State of trust – making sure State Trustees protects and promotes the rights of Victorians with disability

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# Executive summary and recommendations

The appointment of an administrator involves a significant restriction on a person’s right to autonomy and to make their own decisions about their financial and legal affairs. It has far reaching effects on a person’s day-to-day life and, for our clients who also experience social and financial disadvantage, it can be particularly disempowering.

This report contains 12 client stories that highlight consistent experiences reported by Victoria Legal Aid’s clients. Our contribution is drawn from our legal advice, legal information and casework with people who are subject to administration orders, where State Trustees is very often the administrator. In the 2017-18 financial year, for example, we provided nearly 500 advices to over 250 individual clients about administration orders; and legal information about administration orders in over 300 cases. We provided over 2000 advices on infringements matters (which are of crucial importance to people subject to administration orders), as well as representation at the Magistrates’ Court Special Circumstances List in over 3000 cases for over 2000 clients.

In our experience, State Trustees has a ‘one size fits all’ approach that does not consistently recognise the unique needs of the individuals whose financial affairs they manage. Many clients express frustration at the long wait times to speak with State Trustees, only to find they have to introduce themselves and explain their situation all over again to a different administrator. Even when they speak to their administrator it can still be difficult to get information about their account. At other times, the represented person’s views are ignored or disregarded.

Our clients do not feel encouraged and supported to become capable of managing their own financial affairs. Many clients have been unreasonably denied access to financial independence programs and, when they do succeed to regain management of their finances, State Trustees does not support them to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) to have their orders revoked.

We have assisted many clients for whom it appears State Trustees either did not know or understand how to advocate for their rights to have debts waived because they were ‘judgment proof’ or apply for their fines to be waived on the grounds of ‘special circumstances’. For other clients, State Trustees’ failure to notify Centrelink of changes in their income caused them to incur debts or be denied payments to which they otherwise would be entitled. In all these cases, our clients were effectively prevented from participating in activities or spending their funds in ways that they enjoy and contribute to their quality of life.

The workforce and culture of State Trustees only reinforces our clients’ experiences that they are disproportionately or unreasonably restricted compared with others in the community. Furthermore, the safeguards in the regime, such as the oversight by VCAT, do not operate as effectively as they could to ensure the least restriction on the rights of people with disabilities and effective redress.

Informed by our day-to-day work with thousands of Victorians with mental illness and disability, this report highlights six key areas for improvements in both policy and practice to ensure State Trustees, and the regime in which it conducts its role as an administrator for vulnerable Victorians, can most effectively protect and promote the rights of Victorians with disability.

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| **Making sure State Trustees protects and promotes the rights of Victorians with disability** | |
| 1. **Maximising autonomy and building capacity** | To ensure State Trustees maximises autonomy and builds capacity of a represented person, we recommend:   * State Trustees changes its ‘Financial Independence Program’ (**FIP**) policy so that it is consistent with human rights principles and does not exclude people on limited orders or those without a support person. * State Trustees adopts an internal policy that it apply for revocation of an order once the FIP has been successfully completed. * Where a represented person is not accepted into the FIP, State Trustees must advise them of their right to apply to VCAT for reassessment of the order, and must support them to do so. * State Trustees adopts incentives to assist people to build their capacity (eg. KPIs for supporting represented persons to transition on to the FIP). |
| 1. **Acting competently in a represented person’s ‘best interests’ and in consultation** | To ensure State Trustees acts competently in a represented person’s ‘best interests’ and in consultation with them, we recommend:   * State Trustees works collaboratively with stakeholders to develop a best practice model for embedding individualised, tailored, supported decision-making, with proactive steps by administrators to consult in a meaningful way with represented persons and their support people. * State Trustees ensures it meets with a represented person regularly, preferably in person, at a minimum once a year to discuss their finances, proposed budget and the person’s goals, interests and preferences. The outcome of the review meeting should be provided to the represented person in writing. * Training for State Trustees staff on their obligations as a public authority to give proper consideration to human rights when making decisions on behalf of represented persons, including:   + Seeking and giving effect to the person’s view and preferences wherever possible;   + Capacity principles;   + Supported decision-making principles;   + Recognising the inherent dignity of the person; and   + Least restriction on freedom of decision and action. |

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| 1. **Understanding the legal frameworks that determine the represented person’s rights and responsibilities** | To ensure State Trustees understands the legal frameworks that determine the represented person’s rights and responsibilities, we recommend:   * State Trustees ensures all staff have the appropriate understanding and skills to advocate for the represented person’s legal rights through an application on the basis of ‘special circumstances’ or other available mechanisms to resolve infringements (including newly introduced Work and Development Permits and options for victims of family violence). * State Trustees establishes internal policies to ensure a waiver or reduction of any outstanding debts is requested as a matter of course for all eligible represented persons and this is applied consistently regardless of the debt, where they are ‘judgment proof’. * State Trustees develops and implements policies and processes that ensure compliance with Centrelink notification obligations. This includes notifying Centrelink without delay of any change in a represented person’s income (whether employment income, income protection payments or otherwise). * State Trustees communicates without delay to the represented person:   + Any change to their income and what action State Trustees is taking to minimise any adverse impacts on the person; and   + Any action they propose to take to resolve outstanding debts or infringements and clearly explain the process and likely outcome. |
| 1. **Improving the responsiveness, appropriateness and accessibility of services** | To ensure that State Trustees improves the responsiveness, appropriateness and accessibility of services to represented persons, we recommend:   * State Trustees develops robust guidelines for communicating with and consulting the represented person in a timely way on all decisions. * State Trustees removes the ‘pooled’ system of administrators and reverts to a system where individual administrators are allocated to a represented person. * State Trustees ensures that phone calls and written communication and correspondence by or on behalf of the represented person are responded to in a timely way. This can be achieved by development and strict implementation of policies and prescribed timeframes. * State Trustees employs adequate numbers of skilled staff to respond in a timely manner to calls by the represented person. * State Trustees monitors staff caseload to ensure the administrator responsible knows the represented person’s circumstances and can offer meaningful opportunities to consult and participate in decisions. * State Trustees has regular in-person appointments with a represented person to discuss budget and finances – at least once per year. |
| 1. **Making VCAT and the review process a meaningful safeguard** | To make the Victorian Civil and Administrative Tribunal (**VCAT**) and the review process a meaningful safeguard and to encourage better practice by State Trustees, we recommend that:   * The Ombudsman investigates the most effective and accessible redress mechanisms for represented persons where State Trustees is not acting in their ‘best interests’. * VCAT adopt the following practices:   + Ordinarily making orders for a fixed duration of a maximum of three years, with an ability for the administrator to apply for a further order prior to expiry. In determining the order’s duration VCAT must consider the nature of the person’s disability (eg. whether fluctuating or degenerative) and the likelihood of the person regaining their capacity or their circumstances changing (eg. when an appointment is made for a person with a mental illness during an acute period of hospitalisation);   + If making an indefinite order, VCAT should exercise its discretion to nominate a date for reassessment in such a way that is consistent with human rights. For example, if a person is likely to regain decision-making capacity in a short period, then VCAT should consider a shorter reassessment period;   + At a reassessment VCAT should not continue an administration order unless satisfied on the evidence before it that the criteria continue to apply;   + VCAT and the Guardianship List Registry allow applications by the represented person themselves about the scope or powers under the administration order, or a matter arising out of the administration of the person’s affairs, pursuant to ss 55 or 56 of the *Guardianship and Administration Act 1986* (Vic) (**Act**) respectively; and   + VCAT and the Guardianship List Registry take steps to maximise the participation of (proposed) represented persons in hearings (whether an initial application, rehearing or reassessment), including measurable targets for participation rates, and reports on those rates. |
| 1. **Building a workforce and culture that can bring the principles and protections in the current and new Acts to life** | In order to build a workforce and culture that can bring the principles and protections in the current Act and any new Acts to life, we recommend:   * Updated minimum standards for administrators that accurately reflect a rights-based approach to decision-making and training for all State Trustees staff to embed them in practice. * State Trustees adopts a policy that all administrators embed the principles of the Act into their day-to-day decision-making for represented persons, including:   + Regular and meaningful consultation with the represented person; and   + Giving effect to the represented person’s will and preferences and only overriding this where their views can’t be ascertained and where it is necessary to prevent serious harm to the person themselves. * These policies are updated if there are changes to the Act to bring them into line with newly applicable human rights norms. * State Trustees monitors its compliance with the standards, develops protocols for remedying breaches and undertakes regular reporting. |

# Victoria Legal Aid and our work with Victorians with mental health issues and disability

Victoria Legal Aid (**VLA**)[[1]](#footnote-1) is an independent statutory body established under the *Legal Aid Act 1978* (Vic) to provide access to justice to the community through legal advocacy, advice and assistance to socially and economically disadvantaged people across Victoria. Our organisation provides client-centred services through dedicated practice areas to address the legal needs of marginalised Victorians, including people with disabilities.

VLA is a leading provider of legal services to people with disabilities in Victoria, with 26% of clients identifying as having a disability or mental health condition in 2016-17.[[2]](#footnote-2) VLA’s service delivery model takes a dual-pronged approach to promoting access to justice for these clients. We provide both specialist legal services and non-legal advocacy and support, and conduct community legal education and law reform work.

Our Civil Justice Program includes a specialist legal service, the Mental Health and Disability Law sub-program (**MHDL**), which provides advice and representation at courts, tribunals and psychiatric hospitals for people with disabilities and mental health conditions. The Economic and Social Rights sub-program (**ESR**) provides advice and representation to clients who experience various forms of social and economic disadvantage, with legal issues including infringements and social security matters.

Our Independent Mental Health Advocacy (**IMHA**) program provides non-legal advocacy to promote and support the human rights of people experiencing compulsory mental health treatment or those at risk of being subjected to compulsory mental health treatment. The service is funded by the Department of Health and Human Services. It is free to use, independent of mental health services and has an advisory group of people who have lived experience of mental health issues, *Speaking From Experience*.[[3]](#footnote-3)

VLA acts for clients with disabilities who have had their decision-making autonomy restricted or taken away entirely by virtue of guardianship or administration orders under the *Guardianship and Administration Act 1986* (Vic) (**the Act**), as well as by coercive treatment regimes under the *Mental Health Act 2014* (Vic) (**MHA**) or the *Disability Act 2006* (Vic).

Our advice and advocacy for represented persons and proposed represented persons in relation to administration orders often involves liaising directly with State Trustees and other agencies and providing representation at VCAT in relation to both guardianship and administration order matters.

In the 2017-18 financial year VLA provided:

* Nearly 500 advices to over 250 individual clients about administration orders
* Legal information about administration orders in over 300 cases
* Over 2000 advices on infringements matters to over 1300 clients
* Representation at the Magistrates’ Court Special Circumstances List in over 3000 cases for over 2000 clients.

VLA also publishes jointly with the Office of the Public Advocate the *Take Control* booklet which provides information and practical tips for appointing powers of attorney. We also work together with other stakeholders on policy and law reform work to promote the rights of people with disabilities.

# Administration orders and State Trustees through a human rights lens

An administration order made by VCAT pursuant to the *Guardianship and Administration Act 1986* (Vic) (**the Act**) involves a significant restriction on a person’s right to autonomy and to make their own decisions about their financial and legal affairs. It involves a limitation on a person’s rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) not to have their privacy arbitrarily interfered with,[[4]](#footnote-4) not to be discriminated against on the basis of disability, as well as the right to equality before the law.[[5]](#footnote-5) It also involves a restriction on a person’s legal capacity and autonomy enshrined in Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities* (**CRPD**).

The limitation on a person’s rights is engaged not only in the making (or continuation) of an order by VCAT, which is a public authority when so determining,[[6]](#footnote-6) but also when other public authorities exercise powers under the Act. We consider that State Trustees is a public authority when performing the functions of a financial administrator appointed by VCAT and is therefore obliged to give proper consideration to a person’s rights under the Charter.[[7]](#footnote-7) Therefore, for each decision a State Trustees administrator makes on behalf of a represented person, they must consider if it is a reasonable, justified, proportionate and necessary restriction on the represented person’s rights.

Whilst VCAT must apply strict criteria when making or reassessing an order, the Act also contains a number of core principles[[8]](#footnote-8) to ensure the least restriction on a person’s freedom of decision and action, the best interests of the person are promoted and the wishes of the person are given effect to wherever possible.[[9]](#footnote-9) These core principles apply without qualification to the exercise of all powers and discretions under the Act, including by administrators. In *Patrick’s Case*, Bell J explained the role of these principles in preserving a person’s personal autonomy:

Personal autonomy is inherent in the least restrictive means and the wishes of the person principles. The purpose of requiring the adoption of the least restrictive means is to leave the person with as much personal autonomy as possible over their personal and financial affairs. The same value is inherent in the requirement to give effect to the person’s wishes, where ascertainable and wherever possible. Specific provisions of the Act emphasize the importance of promoting, maintaining and enhancing the personal autonomy of persons with a disability.[[10]](#footnote-10)

In addition, the Act mandates that administrators take an active role to support the represented person to build their capacity and maximise their autonomy even whilst on the order. This includes encouraging and assisting the represented person to become capable of administering their affairs, acting in consultation with them and taking into account, as far as possible, their wishes.[[11]](#footnote-11)

It is our view that, notwithstanding the broad powers of an administrator to manage a person’s financial and legal affairs, these obligations, read together with the objects of the Acts mean more than merely acting in their *financial* best interests. The objects of the Act require State Trustees to use its powers as an administrator in ways which promote the represented person’s own autonomy and participation in decision-making. In our view, ‘best interests’ is therefore a subjective test and it encompasses consideration of the person’s unique circumstances, views and preferences including how they wish to live their life, what ‘quality of life’ looks like and what they perceive to be restrictive. Taking too narrow or paternalistic a view of ‘best interests’, without reference to these subjective factors, is not consistent with a contemporary human rights focus.

These core principles and obligations are designed to safeguard the rights of people with disabilities and ensure that rights limitations are proportionate and only justified in certain circumstances.

In our experience, State Trustees too often falls short of its obligations under the current regime to support and enhance the autonomy of represented persons and to encourage their participation in decision-making. Our experience also demonstrates a failure by State Trustees in their processes and decision-making, to comply with their obligations as a public authority to properly consider the human rights of represented persons. Furthermore, other safeguards in the legislative regime, such as the oversight by VCAT, do not operate as effectively as they could to ensure least restriction on the rights of people with disabilities. The combination of these factors means that many of our clients experience disproportionate or unreasonable restrictions on their rights, dignity and autonomy, and without access to effective and accessible redress.

We note that the *Guardianship and Administration Bill 2018* (Vic) (**the Bill**) is currently in the Legislative Council of the Victorian Parliament after a significant process of consultation on the reforms. The Bill goes a significant way to ensuring the rights of people with disabilities and represented persons are brought in line with current human rights standards. Based on our knowledge and understanding of State Trustees’ compliance with the existing regime, we are concerned that State Trustees would be poorly equipped to comply with stronger human rights obligations under the reforms.

This report highlights six key areas for improvements in both policy and practice to ensure State Trustees, and the regime in which it conducts its role as an administrator for vulnerable Victorians, can most effectively protect and promote the rights of Victorians with a disability.

This report also draws on VLA’s previous submissions and consultations relating to review and reform of the Act.[[12]](#footnote-12)

# Maximising autonomy and building capacity

In VLA’s experience, State Trustees does not consistently comply with its obligation to assist represented persons to build their capacity to make decisions about their finances. Nor does State Trustees consistently support them to maximise their autonomy when subject to an administration order. This has significant detrimental impacts on the rights of represented persons and their ability to make or participate in decisions that affect their daily lives.

### Financial independence program – accessible and supportive

For many years State Trustees has offered an internal ‘Financial Independence Program’ (**FIP**) which enables a represented person to regain their independence in decision-making by gradually increasing their management and responsibility for their finances. This would commonly start with managing an allowance for personal expenses over a fortnight, then, if successful, taking responsibility for a small regular bill, such as a chemist bill and progressing to managing more substantial bills like utilities and rent.

We note that, despite the fact that it appears to be designed to address State Trustees’ obligation to assist a person to regain their capacity and was promoted in State Trustees’ annual reports from as far back as 2008[[13]](#footnote-13) there is no mention of this program on State Trustees’ website. Indeed, VLA frequently comes across clients who have been under administration for years who have not heard of the FIP. It is not uncommon for VLA lawyers to be the first to raise the FIP with State Trustees in circumstances where, arguably, State Trustees should have been proactive in initiating such a program based on the represented person’s circumstances.

There is considerable inconsistency and lack of transparency about eligibility, and the way in which State Trustees administers the program, including the support they provide and the criteria used to determine success.

We understand that the Financial Independence Program may have been available to clients who satisfied the following criteria:

* Their affairs are administrated by State Trustees under a non-limited administration order made by VCAT
* They currently receive a regular allowance paid fortnightly
* They have an active support network for example family or caseworker.[[14]](#footnote-14)

Whether or not these are the current criteria is unclear, however, we have been instructed by clients that they have been refused access to the FIP because they had no ‘caseworker’. There does not seem to be any reason to exclude at first instance people on limited orders, or people who do not have an active support network.

By way of comparison, we understand that Australian Unity (which is also appointed by VCAT as an administrator under the Act), has a near identical program to State Trustees without such strict eligibility criteria. Australian Unity, we understand, does not exclude a person from their program merely because they do not have a support person or are on a limited order.

We have assisted clients who have been, in our view, unreasonably refused access to this program due to insufficient supports.

As the case studies below demonstrate, State Trustees’ failure to adopt a more individualised assessment based on a client’s own capacity to be independent means they arguably fail to meet their statutory obligations under the Act to maximise a person’s autonomy.

**Mary’s story: Failure to support building her capacity and autonomy**

In 2011 Mary (not the client’s real name) suffered a stroke and an application was made to VCAT seeking an administration order on her behalf. In early 2012, VCAT ordered that State Trustees be appointed as her financial administrator.

A section 61 report prepared by State Trustees for Mary’s reassessment hearing at VCAT in early 2017 states that Mary was not considered suitable for the Financial Independence Program due to the nature of her disability but does not elaborate further.

In mid-2017 Mary obtained a letter from her GP who, after completing a cognitive assessment with her, concluded that she was mentally competent to make her own decisions. Mary has also been paying her electricity bills herself.

Despite these improvements in her capacity, the report prepared by State Trustees for Mary’s VCAT hearing in late 2017 stated that, although Mary had been considered for the Financial Independence Program as she is receiving and self-managing a weekly living allowance payment, Mary continues to require assistance with large amounts and with her assets and as such is not relevant for the program. We are advocating directly with State Trustees for Mary to be given the opportunity to manage more of her finances and to be put on the FIP with a view to demonstrating that a more limited order, or revocation of the order itself, is the most appropriate outcome in the circumstances at the next VCAT hearing.

Mary’s case illustrates the disconnect between measures theoretically designed to support a person to regain their autonomy and capacity, and their implementation in practice. We question whether State Trustees administrators have a clear understanding of their obligations and of key concepts such as capacity and supported decision-making and the steps they can and should be taking to enhance capacity of all people whose affairs they manage.

### Actively supporting autonomy and embedding supported decision-making

Many clients complain that State Trustees make decisions about their discretionary spending with insufficient consultation with them directly. Other clients instruct that when they have requested assistance from State Trustees with budgeting, they are told to speak with their support worker to be referred to a financial counsellor as State Trustees does not assist with this. These examples do not appear consistent with the human rights obligations of a public authority, or the Act.

State Trustees’ current information brochure on the website[[15]](#footnote-15) makes no mention of State Trustees’ obligations to enhance autonomy and capacity, or how State Trustees will implement such obligations. Similarly, their information brochure for represented persons, entitled ‘Looking out for your financial and legal affairs’[[16]](#footnote-16) makes no reference to supporting the person to make their own decisions. Under the heading ‘Reviewing your support’, the booklet does refer to a standard three-yearly review by VCAT to ‘check to see that [the represented person’s] needs are being met’.

By contrast, the National Standards of Public Guardianship 2016,[[17]](#footnote-17) to which the Office of the Public Advocate subscribes, include a specific minimum standard to make ‘all reasonable efforts to support represented persons to exercise their own decision-making capacity’, as well as guidelines on requesting a review of the order, ensuring the order is least restrictive and for the shortest time possible and ‘only where there is evidence that the represented person needs particular decisions to be made for them’.[[18]](#footnote-18)

In practice, State Trustees does not consistently support represented persons to come off their administration orders and regain full independence. As the following case study demonstrates, failure to take proactive steps to apply to VCAT or support a person to do so can result in an unjustifiable restriction on a person’s autonomy.

**Paul’s story: Failure to take steps to have order limited or revoked, despite successful Financial Independence Plan**

Paul (not his real name) was made subject to an administration order in 2003 appointing State Trustees. The order was made in the context of Paul being diagnosed with schizophrenia, and concerns about his spending and ability to pay rent.

Paul commenced on State Trustees FIP in February 2011.  In correspondence provided to VCAT, State Trustees stated that upon successful completion of the program over three months, the administrator would recommend a review of the order.

VCAT subsequently reassessed and confirmed the order on its own initiative in 2012, 2013 and 2015, each time ‘on the papers’. Despite State Trustees’ mandatory ‘Section 61 reports’ to the Tribunal on each occasion noting that Paul was successful on the FIP, State Trustees took no active steps to request reassessment of the order or request a hearing at VCAT.

State Trustees’ information sheet about the FIP states that the program is reviewed 6 or 12 months after its commencement to determine whether it should continue, increase or be cancelled.[[19]](#footnote-19)

Paul spent much of the time on the program managing almost the entirety of his income. State Trustees was only paying one single expense on his behalf.

Paul sought the assistance of VLA to have the order revoked in 2017 and we represented Paul at VCAT. Finally, in 2018 – seven years after commencing on the FIP – the order was revoked by VCAT.

Throughout that seven year period State Trustees continued to take income commission and management fees, to which they were legally entitled as an administrator, but which amounted to over $8,000.

Arguably, had State Trustees taken more active steps to support Paul to regain full independence, he may have succeeded in having his order revoked sooner, including avoiding having to pay significant fees to State Trustees.

State Trustees’ failure to support or provide a meaningful pathway for Paul (and other clients like him) to seek variation or revocation of an administration order is arguably a breach of their obligations under both the Act and as a public authority under the Charter to maximise a person’s decision-making autonomy and participation in decisions. Concerningly, at the same time, State Trustees benefitted from the receipt of fees as administrator.

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| **Recommendation 1: Maximising autonomy and building capacity**  To ensure State Trustees maximises autonomy and builds capacity of a represented person, we recommend:   * State Trustees changes its ‘Financial Independence Program’ (**FIP**) policy so that it is consistent with human rights principles and does not exclude people on limited orders or those without a support person. * State Trustees adopts an internal policy that it apply for revocation of an order once the FIP has been successfully completed. * Where a represented person is not accepted into the FIP, State Trustees must advise them of their right to apply to VCAT for reassessment of the order, and must support them to do so. * State Trustees adopts incentives to assist people to build their capacity (eg. KPIs for supporting represented persons to transition on to the FIP). |

# Acting competently in a person’s best interests and in consultation

The restrictions imposed by an administration order have ramifications for all aspects of a person’s life. Many clients have expressed concerns that State Trustees make decisions without sufficient consultation with them (or people they authorise to support them) and, when decisions are made, they are contrary to what they want and State Trustees’ reasons for those decisions are not explained.

### ‘Best interests’ is more than just balancing the account

As we explain in part 2, acting in a person’s ‘best interests’ requires more than merely ‘balancing the books’. It requires understanding the represented person’s views and preferences, what is important to them, and their unique life circumstances. Whilst ensuring that the bills are paid is a critical function of State Trustees as an administrator, we question how often State Trustees consults effectively with the represented person to explain the decision that needs to be made, ascertain the views of the represented person, present and discuss options, including their benefits and drawbacks, as part of the decision-making process.

### Understanding what is important to the represented person

Clients frequently instruct us that they struggle to contact their administrator and, when they do make contact, they are frustrated at the lack of personal care and interest. We hear complaints from clients about State Trustees having a ‘one size fits all’ approach and unreasonably limiting or refusing discretionary spending apparently in order to accumulate savings in circumstances where the person’s income is very modest. Were it up to them, some clients would prefer to spend their money on items or activities that enhanced their quality of life in the short-term, rather than ‘save for their funeral’ as they have put it.

Our clients often describe the indignity of having to call State Trustees to ask for money to buy toiletries or underwear or pay for a haircut or buy presents for their niece or nephew because their meagre allowance does not stretch that far. It takes significant effort and time by advocates, support workers and at times lawyers, for State Trustees to agree that, for example, the restrictive ‘drip feed’ approach to an allowance is no longer necessary and the represented person can be given the chance to manage a larger sum. Clients are often frustrated that State Trustees’ system means they cannot take advantage of cheaper bulk-buy products.

From our advocacy directly with represented persons it appears that State Trustees’ administrators do not have sufficient time, resources or interest to establish processes to consistently develop a good understanding of the views, preferences and needs of the individuals whose affairs they manage and how they may change over time.

### Consultation impacts on a person’s health and wellbeing

Many of our clients under administration orders have complex needs by reason of their disability and a failure to consult effectively and sensitively, having regard to their particular needs and circumstances, can have deleterious effects on the represented person’s health and wellbeing, as the following case studies demonstrate.

**Mahmoud’s story: Not consulted before his possessions were thrown out**

Mahmoud (not the client’s real name) was in hospital for medical treatment when State Trustees was appointed to be his administrator by VCAT.

His treating team said he would not be able to go back to living at home due to his disability.

State Trustees told him that his house would need to be cleared for it to be sold, as he was not going to be able to live there again. He was told he would be consulted in the lead up to his house being cleared, but ultimately cleaners were arranged and a lot of his belongings were thrown out.

Mahmoud was already distressed about being in hospital and unable to return home, but he lost all faith in State Trustees to appropriately take care of his affairs after this incident.

After this, State Trustees advised that they would provide quotes before finishing work on his house, but never provided those quotes and Mahmoud subsequently discovered more work had been done on his house without it being discussed with him.

Because of Mahmoud’s impairments, it is difficult for him to remember exactly what was in the house to get compensation for the good things that were disposed of. He knows there were things he did not need anymore, but he is devastated that State Trustees did not help him to sort through things and keep what was important to him.

### Safeguards and standards

Where our clients have been concerned that State Trustees have acted contrary to their best interests there are limited accessible options open to them to seek redress. Where the person otherwise meets the criteria for an administration order, VCAT is not an effective mechanism given its current remit is limited, by and large, to reassessing the criteria of an order. Whilst VCAT can vary the order and may make orders for State Trustees to reimburse the person, the latter is only available in exceptional circumstances.

The lack of effective and accessible sanctions for State Trustees’ failure to act in a person’s ‘best interests’ can impact significantly on represented persons who are already disempowered by their experience of the order.

When VLA is instructed to assess merit in having an administration order revoked, we request the VCAT file, which includes all the ‘section 61 reports’ that State Trustees has prepared for any reassessment hearings since the order was made. The fact that orders are generally only reassessed every three years means that there is no incentive for State Trustees to provide VCAT with evidence of how the represented person’s affairs have been managed in the interim. This means there may be no documented evidence of the person’s financial circumstances or the management of their affairs for up to three years, even if their circumstances or capacity has changed dramatically over that time.

State Trustees internal processes do not appear to be sufficiently robust in the absence of external safeguards as the following case study illustrates:

**Sally’s story: Missed fees meant client’s apparent savings were illusory**

In the course of preparing for Sally’s (not the client’s real name) upcoming reassessment of her administration order at VCAT, VLA requested State Trustees provide a copy of the report they were preparing (the section 61 report).

It was only when the administrator was preparing this report that they realised that Sally’s supported accommodation payments had been mistakenly left unpaid for around eight months. This resulted in Sally having accumulated thousands of dollars in her cash common fund with State Trustees. Sally had been calling State Trustees frequently to check the balance of her savings and had lots of plans for how she wanted to use this money.

State Trustees said it was an ‘oversight’. Sally was devastated to learn what she thought were thousands of dollars in savings were only illusory, as the fees needed to be repaid. This caused extreme distress for Sally and she was unable to participate effectively in the hearing.

VCAT reappointed State Trustees, despite their failure to act in Sally’s best interests. Sally lost all faith in State Trustees as her administrators.

Sally’s story, and the importance of greater oversight, safeguards and quality improvement of State Trustees is not isolated. For example, VLA is currently assisting a client who had his second property sold by State Trustees (his administrator) against his wishes and the wishes of his family, and without meaningful consultation.

We note that the National Standards for Financial Managers[[20]](#footnote-20) to which State Trustees subscribes contains what are in our view weak minimum standards that arguably fall short of the obligations under s 49 and s 4(2) of the Act, and well below the obligations imposed by the Charter. For example, there is no minimum requirement for ascertaining a person’s views or keeping them informed at regular intervals.

Not only is this example clearly in breach of the lesser standards (which mandates “fully considering” the represented person’s views and “carefully considering” the impact on their life before making a decision to sell property), it does not meet the obligations that the Act and human rights require.

Where the person has not been adequately consulted nor their views taken into account, we question how State Trustees can justify that they are acting in the person’s ‘best interests’.

### Promoting personal and social wellbeing

We note that, under proposed reform to the Act, the Bill moves away from ‘best interests’ and instead requires administrators and guardians to ‘promote the personal and social wellbeing’ of the represented person. Regardless of the how this obligation is framed, effective and transparent decision-making processes, a skilled workforce, and a robust accountability mechanism are essential to making these rights a reality.

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| **Recommendation 2: Acting competently in a represented person’s ‘best interests’ and in consultation**  To ensure State Trustees acts competently in a represented person’s ‘best interests’ and in consultation with them, we recommend:   * State Trustees works collaboratively with stakeholders to develop a best practice model for embedding individualised, tailored, supported decision-making, with proactive steps by administrators to consult in a meaningful way with represented persons and their support people. * State Trustees ensures it meets with a represented person regularly, preferably in person, at a minimum once a year to discuss their finances, proposed budget and the person’s goals, interests and preferences. The outcome of the review meeting should be provided to the represented person in writing. * Training for State Trustees staff on their obligations as a public authority to give proper consideration to human rights when making decisions on behalf of represented persons, including:   + Seeking and giving effect to the person’s view and preferences wherever possible;   + Capacity principles;   + Supported decision-making principles;   + Recognising the inherent dignity of the person; and   + Least restriction on freedom of decision and action. |

# Understanding the legal frameworks that determine people’s rights and responsibilities

VLA has acted for clients in cases where State Trustees, as their administrator, has failed to fully understand key legal frameworks that determine that person’s rights and responsibilities, and therefore to take steps to address their financial or other vulnerability, or maximise their entitlements. Three frameworks are most relevant to our clients in this regard – (a) resolving debts, (b) dealing with infringements and (c) notifying Centrelink of changes that affect social security entitlements.

### Administration orders are often sought to resolve financial crisis

Many of our clients had their administration orders imposed in the context of having accrued debt or outstanding infringements or mismanagement of social security entitlements. The stated impetus for the order is often that the client was, at that time the order was made, unable to repay or otherwise address the debt or infringement themselves, or in the context of being unable, due to their disability, to maximise their social security entitlements. Such a ‘need’ is often also the catalyst for the administration order application, to ensure the administrator can step in to resolve these financial issues on a person’s behalf.

The following examples and case studies from our practice highlight that State Trustees has a lack of consistent understanding of these legal frameworks, leading to poor decision-making. Their failure to act with due care and diligence can have a damaging impact on clients, not only their financial stability, but also their health and wellbeing.

The following examples demonstrate how State Trustees falls short of its obligation under the Act to act in the represented person’s best interests and to take care of their affairs,[[21]](#footnote-21) and the urgent need for reform.

### Infringements and ‘special circumstances’

Amongst our clients, it is not uncommon for an administration order to be made as a result of them having accrued outstanding fines in the context of an acute mental health crisis or some other impact of their disability. A range of factors can contribute to clients’ vulnerability to receiving fines, including mental illness or disability, lack of awareness of rights and responsibilities, inability to comply with the requirement to purchase a public transport ticket due to financial circumstances, or a greater public presence because of insecure housing or homelessness. These factors may also impact a person’s capacity to pay a fine and impede their ability to navigate the complex infringements system.[[22]](#footnote-22)

Applying to have outstanding infringements addressed either by review or revocation on the basis of the person’s ‘special circumstances’[[23]](#footnote-23) can result in a more lenient outcome, including through a significant reduction in the fine or waiver or complete dismissal. Payment in full is often not a viable option for clients in receipt of Centrelink benefits and a repayment plan may last years and in some circumstances carry the risk of imprisonment for default. Making effective use of the ‘special circumstances’ provisions to resolve infringements for a represented person (who by default have a disability) and who very often experience additional social or financial disadvantage is critical. As the NSW Law and Justice Foundation has most recently identified, without proactive assistance, fines systems, including the fines which arise from infringements, uniquely perpetuate and exacerbate a ‘vicious cycle’ of disadvantage that people with disability (and other particular communities) already experience.[[24]](#footnote-24) However, we also know that ‘when disadvantaged people do get appropriate assistance for their fines problems, they achieve outcomes on par with others’.[[25]](#footnote-25)

VLA has acted for clients where State Trustees, instead of pursuing a special circumstances application, established a repayment plan to resolve unpaid fines. For a person on the disability support pension, repayments of $20 per week can make a significant difference to the person’s discretionary income.

In our experience, revocation applications on the basis of a person’s ‘special circumstances’ very often result in a full discharge of the fines, provided the person has strong medical evidence that their disability or mental health condition contributed to the offending.

We have acted for clients for whom State Trustees has paid thousands of dollars in fines rather than pursue a ‘special circumstances’ application which, although more time-consuming for State Trustees, is far more likely to be cost-effective for the represented person. At times State Trustees administrators have seemed not to understand that such an application is even an option for the represented person, let alone actively pursue it. This is another example of how State Trustees’ failure to understand legal frameworks that affect their clients results in detrimental outcomes to the represented person.

**Pat’s story: Financial hardship from failure to apply for ‘special circumstances’**

Pat (not the client’s real name) has been on an administration order with State Trustees for over six years. She has been diagnosed with a mental health condition and struggled with a significant drug addiction as well as periods of homelessness. Pat is frequently requesting extra money from State Trustees and money is always tight.

Nevertheless, State Trustees have paid over $2,500 worth of infringements on her behalf over the years, including by way of payment plans. One of the fines was for over $700, which State Trustees paid in full.

Despite the fact that Pat has experienced all three of the (then) grounds for ‘special circumstances’ – namely, mental illness, serious addiction to drugs and homelessness – State Trustees did not apply for review of these fines (or revocation of the enforcement orders) on this basis. Indeed, her administrator at the VCAT hearing was adamant that Pat was not eligible to do so. State Trustees’ failure to use the available special circumstances provisions to Pat’s benefit meant her discretionary income was significantly diminished.

### Resolving debts for clients who are ‘judgment proof’

Many people on administration orders have at some point encountered debt problems. These debts may be incurred because of non-payment of rent, entering large and unmanageable credit contracts or loans, or civil action taken against a person, which the person is unable to resolve or repay. Their disability or other social or financial disadvantage may mean that they cannot resolve these debts in a timely and cost-effective way.

A common practice by State Trustees is to enter the represented person into a repayment plan. For people on modest incomes, and especially where income is solely derived from Centrelink benefits, the repayment amount can be significant, and will last a long time into the future (potentially the rest of their life). However, at law, where a person’s income is solely derived from a social security benefit, and their income and assets fall under the threshold, they will be deemed ‘judgment proof’.[[26]](#footnote-26) That is, they cannot be forced to pay the debt and have no assets to be seized to satisfy the debt against them. Many clients we see fall into this category. It is evident from the case studies below, however, that State Trustees has been making decisions against the person’s best interests by entering repayment plans on debts that are effectively unenforceable.

### Failure to pursue waiver of debts causes financial hardship

We have been instructed by some clients that State Trustees have entered into payment plans (eg. for rental arrears) at high rates which cause financial stress, or at a higher repayment rate than may strictly be necessary to maintain their tenancy.

When coupled with a failure to pursue redress mechanisms for debt, such as seeking a waiver on the basis of the client being ‘judgment proof’, these payment plans can cause financial hardship to clients, as Tran’s case below illustrates.

**Tran’s story: Burdening clients with high debt repayment without seeking waiver**

Tran has been diagnosed with a mental illness and had been detained in a psychiatric unit for some years before State Trustees was appointed.

Tran had refused to pay his accommodation fees for the time he had spent in hospital and, whilst the hospital had not actively sought to recover the debt, when State Trustees was appointed, they soon arranged a payment plan of around $100 per fortnight to pay off the approximately $15,000 in arrears.

Tran was receiving DSP of around $900 a fortnight and had little if any savings. He really enjoyed shopping but had very little money left over to do this once his accommodation and other fees were paid by State Trustees. This was frustrating for Tran. When Tran contacted VLA we advocated to State Trustees to seek waiver or reduction of the debt. In response, the hospital agreed to waive the debt and Tran’s discretionary spending was able to increase and he could again go shopping and attend outings with his friends.

Without VLA’s advocacy, Tran would have been stuck making repayments of a considerable proportion of his income for years to come.

### Failure to pursue waiver of debts means lost opportunity and quality of life

Jamie is one of our clients who experienced financial loss, as well as the loss of opportunities to engage in activities which he enjoyed, due to State Trustees not carefully examining his financial responsibilities.

**Jamie’s story: Failure to seek waiver of debt meant client missed out on cricket and camps**

Jamie lives on his own in regional Victoria. He loves playing cricket for the local cricket club and he also has an intellectual disability.

In 2015 a court ordered that Jamie pay a large insurance company $27,000 in compensation following a car accident where Jamie was driving. State Trustees, who have been Jamie’s administrators for over a decade, entered Jamie into a payment plan where he was to pay $50 a fortnight. That payment plan would require Jamie pay this amount each fortnight until the year 2037.

State Trustees entered Jamie into this payment plan without contacting the insurance company and asking whether they would waive the debt because of Jamie’s circumstances. Because Jamie’s only income is from the Disability Support Pension and he has no assets he is ‘judgment proof’. This means that if the insurance company sought to enforce the debt against Jamie, the court would refuse to make an order forcing Jamie to pay unless he consented to that order.

Jamie was unhappy with being on an administration order and sought advice from VLA though our Legal Help phone line. Jamie and his VLA lawyer read through the State Trustees documents and talked about the payment plan. Jamie’s lawyer told him that State Trustees may have been paying this debt unnecessarily.

We contacted State Trustees on his behalf and advised them of their obligations to act in Jamie’s best interests, including in relation to this debt. State Trustees took six months from when Jamie’s lawyer first brought the payment plan to their attention to stop making the payments and start advocating on Jamie’s behalf to have the debt waived.

By the time payments were stopped, Jamie had been making payments for nearly three years. This means over $3,000 of Jamie’s limited income from the Disability Support Pension had been paid to the insurance company by State Trustees over that time. Jamie had missed out on doing things he loved like participating in his local cricket club games and going on camps for people with disabilities during that time because he was not able to afford them.

State Trustees’ failure to properly examine our client’s financial situation at the earliest opportunity and pursue redress to which he was entitled, meant that he had to miss out on doing things that really mattered to him and that contributed to his rehabilitation and a life in the community.

### Failure to notify Centrelink of changes in income

As an administrator, State Trustees is arguably responsible for maximising a represented person’s entitlements to social security, consistent with their obligation to act in their best interests.

In our experience, when clients seek assistance with a Disability Support Pension (**DSP**) matter where State Trustees is their administrator, there appear to be issues with State Trustees notifying Centrelink about changes in the client’s circumstances. This directly and adversely affects the rate of payment they may be entitled to. We have come across cases where there was such a significant delay in State Trustees notifying Centrelink about income protection payments being stopped, that our clients received a reduced rate of benefit than what they would have otherwise been entitled to if the notification had been made in a timely way.

The following case study illustrates the damaging impact that such issues can have on our clients. In the most serious cases, such conduct may raise a question about whether a client could be advised to commence a claim for negligence.

**Sam’s story: Eight month delay in notifying Centrelink caused hardship and distress**

Last year, VLA assisted a woman called Sam (not her real name) in relation to her social security debt. Sam has been experiencing long-term mental health issues which impacted her functionality and caused multiple hospital admissions as an involuntary patient. In 2010, she was granted DSP due to her mental illness and in 2011, she was placed under an administration order and State Trustees was appointed to manage her finances.

Sam was also eligible for some income protection payments and received funds in February 2012 (back dated to July 2010). As the Centrelink recipient, Sam had the obligation to inform Centrelink of any change of circumstances within 14 days. However, State Trustees only formally advised Centrelink of these payments after a significant delay of nearly eight months. This notification subsequently led to a significant debt which would have been partially averted or minimised had there been a prompt notification by her administrator.

Internal records of Centrelink expressly stated that the lack of timely action by State Trustees ‘*could be perceived as negligent and financially abusive and there was no false misrepresentation [by Sam] who had nil capacity herself to update Centrelink with her financial affairs*’. However, Centrelink only waived part of her debt (finding the remainder as arising out of the ordinary operation of income test provisions).

Sam subsequently made a significant recovery and her administration order was revoked in 2014. The ongoing debt caused her significant stress and financial hardship especially as she strongly believed that she was not responsible for the delay by the State Trustees.

Sam had to lodge a further review application at the first tier of the Administrative Appeals Tribunal to make her arguments. VLA assisted her by making written submissions highlighting that her particular circumstances met the high threshold requirement of ‘special circumstances‘ waiver under s 1237AAD of the *Social Security Act* *1991* (Cth). The Tribunal agreed to exercise its discretion and waived her debt in full.

Sam is relieved that the saga is finally over.

In our view, these various failures by State Trustees to comply with reporting obligations to Centrelink and pursue effective avenues to resolve unpaid debts and infringements, amount to serious breaches of its obligations to act in the represented person’s best interests – both in terms of their finances and their quality of life and wellbeing. Perversely, these failures by State Trustees are examples of precisely the kind of decision-making that VCAT has determined warrant an administrator being appointed. This calls into question the extent to which, in these cases, State Trustees’ role as an administrator was in fact a benefit to the represented person.

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| **Recommendation 3: Understanding the legal frameworks that determine the represented person’s rights and responsibilities**  To ensure State Trustees understands the legal frameworks that determine the represented person’s rights and responsibilities, we recommend:   * State Trustees ensures all staff have the appropriate understanding and skills to advocate for the represented person’s legal rights through an application on the basis of ‘special circumstances’ or other available mechanisms to resolve infringements (including newly introduced Work and Development Permits and options for victims of family violence). * State Trustees establishes internal policies to ensure a waiver or reduction of any outstanding debts is requested as a matter of course for all eligible represented persons and this is applied consistently regardless of the debt, where they are ‘judgment proof’. * State Trustees develops and implements policies and processes that ensure compliance with Centrelink notification obligations. This includes notifying Centrelink without delay of any change in a represented person’s income (whether employment income, income protection payments or otherwise). * State Trustees communicates without delay to the represented person:   + Any change to their income and what action State Trustees is taking to minimise any adverse impacts on the person; and   + Any action they propose to take to resolve outstanding debts or infringements and clearly explain the process and likely outcome. |

# Improving responsiveness, appropriateness and accessibility of services

### Supporting represented persons to understand the order and their rights

For many of our clients, the imposition of an administration order occurs in the context of a crisis of some kind which impacts on their ability to manage their finances. This includes, for example, an acute episode of psychosis resulting in a person falling behind in their bills and a prolonged admission to hospital, or the death of a family member who had previously been supporting a person with an intellectual disability to manage their day-to-day expenses. The current legislative regime is particularly disempowering as it does not require the (proposed) represented person to be given information prior to their hearing, or provide incentives for them to attend.

VLA has come across many cases where the applicant social worker from the hospital has, mistakenly, advised the person that an administration order will be put in place for a limited period until the person’s finances are back on track (eg utilities debt or rent arrears paid off and the order will be cancelled once they are discharged). This is a mischaracterisation of what are effectively indefinite orders and the person is left frustrated by the reality of the situation – that it is often more difficult to have the order revoked than to contest it being made in the first place.

As a result, many people are left in the dark about what an order means, the reasons it was sought and/or ultimately made, what State Trustees are in fact doing on their behalf, and their rights.

This is in stark contrast to other substitute decision-making regimes such as the *Mental Health Act 2014* (Vic) which has far stronger positive obligations on the person applying for the order (the psychiatrist) to provide reports and information prior to the hearing,[[27]](#footnote-27) as well as information about decisions being made on their behalf.[[28]](#footnote-28)

### Responsive and accessible administrators

A common complaint from our clients is that State Trustees administrators are unresponsive and often inaccessible and that the system of ‘pooled’ administrators results in decisions that are not individualised or consistent.

Our clients instruct they have excessively long wait times when they call to speak with their administrator and when they do finally get through to speak with someone, it is frequently a different person who does not know about them or their case.

Despite the fact that State Trustees routinely advises that they will respond to emails within 10 business days, this is rarely the case and multiple follow-ups are required. Other times, clients complain they received no response to their written communication.

For our clients – many of whom have complex needs in addition to their disability – this causes unnecessary frustration and stress.

Tom’s case highlights the unnecessary stress and distress our clients experience due to State Trustees’ lack of responsiveness and failure to take necessary proactive steps. It is one example of what clients instruct is an all too common impersonalised, inflexible system.

**Tom’s story: Failure to follow up letters of demand for over four months**

Tom (not his real name) has been on an administration order since 2013 with a stated disability of hoarding. Tom resides in supported elderly accommodation, renting out two storage containers for the remainder of his possessions. The storage container invoices are paid by State Trustees. In around May this year Tom told VLA he had concerns one of storage facilities was not being paid as he had received letters from a debt collector demanding $5,000 for apparently unpaid storage fees.

Tom had not heard from State Trustees in months. He had tried to visit the State Trustees’ office but this had moved since last time he was there. Although he does not have a personal phone, his VLA lawyer had no trouble making phone appointments ahead of time with staff at his accommodation. Tom has attended these phone appointments promptly without fail.

VLA contacted State Trustees on Tom’s behalf to follow up both issues – his possessions from the storage facility and the letters of demand. The administrator confirmed that the storage facility had been closed in around July 2017 because State Trustees deemed it was not financially viable for Tom to have two storage units. The financial consultant did not know if Tom had been consulted regarding this decision or where his possessions had gone. We asked State Trustees to contact Tom directly about the letters of demand.

After following up with State Trustees by email and phone for several months, VLA was told in mid-September, that Tom had in fact been consulted last year regarding the closure of his storage facility and had agreed that his possessions be sold or donated. State Trustees had not done anything about the letters of demand – they claimed they were waiting for VLA to send the letters through.

We stressed it was State Trustees’ obligation to resolve this as Tom’s administrator and yet they had made no effort to contact either Tom or the storage facility. Tom’s diagnosis of hoarding means that maintenance and storage of his possessions is particularly important to him and State Trustees’ conduct has added to his distress.

The debt collection issue remains unresolved after more than four months.

Tom’s case highlights the inaccessibility, uncertainty and lack of responsiveness of State Trustees. Represented persons very often already have their own challenges (recognised by the making of the relevant administration order) with executing follow-up decision-making and marshaling information, and for people with disabilities and complex needs, the impact of poor practice by their administrators can be significant.

### Keeping the represented person informed

We are frequently instructed by clients that they have difficulty obtaining information about their accounts from State Trustees, including a statement of account and their fortnightly budget prepared by State Trustees. VLA lawyers have also experienced considerable delays (up to months in some cases) when we have requested this information from State Trustees.

When a person’s financial affairs are taken out of their control, this can cause considerable frustration and distress. This is compounded when the person has difficulty accessing information about their finances and what is being done with their money. Failure to provide this information and in a timely way also impedes the person’s ability to understand financial decisions that are being made on their behalf. It also risks adversely impacting a person’s financial literacy and their autonomy by discouraging rather than encouraging informed participation in decision-making.

### ‘Pooled’ administrator system – impersonal, inconsistent and ineffective

Another common issue shared by our clients is the uncertainty caused by State Trustees’ move to having ‘pooled’ administrators instead of the previous practice of allocating specific administrators to clients. This causes further frustration to clients as they are left to speak to someone who they have no personal relationship with and who has no (or only limited) first-hand knowledge of the client’s circumstances.

**Siobhan’s story: Impersonal and inconsistent decision-making**

VLA’s client, Siobhan (not her real name) said she was much happier with the old system, before State Trustees pooled their administrators. Siobhan, who has a mild intellectual disability, says she found it much easier speaking to one person instead of now just “speaking to anyone”. Siobhan finds it confusing as with the pooled administrator system they do not know anything about her and she has to continually re-tell her story.

Siobhan also receives different answers to her requests for funds, depending who answers her telephone call. For example, she wanted funding to get a tattoo for her birthday. In one telephone call she was told funding had been approved, and in a later telephone call with a different administrator, she was told the opposite and the money had not been approved.

Clients like Siobhan also tell us they have less understanding or control over how their money is budgeted because they no longer have an individual case manager at State Trustees. This can result in less meaningful consultation with, and participation by, the person in decisions that affect them. Jamie was also in this situation.

**Jamie’s story: Frustration at lack of individual case management**

Jamie lives on his own in regional Victoria. He loves playing cricket for the local cricket club and he also has an intellectual disability. Part of Jamie’s story is outlined above in part 5.

Jamie’s finances have been managed by State Trustees under an administration order for over a decade. Jamie used to have a case manager who managed his budget for him. They met on a regular basis and his case manager explained to Jamie what his money was being spent on, what bills were being paid and what he was saving.

Since State Trustees has moved to a system of pooled administrators Jamie no longer has one single person he can discuss his financial situation with. Jamie now does not feel he understands where his money is going and is confused by how State Trustees budget for him.

Apart from having less understanding about how his money is spent, Jamie also gets really frustrated that each time he calls State Trustees he speaks to someone who does not know him or his case. He must explain his situation to a new person each time he calls.

Jamie finds being an administration order a frustrating experience and would prefer to have management of his own funds. Previously his case manager regularly included him in discussions and if they refused a request for additional funds they explained why they made that decision. This made it much easier for Jamie to accept and understand and made Jamie feel he had some autonomy over his finances. The pooled administrators model means that the small amount of autonomy Jamie felt is now gone.

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| **Recommendation 4: Improving the responsiveness, appropriateness and accessibility of services**  To ensure that State Trustees improves the responsiveness, appropriateness and accessibility of services to represented persons, we recommend:   * State Trustees develops robust guidelines for communicating with and consulting the represented person in a timely way on all decisions. * State Trustees removes the ‘pooled’ system of administrators and reverts to a system where individual administrators are allocated to a represented person. * State Trustees ensures that phone calls and written communication and correspondence by or on behalf of the represented person are responded to in a timely way. This can be achieved by development and strict implementation of policies and prescribed timeframes. * State Trustees employs adequate numbers of skilled staff to respond in a timely manner to calls by the represented person. * State Trustees monitors staff caseload to ensure the administrator responsible knows the represented person’s circumstances and can offer meaningful opportunities to consult and participate in decisions. * State Trustees has regular in-person appointments with a represented person to discuss budget and finances – at least once per year. |

# Making VCAT and the review process a meaningful safeguard

As previously outlined, the appointment of an administrator has significant ramifications for a person’s autonomy and it is therefore imperative to have effective safeguards in relation to the making (and continuation) of orders as well as the exercise of powers by the administrator pursuant to such orders. Currently, VCAT is effectively the only accessible safeguard for represented persons against broad and prolonged loss of independence. However, we see through our work that this mechanism is not working as it should.

### Reassessments every three years is not best practice

The Act does not require administration orders to be time-limited – they are effectively indefinite orders. We often see clients who have been placed on an administration order in the context of an acute episode of mental illness, who are then maintained on the order for many years without any up-to-date evidence establishing that the criteria for an order continue to be met. In practice, once a person is made subject to an order, VCAT places an onus on the represented person to provide (usually expert, medical) evidence that the criteria no longer apply to them. This is, in effect, a reversal of the onus of proof required for the making of an order.

This is particularly problematic for people diagnosed with a condition that can fluctuate, like mental illness, whose circumstances may have changed markedly since the initial hearing. This undermines a safeguard that is critical to ensuring the order is still necessary. The lack of any need to re-establish the necessity of the order, combined with the current ability to make indefinite orders, also removes pressure from VCAT or any other oversight body to ‘check in’ regularly on State Trustees. In practice, administration orders are rarely reassessed more frequently than the statutorily required minimum three-year period and, as the case study of Paul’s in part 3 above demonstrates, VCAT is not a consistently effective oversight mechanism in practice at these reassessment hearings.

### Indefinite orders are not best practice or consistent with human rights principles

The Act is silent on consequences for VCAT’s failure to reassess an order within the three-year period. A similar scheme (including indefinite restrictive orders with tribunal review obligations under the previous *Mental Health Act 1986* (Vic)) in the context of mental health orders was the subject of detailed scrutiny in the case of *Kracke*,[[29]](#footnote-29) including in relation to whether that scheme was compatible with the human rights obligations under the Charter.

In that case, Justice Bell found that, notwithstanding the Tribunal’s review obligation in the legislation, Mr Kracke’s involuntary treatment order was not invalid. Critically, in this case, the order was valid because oversight of the tribunal was only one of a number of safeguards in the legislation, including regular review by Mr Kracke’s psychiatrist.

For administration orders however, there is no ‘psychiatrist’ equivalent to provide that safeguard.

Arguably, this places a greater onus on public authorities like State Trustees to take a more assertive role in ensuring orders are only continued where necessary and supporting a person at reassessments by VCAT.

We also note that, since the *Kracke* decision, the ability to make indefinite orders has been removed from the relevant mental health legislation.

### Participation of the (proposed) represented person at a hearing

The current Act provides no incentive for VCAT to prioritise the represented person’s participation in a hearing before a decision is made to restrict their decision-making autonomy. Unlike the Mental Health Tribunal for example, VCAT does not report on the attendance rates of represented persons at administration order hearings, or on the proportion of reassessment hearings that take place ‘on the papers’ without a hearing.[[30]](#footnote-30)

We come across many clients who were not present at the hearing at which the order was made, sometimes because they were detained in hospital for mental health treatment following an acute crisis. Many clients we assist are under the mistaken apprehension that an administration order cannot be made against them if they do not attend the hearing.

We note that a key priority in VCAT’s Accessibility Action Plan 2018-2022 relates to VCAT services and the community. The core objectives related to this priority include:

* + - “hearings are fully inclusive and accessible for people with disability” and
    - *“*promote the inclusion and participation at VCAT of people with disability.”[[31]](#footnote-31)

However, we are frequently instructed by clients (all of whom have been deemed to have a disability) that they were unable to participate in the VCAT hearing of the application or at subsequent reassessments, either because they were unaware of the hearing, they did not receive their notice with sufficient time, they couldn’t open the notice when it arrived, or they did not receive sufficient support to attend or otherwise participate in the hearing.

### VCAT process on a reassessment

Reassessments comprise the majority of cases before VCAT in the Guardianship List[[32]](#footnote-32) and our experience is that more needs to be done to improve the process at VCAT.

It is our understanding that VCAT considers it sufficient to send a proforma letter to the last known address of the represented person, but not to make any further inquiry. Unless a hearing is specifically requested, we understand that VCAT would often conduct a reassessment ‘on the papers’.

**Ahmed’s story: Order confirmed ‘on the papers’ without VCAT opening the file**

VLA represented Ahmed at a reassessment of his administration order which the client himself had requested. The Member adjourned the matter to deliberate as the issues were complex.

In the course of waiting for a decision on Ahmed’s proactive reassessment application, an ‘automatic’ (three-yearly) reassessment of the order took place ‘on the papers’ and the administration order was confirmed.

Assuming that VCAT had recorded or filed the proactive reassessment application material, VCAT’s conduct in this case suggests that the Member who conducted the ‘automatic’ reassessment on the papers had done so without looking at the file. Alternatively, it indicates that there is either (a) no rigorous process which accompanies automatic reassessment including checking any outstanding unresolved proactive reassessment hearings or (b) that the presence of an unresolved, complex reassessment application was not considered relevant to whether the order should be automatically confirmed without the appearance of the represented person.

We have also seen cases where clients’ administration orders have been reassessed and confirmed ‘on the papers’ despite an apparent lack of evidence that the criteria continue to apply. In other cases, orders are confirmed on the papers where there is medical or lay evidence before the Member that suggests the person may have regained their capacity. In either case, arguably, further inquiries should have been made to include the represented person and conduct a hearing to consider more closely if the criteria are met.

We welcome the inclusion of provisions in the new Bill which place a greater onus on VCAT to involve the person in a hearing (including being satisfied of certain matters before hearing an application in the person’s absence) and to take ‘reasonable steps’ to contact the person before a reassessment.[[33]](#footnote-33)

### Represented person seeking advice or other determination from VCAT

If a represented person is concerned that the administrator is acting beyond power, their only option currently is seeking judicial review in the Supreme Court (coupled with an urgent interlocutory injunction) which is very often prohibitively time-consuming, expensive and complex.

By contrast, the Act currently has provision for guardians and administrators to seek the advice of VCAT under s 55 as to the scope of the relevant order or the exercise of powers under the order.

Similarly, s 56, entitled ‘application… by a creditor [etc]’ enables a broad range of people[[34]](#footnote-34) to apply to VCAT ‘upon any matter arising out of the administration of the estate by the administrator’ and VCAT has broad discretion to make orders ‘as the circumstances of the case may require’.

It is unclear whether the represented person themselves can apply for advice or an order, as the case may be, under these provisions.

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| **Recommendation 5: Making VCAT and the review process a meaningful safeguard**  To make the Victorian Civil and Administrative Tribunal (**VCAT**) and the review process a meaningful safeguard and to encourage better practice by State Trustees, we recommend that:   * The Ombudsman investigates the most effective and accessible redress mechanisms for represented persons where State Trustees is not acting in their ‘best interests’. * VCAT adopt the following practices:   + Ordinarily making orders for a fixed duration of a maximum of three years, with an ability for the administrator to apply for a further order prior to expiry. In determining the order’s duration VCAT must consider the nature of the person’s disability (eg. whether fluctuating or degenerative) and the likelihood of the person regaining their capacity or their circumstances changing (eg. when an appointment is made for a person with a mental illness during an acute period of hospitalisation);   + If making an indefinite order, VCAT should exercise its discretion to nominate a date for reassessment in such a way that is consistent with human rights. For example, if a person is likely to regain decision-making capacity in a short period, then VCAT should consider a shorter reassessment period;   + At a reassessment VCAT should not continue an administration order unless satisfied on the evidence before it that the criteria continue to apply;   + VCAT and the Guardianship List Registry allow applications by the represented person themselves about the scope or powers under the administration order, or a matter arising out of the administration of the person’s affairs, pursuant to ss 55 or 56 of the *Guardianship and Administration Act 1986* (Vic) (**Act**) respectively; and   + VCAT and the Guardianship List Registry take steps to maximise the participation of (proposed) represented persons in hearings (whether an initial application, rehearing or reassessment), including measurable targets for participation rates, and reports on those rates. |

# Building a workforce and culture that can bring the principles and protections in the current and new Acts to life

We know from our work with clients around the 2014 reforms to the *Mental Health Act 2014* (Vic) that, even with progressive legislation focussed on safeguards, autonomy and promotion of a person’s rights, the reforms will not lead to substantive change in conduct if the actors or agencies with power under the law are not willing or equipped to comply with their obligations. Likewise, without effective accountability mechanisms for exercise of coercive or restrictive powers, there is little to guarantee that restrictions imposed are those which would least restrict people’s rights.

### Complying with existing principles and striving for evidence-based best practice

As our case studies throughout this report illustrate, there are concerns that the culture of State Trustees and the skills of its administrators do not promote consistency in consulting with the represented person, rigorously pursuing their rights and entitlements or supporting their autonomy and participation in decision-making.

As a public authority, State Trustees must do more to ensure its administrators have the skills and training to ensure the rights of represented persons are promoted and that, for each decision, their freedom of decision and action is restricted only to the extent necessary in the circumstances.

State Trustees must improve its workforce and culture to bring it in line with the Act. Failing to do so will mean it is not only breaching its obligations under the current Act, but also that it will be unable to meet the requirements proposed in the new Bill which reflect a stronger focus on the rights and dignity of people with disabilities.

### Existing standards must reflect human rights norms

State Trustees’ annual report[[35]](#footnote-35) states that it follows the Australian Guardianship and Administration Council National Standards for Financial Managers[[36]](#footnote-36) (**the Standards**). The Standards relate to providing the client with information, ensuring client views and involvement are taken into consideration and protecting and respecting the client’s legal rights. They are dated 2010 and, in our view, do not go far enough to provide sufficient guidance for State Trustees to meet their obligations even under the current Act.

There is no reporting on what measures State Trustees takes to ensure its personal financial administrators are in fact complying with the Standards and skilled in best-practice.

By contrast, the comparative standards for guardianship (the National Standards of Public Guardianship) are dated 2016 and, as we have outlined above, contain better rights protections.

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| **Recommendation 6: Building a workforce and culture that can bring the principles and protections in the current and new Acts to life**  In order to build a workforce and culture that can bring the principles and protections in the current Act and any new Acts to life, we recommend:   * Updated minimum standards for administrators that accurately reflect a rights-based approach to decision-making and training for all State Trustees staff to embed them in practice. * State Trustees adopts a policy that all administrators embed the principles of the Act into their day-to-day decision-making for represented persons, including:   + Regular and meaningful consultation with the represented person; and   + Giving effect to the represented person’s will and preferences and only overriding this where their views can’t be ascertained and where it is necessary to prevent serious harm to the person themselves. * These policies are updated if there are changes to the Act to bring them into line with newly applicable human rights norms. * State Trustees monitors its compliance with the standards, develops protocols for remedying breaches and undertakes regular reporting. |

1. For more information, please see our website: <https://www.legalaid.vic.gov.au/>. [↑](#footnote-ref-1)
2. Victoria Legal Aid, *Annual Report 2016-17*. [↑](#footnote-ref-2)
3. See Independent Mental Health Advocacy, *IMHA gives choice and dignity back to consumers – evaluation* (13 June 2018) (https://www.imha.vic.gov.au/about-us/news/imha-gives-choice-and-dignity-back-to-consumers-evaluation). [↑](#footnote-ref-3)
4. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13. [↑](#footnote-ref-4)
5. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8. [↑](#footnote-ref-5)
6. *Patrick’s Case* [2011] VSC 327. [↑](#footnote-ref-6)
7. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38. [↑](#footnote-ref-7)
8. *Patrick’s Case* [2011] VSC 327, [23]. [↑](#footnote-ref-8)
9. *Guardianship and Administration Act 1986* (Vic) s 4(2)(a), (b) and (c). [↑](#footnote-ref-9)
10. *Patrick’s Case* [2011] VSC 327, [18]. [↑](#footnote-ref-10)
11. *Guardianship and Administration Act 1986* (Vic) s 49. [↑](#footnote-ref-11)
12. See, eg, VLA’s submission to the VLRC Review of Guardianship Laws (2010) (<http://www.lawreform.vic.gov.au/sites/default/files/Submission_IP_43_Victoria_Legal_Aid_18-05-10.pdf>). [↑](#footnote-ref-12)
13. See State Trustees, *Annual Report 2008* 39 (https://www.statetrustees.com.au/wp-content/uploads/2015/05/102-AnnualRep2008.pdf). [↑](#footnote-ref-13)
14. See State Trustees, *Financial Independence Program* (<https://www.guardianship.org/IRL/Resources/Documents/state_tustees_program_17.pdf>) (**Financial Independence Program**). [↑](#footnote-ref-14)
15. State Trustees and State Government, *Looking out for your financial and legal affairs* (<https://www.statetrustees.com.au/wp-content/uploads/2017/12/State_Trustees_Financial__Legal_Affairs_Brochure_14122017.pdf>). [↑](#footnote-ref-15)
16. [Ibid.](https://www.statetrustees.com.au/wp-content/uploads/2017/12/State_Trustees_Financial__Legal_Affairs_Brochure_14122017.pdf) [↑](#footnote-ref-16)
17. See *National Standards of Public Guardianship 2016* (<https://www.publicadvocate.vic.gov.au/our-services/publications-forms/guardianship-a-administration/guardianship-1/357-national-standards-of-public-guardianship>). [↑](#footnote-ref-17)
18. Ibid 5. [↑](#footnote-ref-18)
19. See Financial Independence Program, above n 14. [↑](#footnote-ref-19)
20. *National Standards for Financial Managers* (2011) (<https://www.agac.org.au/images/stories/nat_stds_fin_mgrs.pdf>). [↑](#footnote-ref-20)
21. *Guardianship and Administration Act 1986* (Vic) s 58B. [↑](#footnote-ref-21)
22. See, eg, Victoria Legal Aid, *Vulnerable People and Fines* (2013) (<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-vulnerable-people-and-fines-position-paper.doc>). [↑](#footnote-ref-22)
23. Defined in section 3 of the *Infringements Act 2006* (Vic) as a mental or intellectual disability, disorder, disease or illness; a serious addiction to drugs, alcohol or a volatile substance; homelessness; or family violence which results in the person being unable to understand or control the offending conduct. [↑](#footnote-ref-23)
24. S Wei, Z, McDonald, HM and Coumarelos C, 2018, *Fines: are disadvantaged people at a disadvantage?*, Justice issues paper 27, Law and Justice Foundation of NSW, Sydney (http://www.lawfoundation.net.au/ljf/app/&id=D5D375991CE8E1B68525823A000641F4). [↑](#footnote-ref-24)
25. Ibid. [↑](#footnote-ref-25)
26. Judgment Debt Recovery Act *1984* (Vic) s 12. [↑](#footnote-ref-26)
27. *Mental Health Act 2014* (Vic) s 191. [↑](#footnote-ref-27)
28. *Mental Health Act 2014* (Vic) ss 68, 69, 71(3) and (4). [↑](#footnote-ref-28)
29. Kracke v *Mental Health Review Board & Ors* (General) [2009] VCAT 646. April 2009. [↑](#footnote-ref-29)
30. See Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017*; Mental Health Tribunal, *Annual Report 2017* 29 [↑](#footnote-ref-30)
31. Victorian Civil and Administrative Tribunal, *Accessibility Action Plan 2018-2022* (<https://www.vcat.vic.gov.au/sites/default/files/resources/VCAT-Accessibility-Action-Plan-2018-2022.pdf>). [↑](#footnote-ref-31)
32. Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017* 49 indicates that, of the 13,896 cases that originated regarding making or reassessing guardianship or administration orders, over half (7,177) involved reassessments(<https://www.vcat.vic.gov.au/sites/default/files/resources/annual-report-2016-17.pdf>). [↑](#footnote-ref-32)
33. Guardianship and Administration Bill 2018 (Vic) cls 29 and 165(2)(a). [↑](#footnote-ref-33)
34. Including ‘any person interested as a creditor, beneficiary, next of kin, guardian, nearest relative, primary care or the Public Advocate or otherwise in any estate administered by an administrator’. [↑](#footnote-ref-34)
35. State Trustees, *Annual Report 2017: People Protecting People* (<https://www.statetrustees.com.au/wp-content/uploads/2015/03/State-Trustees-Limited-Annual-Report-2017-2209.pdf>) 34. [↑](#footnote-ref-35)
36. *National Standards for Financial Managers*, above n 20. [↑](#footnote-ref-36)