

Protecting the Estates of Missing Persons

**A submission to the Victorian Law Reform Commission's Review
of the *Guardianship and Administration Act 1986* (Vic)**

 loddon campaspe
community legal centre

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INTRODUCTION

This submission is made by the Bendigo based Loddon Campaspe Community Legal Centre (LCCLC). LCCLC is one of Victoria's 51 Community Legal Centres and provides legal assistance targeting disadvantaged and vulnerable members of the community, undertakes community legal education and engages in law reform activities.

The submission does not seek to address all aspects of the Victorian Law Reform Commission's (**VLRC**) Guardianship Review. Rather, it seeks to identify a current gap in the law which could be addressed by broadening the application of the *Guardianship and Administration Act 1986* (Vic) (the **G&A Act**).

Under the *G&A Act* protection is currently limited to people who can be characterized as having a 'disability'. Unlike similar legislation in New South Wales and the Australian Capital Territory, the *G&A Act* fails to provide protection to the estates of missing people in Victoria.

LCCLC was influenced to make this submission on becoming aware of the experience of a client, a father of a missing person, who has no legal means through which to deal with his missing son's estate.

Currently there are no provisions in Victorian legislation enabling a next of kin, family member or any other relevant person to act on behalf of a missing person where the missing person has not appointed a general or financial power of attorney. Neither the *G&A Act* or the *Administration and Probate Act 1958* (Vic) provide protection for the estate of a person where a person is missing and is therefore unable to take care of their estates. VLRC's Guardianship Review Terms of Reference provide that its purpose is to ensure that guardianship and administration law in Victoria is responsive to the needs of people with an impaired decision making capacity. The basis of this submission is that current Victorian legislation fails to respond to missing persons (and their families, friends and other concerned people). LCCLC submits that missing persons, while they remain missing, have impaired decision making ability, but may not necessarily fall within the *G&A Act* definition of 'disability', and thereby attract its application.

LCCLC submits that the *G&A Act* is the appropriate legislation to provide for the protection of the estates of missing persons because in New South Wales and the Australian Capital Territory, similar legislation to the *G&A Act* were deemed the appropriate legislation to house their amendments regarding the estates of missing persons. Similar amendments to the *G&A Act* would provide some consistency throughout the States and Territories.

LCCLC submits that the current gap in the law in Victoria causes significant distress to families, dependants and friends of missing persons and recommends that, in its Guardianship review, the VLRC should report on the need to introduce changes to the *G&A Act* which provides for the protection and administration of the estates of missing persons while they remain missing.

DAVID ROSEWALL'S EXPERIENCE

David Rosewall's son, Daniel, has been missing since January 2010. One regular work day after lunch, Daniel left the office of the family business where he worked in Bendigo to attend an appointment. He did not return and no one has sighted or heard from him since. Days after his disappearance, his car was found abandoned just north of Silverton, near Broken Hill, New South Wales; his personal belongings still in the vehicle. According to David, Daniel's disappearance was completely out of character. Daniel's family members are convinced that he is still alive.

After the immediate concern for his son's safety, David became aware of Daniel's personal affairs that required attention. He was receiving bills from utilities companies. He also had a small loan and a credit card which required repayments. A number of the bills were late notices and at least one had already been referred to a debt agency.

Before he went missing, Daniel lived in a rental property. Fortunately, the process for dealing with the rental property in Daniel's name was reasonably straightforward. David was able to negotiate the termination of the lease with the agent and the agent made a successful application to Victorian Civil and Administrative Tribunal for the outstanding rent to be taken out of Daniel's bond. The member agreed that the rent was outstanding

and it was therefore appropriate in the circumstances to take the outstanding amount from the bond.

David attempted to redirect Daniel's mail to his address, so any bills could be managed. Australia Post refused to redirect Daniel's mail to David's address, citing privacy concerns. Instead, they informed David that all Daniel's mail would be returned to sender. Meanwhile, David is worried about the interest, late fees and legal procedures accumulating in Daniel's affairs due to his absence.

David sought legal advice about his options for administering Daniel's estate while he remains missing. If David could apply in the State Daniel was last seen, New South Wales, he would be eligible to apply for an order to manage Daniel's estate under the *NSW Trustee and Guardian Act 2009* (discussed in New South Wales Legislation, below). Unfortunately, the relevant jurisdiction is Victoria, the last known place in which Daniel resided, where no such legislation is in place.

APPLYING TO MANAGE THE ESTATE OF A MISSING PERSON IN VICTORIA

Currently in Victoria, if a person is missing, family or friends have insufficient legal avenues enabling them to manage the estate of the missing person. The *G&A Act* provides for a person to apply to the Victorian and Civil Affairs Tribunal (**VCAT**) to make administration orders in respect of the estate of a person with a disability¹. A missing person may not necessarily fit within the meaning of 'disability' which under the *G&A Act*, in relation to a person, means intellectual impairment, mental disorder, brain injury, physical disability or dementia.² In any event, even where a missing person may have a disability, VCAT may be unlikely to make administration orders where it has not been able to consider the wishes of the person with the disability who is missing.³

¹ *Guardianship and Administration Act 1986* (Vic), s 43.

² *Guardianship and Administration Act 1986* (Vic), s 3.

³ *Guardianship and Administration Act 1986* (Vic), s 4(2) the refers to Parliament's intention for the wishes of a person with a disability to wherever possible be given effect to. Further, section 47(2)(a) of the same act states that in determining whether a person is suitable to act as the administrator of the estate of a

The only other possible means by which family and friends of the missing person may be given authority to manage the missing person's estate is an application to the Supreme Court for a grant of probate or letters of administration on presumption of the person's death⁴.

A Coroner may investigate a missing person's case and, following investigation, may make a decision of presumption of death of a missing person. Before a Coroner will investigate a missing person's case, the Coroner has to be of the belief that there is a probability that the person is deceased consistent with the findings of any police investigation. If a Coroner makes a presumption of death, a person would then be able to apply to the Supreme Court for grant of administration or probate of the missing person's estate.⁵

Unless there is strong evidence before the Court that the person has died, probate may not be granted unless the missing person 'has not been heard of by persons who might have been expected to hear of him for a period of not less than seven years'⁶.

In certain cases, the circumstances surrounding the missing person's disappearance may satisfy the Court to make an inference of death. For example, a Court may be more likely to make an inference of death where a person disappeared at sea or in a plane crash, as opposed to where a person with a known mental health condition has failed to return home. A person making an application is required to file additional affidavits to establishing presumption of death⁷.

proposed represented person, the Tribunal must take into account the wishes of the proposed represented person.

⁴ Section 7 of the *Administration and Probate Act 1958* (Vic), enables the Supreme Court to make a grant of probate or administration of a person's estate on presumption of their death.

⁵ *Coroners Act 2008*, s 67. For further information, refer to *Information for families and friends of missing persons*, National Missing Persons Coordination Centre Fact Sheet.

⁶ Section 8 of the *Administration and Probate Act 1958* (Vic) requires evidence to support the presumption of death of the person to be provided. This will be satisfied if there has been no evidence of the person being alive after 7 years: *Axon v Axon* (1937) 59 CLR 395 at 405. In appropriate circumstances, an inference of death may be made where less than 7 years has elapsed.

⁷ Supreme Court of Victoria, *Guidance Notes for Completing Probate Forms and the Filing of Applications*, 1 October 2009.

If the Court is satisfied with the evidence provided, a grant of probate or administration will be made, meaning that for legal purposes the person is deceased and their estate can be managed according to the *Administration and Probate Act 1958* (Vic).

THE CASE FOR LEGISLATIVE CHANGE IN VICTORIA

There are many reasons why provisions for application for a grant of administration or probate on the presumption of death of a missing person alone is an ineffective and inappropriate remedy for family and friends of missing persons, and for missing persons themselves.

Most missing people return

First, the option sits uneasily with the available statistics about missing persons. 90% of missing persons are found within 2 weeks 98% are found within six months. There are approximately 1600 missing persons in Australia who remain missing after 6 months.⁸

While the *Administration and Probate Act 1958* (Vic) provides for the revocation of a grant if a person who was presumed dead is later found alive, and provides for the repayment of any money paid out by the administrator, such a provision indicates that an order pronouncing a person as being legally deceased is not an appropriate way to enable the protection and administration of the estate of a missing person⁹.

Proving death while clinging to hope

Secondly, in the absence of an alternative remedy to a grant of probate or administration a family member or friend of the missing person who does not believe or does not want to believe the missing person is dead may be inappropriately pressured to:

- a) make an application, in the absence of an alternative remedy, for a grant of administration or probate on the presumption of death that they believe is false;

⁸ Marianne James, Jessica Anderson, Judy Putt, *Missing Person's in Australia Report*, 2008, p15.

⁹ *Administration and Probate Act 1958* (Vic), s 9.

or

- b) make an emotional leap from believing the person is alive to believing they are dead.

The effect of applying for grants of probate or administration or undertaking coronial inquests to declare a person legally dead has been widely criticised by people who work closely with families and friends of missing persons. For example, in the Report, *'Supporting Those Who are Left Behind'* Sarah Wayland states:

*'the majority of missing persons want resolution; they do not want to be told that the missing person is deceased. These are two different issues that need to be explored and supported in a safe and accepting environment.'*¹⁰

Further, a fact sheet by the National Coordination Centre Missing Person's Unit which provides an explanation of the Coronial process states:

*'The coronial process often creates a mixed response – an anticipation of a resolution through the examination of evidence, coupled with the trepidation that a presumption of death will not bring a family any closer to finding resolution amongst the ambiguity they are experiencing'*¹¹

Waiting 7 years to prove death

Thirdly, even where the person making the application believes the missing person is dead or more likely to be dead than not, where a Coroner has not made a presumption of death following an investigation, 7 years must have passed since the missing person has been in contact with anyone before the presumption of death will apply. If 7 years have not passed, the person making the application will be required to provide significant evidence to support a presumption of death before the Court will make a

¹⁰ Wayland, Sarah, (2007), *'Supporting Those Who are Left Behind'*, National Missing Persons Coordination Centre, Australia, p 28.

¹¹ *Information for families and friends of missing persons*, National Missing Persons Coordination Centre Fact Sheet.

grant¹².

Family and friends of missing persons call for legislative change

Perhaps the most compelling need for change comes from the voices of those who are left to deal with their ambiguous loss and the burden of a missing person's estate.

This excerpt, taken from the book 'Lady Killer'¹³, describes the experiences of the Dorothy Davis' daughters after their mother disappeared in circumstances involving the subject of the book. Maree Dawes (Dorothy's daughter) was instrumental in bringing about the introduction of the amending legislation to NSW's *PE Act* in 2004.

'After their mother disappeared, the bitter pill of her vanishing would rise up in Maree and Lessel's throats for many years to come. They had no body to bury, so no grave for them and Dottie's Grandchildren to visit. Maree and Lessel kept the house at Undine St going, but cleaning away the cobwebs and dust every few weeks was an emotional task that only got harder. They could not sell her house, or even Dottie's car because, according to the law, the family was not allowed to declare probate on her possessions.'

Similarly, David Rosewall's experience indicates that some family and friends of a missing person feel obligated to look after the missing person's affairs, particularly where they believe the person is still alive. David's frustrations with the lack of options provided to him to take care of Daniel's affairs while he is missing are expressed below:

*'It would be a huge thing for us to apply for Daniel to be declared deceased. We think he's out there somewhere. What if he turns up? As Daniel's parents, we can't do much more to find Daniel. What we can do is look after his affairs otherwise they will end up in tatters. But everywhere I've turned in Victoria, I've been told I can't.'*¹⁴

¹² *Administration and Probate Act 1958* (Vic), s 7. See also Guidance Notes for Completing Probate Forms and the Filing of Applications, Supreme Court of Victoria.

¹³ Candace Sutton and Ellen Connolly, *Lady Killer*, 2009, Sydney, p 114.

¹⁴ Interview with David Rosewall, in person at Bendigo, 10 May 2010.

THE LAW IN OTHER JURISDICTIONS

NSW Legislative Amendments

In 2004, New South Wales Parliament amended the *Protected Estates Act 1981* (NSW) (*PE Act*), which was recently repealed and replaced by the *NSW Trustee and Guardian Act 2009* (*TG Act*), to enable a Court to declare that a person is a missing person and order the management of estate of the person by another person. This was the first legislation of its kind in Australia and was introduced to ease *'the quagmire of legal problems involved in trying to deal with the estate of a missing loved one'*¹⁵.

Currently, under the *TG Act*, the Supreme Court of New South Wales may declare that a person is a missing person and order that the estate of the person (or any part of it) be subject to management under the *TG Act* if the Court is satisfied that:

- (a) the person is a missing person, and
- (b) it is not known whether the person is alive, and
- (c) all reasonable efforts have been made to locate the person, and
- (d) the person's usual place of residence is in NSW, and
- (e) persons with whom the person would be likely to communicate, have not heard from, or of, the person for at least 90 days, and
- (f) it is in the best interests of the person to do so.¹⁶

An application to the Court can be made by the spouse of the person, a relative of the person, a business partner or employee of the person, the Attorney General, the NSW Trustee or any other person who has an interest in the estate of the person.

The reason why an application for an order in NSW is made to the Supreme Court rather than a Tribunal (like in all other Australian jurisdictions) is historical; prior to the enactment of the *PE Act*, the Protective Division of the Supreme Court exercised the

¹⁵ The Hon. John Hatzistergos, Protected Estates Amendment (Missing Persons) Bill, Second Reading Speech, Legislative Council, 11 November 2004.

¹⁶ *NSW Trustees and Guardianship Act 2009* (NSW), s 54.

functions of the Protective Commissioner rather than a Public Trustee. The *TG Act* merged the Protective Commissioner and the NSW Public Trustee into one body. The *TG Act* provides that applications for an order declaring a person missing and appointing a suitable person as manager of their estate continue to be made to the Supreme Court.

The *TG Act* enables the Court to make such orders as it sees fit in relation to the administration and management of the missing person's estate including making orders as appear to it necessary for rendering the property and income of a managed person available for the payment of the debts and engagements of, and otherwise for the benefit of, the person, the maintenance and benefit of the family of the person and otherwise as it thinks necessary or desirable for the care and management of the estate of the person.¹⁷

The *TG Act* applies to the estates of protected missing people as it does to the estates of protected people who have been found to be incapable of managing their affairs. It offers families and friends of missing persons a means of managing and protecting the estate of the relevant missing person, without having to go through the process of having the person declared as legally deceased.

*'In the past, families often went through the traumatic experience of applying for a coronial inquest to declare the person legally dead before they could manage their estate. As one person consulted commented, it 'keeps the hope alive', without the finality of having the person declared deceased.'*¹⁸

Since the 2004 amendments to the *PE Act*, it is believed that approximately 6 people concerned about missing persons have applied to the Supreme Court for an order that the estate of the missing person be managed by them. LCCLC submits that while it may appear that relatively few people have utilised the amended legislation, it consistently reflects the limited number of people who remain missing after 6 months.

¹⁷ *NSW Trustees and Guardianship Act 2009* (NSW), s 65.

¹⁸ Marianne James, Jessica Anderson, Judy Putt, 'Missing Person's in Australia Report', 2008, p118.

The important thing is that families and friends of missing persons in NSW are now armed with a choice about what is appropriate in the particular circumstances of the missing person and their estate.

ACT Legislative Amendments

In 2005, the Australian Capital Territory (**ACT**) followed NSW in amending its *Guardianship and Management of Property Act 1991* (ACT) to enable the management of the estates of missing persons. The ACT amendments are similar to amendments to NSW's *PE Act*, however they provide the Australian Capital Territory Civil and Administrative Tribunal (**ACAT**) (rather than the Supreme Court) with the power to make an order to appoint a manager to manage all, or part of, a missing person's property.

Under the *Guardianship and Management of Property Act 1991* (ACT), before making an order, ACAT must be satisfied that:

- (a) someone is a missing person; and
- (b) the person usually lives in the ACT; and
- (c) while the person is missing, there is, or is likely to be, a need for a decision in relation to the person's financial matters or property; and
- (d) the person's interests will be significantly adversely affected if a manager is not appointed.

SUGGESTED AMENDMENTS FOR VICTORIA

LCCLC submits that the most appropriate way to provide for the protection of the estates of missing persons would be to amend the G&A Act, particularly considering that it is the subject of current review by the VLRC.

LCCLC suggest that the amendments could follow the form of amendments made to the *Guardianship and Management of Property Act 1991* (ACT) and provide a Tribunal rather than the Supreme Court with the power to make orders regarding the management of a missing person's estate. Given that under the G&A Act, VCAT is provided with the power to make orders regarding the guardianship of a person with a

disability and regarding the administration of the estate of a person with a disability, it would be appropriate the G&A Act were amended to provide VCAT with the power to make orders regarding the management of a missing person's estate.

COMPLIANCE WITH HUMAN RIGHTS PRINCIPLES

It is necessary to consider any potential limitation on the human rights of a missing person if VCAT's powers to make an order for the administration of a person's estate were to be extended to include the estates of missing persons. Since the introduction of the Victorian Charter of Human Rights and Responsibilities (the **Charter**), any new or amending legislation must be assessed against the human rights contained within the Charter. Section 7(2) of the Charter sets out the proportionality requirement of the Charter. Where any rights are to be limited by the proposed legislation, section 7(2) must be satisfied. It states that a human right may only be limited in a way that is reasonable and can be demonstrably justified, taking into account:

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

In assessing the proposed legislation, the human rights of the family and dependents of missing people may also be considered.

It is possible that an order for the management of a missing person's estate would be viewed as an infringement on the following rights which are contained in the Charter:

- Section 12, concerning the freedom of movement

“Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.”

- Section 13, concerning the right to privacy

Every person lawfully within Victoria has the right:
(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
(b) not to have his or her reputation unlawfully attacked.

- Section 20 of the Charter provides for property rights

“A person must not be deprived of his or her property other than in accordance with law.”

It is likely that such potential limitations would be deemed to be demonstrably justifiable under section 7(2) because the limitations would likely be held to be important in that it would be providing for the needs of a dependant person or for the benefit of the missing person. This would depend on the facts of an individual case, for example the proof of dependency and the reasons for accessing the missing persons property or correspondence, and depend on the scope of the any order made (ie. what access to a missing person’s property and correspondence was potentially allowed, by whom and on what grounds). Further, as a public authority, when making any decision, VCAT would be required to engage the Charter¹⁹.

In addition, section 17 of the Charter, concerning the protection of families and children, may provide grounds upon which any legislation enabling VCAT to make an order for the management of a missing person’s estate might be supported. A failure to provide a means by which dependent family members can seek access to their missing family member’s property could be seen to be a limitation of the section 17 rights, below. The limitation of those rights should be weighed against the limitation of the rights in sections 12, 13 and 20. Without legislation enabling VCAT to make an order for the management of a missing person’s estate, the rights set out below are arguably limited. Section 17 states:

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

¹⁹ *Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic), s 38.*

(2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

CONCLUSION

When a person goes missing, they often leave behind financial obligations and in some cases, dependents. Under current Victorian legislation, there is little to enable a next of kin, family member or any other concerned person to apply to manage the estate of the missing person. The *G&A Act* enables an order for the administration of the estate of a person only where that person has a disability. Applying to the Supreme Court for a grant of administration or probate requires the person to proceed on the basis that the missing person is deceased, may require a Coronial inquest and may require the passing of 7 years before the presumption of death applies. The processes are cumbersome and do not enable family or friends of a missing person to manage the financial affairs of the missing person unless they engage in a process which is based upon the missing person's death.

LCCLC recommend that in conducting its review of the *G&A Act*, the VLRC should consider LCCLC's suggestion for an amendment to the *G&A Act* so as to provide a VCAT with additional power to make orders regarding the management of a missing person's estate (providing similar conditions required in NSW and ACT are met).

Should VLRC choose not to adopt the recommendations in LCCLC's submission as part of its Guardianship Review, LCCLC recommend that the VLRC accept this submission as a Community Law Reform submission regarding the management of estates of missing persons.