

© in compilation Australian Institute of Criminology 1996
© in text Marion Champion

The contents of this file are copyright. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the *Copyright Act 1968* (Cwlth), no part of this file may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise), be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publisher, the Australian Institute of Criminology, GPO Box 2944, Canberra ACT 2601.

Crime and Older People, ISBN 0 642 22739 X

Advocacy, Guardianship and Administration in Victoria

[Unedited. Paper as presented at Conference of 23-25 February 1993]

Marion Champion
Systemic Advocate
Office of the Public Advocate
Victoria

The Guardianship and Administration Board Act 1986 (Victoria) established the Office of the Public Advocate (OPA) and the Guardianship and Administration Board (GAB) to provide new opportunities and greater protection for people with disabilities.

OPA advocates for frail older people in situations where they face exploitation, abuse or neglect. OPA takes up both individual and systemic advocacy through case work, education and research, community visitors programs, and an advice and enquiry service. OPA also investigates complex applications to the Guardianship and Administration Board and may be appointed guardian by the board.

GAB can appoint a guardian or administrator for an older person who no longer has the capacity to make reasonable judgments about lifestyle or financial matters. The guardian or administrator can respond appropriately to a situation involving maltreatment or neglect. The GAB can also make a special protective order if a person is being unlawfully

detained or revoke a medical or financial Enduring Power of Attorney which is not being used in a person's best interest.

Advocacy, guardianship and administration as they operate in Victoria can be effective responses to the maltreatment and neglect of older people. However the challenge is to respond to abusive situations not in a centralist or sensational way, but through the effective and sensitive response of local support services.

The experience in Victoria is that the *Guardianship and Administration Board Act 1986* (the Act) has provided new opportunities and greater protection against abuse and exploitation for frail older people and other people with a disability. The Act established two separate but related statutory bodies - the Office of the Public Advocate and the Guardianship and Administration Board.

While the principles underlying the Act provide a protective element, there is also an emphasis on ensuring that the independence of people with disabilities is maintained. The Act provides under S.4(2)(1) that advocacy, guardianship and administration should:

- (a) be least restrictive of a person's freedom as is possible;
- (b) ensure the best interests of a person with a disability are promoted; and
- (c) give effect wherever possible to the wishes of the person with a disability.

The Board can only make orders in relation to adults (persons eighteen years or over) whereas the functions of the Public Advocate relate to all people with a disability, including children. The definition of disability in the Act is:

Intellectual impairment, mental illness, brain damage, physical disability or senility. (S3(1))

Office of the Public Advocate

The Office of the Public Advocate is committed to promoting the rights and dignity of people with disabilities, to strengthen their position in society and to reduce their exploitation, abuse and neglect. The specific functions and powers of OPA are clearly stated in S.15 of the Act. This paper deals with the various ways by which OPA fulfils its advocacy role.

Individual Advocacy

Individual advocacy provides specific protection and support for a person with a disability and ensures any complaints about abuse are properly investigated and dealt with. Due to limited resources OPA's individual advocacy focuses on cases of significant exploitation, abuse and neglect. Other issues are referred to community visitors, community advocates or other appropriate complaint organisations, such as the Ombudsman, Equal Opportunity Commissioner, Health Complaints Commissioner or complaint mechanisms within agencies.

In 1991 nearly 500 or 45 per cent of OPA's clients were over seventy years (OPA 1991, p. 12). A considerable number of these cases involved financial exploitation or self-neglect - often associated with an older person's dementia. Cases are often referred to the Public Advocate by health, welfare or protective service workers who are unsure about their own mandate to act. Other referrals come from concerned family members, friends or neighbours.

Case One

A concerned neighbour alerted OPA to Annette's situation. She was a frail confused woman in her seventies who was allegedly kept locked in her house by a man who proved threatening. An advocate from OPA was refused entry so immediately applied for a GAB order authorising entry into Annette's house in the company of the police, pursuant to S.27 *GAB Act 1986*.

Before having to use this power of entry, OPA received a call from the proprietor of a special accommodation home (SAH). Immediately after the Advocate's visit, the man had taken Annette to the SAH stating that she had sold her house and needed somewhere to live. Realising that there was something amiss, the proprietor rang OPA and waited with Annette and the man until the Advocate arrived. Annette was obviously very confused, incontinent and in a poor state of health and hygiene. She was admitted to the local geriatric centre.

The OPA's investigations revealed that Annette had been locked in the house for eighteen months, and had suffered with dementia for some years. The house was dilapidated and filthy and the windows and doors were bolted from the outside. Should a fire have occurred there would have been no chance to rescue Annette. The danger to her life was obvious.

The man had recently arranged an Enduring Power of Attorney in his favour, and was in the process of selling her house. The board found this document to be invalid due to Annette's mental incapacity at the time. Although the man collected her pension, paid her electricity bills and bought some food, Annette had no money.

In fact the Advocate discovered that Annette was not the only confused older woman subjected to this man's attention. With the cooperation of local people, the police and the local geriatric centre, applications were made to GAB for orders to protect the other vulnerable women (OPA 1988, p. 14).

Under Section 27(1) of the GAB Act 1986, the Board may make an order empowering the Public Advocate or another specified person to visit a person with a disability in order to prepare a report to the Board if it has received information on oath that the person:

- a) is being unlawfully detained against his or her will; or
- b) is likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken.

Sometimes OPA receives information that gives rise to a sound prima facie reason for believing that a person with a disability is at risk, but does not constitute sufficient evidence to initiate proceedings under Section 27. The powers of the Victorian Health Services Commissioner (HSC) might provide an appropriate model for strengthening the Public Advocate's investigative powers. The HSC may apply to a magistrate for a warrant to enter and inspect premises, to interview specified people or to inspect specified documents. These powers were in fact used after OPA complained to the HSC about care practices at a nursing home (OPA 1991, p. 33).

Advocacy Through Guardianship and Administration Board Investigations

Cases needing individual advocacy may be referred by GAB for investigation of matters relevant to Board hearings.

Case Two

A concerned nephew lodged a GAB application regarding his elderly aunt's recent marriage to her gardener. The aunt had advanced dementia and could not remember the marriage or indeed that she was married.

An Advocate's enquiries of service providers, her doctor, neighbours and the marriage celebrant confirmed that the aunt's competency to marry was indeed questionable. The lady had considerable assets which she'd left to relatives in her will, but the recent 'marriage' of course nullified her last will in favour of her new husband.

During the investigation OPA ascertained that a relative of the gardener had recently bought Ivy's property at a less than favourable price. As proceeds of the sale could not be

readily traced, OPA also initiated an application for an administrator to recover the property.

The State Trustees were appointed administrators and the Public Advocate was appointed limited guardian to commence legal proceedings in the Family Court to test the validity of the marriage. Unfortunately, Ivy died before the case came to court (OPA 1990, p. 22).

Advocacy by Community Visitors

OPA administers a Community Visitors program to Supported Residential Services (SRS) in Victoria under the *Health Services Act 1988*. This is different to the Commonwealth funded Community Visitors Program which provides friendly visitors to isolated residents in nursing homes. OPA's program in Victoria has a stronger emphasis on advocacy. Volunteers visit residents and concerns about standards of accommodation or care are highlighted in an annual report to the Minister for Health which is tabled in Parliament. The Community Visitors have been strong advocates for improved basic nutrition, adequate clothing, heating and health care for residents.

Case Three

Community Visitors were called by a proprietor of a supported residential service (SRS) regarding an eighty-three year old resident recently discharged from the local medical centre with bed sores. The resident was in severe pain and needed hospital treatment. It took the Community Visitors several days to convince the hospital to re-admit the woman. All through this trauma of discharge and readmission to the hospital, the resident remained lucid and she was able to give Community Visitors permission to photograph her bed sores. These photographs and a report were referred to the Health Services Commissioner for further investigation (OPA 1992b, p. 70).

The Community Visitors also take up systemic issues. The 1992 *Annual Report of the Community Visitors* notes 'the tardiness of HDV in pursuing new, much needed regulatory

requirements; problems of access by SRS residents to Home and Community Care Program services; the inadequacy of the State Trust Corporation in meeting the needs of clients; and the failure of the psychiatric service system to provide adequate support to residents' (OPA 1992a, p. 2).

At a recent Coronial Inquiry into the death of ten older people in two separate fires in supported residential services, the Public Advocate gave evidence about inadequate fire safety precautions noticed by the Community Visitors. The Deputy Coroner recommended that all supported residential services should have alarm and sprinkler systems installed (OPA 1992a, p. 33).

Systemic Advocacy

Individual cases involving abuse and financial exploitation of older residents in care highlight the need for OPA to continue to advocate for quality care in nursing homes, hostels and supported residential services.

In recent years, both the Commonwealth and State Governments have made significant reforms to their regulation of residential facilities by defining service standards. OPA liaises with the HSC, the Residential Standards section of Health and Community Services Victoria and the Commonwealth Department of Health and Community Services on issues of mutual concern, but policy and program deficiencies still exist. Recently the Department of Health and Community Services still needed to rely on OPA's guardianship role to move 'at risk' residents from a residential facility with fire safety problems because the Health Services' regulations proved inadequate to address the problem.

There is obviously a tension inherent in the role of any regulatory authority that has a dual role of sanctioning and educating the management of residential services. More explicit guidelines on the appropriate use of sanctions and educative approaches appear necessary. However, regulation alone cannot improve standards of care in facilities that are in a

financially weak position. Government subsidies for hostel type services should be directed at people who must rely on the cheaper private sector facilities, and are therefore more vulnerable to abuse and exploitation.

Advocacy through Research and Community Education

The Public Advocate has a statutory responsibility for raising community awareness about abuse and exploitation of people with disabilities.

Following a public seminar in Melbourne in 1986, OPA was part of an Aged Abuse Working Party which developed a research proposal on abuse of older people in Victoria. The research project was carried out by OPA, and published as *No Innocent Bystanders* (OPA and VCOTA 1990). The report and handbook provides a reference for people who wish to understand more about abuse and how to act when it is suspected.

The report contains a number of recommendations directed at various agencies in the Victorian Government. A departmental working party is currently considering the government's response.

Not only did the report enjoy wide media coverage when first released, but OPA has consistently received and fulfilled requests for speakers on the issues raised. Community and professional awareness has been raised about ageism, services and supports for older people and avenues for detection of abuse, intervention and prevention.

Some aged service workers have responded by developing agency policy and procedures to guide workers how to identify and intervene in abusive situations. For instance the City of Footscray has developed *A Protocol for Intervention where Older Adults are at Risk of Abuse or Neglect* (City of Footscray 1992). Other OPA publications have also played a part in raising community and professional awareness not only in relation to improving the

quality of older people's lives, but also in preventing situations of maltreatment and neglect.

A strong case management framework is often necessary to ensure that services work effectively to achieve optimum outcomes for older people who have been maltreated or neglected. The purpose of case management is to ensure that at least one agency accepts responsibility for coordinating responses in agencies that operate across different service systems such as the police, health, or home and community care services.

Advocacy Through the Public Access and Inquiry Service

The OPA provides advice and information about advocacy, guardianship, administration and other legislation and services relevant to people with disabilities. The OPA's two intake officers received over 8 000 enquiries during the last year. Their advocacy assists people with disabilities and those enquiring on their behalf to seek a solution in relation to particular problems or needs.

Case Four

The proprietor of a private hotel contacted OPA's intake worker to discuss the need for an urgent guardianship application for Alan, an elderly gentleman who was bedridden and refusing medical assistance. Alan was refusing meals and fluids and was believed to be at medical risk.

As there was little evidence of Alan having a disability which prevented him making reasonable decisions about his well-being and medical treatment, the matter was urgently referred to the nearest geriatric assessment team. The assessment team persuaded Alan to accept hospital admission and a GAB application was not needed (OPA 1992, p. 14).

Alan's story illustrates how a matter when referred to the appropriate external agency can result in a positive outcome using a less restrictive alternative than guardianship.

The Public Advocate as Guardian of Last Resort

The GAB may appoint the Public Advocate as guardian for a person with a disability if no suitable relative or friend is available - sometimes because of a conflict of interests. A trustee company such as the State Trustees can similarly be appointed as an independent administrator to manage the financial affairs of a person with a disability.

The Act under S.23(1)(b) specifically identifies conflict of interest as a factor to be assessed in determining who should be appointed guardian or administrator, which can be particularly relevant when considering cases involving maltreatment or neglect.

The Public Advocate also accepts temporary guardianship orders (and the State Trustees accept temporary administration orders) when urgent decisions are needed. GAB has a twenty-four hour per day capacity to respond to applications and any person may apply for a temporary order by telephone. Temporary orders can be made for up to twenty-one days but the Board must then hold a formal hearing to determine if a further order is required (S.33 and 60).

Case Five

Harold was an eighty-nine year old wealthy man with senile dementia. He was widowed a number of years ago and recently married a former housekeeper.

Harold's family contacted the Board three days before Christmas because they were denied access to Harold and understood that he was to be left at home with a housekeeper over Christmas, while his second wife travelled interstate. The family also alleged that Harold's mail was being destroyed, that he was being over-medicated and locked in one end of the house at night, that his family home had been sold and that considerable money was being misappropriated by his wife.

The Public Advocate was appointed as temporary guardian and arranged for Harold to stay with his family over Christmas. Harold stated adamantly that he did not wish to have anything to do with his wife, and he was unable to remember having married her fifteen months earlier. The guardian arranged for psychogeriatric and psychological assessments which confirmed that Harold had advanced dementia.

After a lengthy hearing the Public Advocate was appointed as plenary guardian and Harold's accountant was appointed administrator. Solicitors were employed to act for Harold in Family Law matters. A settlement was negotiated which included his wife vacating the house. Harold then returned to live peacefully in his home under nursing supervision (OPA 1989, p. 70).

Community Guardianship

The Act requires the Public Advocate to find a suitable person in the community to be a guardian (S.16(2)(b)). This has given rise to a Community Guardianship Program. The one to one relationship that is the foundation of the Community Guardianship Program has additional benefits as illustrated by the case of Bill.

Bill was a frail seventy-eight year old man with an intellectual disability who has resided inappropriately in a country psychiatric institution for many years. Plans for him to be moved to a large nursing home in Melbourne were disputed. OPA was appointed guardian to decide on his future accommodation and whether he should have an eye operation which was contentious because of his poor general health.

As Bill lived in the country a local person was recruited, trained and appointed his community guardian. The guardian arranged for Bill to move to a small nursing home in the country town where he had some friends, and consented to the eye operation which was successful. Through the efforts of the community guardian, Bill became involved in some local community activities and his quality of life improved.

Guardianship and Administration Board

The Role of the Guardianship and Administration Board

The fundamental role of the Guardianship and Administration Board (GAB) is to protect the interests of adults with a disability by legally appointing a guardian and/or administrator as substitute decision-makers. A guardian makes decisions about lifestyle matters such as health care and accommodation, and an administrator makes decisions about financial matters.

Case Seven

One application involved Mary, an eighty-four year old woman with no family. Mary had advanced dementia but lived alone with home care support from the local council. She was well known to the Community Policing Squad. On her second admission to hospital in twelve months, the social worker noticed her bank account had dwindled by some \$12 000 without explanation and lodged a GAB application. The home care worker was carefully questioned during the hearing about signatures on the bank withdrawal slips and household expenses.

The Public Advocate was appointed guardian for accommodation and the State Trustees were appointed administrator to endeavour to recover Mary's assets. The State Trustees referred the matter to the police, but Mary's dementia precluded legal action as she could not be a reliable witness. The home care worker was, however, found guilty of perjury in relation to her evidence at the GAB hearing about signatures on the bank withdrawal forms.

Orders of the Board can be plenary or limited and are 'tailor made' to meet the individual needs of the person with a disability. Plenary guardianship orders confer the same authority in law on the guardian which a parent would have concerning her/his child (Section 24(1)). Adults with disabilities are not children but the legislation specifically

describes the legal relationship between a plenary guardian and a represented person in those terms. A limited guardianship or administration order confers on a guardian or administrator only those powers and duties which the Board specifies in the order (S.25(1), S.48).

There are eight different types of Board orders.

- Guardianship orders (S.22).

The GAB has issued specific guidelines regarding incapacity and consent for health care which state that a guardianship application should be made in the following circumstances:

- disputes about treatment;
 - treatment with significant risk;
 - ethically contentious treatment or procedures;
 - where the health care provider requires the consent of a legally appointed decision maker.
- Administration orders (S.46).
 - Special Protective orders - To enable the Public Advocate, police or another authority to investigate the unlawful detention of a person with a disability or situations of potential serious harm (S.27).
 - Consent for major medical procedures (Section 37) - including donation by a patient of non-regenerative tissue material.
 - Reviews - Orders to be reviewed every three years (S.61(2)). Interested party can apply for review at any time (S.61(3)).
 - Formal advice/direction - to guardian or administrator upon application (S.30, 55).
The Board has also issued *Directions and Information for Guardians*.
 - Temporary orders - Appointment of temporary guardian or administrator to deal with emergencies (S.32, S.60).

- Revocation of Enduring Powers of Attorney - Medical or Financial if invalidly executed or not in best interests of donor (S.118 *Instruments Act* and *Medical Treatment - Enduring Power Attorney Act 1990*).

Case Eight

Leslie was an eighty-year-old man who boarded in a private home before being admitted to a geriatric centre for assessment and treatment. The social worker applied to GAB for the appointment of a guardian and administrator. Major concerns were raised over the standard of accommodation and care provided by Leslie's landlady and the possibility of misappropriation of funds from his bank account. The investigator found that the landlady and Leslie had a joint bank account and Leslie had signed an Enduring Power of Attorney in favour of the landlady.

At the hearing the Board found the EPA had not been validly executed and appointed Leslie's daughter his administrator and limited guardian for accommodation decisions. The guardian moved her father to more appropriate supported accommodation.

After further enquiries, the administrator reported a number of matters to the police resulting in the landlady being charged with a number of offences relating to finances of other people for whom she provided accommodation. The police lodged further applications to GAB to ensure financial protection for these other residents (OPA 1992b, p. 47).

Once a case of possible abuse comes to its attention, the Board has the power to subpoena witnesses and any relevant documents. The Board is inquisitorial and abides by the principles of natural justice to ensure a fair hearing (S.10(1)).

Criteria for Decision-Making

In considering whether a guardianship and/or administrative order is required, the Board must establish the following three matters (S.22, 46).

- That the person has a disability as defined in Section 3. The legislation presumes that a person with a disability is competent unless demonstrated otherwise (S.22(1)).
- That the person is unable by reason of the disability to make reasonable decisions for her or himself.
- That the person is in need of a guardian and/or administrator. This prevents the Board from making speculative orders on the basis of a possible event or set of circumstances occurring in the future.

In assessing disability and its impact the Board takes into account the views of the person with the disability, the views of family and friends and professional assessments. Incapacity to make decisions must be related to the disability. The Board is not a vehicle for intervening in the affairs of people who simply make mistakes, are eccentric or have different cultural or ethical views. A recent case involving self-neglect illustrates the limits of the Board's jurisdiction in relation to disability.

Case Nine

A Telecom worker found Frank in his rented inner city home lying on a worn, soiled mattress surrounded by squalor. He contacted the Community Policing Squad who took him to a major Melbourne hospital. Frank was over eighty and legally blind. The local council had arranged Home Help in the way of weekly shopping.

Frank wanted to discharge himself from the hospital and return to his home. An application was made to GAB by the hospital's social worker for a guardian to be appointed to make decisions about his accommodation.

The Board in hearing the matter received specialist reports in relation to Frank's disability and his capacity to make informed decisions regarding his accommodation. It was established that his only disability was sight impairment which did not prevent Frank from making an informed decision. The application was dismissed.

The local council then examined local regulations regarding accommodation fit for human habitation to determine whether the property should have an order to be cleaned or be demolished. To make the property fit for human habitation the landlord would have needed to spend in excess of \$50 000. Instead the house was demolished leaving Frank homeless. The Public Advocate requested a report from the Council and the Board subsequently received four more applications in relation to guardianship for Frank. The Board has heard the applications as they have presented but the situation has not changed. There is no jurisdiction to appoint a guardian as he does not have a disability within the meaning of the Act (OPA 1992b, p. 16).

In other cases of self-neglect involving older people with dementia, guardianship has proved an effective intervention.

Cast Ten

A ninety-year-old widow with advanced dementia was considered to be at risk living alone in her flat but refused to move. She had no insight into her health or care needs. A guardian was appointed and with the approval of the Board and the assistance of the Community Policing Squad, the lady was moved to supportive accommodation. Her physical and mental condition improved with care.

In deciding whether a person needs a guardian and/or administrator, the Board must examine whether there are any less restrictive alternatives. Such possibilities include changes to a person's living circumstances to reduce the chance of abuse or exploitation or providing assistance to enhance the person's capacity to take control of his/or her own

affairs. For instance the person may have the capacity to sign an Enduring Power of Attorney.

The Board's interpretation of 'need' for guardianship was upheld in an appeal to the Victorian Administrative Appeals Tribunal (AAT). The AAT found that an elderly nursing home resident with proven dementia was being well cared for by her daughter and would not benefit from a guardianship order.

Choice of Guardian and Administrator

The GAB Act provides that a guardian or administrator must be a person who:

- is willing to act in the best interests of the represented person;
- has no conflict of interests with the represented person;
- will encourage independence and community participation;
- will protect a person from neglect, abuse or exploitation; and
- will take into account as far as possible the wishes of the person.

These criteria were well illustrated in the case of Harold (Case Five), who was isolated by his wife for his money. His guardian took into account Harold's expressed wishes that he did not wish to have anything more to do with his wife.

Limitations to Guardianship

While a guardian can direct or even advance the interests of a represented person in some important ways, a guardian cannot necessarily solve all the person's problems.

A guardian is a legal decision maker and should not be appointed as a mediator to unravel family conflict. Nor should a guardian be appointed purely to monitor a situation of concern. A guardian is not a gaoler and it is inappropriate and often impractical to use guardianship to keep a person in a psychiatric facility or nursing home. Guardianship is not a quality control mechanism although as already mentioned, OPA guardians have

sometimes been inappropriately forced into this role in relation to enforcing standards in supported residential services. A guardian should not be expected to find services for a represented person or take a case management role. Guardians need to rely on good case workers in community services.

Effective intervention by workers in local support services can often solve potential problems for frail older people and minimise the need for guardianship and administration. Furthermore, when an older person is competent (although they may also be vulnerable), GAB has no authority to intervene through guardianship or administration. This is when it is essential for community support workers to be able to respond effectively.

Community Based Advocacy and Intervention

In Victoria, a whole range of services exist that can deal with various situations of maltreatment and neglect of older people. It is not necessary to set up a new protective system for older adults. One has to be wary of reinforcing structural factors such as ageist attitudes that older people are generally 'feeble-minded', 'a burden on care givers' and at 'risk of abuse'.

The challenge is to develop local networks of health, welfare and protective services with clear protocols and procedures for intervention. A case management framework needs to be adopted to ensure that services work together effectively. Agencies need to develop procedures to guide workers how to recognise, assess and respond to family violence, professional malpractice, fraud, caregiver stress and other situations which may concern older people.

The issues involved in the range of situations involving maltreatment and neglect of older people will then be dealt with appropriately, not in a sensational or centralist way, but through the effective and sensitive response of local support services.

References

- City of Footscray 1992, *A Protocol for Intervention Where Older Adults Are At Risk of Abuse or Neglect*.
- Office of the Public Advocate 1988, *Annual Report 1988*, Government Printer, Melbourne.
- Office of the Public Advocate 1989, *Annual Report 1989*, Government Printer, Melbourne.
- Office of the Public Advocate 1990, *Annual Report 1990*, Government Printer, Melbourne.
- Office of the Public Advocate 1991, *Annual Report 1991*, Government Printer, Melbourne.

Office of the Public Advocate 1992a, *Community Visitors Report, Health Services Act 1988*, Government Printer Melbourne.

Office of the Public Advocate 1992b, *Annual Report 1992*, Government Printer, Melbourne.

Office of the Public Advocate & VCOTA 1990, *No Innocent Bystanders - A Study of Abuse of Older People in our Community*, Publicity Works, Melbourne.