



Submission No. 46

VICTORIAN COALITION OF ABI SERVICE PROVIDERS INC.



RESPONSE TO THE VICTORIAN LAW REFORM COMMISSION GUARDIANSHIP CONSULTATION PAPER

MAY 2011

To:

Victorian Law Reform Commission
Level 3, 333 Queen Street
Melbourne
VIC 3000
law.reform@lawreform.vic.gov.au

From:

Victorian Coalition of ABI Service Providers Inc.
PO Box 900
Northcote
Victoria 3070

Contact:

Marc Paradin
Kerry Stringer

INTRODUCTION

Acquired Brain Injury (ABI) touches the lives of a growing number of Australians, and can influence decision-making capacity at stages and durations of a life, dependent upon the nature and severity of the brain injury.

The development of appropriate mechanisms to support decision-making and to retain inherent rights, and the development of effective practices and community awareness of such mechanisms, is a key to the delivery of successful outcomes for people with ABI and the wider community.

Victorian Coalition of ABI Service Providers Inc. (VCASP) welcomes the opportunity to respond to the Victorian Law Reform Commission's Guardianship Paper, and to respond to a number of the Commission's key questions.

ABOUT VCASP

VCASP was established in 1998 in response to the need for coordinated policy and service development for people affected by acquired brain injury (ABI). VCASP is a not-for-profit peak body acting on behalf of public and private sector service providers who assist people with acquired brain injuries, their families and others involved in their support. VCASP advocates for the availability of appropriate services and resources, as well as information and research that can assist those experiencing the effects of ABI. VCASP has advised the Victorian Department of Human Services (DHS) and been involved in the ABI strategic plan and its implementation. As a key body, VCASP is actively involved in implementing innovative service delivery development, such as the response to people with ABI due to alcohol and other drug use.

VCASP COMMENTS ON THE GUARDIANSHIP PAPER

VCASP congratulates the Commission on its work so far in reviewing the current Victorian Guardianship processes and principles, and on developing a range of potential amendments that aim to reflect relevant State, Federal and International Acts and Charters. VCASP welcomes enhancements of Guardianship laws to further the rights of people with acquired brain injury. VCASP further recommends that such amendments should operate alongside appropriate funding and support to ensure that those rights may be achieved.

VCASP is keen to see a system develop which can respond through an approach of early intervention discussions, pre-planning and support, rather than through the more "crisis-driven" (Victorian Law Reform Commission 2011, p.125) approach of the past, and which provides increased accommodation of the variable nature of 'capacity'.

ASSESSMENT OF DECISION-MAKING CAPACITY

As stated within the Commission's Consultation Paper, there is a need within any legislation to strike a balance between the best interests of a person, and their rights under the Victorian Charter of Human Rights (Victorian Law Reform Commission 2011, p. 30). VCASP believe that the Commission's proposed development of a co-decision making model, and the recognition of rights-based principles within its structure, can potentially balance and address such concerns.

VCASP notes the Commission's awareness of the need to reflect the 'changing' nature of decision-making capacity, and the impact that this may have on individuals within a guardianship setting. Supported decision making, and co-decision-making processes provide a preferred option to the previous system with its entrenched lifelong approach.

This 'fluidity' of capacity is of particular relevance in the area of acquired brain injury, and VCASP recommend that there is a need for any developed guardianship laws for an individual to be regularly reviewed and open to amendment, in a timely and cost-effective manner.

VCASP recommends that 'capacity' also be defined within the context of both a medical/physical capacity and a social/community capacity. Appropriate neuropsychological assessments by qualified personnel can assist in ensuring that such accurate reflection of a person's capacity can occur.

USE OF THE TERM 'CAPACITY'

Further to the above recommendation, VCASP note the Commission's query re the use of the term 'capacity' rather than disability within legislation. VCASP supports the use of the term 'capacity', and its potential to more accurately include persons who may not wish to identify as having a 'disability', including ATSI and CALD community members.

DECISION MAKING OF INDIVIDUALS

VCASP supports the inherent right of individuals to make legal and non-high-risk decisions, and for processes to be developed for such decisions to be both respected and achieved. Individuals with ABI have a history of social, financial and cultural lifestyle, which should be acknowledged in any guardianship-based decision-making.

CAPACITY-BUILDING WITHIN THE COMMUNITY

Whilst VCASP supports the development of enhanced legislation regarding Guardianship and individual rights, it should be acknowledged that such legislation requires appropriate funding and systemic responses over the long-term within government policy and within the community.

Such areas of response may include:

- Education within community of importance of pre-planning for effects of acquired injuries such as ABI, and pre-consideration of guardianship options
- Increased funding of agencies such as OPA, Villamanta, Legal Services etc, to provide information and advice on individual rights.
- Increased community awareness of disability rights within the Victorian Charter and State Disability Act.
- Ongoing data collection from relevant agencies regarding guardianship processes, for future re-evaluation and enhancement of guardianship structures.
- Appropriate models/frameworks of care, eg. 'slow to recover', which provide/allow for increased times to make decisions

UNIFORM AND NATIONAL RESPONSE

In recognition of the potential impact of a National Disability Insurance Scheme within the area of disability and relevant legislation, VCASP note the importance of developing a set of Guardianship guidelines and principles which are reflective of a national viewpoint. This national context should however retain the inherent rights expressed within the Victorian Charter, Disability Act and Equal Opportunity Act, at a minimum.

RESPONSES TO LAW REFORM COMMISSION'S QUESTIONS

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

Yes

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

VCASP agrees with the Statement of Purpose, and General Principles, subject to the following:

In the term 'all adults are presumed to have the ability to make decisions that affect their lives unless this is shown to not be the case', there is a rigidity that implies that 'shown not to be the case', is a permanent state. Whilst the next principle 'The assessment of... etc" does refer to the fluctuating nature of capacity, we believe there is still a need to remove the implied permanence and rigidity from the aforementioned principle.

That a further principle be added that recognises the personal and cultural rights of an individual, as outlined within the Victorian Equal Opportunity Act, incl. cultural heritage, sexuality, gender orientation, religion, etc. (Parliament of Victoria 2010).

QUESTION 6: Do you agree with the Commission's proposal that the term 'medical decision maker' or 'health decision maker' should replace 'person responsible' in legislation? If so, which one do you prefer?

Should a decision be made to amend the term from 'person responsible, VCASP would hold that the preferred term be 'health decision maker'. Such a term would more accurately reflect the variety of impacts, physical, psychological and social, in addition to medical, which can impact upon a person upon obtaining an acquired brain injury.

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?

From an ABI perspective, community education regarding guardianship, which can result in an increase in forward planning of guardianship matters within the community, has long-term financial, social, rehabilitative and time-efficacy benefits to both the individuals affected and the broader community. In addition to increasing the role of OPA in such matters, there should be the capacity to increase funding and support to a broad-range of advocacy bodies.

Question 13: What type of data do you think needs to be collected and made available and from what bodies?

Data collection and collation could also include data on persons undertaking pre-planning of guardianship decision-making, and the flow-on percentages of this data within subsequent actual guardianship practices.

Question 23: Should all enduring powers occur at the same time?

If enduring powers were to occur simultaneously at the time of incapacity, this system would require adequate resources to allow for expeditious, yet informed and thorough, assessments of capacity. With regard to immediate powers upon signing, this would potentially disengage people from planning such actions prior to injury or disability, for fear that their rights would be shared prior to any potential future event.

Question 50: Do you agree... .. that disability should no longer be a separate criterion for the appointment of a substitute decision maker... ?

Removal of the term disability can potentially form a language more encompassing of individuals who may not see themselves, or wish to be identified, as having a disability. However there will need to be safeguards within any developed languages, to ensure that the Commission's developed Act, and any future developed Acts, include those protective and rights-based mechanisms currently identified through the term 'disability'.

Question 74: Do you think there should be specific laws about people being admitted to and remaining in residential care facilities in situations where they do not have capacity to consent to those living arrangements but are not objecting to them?

A key consideration to the situation of accommodation in residential aged care facilities, or any other facilities, is the varying nature of capacity, and the potential that such an arrangement may not be appropriate to their wishes and/or needs. As VCASP has stated in discussions on Power of Attorney,

“An example of that is probably the issue of nursing homes... ...needing to be able to make the decision about where somebody should go. If that is being made done efficiently, it is almost like abuse because you are forcing somebody into a place where, six months down the track, they may no longer need it but because they have actually been assessed as requiring it, it then takes a lot of effort to get that assessment changed.” (Law Reform Committee 2010, p.5)

What ultimately will be of most benefit is the development of a system of support that allows for diversity of choice. Providing a range of accommodation options, and the capacity to move within these options over time, will be the true indicator of a system which provides guardianship rights.

Age-appropriateness, access to appropriate levels of care, proximity to family, friends and services, and respect of personal beliefs and identities, are fundamental to a variety of legislated human rights principles. Where the potential exists to relocate a person to accommodation which respects and supports such rights, such actions would in principle be encouraged.

Question 87: Does the law need to provide more guidance about the relationship between the wishes a person expresses at the time a decision is made, and any past wishes, views, beliefs and values the person has expressed?

As per the OPA recommendations stated on page 326 of the Commission's Report, there needs to be a balance between relying too much on past wishes, and to reflect such wishes against current needs and circumstance.

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

ABI is an injury which is often misunderstood and misdiagnosed within the broader community, and is often described as the invisible disability. There may be significant communication issues, depending on the severity and type of ABI. Likewise, there may be social functioning and interaction issues which whilst not immediately apparent, affect capacity.

Having panel members with awareness and training in ABI, from both a medical and social perspective, is imperative to the delivery of appropriate decision-making within VCAT or within any other similar panel setting.

Question 156: Do you agree with the... recommendation that the compulsory treatment provisions in the Disability Act 2006 be extended to people with a cognitive impairment other than intellectual disability?

VCASP contends that at a minimum people with an ABI who are involved in the criminal justice system in Victoria should have access to a comparable system to that which currently exists for people with an intellectual disability, and argues that this requisite of legislative and policy reform is central to the rights of people with ABI and to any future success in reducing numbers of people with ABI involved in the criminal justice system. For example, the prevalence of acquired brain injury in the Victorian Correctional System is high, with 42% of males and 33% of females found to have evidence of an acquired brain injury on formal neuropsychological assessment:

- Severity of ABI
- Moderate 39% males; 21% female
- Severe 6% males; 7% female (arbias Ltd and La Trobe University 2010, p83)

Arguably people with moderate to severe ABI would be disadvantaged in the criminal justice system without additional support to ensure that they are treated in the same way as all other alleged offenders or offenders. Provisions under the Disability Act 2006 would support this.

Question 158: Do you believe that an advocate should be made available to a person subject to the Crimes (Mental Impairment and Unfitness to be Tried) Act 2007 at particular times?

Yes

CONCLUSION

VCASP supports the key principles and purposes as outlined within the Law Reform Commission's Guardianship Paper, and commends the Commission on the development of this Paper.

As stated with the Commission's paper, (page 50), ABI is now one of the key areas of service of guardianship regulations, and such client bases are currently operating within a structure established primarily for intellectual disability, and developed prior to the legislation of a number of key human rights Acts.

The development of a Final Paper which includes within it the issues of relevance to people with ABI, such as recognition of fluctuation of capacity, recognition of pre-injury lifestyles, and advocacy for increases to sector funding for service delivery, community education and ongoing data collection/research, can be of significant benefit to current and future persons with ABI and their guardians/carers.

We acknowledge the opportunity provided by the Commission through this formal submission and through forum consultations to comment upon the development of the Guardianship Paper, and we thank the Commission for the opportunity to forward our response. We look forward to the Commission's Final Report in December 2011.

REFERENCES

arbias Ltd & La Trobe University (2010) *Acquired Brain Injury Screening, Identification & Validation in the Victorian Correctional System*.

Law Reform Committee (2010), *Inquiry into powers of attorney*. Accessed online April 2011. www.parliament.vic.gov.au/images/stories/committees/lawrefrom/powers_of_attorney/transcripts/2010-03-30_VCASP.pdf

Parliament of Victoria (2010), *Equal Opportunity Act 2010*. Victoria.

Victorian Law Reform Commission (2011), *Guardianship Consultation Paper*. Victoria