Do What I Want: Having to make Decisions about Someone Else's Money' (2002) 51 *Plaintiff* 15, 19–21.

115 Office of the Public Commissioner and Public Guardian, above n 32, 10.

116 ABC Radio National, *Protective Commissioner Changes* (2007) ABC Life Matters <<http://www.abc.net.au/rn/lifematters/stories/2007/1971719.htm>> at 21 March 2008.

117 Interview with social worker (October 2006).

118 Focus group with social workers (28 February 2007).

119 *GAA* (Vic) s 40.

which has led to the appointment, such person may remain in charge of, or at least able to influence, the broad directions of the management of the estate'.<sup>120</sup> Despite the fact that an administration order removes legal competence to manage one's estate, recipients have varying levels of, and often substantial, ability to remain actively involved in substitute decision-making processes.

Discontinuity in relationships between the OPC and its clients, however, may make it more difficult to give effect to this policy. Because of concerns about the restructure raised by clients, the OPC refined its 2006 reorganisation of guardianship services, with effect from the first half of 2008. Clients with complex or major issues are now able to deal directly with the relevant specialist unit and in extreme cases with a single staff member, until those issues are resolved.<sup>121</sup> Clients' responses to this fine-tuning are yet to be gauged. This policy reform underscores the importance of administering *PEA* orders in a manner sufficiently responsive to clients on an interpersonal level, including fostering relationships within which clients feel supported and able to express their wishes.

## VI TOWARDS THE FUTURE

The most radical, and arguably the 'least worst' alternative to the *PEA* regime, bringing NSW in line with other Australian jurisdictions, would involve repealing the relevant mental health related provisions. People admitted to a mental health facility, whether voluntarily or otherwise would then be treated no differently to anyone else, according to general guardianship laws. Taking the *GAA* (Vic) as a benchmark, this reform model would involve the following key characteristics:

- the guardianship application process alone would trigger any Guardianship Tribunal consideration of whether an administration order should be made;
- notice would be given to specified categories of people;
- the hearing would commence within 30 days of receipt of the application,<sup>122</sup> and
- the onus of proof would be placed on the applicant to demonstrate the need for an order.<sup>123</sup>

Reconsideration of guardianship laws in light of the *Vu* and *WP* decisions suggests that, while superior to the *PEA*, guardianship laws may also lean too far towards the misconception that decision-making incapacity is likely to be an

120 *Holt* (1993) 34 NSWLR 227, 242.

121 Office of the Protective Commissioner, *OPC News, Issue 14* (2008) Attorney-General's Department of NSW <[www.lawlink.nsw.gov.au/opc](http://www.lawlink.nsw.gov.au/opc)> at 21 March 2008.

122 *GAA* (Vic) ss 43–5.

123 *GAA* (Vic) s 46.

'intractable' problem,<sup>124</sup> an approach particularly ill-suited to the mental context. The *GAA* (Vic) provides for temporary or indefinite orders<sup>125</sup> and mandates ongoing review of any indefinite orders.<sup>126</sup> Interestingly, though, even though both Victorian and NSW guardianship laws allow for temporary or interim orders, similar to the *PEA* they require or envisage further consideration of the matter prior to the expiry of such orders.<sup>127</sup> The preferred default position tends towards ongoing orders. Unlike the *PEA*, however, the *GAA* (Vic) mandates periodic review of ongoing orders within one or at the most three years, unless the VCAT orders otherwise.<sup>128</sup> In NSW, a periodic review requirement may be ordered at the Guardianship Tribunal's discretion; review is only mandatory following an application for variation or revocation of the order.<sup>129</sup>

In light of this comparison between the *PEA* and NSW and Victorian guardianship legislation, we suggest that repeal of the relevant sections of the *PEA* should be accompanied by reform of the *GA* (NSW) to provide for at least two alternatives:

- finite temporary orders specifying a maximum time length without any requirement for further review; and
- ongoing orders subject to mandatory periodic review by the Guardianship Tribunal.

If a temporary order is made and a further order is thought necessary prior to its expiry, a further application could be made to continue the order. An ideal legislative model would empower the Guardianship Tribunal to tailor orders to individual needs if appropriate, in terms of both the choice of guardian and areas of property to be subject to guardianship. It would contain a requirement that the

<sup>124</sup> The possible negative effects of this tendency, however, are minimised somewhat by the fact that general guardianship laws do not contain the reverse onus of proof as shown in *Vu* [2006] NSWADTAP 19 and the *PEA*.

<sup>125</sup> Part 5 Division 4 authorises temporary administration orders for up to 21 days duration, renewable once for a further period of 21 days: *GAA* (Vic) s 60. Even so, if a temporary order is made, there is a similar requirement to the *PEA* that a further hearing must be held as soon as possible or within 42 days to determine whether an ongoing order is needed: *GAA* (Vic) s 60. The *GA* (NSW) contains a similar provision to section 20 of *PEA*, allowing an interim financial management order for a specified period not exceeding six months to be made, 'pending the Tribunal's further consideration of the matter': *GA* (NSW) s 25H.

<sup>126</sup> Section 61 provides for review within first 12 months, and following that within every three-year period thereafter, or between those dates at the initiative of the tribunal or upon application, although such reassessment need not involve a hearing: *GAA* (Vic) s 62.

<sup>127</sup> The *GAA* (Vic) expressly requires a further hearing be held to reconsider the matter: *GAA* (Vic) s 60; whereas the *GA* (NSW) is looser in making provision for an interim order pending further consideration of the matter, similar to the *PEA*: *GA* (NSW) s 25H(1). Interim financial management orders cannot last longer than six months (s 25H(1)) and are 'taken to be revoked' on the expiry of the specified period: *GA* (NSW) s 25H(3).

<sup>128</sup> The *GAA* (Vic) insists on mandatory VCAT review: *GAA* (Vic) s 61. The *GA* (NSW) provides for, but allows exceptions to, reviews of administration orders: *GA* (NSW) s 25A; but regular review is mandatory for guardianship orders without exception: see *GA* (NSW) ss 18, 35 (review of guardianship orders); ss 25N–P (review of administration orders).

<sup>129</sup> *GA* (NSW) s 25N.

availability of less restrictive alternatives and the person's wishes be taken into account in respect of all decisions made under the legislation.<sup>130</sup> There would also be a duty for administrators to assist people towards independent property management. Similar to the *PEA* regime, a process whereby recipients or interested persons are able to apply for reviews of administrators' decisions should be established.

Some psychiatrists and MHRT members who participated in focus groups, were of the view that a specialised regime should be kept for appointing administrators in the context of involuntary hospitalisation. Several MHRT members thought the *PEA* was the appropriate piece of legislation because of the 'mental health-specific' nature of applications arising in the context of involuntary detention.<sup>131</sup> A psychiatrist said:

I think it is quite appropriate actually [to consider the need for an administration order at the same time as the need for involuntary detention] because often times the issues are quite interlinked. You know, the reason why there's difficulty arranging finances or affairs is because of the effects of the mental illness and to hear them together is I guess in a way to make it a slightly more holistic approach to ... the person and ... you know, their risks.<sup>132</sup>

Participants also commented on the slow and cumbersome nature of guardianship processes compared to proceedings of the magistrates and the MHRT.<sup>133</sup> These arguments are strongly linked to difficulties arranging initial and ongoing reviews by the Guardianship Tribunal and their time-consuming nature.

We suggest that there may be some tension between the interest in assuring effective safeguards against arbitrary deprivation of service users' freedom in processing administration order applications, and the interests of service users in cutting costs and saving time given the overburdened state of (mental) health service systems. Part of the problem with the guardianship alternative from the service-provider perspective appears to be that it is less convenient, given the limited time service-providers have to attend to such matters amidst their demanding clinical, administrative and mental health law duties. Some of these concerns suggest that the urgent nature of some *PEA* matters, in conjunction with other unique features of the mental health context, may be assuaged through tinkering with procedures for scheduling and conducting hearings. We argue that guardianship legislation is already flexible enough to cater for any such needs, as it already does in other jurisdictions.<sup>134</sup> Tribunals should be able to adapt their

<sup>130</sup> See further Justice Cavanough's remarks about the importance of taking account of the person's wishes at all levels of decision-making: *XYZ* [2006] VSC 444, [32]–[36].

<sup>131</sup> Focus group with MHRT (July 2006).

<sup>132</sup> Focus group with clinicians (31 October 2006). One psychiatrist was particularly concerned about PEOs proposed by service-providers being opposed and the patient left without adequate protection: 'So the PEO is, it may seem small to people, but it's a very major thing in the patient's care, for most of them. The families can't do it and expenses are a struggle then. The do-gooders come along whether they're the lay member or sometimes a few family members and the whole thing is hijacked'; Interview with psychiatrist (8 November 2006).

<sup>133</sup> Focus group with MHRT (July 2006).

<sup>134</sup> However, amendments relating to length and review of orders would be desirable, as outlined above.

procedures to accommodate urgent applications, although it may not be appropriate for an indefinite order to be made as a result of such applications.

It should be noted that the MHRT or the Guardianship Tribunal could arguably perform, or even share, this function, depending on the stage of a person's illness, recovery or life. This could ensure a more streamlined process for hearing urgent applications in the context of involuntary hospitalisation if necessary. Some fieldwork participants commented that any transfer of these functions to the Guardianship Tribunal would need to be accompanied by assurance that the Tribunal is equipped with members with requisite mental health expertise.<sup>135</sup> Equally, though, if the MHRT retains these functions, reform is needed to ensure that its decision-making accords as far as possible with human rights principles. Furthermore, as Brendan Kelly points out, a 'rights-based' approach is arguably one of the most powerful ways of empowering people with mental illnesses to overcome the systemic disadvantages associated with the condition.<sup>136</sup> Until the *PEA* regime is repealed, however, its archaic logic erects a substantial barrier to such cultural reform.

## VII CONCLUSION

We have suggested that there are important differences of philosophy between the NSW protected estates regime and adult guardianship laws. It has been shown that the *PEA* fails to comply with relevant human rights and disability rights principles requiring equal protection of the freedom and autonomy of people with (suspected) disabilities. Despite the resistance of those who work with the *PEA* to its most discriminatory and abusive aspects, the regime is inherently incapable of ensuring that least restrictive options will be chosen which assist recipients towards independent property management as far as possible. There is little evidence that the *administration* of *PEA* orders by the OPC brings the regime into closer conformity to human rights principles.

Chief among the concerns highlighted in this article is that the *PEA* regime leads to too many unnecessarily wide-ranging property orders, and that these orders then subsist for far too long. They frequently post-date the expiry of involuntary detention orders, a problematic result if the logic for dealing with these two matter types together is that they are parts of the same holistic management challenge. In addition, a significant amount of orders continue for years without being subject to ongoing review by an external decision-maker.

The *PEA* should be repealed and the guardianship model to 'fill the gap' should provide for both finite temporary orders and ongoing orders subject to regular mandatory review. It is argued that the criteria for making administration orders should mirror those in guardianship legislation, since they involve more

<sup>135</sup> One MHRT member commented that the Guardianship Tribunal would not be an appropriate decision-maker because the Panel don't know about mental health issues: Focus Group with MHRT (26 July 2006).

<sup>136</sup> Brendan Kelly, 'The Power Gap: Freedom, Power and Mental Illness' (2006) 63(8) *Social Science and Medicine* 2118.

careful case-by-case assessment of whether and what kind of order is most appropriate. Associated with these recommendations regarding legal rules is a plea for a higher quality of processes for dealing with these matters. Magistrates and the MHRT often had insufficient time, resources, or information to make fair and informed decisions in the hearings observed by the study. Of course, decision-makers themselves may need to be more proactive in gathering relevant information.

Ideally what is required is a portfolio of complementary measures delivered by an integrated generic law offering the full range of informal and formal options for dealing with the preventive, protective and developmental property management needs of people experiencing episodes of mental illness. We suggest that guardianship legislation, constructed along Queensland lines, as a 'last resort' option built around strong encouragement of preventive measures like advance directives<sup>137</sup> or informal support networks, should be the centrepiece.

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137 See Alexia Papageorgiou et al, 'Advance Directives for Patients Compulsorily Admitted to Hospital with Serious Mental Illness' (2002) 181(6) *British Journal of Psychiatry* 513. Cf advance directives regarding treatment, where stakeholder views are quite divided: Jacqueline Atkinson, Helen Garner and Harper Gilmour, 'Models of Advance Directives in Mental Health Care: Stakeholder Views' (2004) 39(8) *Social Psychiatry & Psychiatric Epidemiology* 673; Mimi Kim et al, 'Front Line Workers' Attitudes towards Psychiatric Advance Directives' (2008) 44(1) *Community Mental Health Journal* 28. Indeed half of US psychiatrists reportedly would exercise statutory powers to 'over-ride' objections to treatment: Jeffrey Swanson et al, 'Overriding Psychiatric Advance Directives: Factors Associated with Psychiatrists' Decisions to Preempt Patients' Advance Refusal of Hospitalization and Medication' (2007) 31(1) *Law and Human Behavior* 77.