



**scope**

FOR PEOPLE WITH A DISABILITY

Submission to the Victorian Law  
Reform Commission regarding the  
Review of Victoria's Guardianship and  
Administration Laws

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*Scope's Response to the VLRC's 2<sup>nd</sup> information paper*

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## INTRODUCTION

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Scope welcomes the Victorian Law Reform's second invitation to provide input into the review of the State's guardianship legislation. Scope continues to recognise the opportunities this review presents for *all* Victorians. However, Scope's submissions clearly focus on the relevance of this reform to the people it provides services to, particularly those with intellectual disabilities. Scope has used the questions provided by VLRC to guide this submission and it is therefore structured accordingly. Although each of the questions put forward by the VLRC has been considered by Scope, this submission only provides commentary on the areas Scope believe they are qualified to comment on based on the collective experience of the organisation as a whole as well as those it provides services to.

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### PART 1: HISTORY, CURRENT LAW AND CHANGE

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*Question 1: Do you have any general comments about the matters identified by the Commission as influencing the need for change? Are there any other important matters that should affect the content of future guardianship laws?*

Scope support all the matters identified by the Commission as influencing the need for change, however would like to particularly emphasise the social and legislative drivers behind this need for reform.

Victoria's current Guardianship and Administration Act (G&A Act) (The Parliament of Victoria 1986) was enacted 24 years ago. At this time it was regarded as a progressive piece of legislation promoting the rights and interests of people whose decision making capacity

was considered impaired. It is not surprising that 24 years later, this piece of legislation appears dated within our modern day Australian context. Today's social, philosophical and legislative environment is very different from that which existed at the conception of the G&A Act in 1986. The environment in which this legislation was written was far more paternalistic and restrictive for people with disabilities than it is today. Although Scope acknowledges that we still have a long way to go, today, there is an increasing acknowledgment that the human rights of people with disabilities, particularly those with intellectual disabilities, do indeed matter and should be protected. This acknowledgment is clearly present in the United Nations adoption and Australia's ratification of the Convention on the Rights of Persons with Disabilities. Additionally, Victoria's introduction of the Victorian Charter of Human Rights and Responsibilities clearly articulates the rights of all people, including those with disabilities, to lead self determined lives.

Scope is supportive of law reform which takes into consideration the many social, philosophical and legislative changes that have taken place in our society, particularly those changes relating to people with disabilities. Scope encourages the VLRC to ensure that any legislative changes to Victoria's Guardianship laws are relevant and consistent with our modern day philosophy and legislation around the human rights of all people particularly those with decision making disability.

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PART 2: THE DIRECTION OF NEW LAWS

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*Question 2: Do you agree with the Commission's draft statement of purpose for new guardianship laws?*

*The purpose of this Act is to protect and promote the dignity and human rights of people with impaired decision-making capacity. To this end, the Act establishes mechanisms to support and assist people to participate in decisions that affect their lives, realise their rights and protect their inherent dignity.*

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Scope agrees that the statement of purpose within the current legislation is 'narrowly legal' and lacks a 'broad vision or goal'. Scope believes that the above statement is a great improvement on the current statement.

However, Scope would like to see further emphasis on the principles of supported decision making incorporated into the statement. Specifically it would like to see less of an emphasis on individual decision making capacity, and more of an emphasis on the value of collaborative supportive decision making processes. Scope has taken the position that in our contemporary world a person's ability to make a decision should not only be related to their level of individual cognitive capacity but perhaps more, to the degree of support available to help them make this decision. A quote by Values in Action, an organisation in the United Kingdom eloquently expresses Scope's view, particularly in relation to people with the most profound intellectual disabilities.

*'The starting point is not a test of capacity, but the presumption that every human being is communicating all the time and that this communication will include preferences. Preferences can be built up into expressions of choice and these into formal decisions. From this perspective, where someone lands on a continuum of capacity is not half as important as the amount and type of support they get to build preferences into choices'*

*(Beamer and Brookes 2001).*

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This view is encapsulated within the concept of 'Supported Decision Making', an approach which is attracting increasing attention both in the literature and in practice. Supported decision making makes the assumption that everyone can guide their own decisions with support and therefore challenges the relevance of individual decision making capacity. A discussion paper written by Scope in 2009 states:

*'A 'Supported Decision Making' approach makes the assumption that everyone can guide their own decisions with support. The question that is asked when using a supported decision making framework is not one around individual competence, but one around how much support someone needs to build their preferences into choices and from there into decisions.'*

*(Watson and Garde 2009).*

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Scope suggests the commission review the draft statement taking the above points in to consideration. They also suggest that within the draft statement the phrase 'people with impaired decision-making capacity' be replaced with 'people who benefit from support to make decisions'.

***Question 3: Do you agree with the Commission's draft general principles for new guardianship laws?***

Scope generally agrees with the Commission's draft principles for new guardianship laws. However, it would like the Commission to consider the following alterations to those proposed. These suggested changes are outlined below:

Principle 3: *All adults are presumed to have the ability to make decisions that affect their lives unless this is shown not to be the case.*

SCOPE'S SUGGESTED REWORDING: *All adults are presumed to have the ability to make decisions that affect their lives with support.*

Principle 6: *All adults, regardless of their ability to make decisions, have wishes and preferences that can and should inform decisions made in their lives.* Scope is supportive of this principle. However, it suggests that it follow principle 3, as it further explains the notion of supported decision making.

***Question 4: Are there principles you think should be added or removed from these general principles?***

The Commission's question regarding the inclusion of an overarching statement about the role of carers, families and other supportive relationships in the life of a person with intellectual disability is welcomed by Scope. Scope is supportive of inclusion of such a statement, as it is acutely aware of the importance of relationships and support networks in the lives of people with disabilities, particularly those with the most severe intellectual disabilities. A circle of support's role is to collectively represent the person's wishes and best interests, identify and weigh up the available range of choices, implement decisions and review the impact of decisions, both positive and negative, on the person and others. Scope encourages the Commission to approach the documentation of this role cautiously and to build in safeguards to ensure that members of a person's support network are indeed acting in their best interest. Although current legislation doesn't exclude the

appointment of more than one guardian, Scope would like to see a greater emphasis on circles of support as a way of achieving more collaborative and representative decision making. An advantage of this approach is that it shifts the decision making responsibility from a single individual, to a group of people representing the wishes of the person with the disability. Because a circle of support comprises a team of people important to the person with a disability, this model allows for broad representation from family, friends, advocates, and support workers and may safeguard against the person being abused.

Despite the value of such networks, Scope is acutely aware that many of those it provides services to do not have an existing unpaid network of people in their life who are willing and able to support them through a decision making process. This is a sad reality for many people, particularly those who have been institutionalized from a young age and as a consequence have limited, if any, community supports. Scope would like to see additional attention and resource given to the establishment, training and nurturing of circles of support. Scope emphasizes the importance of additional resources for such an activity, as existing community based organizations do not currently have the capacity to expand their workload. Scope suggests that any additional resource seek to establish, strengthen and extend the natural supports that might be present in a vulnerable decision maker's life, rather than substituting them with professional services. Specifically, Scope would like consideration, within the context of this review, to be given to schemes such as volunteer social advocacy (sometimes referred to as "citizen advocacy"). Within such a model, a support network is intentionally established to act as a support, providing information, advice, and a voice for the person's decisions. Such a 'purpose built' network is clearly not

ideal. However, without such a support network, supported decision making for many would merely be a pipe dream.

***Question 5: Do you agree with the Commission's proposal that Victoria's various substitute decision-making laws be consolidated into one single Act?***

Scope agrees that Victoria's current substitute decision making laws can be difficult to navigate and understand due to the fact they are spread over 3 different Acts. Therefore, Scope supports reform in this area and suggests that the Commission adopt Option C: One single Act consolidating all the various substitute decision making laws. As stated in the Commission's consultation document:

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*'This option would consolidate all generic substitute decision-making laws into one piece of legislation. This occurred in the United Kingdom in 2005 with the enactment of the Mental Capacity Act 2005 (UK).'*

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***Question 8: Do you agree with the Commission's proposal that the term 'administrator' should be replaced with 'financial guardian'?***

Scope is supportive of a change in terminology. Specifically it is supportive of Option D: the term 'guardian' should be replaced with 'personal decision maker' and the term 'administrator' should be replaced with 'financial decision maker'.

***Question 10: Do you have any specific ideas about how to better target education about guardianship laws towards people with disabilities, family, friends and carers of people with disabilities, culturally and linguistically diverse (CALD) groups, Indigenous communities, older people, young people, health and community sector professionals, lawyers?***



Scope is of the view that further public and professional education and training is required in relation to the nature and availability of Guardianship legislation. Scope sees the need for more training and education for both the general public around the Act's processes, as well as for professionals who have a role in guardianship law. Although the Office of the Public Advocate provide some excellent information sessions for all audiences, Scope believes that more resources should be provided not only for the delivery of education and training but also in marketing these activities.

Scope's position on training and education for professionals who have a role in the implementation of guardianship law stems from feedback provided by some of the professionals the organisation employs. Many of Scope's staff report feeling ill-equipped in their ability to support service users and families in the navigation of the current system. In a forum conducted by Scope in 2005 around risks, rights and responsibilities, several staff described their feelings in this area as 'out of control'. This feeling is backed up by the literature. A recent Victoria-based survey of neuropsychologists, many of whom are involved in capacity assessments on a regular basis (Mullaly, Kinsella et al. 2007), revealed they felt poorly prepared by their training to complete capacity assessments. In this study more than half of the respondents rated assessing decision-making capacity as 'time-consuming, stressful, and difficult'. The Australian Psychological Society's Guardianship Tribunals Guidelines Working Party notes that training for assessment of decision-making capacity is occurring in postgraduate psychology courses; however, many practising psychologists have limited knowledge of the relevant legislation and the requirements of courts when making their determinations (Mullaly et al., 2007).

Scope sees a need not only for increased education and training for those working in the field, but also for people with disabilities themselves, their supporters and the general public. Scope is of the view that there are deep rooted assumptions and prejudices that exist around the ability of people with intellectual disabilities to control their own lives. It is clear that if there is to be a paradigm shift in the perception of how people with intellectual disabilities can lead lives they prefer considerable resources need to education and training.

Scope recommends that any reform of current Guardianship legislation in Victoria be accompanied by a commitment to further education and training not only for professionals but also for people with intellectual disabilities and those who support them.

***Question 11: Should the Public Advocate play a greater role in producing community education materials and educating the community about substitute decision making? What other bodies could play a role?***

Scope is of the view that the Office of the Public Advocate is well placed to produce community education materials and educating the community about guardianship. Scope suggests however that OPA consult other organisations/bodies/individuals around specific areas of expertise relating to guardianship (e.g. supported decision making). In particular Scope would be supportive of the development of a practice framework/s for supporting collaboration by circles of support (including VCAT appointed guardians) in determining 'best interest' similar to that which has been developed as part of the United Kingdom's Mental Capacity Act (Parliament of the United Kingdom 2005). The Mental Capacity Act is

accompanied by a range of resources including a 'best interest checklist' (Department of Health 2005) which identifies the factors that must be taken into account when determining what is in someone's best interests. Other guidance materials which have been developed as part of the implementation of this Act include a Code of Conduct (Department of Health 2005) and core set of training materials (Department of Health 2007). Scope would be supportive of a suite of training materials such as those already produced by Scope, in the form of the training package/resource 'Listening to those rarely heard: Supported decision making for people with severe to profound intellectual disabilities' (in press).

***Question 12: Would an educational and awareness campaign assist the community to better understand and make use of guardianship laws?***

Scope is of the strong view that an educational and awareness campaign would greatly assist the community to better understand and make use of guardianship laws.

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**PART 3: SUPPORTED DECISION MAKING**

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***Question 14: Do you agree with the Commission's proposal to introduce new supported decision-making arrangements?***

Scope is supportive of the Commission's proposal to introduce new supported decision making arrangements.

***Question 15: Do you agree with any or all of the proposed roles of supporters and co-decision makers?***

Scope is supportive of the Commission's proposal for new formal supported decision-making appointments. However, Scope would like the Commission to take the following points into account:

- In the Commission's proposal there are no provisions for people who by the very nature of their disability are not able to formally appoint a 'supporter' or 'co-decision maker' due to the severity of their intellectual disability. Scope is of the view that the principles of supported decision making have particular relevance for this group. Scope suggests that the Commission consider how people with severe to profound intellectual disability can benefit from supported decision making. Scope believes that there needs to be some acknowledgment that this group is not able to select a supporter or co-decision maker independently. However, this should not exclude them from benefiting from the use of a supported decision making framework, such as the one developed by Scope (Watson and Joseph 2011);
- Scope would like to emphasise the need for a collaborative approach to decision making for people who have severe to profound intellectual disability. It suggests the Commission consider the appointment of more than one supporter or co-decision maker. These supporters/co-decision makers may resemble a circle of support. A circle of support's role can be to collectively represent the person's wishes and best interests, identify and weigh up the available range of choices, implement decisions and review the impact of decisions, both positive and negative, on the person and others. A circle of support obviously varies in its level of formality. Many Scope service users benefit greatly from the informal nature of support provided by people who care for and about them. Others, however, appear to benefit from a more formally developed and maintained circle of support. Regardless of the level of formality adopted in

Guardianship legislation, Scope emphasizes the need to recognize their importance as vital aspects in the self determination of people with intellectual disabilities, especially those with severe to profound intellectual disability. Although current legislation doesn't exclude the appointment of more than one guardian Scope would like to see a greater emphasis on circles of support as a way of achieving more collaborative and representative decision making specifically for people with severe to profound intellectual disability. An advantage of this approach is that it shifts the decision making responsibility from a single individual, to a group of people representing the wishes of the person. Because a circle of support comprises a team of people important to the person, this model allows for broad representation from family, friends, advocates, and support workers.

***Question 17: Do you agree that the Public Advocate should not be a 'supporter' or a 'co-decision maker'?***

Scope agrees with the Commission that due to the personal and intensive role of a supporter or co-decision maker OPA is not in a position to take on this role.

***Question 18: Do you think that the Public Advocate should play a role in training supporters and co-decision makers, and monitoring supported decision-making arrangements?***

As already mentioned Scope is supportive of OPA taking on a role of training supporters and co-decision makers as well as monitoring supported decision making arrangements.

***Question 19: Should the Public Advocate establish and coordinate a volunteer support program to assist people who do not have family or friends willing and able to take on these roles?***

Scope is acutely aware that many of those they provide services to do not have an existing unpaid network of people in their life who are willing and able to support them through a decision making process. This is a sad reality for many people, particularly those who have been institutionalized from a young age and as a consequence have limited, if any, community supports. Scope would like to see additional attention and resource given to the establishment, training and nurturing of circles of support. Scope emphasizes the importance of additional resources for such an activity, as existing community based organizations do not currently have the capacity to expand their workload. Scope suggests that any additional resource seek to establish, strengthen and extend the natural supports that might be present in a vulnerable decision maker's life, rather than substituting them with professional services. Specifically, Scope would like consideration, within the context of this review, to be given to schemes such as volunteer social advocacy (sometimes referred to as "citizen advocacy"). Within such a model, a support network is intentionally established to act as a support, providing information, advice, and a voice for the person's decisions. Such a 'purpose built' network is clearly not ideal. However, without such a support network, supported decision making for many would merely be a pipe dream. Scope is supportive of OPA taking on the role of establishing and supporting such networks for those who don't have existing networks in place. Alternatively Scope would be supportive of additional resources being given to community organisations who may be willing to take on this role.

***Question 22: What safeguards do you think are necessary to protect supported people from abuse?***

As discussed Scope emphasises the need for a collaborative approach to decision making for people who have severe to profound intellectual disability. It suggests the Commission consider the appointment of more than one supporter or co-decision maker. An advantage of this approach is that it shifts the decision making responsibility from a single individual, to a group of people representing the wishes of the person. Because a circle of support comprises a team of people important to the person, this model allows for broad representation from family, friends, advocates, and support workers.

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PART 5: VCAT APPOINTMENTS

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***Question 50: Do you agree with the Commission's proposal that disability should no longer be a separate criterion for the appointment of a substitute decision maker, but that it should be necessary for VCAT to find that a person is incapable of making their own decisions because of a disability before it can appoint a guardian or an administrator?***

The Victorian Guardianship and Administration Act states that VCAT can make an order for guardianship only if a 3 tier test is satisfied. This test is sometimes referred to in the field as the 'disability, capacity and need' test. This means, in order to qualify for a legally appointed guardian in Victoria a person must have a disability, not have the capacity to make 'reasonable judgments' because of their disability and finally, they must 'need a guardian'.

Scope has particular concerns about the need to have a 'disability' before guardianship can be granted and welcomes a review of this criterion. The Guardianship and Administration Act defines 'disability' broadly. According to the Act, a disability may mean 'intellectual impairment, mental disorder, brain injury, physical disability or dementia' (The Parliament of Victoria 1986). Scope is of the view that having a disability is not, in itself, an indication of the need for support to make decisions. Scope recommends that the requirement for guardianship be based on a person having 'decision making difficulty', deeming whether or not they have a disability irrelevant. The challenge arises then around how a person is deemed to have 'decision making difficulty', something that is currently unclear in the legislation.

***Question 51: Do you agree with the Commission's suggestions for capacity principles (Option A) and a legislative definition of incapacity (Option B) in order to provide legislative guidance on how to determine when a person is unable to make their own decisions? Are there additional or other ways to provide this guidance?***

Scope agree with both Option A and B of the Commission's suggestions for capacity principles, however with some adaptations. The essence of Scope's suggestions around this is encapsulated in the supported decision making principle that everyone can be supported to make a decision.

Specifically, Scope would like to see the final point in Option A changed from:

*'a person should not be treated as unable to make a decision if it is possible for them to make that decision with appropriate support'*

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To

*'a person should not be treated as unable to make a decision if it is possible for them to make that decision with appropriate support using supported decision making principles'*

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Additionally Scope would like to see the introductory phrase in Option B's wording changed

from:

*'A person is unable to make a decision for himself if he is unable to'*

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To

*'A person is unable to make a decision without support if he is unable to'*

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These suggested changes reflect Scope's position that everyone can make decisions with support. Scope once again asks the Commission to consider the following quote which sums up the concept of supported decision making.

*'The starting point is not a test of capacity, but the presumption that every human being is communicating all the time and that this communication will include preferences. Preferences can be built up into expressions of choice and these into formal decisions. From this perspective, where someone lands on a continuum of capacity is not half as important as the amount and type of support they get to build preferences into choices'*

*(Beamer and Brookes 2001).*

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***Question 149: Should the legislation allow guardians and administrators to seek a VCAT order to enforce decisions they make which a third party refuses to accept?***

Scope is of the view that a guardian should have the power of the court to enforce a decision. However Scope believes that this should involve going back to VCAT for this order to be enforced.

***Question 150: Should multi-member panels, with members drawn from a range of backgrounds, be the standard practice for initial guardianship and administration applications?***

Scope is not supportive of a multimember panel. In the experience of Scope clients and supporters the current system is already 'daunting' and everything should be done to make it less intimidating.

***Question 151: Do you have any views about how VCAT Guardianship List hearings should be conducted?***

In Scope's experience, the VCAT guardianship hearings are often unnecessary. They believe in many cases the same outcomes could have been achieved through mediation.

***Question 152: Do you have any ideas about how to achieve better attendance of the represented person at VCAT hearings?***

Scope believes there is a need for better communication and clearer information for people with disabilities and their supporters. Information needs to be accessible and sufficiently detailed for the person and their supports to be able to properly prepare for a hearing. VCAT also needs to have clearly articulated procedures in regard to communication that minimise stress placed on the represented person. A quote from a Scope staff member supporting someone at a hearing emphasises this point:

*'The information sent to people needs to be clear and in an Easy English format. The people I have supported to go to hearings were reluctant to go along until I went with them. They were overawed by the legal paperwork. The paperwork should be welcoming and informative. People need to know what the hearing is about. This is not explained in the summons. The summons only states that you are required to come along to a hearing about you on this date. Unless you ring the VCAT office you know very little. In one circumstance the VCAT office told us to contact the person putting in the application for a copy of the actual application. Where this is an adversarial relationship that is not always possible. If the hearing is about me, I should have information about it and know what is being questioned about me.'*

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**PART 9: INTERACTION WITH OTHER LAWS**

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***Question 156: Do you agree with the Commission's previous recommendation that the compulsory treatment provisions in the Disability Act 2006 (Vic) extend to people with a cognitive impairment other than intellectual disability?***

Scope agrees that the compulsory treatment provisions in the Disability Act 2006 (Vic) should extend to people with a cognitive impairment.

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