Chapter 19
Merits review

CONTENTS
Introduction 428
Current law 428
Other jurisdictions 428
Community responses 430
The Commission’s views and conclusions 432
Chapter 19

Merits review

INTRODUCTION

19.1 This chapter considers the Commission’s proposal that new guardianship legislation include a right to review the merits of individual guardianship and administration decisions made by the Public Advocate and professional financial administrators. The terms of reference directed the Commission to consider means of reviewing decisions by guardians and administrators.

CURRENT LAW

19.2 The Guardianship and Administration Act 1986 (Vic) (G&A Act) does not currently allow for merits review of individual decisions of guardians and administrators. In other words, it is impossible for a represented person, or any other interested person, to challenge the merits of an individual decision by a guardian or an administrator in a court or tribunal if they believe the decision is wrong.

19.3 It is possible to mount indirect challenges to the merits of an individual decision. Guardianship and administration orders can be reassessed on the Victorian Civil and Administrative Tribunal (VCAT)’s initiative or ‘upon the application of any person’.1 Guardians and administrators may seek advice from VCAT about the exercise of their powers.2 In addition, VCAT may on its own initiative direct or give an advisory opinion to an administrator concerning any matter.3 Certain interested people can also apply to VCAT in relation to any matter arising out of the administration, and VCAT has the power to make ‘such order in relation to the application as the circumstances of the case may require’.4

19.4 A person with a ‘special interest’ in the affairs of a patient may also apply to VCAT for review of a matter relating to medical or dental treatment for a patient who cannot consent.5 This might include review of a medical or dental decision made by a guardian, enduring guardian, medical agent or another ‘person responsible’ under guardianship laws. We discuss medical and dental treatment for people who are unable to consent in more detail in Chapter 13.

19.5 Where the Public Advocate or State Trustees is appointed as a guardian or administrator, there are some existing options available for complaints to be made. Both of these bodies have internal complaints processes that allow for internal review of decisions they make.6 It is also possible for a complaint to be made to the Victorian Ombudsman about either of these bodies. The Ombudsman has advised the Commission that in 2010, he received 47 complaints in relation to the Public Advocate and 230 complaints in relation to State Trustees.7

OTHER JURISDICTIONS

NEW SOUTH WALES

19.6 New South Wales is the only Australian jurisdiction that allows merits review of individual decisions of some guardians and administrators. Since 2003, the New South Wales Administrative Decisions Tribunal (ADT) has had jurisdiction to review guardianship decisions made by the New South Wales Public Guardian (similar to the Victorian Public Advocate), and financial management decisions made by the New

---

1 Guardianship and Administration Act (Vic) s 61(3).
2 Ibid s 30, 55(1)-(4). The person responsible may also seek advice from VCAT: at ss 42I, 42W.
3 Guardianship and Administration Act (Vic) s 55(4A).
4 Ibid s 56. People who can seek application are any person interested as a creditor, beneficiary, next of kin, guardian, nearest relative, primary carer, the Public Advocate or any person interested in any estate administered by an administrator.
5 Guardianship and Administration Act (Vic) s 42(10).
7 Submission CP 15 (Ombudsman Victoria).
South Wales Trustee and Guardian (which has a broadly similar role to State Trustees in relation to administration). The ADT has a specialised ‘Guardianship and Protected Estates List’ that conducts the reviews. However, the ADT is unable to review decisions of private guardians and financial managers. The ADT is separate to the New South Wales Guardianship Tribunal. The Guardianship Tribunal is the New South Wales equivalent of VCAT’s Guardianship List.

19.7 All decisions made by the Public Guardian ‘in connection with the exercise of the Public Guardian’s functions’ are reviewable. Review of a Public Guardian’s decision can be sought by the person to whom the decision relates, their spouse, their carer, or any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.

19.8 In relation to financial management (the New South Wales equivalent of administration), review may be sought for all decisions made by the New South Wales Trustee and Guardian about the management of a represented person’s estate.

19.9 Review of financial management decisions may be sought by:
- the represented person about whose estate the decision was made
- their spouse, or
- any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.

19.10 ADT review is usually available only after internal review with the New South Wales Public Guardian or the New South Wales Trustee and Guardian has been sought and finalised.

19.11 The ADT is required ‘to decide what the correct and preferable decision is having regard to the material then before it’. The ADT has the power to:
- affirm the decision
- vary the decision completely or in part
- substitute a new decision for the original decision, or
- order the Public Guardian or the New South Wales Trustee and Guardian to reconsider the decision with directions or recommendations.

19.12 In 2008–09, there were eight review applications lodged in relation to decisions of the Public Guardian, and nine review applications lodged in relation to decisions of the Office of the Protective Commissioner (as the New South Wales Trustee and Guardian was then known). In 2009–10 there were only 10 review applications lodged in total.

19.13 These review applications have produced a useful body of case law about the operations of the New South Wales legislation. These decisions are available to the public on the ADT’s website and Austlii.

---

8 Guardianship and Protected Estates Legislation Amendment Act 2002 (NSW).
9 Guardianship Act 1987 (NSW) s 80A(1); Guardianship Regulations 2010 (NSW) s 17.
10 Guardianship Act 1987 (NSW) s 80A(2).
11 NSW Trustee and Guardian Act 2009 (NSW) s 62(1); NSW Trustee and Guardian Regulations 2008 (NSW) s 43. The powers of the NSW Trustee and Guardian in relation to the estates of managed people committed to its management are outlined in ss 56–61 of the NSW Trustee and Guardian Act 2009 (NSW).
12 NSW Trustee and Guardian Act 2009 (NSW) s 62(3).
14 Ibid s 63(1).
15 Ibid s 63(3).
Merits review

QUEENSLAND

19.14 The Queensland Law Reform Commission (QLRC) recently recommended that decisions of the Queensland Adult Guardian (which has a similar role to the Victorian Public Advocate) and the Public Trustee of Queensland (which has a broadly similar role to State Trustees) should be reviewable by the Queensland Civil and Administrative Tribunal as part of its merits review jurisdiction. The Queensland Government’s initial response to the recommendations has been to reject this proposal, preferring instead to look at improving the current review and accountability mechanisms such as the ability of the Queensland Civil and Administrative Tribunal to give directions or advice to substitute decision-makers; and ability to review appointments.

19.15 We discuss some of the QLRC’s recommendations in more detail later in this chapter.

NEW ZEALAND

19.16 New Zealand has a system of merits review in its Protection of Personal and Property Rights Act 1988 (NZ), which applies to any person acting as ‘welfare guardian’ or ‘property manager’.

COMMUNITY RESPONSES

19.17 In the consultation paper, the Commission identified three options for consideration in relation to merits review of individual decisions by guardians and administrators. The first was to leave the current law unchanged and not allow any form of merits review. The second option, which the Commission preferred, was to permit review of the decisions of the Public Advocate and State Trustees. The final proposal was allowing merits review of the decisions of all guardians and administrators.

19.18 The Commission also asked a range of detailed questions about aspects of the merits review proposal. We sought community views about:

• who should be able to apply for such review
• what should constitute a ‘reviewable decision’
• whether extra procedural requirements are necessary to dismiss trivial, vexatious or repeated applications
• whether administrators’ decisions should be treated differently to decisions of guardians
• which body should conduct merits review.

INTRODUCTION OF MERITS REVIEW

19.19 There was broad community support for merits review of decisions by guardians and administrators. As the submission by Victoria Legal Aid noted:

In VLA’s experience, people are often not so much perturbed by the appointment of a guardian and/or administrator to assist them, but feel the particular decisions being made by that guardian and/or administrator are not appropriate decisions, and would like an independent, impartial review of the decision making process to have their views properly aired and considered in the process. This may not result

---

21 Protection of Personal and Property Rights Act 1988 (NZ) s 89.
in a change of the original decision, but allows for a fair and proper process in relation to decisions that can substantially affect an individual’s life. It also provides an additional layer of scrutiny to minimise the chances of a decision maker acting outside the decision making principles.23

19.20 However, most responses disagreed with the proposal that only decisions of the Public Advocate and State Trustees be reviewable, arguing that review should also extend to the decisions of private guardians and administrators.24

19.21 The Public Advocate supported merits review of both its own decisions and the decisions of State Trustees ‘once internal complaints processes have been completed’.25 The Public Advocate also favoured extending merits review to the decisions of private guardians and administrators.26

19.22 Neither State Trustees nor the Catholic Archdiocese of Melbourne favoured introducing merits review. The Archdiocese regarded the current system of review of guardian or administrator appointments as one that both permits challenges based on the person’s ‘best interests’ and is less onerous than merits review of individual decisions.27 The Archdiocese emphasised that new accountability mechanisms should not be so onerous that individuals are discouraged from acting as guardians or administrators.28

19.23 State Trustees repeated the concerns it expressed in the first round of consultations that ‘[a]part from potential added expense and delay in an administration, a key concern is the creation of uncertainty for third parties in their financial dealings with the administrator’.29 State Trustees added that any merits review should:

- apply to all administrators (but not personally appointed attorneys)
- not encompass decisions that affect the legal position of third parties
- be linked to a monetary threshold, below which there should be no review.30

FORUM FOR MERITS REVIEW

19.24 VCAT was widely considered the appropriate forum for conducting merits review.31 Submissions favoured reviews by either the Guardianship List itself,32 or a specialised guardianship review list within VCAT.33

REVIEW OF BOTH GUARDIANSHIP AND ADMINISTRATION DECISIONS

19.25 There was support for the proposal that it should be possible to seek merits review of administration as well as guardianship decisions.34 While supportive of merits review of Public Advocate decisions, VCAT indicated that it had some concerns about review of State Trustees decisions because of the potential for review to undermine third party certainty and of the danger of raising expectations that all decisions can be undone.35

23 Submission CP 73 (Victoria Legal Aid).
24 For eg., Submissions CP 21 (Action for More Independence & Dignity in Accommodation), CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).
25 Submission CP 19 (Office of the Public Advocate).
26 Ibid.
27 Submission CP 27 (Catholic Archdiocese of Melbourne).
28 Submission CP 27 (Catholic Archdiocese of Melbourne).
29 Submission CP 70 (State Trustees Limited).
30 Ibid.
31 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer’s Australia Vic), CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 73 (Victoria Legal Aid).
32 Submissions CP 19 (Office of the Public Advocate) and CP 22 (Alzheimer’s Australia Vic).
33 Submissions CP 29 (STAR Victoria), CP 35 (Ursula Smith) and CP 71 (Seniors Rights Victoria).
34 Submissions CP 29 (STAR Victoria), CP 35 (Ursula Smith), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).
35 Submission CP 80 (Victorian Civil and Administrative Tribunal).
Merits review

TRIVIAL AND VEXATION APPLICATIONS FOR REVIEW

19.26 Victoria Legal Aid and the Federation of Community Legal Centres did not believe that VCAT requires additional powers beyond those already contained in the Victorian Civil and Administrative Tribunal Act 1998 (Vic) to respond to applications that are trivial or vexatious.36 Victoria Legal Aid recommended, however, that VCAT provide written reasons for dismissing applications, to avoid worsening an applicant’s ‘grievance’, given the generally low level of understanding by most parties of the role of VCAT and the Public Advocate.37

REQUIREMENT OF INTERNAL REVIEW AS A FIRST STEP

19.27 The Law Institute of Victoria and State Trustees argued that, if merits review is introduced, there should be a requirement that internal review processes must be exhausted first.38 Seniors Rights Victoria noted that, as in New South Wales, the requirement for internal review before making an application to the tribunal is likely to result in VCAT undertaking only a few merits review cases.39

NEW SOUTH WALES EXPERIENCE OF MERITS REVIEW

19.28 The Commission has consulted with key New South Wales organisations affected by the right to seek merits review of decisions of the Public Guardian and the New South Wales Trustee and Guardian. The Public Guardian stated that merits review has been constructive and has led to greater transparency in decision making.40 The New South Wales Trustee and Guardian also supported merits review of its decisions, arguing that the process works well, is accessible to its client base, and contributes to greater oversight and discipline in decision making.41 The New South Wales Guardianship Tribunal has also indicated its support for merits review of the decisions of guardians and administrators.42

THE COMMISSION’S VIEWS AND CONCLUSIONS

A RIGHT TO MERITS REVIEW

19.29 Merits review of decisions of public officials by specialist tribunals has been a right available to Australians for many years.43 Almost every Australian jurisdiction now has a ‘generalist’ tribunal that is able to review numerous decisions of public officials on their merits.44

19.30 As the former President of the Commonwealth Administrative Appeals Tribunal said, ‘[t]he notion that administrative decisions affecting people’s interests should, in general, be subject to external merits review is now accepted’.45 This is also the view of the Administrative Review Council in its report, What Decisions Should be Subject to Merit Review?.46 The trend in Australia has been to extend the number and range of decisions to which merits review can apply47 and, while generally merits review applies

---

36 Submissions CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)). The relevant powers are in section 75 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic).
37 Submissions CP 73 (Victoria Legal Aid).
38 Submission CP 77 (Law Institute of Victoria); State Trustees, Further Technical Comments to VLRC Guardianship Review (31 October 2011) 5.
39 Submission CP 71 (Seniors Rights Victoria).
40 Consultation with Graeme Smith—Public Guardian, New South Wales (16 March 2011).
41 Submission CP 79 (NSW Trustee and Guardian).
42 Submission IP 32 (NSW Guardianship Tribunal).
to decisions of public officials within bureaucracies, it can apply to other bodies that perform ‘public’ functions.48

19.31 As Robin Creyke points out, ‘merits review is simpler, cheaper and faster than going to court and is generally what people want’.49 Another advantage is that because it makes officials more aware of the legal rules they must apply, they tend to make better and more consistent decisions.50 Merits review also enhances the accountability of public bodies to those people affected by their decisions.51

19.32 The Administrative Review Council, in highlighting the central purpose of merits review as being to reach ‘correct and preferable decisions’, wrote that this also means that all persons who might benefit from merits review are informed of their right to seek review and are in a position to exercise those rights, and that the overall quality of agency decision making is improved. This overall objective therefore incorporates elements of fairness, accessibility, timeliness andiformality of decision making, and requires effective mechanisms for ensuring that the effect of tribunal decisions is fed back into agency decision-making processes.52

19.33 The Administrative Review Council was of the view that the federal system of merits review had met these goals well in some respects but not in others. The Commission believes that these objectives are particularly important in the context of guardianship and administration in Victoria, where agency decisions affect the lives of a large number of vulnerable individuals in very significant ways.

19.34 The Commission believes that new guardianship legislation should contain a right to review the merits of decisions made by the Public Advocate and State Trustees when they are acting in the capacity of a personal guardian or financial administrator for a person who is unable to make their own decisions. The Commission also believes that it should be possible to review the merits of decisions made by any other financial administrator who receives payment for their services. We discuss the reasons why merits review should be limited to decisions made in these circumstances below.

RECOMMENDATIONS

A right to merits review

315. It should be possible to apply to VCAT for review of a decision of the Public Advocate when acting as the personal guardian or health decision maker of a person.

316. It should be possible to apply to VCAT for review of a decision of State Trustees, or any other person or organisation receiving remuneration for this role, when acting as the financial administrator of a person.

317. A ‘decision’ is reviewable if it is one made in connection with the powers and responsibilities of the Public Advocate, State Trustees or any other person or organisation receiving remuneration for this role pursuant to new guardianship legislation and the decision is final or operative and determinative of a matter requiring resolution by the substitute decision maker.

48 Thus, discussing the jurisdiction of the AAT, Justice Deidre O’Connor wrote in 2000 that ‘a range of companies have been authorised under the Air Navigation Regulations 1947 to make decisions in relation to the issue of security identification cards for use in airports. Decisions made by these issuing bodies are subject to merits review’: ‘Lessons from the Past/Challenges for the Future’, above n 45.


50 The Honourable Justice Deidre O’Connor, above n 45.

51 Ibid.

52 Robin Creyke, above n 43, 16–17.

53 In Chapter 5, the Commission recommends replacing the term ‘guardian’ with ‘personal guardian’ and the term ‘administrator’ with ‘financial administrator’.
Chapter 19

Merits review

STANDING TO SEEK REVIEW
19.35 The Commission believes that there should be a broad standing provision that the represented person and anybody else who, in the opinion of the tribunal, has a special interest in the affairs of that person should have a right to seek merits review of a decision made by the Public Advocate or State Trustees.

RECOMMENDATION

Standing to seek review

318. Standing to seek merits review of any relevant decision made by the Public Advocate or State Trustees or any other professional financial administrator should be available to the represented person and to any other person who satisfies VCAT that they have a special interest in the affairs of the represented person.

REVIEWABLE DECISIONS

19.36 New guardianship legislation should follow the approach taken in New South Wales and provide that a ‘decision’ is reviewable if it is one made ‘in connection’ with the powers and responsibilities of the Public Advocate or State Trustees (or other remunerated administrators) as substitute decision makers.54

19.37 In the High Court case of Australian Broadcasting Tribunal v Bond, Chief Justice Mason held that the legal meaning of a ‘decision’ for the purposes of a review will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.55

19.38 This means that anticipated decisions, or decisions that are ‘steps along the way’ prior to a final decision, would not be reviewable. An example of a decision that is not ‘final and operative or determinative’ would be an administrator agreeing to settle legal proceedings on behalf of a client in circumstances where the final terms of the settlement must be approved by a court.56

Personal and financial decisions should be equally reviewable

19.39 The Commission does not think that new guardianship legislation should treat financial and property decisions by remunerated administrators any differently to guardianship decisions made by the Public Advocate for the purposes of merits review.

19.40 We address concerns that merits review of the decisions of State Trustees and other professional financial administrators might adversely affect the legal and financial position of third parties below.

---

54 Guardianship Act 1987 (NSW) s 80A(1)(a).
55 Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, 337.
56 See eg, JX v Protective Commission [2004] NSWADT 20, [38] where the NSW Administrative Decisions Tribunal held that the decision of a judge to approve the settlement terms of litigation, rather than the decision of the administrator to approve those terms, was the ‘decision’.
Outcome of merits review

19.41 The Commission recommends that in all cases involving merits review of decisions by substitute decision makers, VCAT must decide the correct or preferable decision in the circumstances, having regard to both the material before it and the applicable law at the time of the decision.57

19.42 Inevitably, in some cases it will be very difficult, or impossible, to set aside a decision that has already been made and substitute it with another decision because the rights of innocent third parties would be irreparably damaged or because of sheer inability to ‘turn back the clock’. The Commission recommends that to avoid doubt about the reach of its powers, VCAT should be required to consider the impact that any decision may have on the legal rights or financial interests of third parties when determining the correct or preferable decision in the circumstances of the case before it.

RECOMMENDATION

Outcome of merits review

319. When reviewing a relevant decision of the Public Advocate, State Trustees and any other financial administrator whose decisions are subject to merits review, VCAT must decide what is the correct or preferable decision in the circumstances having regard to the material then before it and after applying the law that is applicable at the time of this decision. VCAT must seek to consider the impact that any decision may have on the legal rights or financial interests of third parties when determining the correct or preferable decision in the circumstances of the case before it.

INTERNAL REVIEW SHOULD BE REQUIRED FIRST

19.43 The Commission proposes that applicants must seek internal review of the contested decision before making an application to VCAT. A requirement to seek internal review within the Public Advocate and State Trustees (and the offices of remunerated administrators) should address concerns about an excessive number of merits review applications coming before VCAT. It would also promote the development of internal processes within these organisations that seek to encourage high quality and consistent decision making.

19.44 Some may regard the requirement for internal review before merits review as unfair. The Commission notes that a different and more senior person to the original decision maker would undertake the internal review, which should overcome some of the concerns of the person seeking review.

57 While the words ‘correct or preferable’ are not found in the Administrative Appeals Tribunal Act 1975 (Cth), courts have held that, when reviewing a decision, a tribunal must decide ‘the correct or preferable one on the material before the Tribunal’: Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409, 419. Section 63 of the Administrative Decisions Tribunal Act 1997 (NSW) uses the term ‘correct and preferable’. Courts and tribunals at the Commonwealth level do not use the term ‘correct or preferable’ consistently and some prefer the wording in the NSW provision. Creyke and McMillan seem to favour ‘correct or preferable’ and argue that the ruling in Drake means that [i]n some instances only one decision is open on the facts or the law: in such a case the tribunal decides if the correct decision was made. In other instances there is a discretion—a choice open to the decision maker—as to which decision to make: there it is for the tribunal to decide which is the preferable decision’: Creyke and McMillan, Control of Government Action, above n 44, 141. Where there exists the same discretion mentioned by Creyke and McMillan under the ‘correct and preferable’ phraseology, ‘the role of the tribunal is to determine which decision is the preferable decision and so the correct and preferable decision’: Re De Brett Investments Pty Ltd and Australian Fisheries Management Authority and 4 Seas Pty Ltd (part joined) (2004) 82 ALD 163, 121.
19.45 There are other important policy reasons that favour requiring a person to seek internal review of a contested decision by a substitute decision maker before being able to apply to VCAT for review of the merits of that decision. First, individuals are part of a broader system that must meet the needs of many people. Internal review has the advantage of improving future decision making for everyone and means there is less need to invoke tribunal processes. Secondly, internal review does not disadvantage an applicant financially because the process is free. Finally, as in New South Wales, internal reviews should be completed within a reasonable period\(^{58}\) and VCAT should have the power to review a decision in the absence of internal review in exceptional circumstances.\(^{59}\)

**RECOMMENDATION**

Internal review should be required first

320. Where a person seeks merits review of a relevant decision by the Public Advocate or State Trustees, that person should be required to seek internal review of that decision before making an application to VCAT for review of the matter, unless VCAT decides that an urgent review is necessary to protect the represented person’s interests.

**MERITS REVIEW SHOULD BE CONDUCTED BY A SPECIAL LIST OF VCAT**

19.46 The Commission believes that a specialist list within VCAT is the most appropriate forum in which to review the merits of individual decisions of the Public Advocate and remunerated financial administrators. The creation of a new list should ensure some separation from the VCAT members in the Guardianship List who appoint guardians and administrators.

**DECISIONS OF PRIVATE PERSONAL GUARDIANS AND FINANCIAL ADMINISTRATORS**

19.47 The Commission acknowledges that many people and organisations suggested that it should be possible to review the merits of the decisions of all guardians and administrators. The Commission does not support this step.

19.48 The Commission remains of the view, expressed in the consultation paper, that the New South Wales model—which limits the availability of review to the two major publicly funded substitute decision-making bodies—is appropriate for adoption in Victoria. As many Victorians have their estates managed by professional administrators other than State Trustees, the Commission believes it is appropriate to extend the availability of merits review to all administrators acting on a remunerated basis in this ‘public’ role. This proposal would include FTL Judge and Papaleo Pty Ltd, the trustee companies, and other professionals who accept appointments on a remunerated basis, within the scope of merits review.

19.49 The Commission believes this approach strikes the right balance between several competing considerations. It ensures that individuals who have a guardian or administrator of last resort enjoy a right to merits review. It also does not overly intrude into the private sphere, given that most private guardians and administrators are likely to have a personal connection with those that they represent.

---

\(^{58}\) Administrative Decisions Tribunal Act 1998 (NSW) s 53(6).

\(^{59}\) ibid s 55(3).
While the G&A Act does not describe State Trustees as the administrator of last resort, it fulfils this practical role together with FTL Judge and Papaleo Pty Ltd. These two organisations frequently provide services for individuals who are solely dependent on government benefits and who do not have appropriate people in their lives to act as private administrators. Thus, in many cases a represented person has no option but to have their financial affairs managed by State Trustees or other professional administrators. It is because there is often no alternative to the appointment of a professional guardian or administrator that the Commission feels that the need for merits review of these appointments is particularly compelling.

Furthermore, while it is sound practice for statutory authorities and state corporations to have processes for reviewing their own decisions in an effort to be responsive and improve accountability, there are problems in having private personal guardians and financial administrators respond to merits review. Private appointees undertake their role on a voluntary basis and are likely to find the tribunal merits review process far more burdensome than professional guardians and administrators, who are remunerated for their services and generally have internal systems in place for reviewing complaints internally. This is particularly the case when those challenging their decisions may not be the represented person but a third party who can demonstrate a relevant interest. Extending merits review to the decisions of private personal guardians and financial administrators would probably discourage a reasonable number of people from accepting appointment to this challenging and unpaid role.

Merits review of decisions of private personal guardians and financial administrators would also not provide the ‘systemic’ benefits for decision making that both the New South Wales Public Guardian and New South Wales Trustee and Guardian have argued that merits review has brought to their organisations. The Commission believes that a better way to improve decision making by private personal guardians and financial administrators is through appropriate support and education. We discuss this in Chapter 5.

It is open to Parliament to extend merits review to private guardians and administrators at some time in the future. Once the system of merits review of decisions of the Public Advocate and remunerated administrators has been operating for some time, policy makers may regard it as a useful means of improving the quality of all substitute decision making. The Commission urges the Public Advocate, State Trustees and VCAT to keep this matter under active review and to advise the Attorney-General if they see benefit in extending the merits review jurisdiction to the decisions of all personal guardians and financial administrators.

THE PUBLIC ADVOCATE AS HEALTH DECISION MAKER

The Commission believes that it should be possible to seek merits review of individual decisions of the Public Advocate, not only when she is acting as a personal guardian but also in her proposed role as a health decision maker of last resort.

---

60 See Guardianship and Administration Act 1986 (Vic) s 47. This is in contrast to section 23(4) which does prescribe the Public Advocate as guardian of last resort if no other suitable person is available.

61 A large number of State Trustees clients have a very limited income, and its administration services for these people are subsidised by the Minister for Community Services as part of the Minister’s obligations under part 4 of the State Trustees (State Owned Company) Act 1994 (Vic). Of the 10,197 clients State Trustees provided administration services to during 2009–10, 8978 received a component of subsidy under this agreement. This figure includes represented persons whose order was revoked, or for whom a new administrator was appointed, or who died prior to the end of the financial year; email from State Trustees to Victorian Law Reform Commission, 4 November 2010, 4.

62 Consultation with Graeme Smith—Public Guardian, New South Wales (16 March 2011); Submission CP 79 (NSW Trustee and Guardian).
19.55 At present, any person with a ‘special interest’ in the affairs of a patient who is unable to consent to medical treatment can apply to VCAT for review of any matter arising from this treatment. VCAT has broad powers to make orders in relation to such applications. The Commission believes this power should continue, and that it should also be possible for a person with a ‘special interest’ to seek merits review of medical or dental treatment decisions made by the Public Advocate.

19.56 In many cases, there may be no opportunity for review where the Public Advocate makes a decision and a medical practitioner performs the treatment in a short space of time. However, for many significant treatments that are not emergencies, there will be time for the Public Advocate to review a decision internally and to apply to VCAT if the internal review is unsatisfactory. Given the serious nature of many treatment decisions for the represented person, merits review (preceded by internal review) will enhance accountability and thus contribute to higher quality decisions.

19.57 The Commission is mindful that individuals with a health decision maker who is not the Public Advocate will not have the same right to merits review of individual treatment decisions. However, we believe that this distinction is justifiable for the same reasons we recommend against permitting merits review of decisions of private personal guardians and financial administrators—the Public Advocate will be the health decision maker of last resort and she is a public official who should be subject to external review.

**IMPACT OF MERITS REVIEW ON THIRD PARTIES**

19.58 It is important to consider whether permitting merits review of the decisions of State Trustees and other professional financial administrators might adversely affect the legal and financial position of third parties who enter into transactions with those organisations or represented people.

19.59 While State Trustees expressed significant concerns that third parties will be reluctant to deal with administrators, or deal with them on financial terms detrimental to the represented person because of the potential uncertainty caused by merits review, the Commission is not convinced that concern is likely to be realised. The experience of review of New South Wales Trustee and Guardian decisions suggests that it is possible for a tribunal to consider the impact of its decisions on affected third parties and represented persons. The Commission has not been alerted to any New South Wales cases where an ADT review of an earlier decision by the New South Wales Trustee and Guardian has adversely affected the interests of a third party or the represented person. Indeed, the New South Wales experience suggests that the prerequisite of internal review prior to an application for merits review provides further oversight and consistency within the office of the New South Wales State Trustee and Guardian. This is probably one of the reasons why there have been very few applications for ADT review.

---

63 Guardianship and Administration Act 1986 (Vic) s 42N.
64 Submission CP 79 (NSW Trustee and Guardian).
65 After making its own enquiries with the NSW Trustee and Guardian, State Trustees advised the Commission that over the past three years there have been 148 internal reviews of decisions made by the NSW Trustee and Guardian and 90 review applications to the Administrative Decisions Tribunal: State Trustees, Further technical comments to VLRC Guardianship review (31 October 2011) 5. While not insignificant, the Commission does not consider these numbers to be alarming given that the NSW Trustee and Guardian acts as financial manager for approximately 9000 clients over this period (which is a comparable number of clients to State Trustees): see NSW Trustee and Guardian, Annual Report 2010–11 (2011) 10.
19.60 Merits review has operated successfully in New South Wales. There is nothing distinguishing the two jurisdictions when considering whether concern about permitting merits review of decisions by the Public Advocate and professional administrators is warranted. Introducing merits review in Victoria will help ensure that professional guardians and administrators are accountable and make high quality decisions.

19.61 Finally, concerns about third party rights can be ameliorated by the inclusion of an express provision that directs VCAT to consider the impact that any decision may have on the legal rights or financial interests of third parties when determining the correct or preferable decision in the circumstances of the case before it.

**PROCEDURAL MATTERS**

19.62 The Commission believes that the procedural provisions in sections 45–50 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) should apply when decisions of the Public Advocate and professional administrators are reviewed. Section 50 of the Act provides that an application for a review does not stay the decision—or the implementation of a decision—for which an applicant seeks review, unless VCAT so orders.

19.63 Pursuant to section 46 of the Act, a decision maker must provide a person who is entitled to a review of a decision with written reasons for a decision ‘as soon as practicable but no later than 28 days’ after receiving the request. VCAT’s review jurisdiction under section 48 is established ‘under an enabling enactment’ (that is, separate legislation) and does not provide that an applicant must be notified of their right to a review. New guardianship legislation should provide that a decision maker must inform the represented person (or other person with a special interest in their affairs) of their right to seek internal review, and later VCAT review, of a decision if they so wish.

19.64 In its recent review of Queensland’s guardianship laws, the QLRC considered the provision in the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) that requires a decision maker to notify a person in writing of a decision and their review rights. The QLRC proposed that the Adult Guardian and Public Trustee be exempted from such a requirement because of the ‘ongoing decision-making role’ of both agencies and the fact that it would not be feasible to notify all of those people who might be entitled to notice of their review rights.

19.65 The *Administrative Decisions Tribunal Act 1997* (NSW) says that administrators must ‘take such steps as are reasonable in the circumstances’ to provide reasons for decisions and explain the represented person’s entitlement to review in writing. Administrators are relieved from this requirement in certain circumstances. The Act also provides that an interested person can request reasons for the decision and that these should be produced ‘as soon as practicable’ and no later than 28 days after the request.

---

66 Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 157.
68 *Administrative Decisions Tribunal Act 1997* (NSW) s 48(1).
69 See ibid s 48(2).
70 ibid s 49(2).
19.66 The Commission agrees that it may be difficult for the Public Advocate and professional administrators to provide written notification to the represented person, and others with a special interest in their affairs, regarding their entitlement to a review following each decision. However, notice of the decision and an individual’s review rights is clearly necessary in some form; without it, the right to review would be illusory. In their submission, the New South Wales Trustee and Guardian suggested that they provide reasons for each decision to their clients in writing. Their submission did not question this requirement.

19.67 The Commission recommends that Victoria follow the New South Wales approach that splits the requirement to provide written notification of the decision and the individual’s review rights from a request for fuller reasons.

RECOMMENDATIONS

Procedural matters

321. When reviewing a relevant decision of the Public Advocate, State Trustees or any other financial administrator whose decisions are subject to merits review, the tribunal should have the powers set out in sections 45–50 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic).

322. When reviewing a relevant decision of the Public Advocate, State Trustees or any other financial administrator whose decisions are subject to merits review, the tribunal should have the powers set out in section 51 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic).

71 Submission CP 79 (NSW Trustee and Guardian).