



Submission No. 57

AGED CARE ASSESSMENT SERVICE (ACAS) VICTORIA

Submission to the **Victorian Law Reform Commission** in
response to the **Guardianship Consultation Paper**

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Contact:

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Introduction

ACAS Victoria is a representative body which consists of the Manager or a representative from each of the 18 Aged Care Assessment Services (ACAS) across Victoria. ACAS Victoria provides a forum for discussion regarding clinical and service issues. It contributes to the development of consistent and quality services for consumers and carers across Victoria.

ACAS Victoria is part of the national Aged Care Assessment Program (ACAP) and operates in accordance to the ACAP Guidelines that state:

"The role of ACATs is to determine the overall care needs of frail older people and to assist them to gain access to the most appropriate types of services. In doing this ACATs comprehensively assess older people taking account of the restorative, physical, medical, psychological, cultural and social dimensions of their care needs. ACATs involve clients, their carers, and service providers in the assessment and care planning process. ACATs are also encouraged to involve the person's General Practitioner (GP). There are a number of principles underpinning ACAT assessments that distinguish them from other assessment types." (ACAP Guidelines September 2006)

ACAS appreciated the opportunity to attend a consultation with the Victorian Law Reform Commission in February 2011.

ACAS Victoria has considered the Victorian Law Reform Commission's Guardianship Consultation Paper and welcomes the opportunity to continue its contribution to the review.

ACAS Victoria would like to highlight and comment on the following areas:

Part 2: The Direction of New Laws

Chapter 5: Principles of Laws

Question 2 & Question 3: Do you agree with the Commission's draft statement of purpose and draft general principles for new guardianship laws?

Yes – ACAS has a pivotal role in ensuring people have a right to make informed decisions regarding access to Commonwealth programs, These principles underpin the way ACAS practice and these guidelines strengthen the rights of the individual

Chapter 6: Clear and Accessible Laws

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

Yes – The current system is confusing and fragmented. One single Act would improve communication and access and aid community education.

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?

YES we support the replacement of the "person responsible". We prefer the term "health decision maker" as it removes the focus from a medical model.

Question 7 & 8:

Do you agree with the Commission's proposal that the term 'guardian' should be replaced with 'adult guardian' and that 'administrator' be replaced with 'financial guardian'?

ACAS does not support changing the term 'guardian' as it is a term that is accepted and generally understood with the community and service network. If the term was to change we would prefer 'personal or lifestyle guardian', as being descriptive of the type of decisions to be made.

ACAS does support changing the term administrator. If the term was to change the term 'financial guardian' would be preferred.

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?

Education needs to consider the needs of the community including those who have sensory impairment, are isolated and have cultural and language differences. Community radio/TV and presentations to community groups/senior citizen's groups/carer respite centres should all be considered, as well as the engagement of organisations such as Vision Australia for access to alternative print materials and radio.

Particular attention should be given to the following;

- Indigenous communities - ACAS encourages the use of existing ATSI liaison workers in HACC and Health Services, and consultation with key aboriginal services.
- CALD groups – consideration be given to key liaison groups for each community such as the Community Partners Program (CPP) aims to promote and facilitate increased and sustained access to aged care information and services by culturally and linguistically diverse communities with significant aged care needs
- Older people – The establishment of a series of education modules targeting older person's networks similar to the Elder Person's Rights training in Victoria could be effective. This program incorporates training of key personnel in services, who can run education sessions for older people. This ensures consistency and a proactive approach for older people. This approach should be encouraged for key workers in Health Services especially social workers in hospital settings.

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?

Yes. The Public Advocate should expand their role in producing community education materials and educating the community. It is important to have one repository of information for consistency and access to/for the community. Other key bodies such as Senior's Rights, ACAS etc have a role in informing and educating the public and consumer groups. However education materials should be produced by one key body.

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

Yes. However any campaign needs to be directed towards consumer rights and empowerment, similar to the Elder Person's Rights campaign in Victoria.

Chapter 7: Supported Decision Making

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

ACAS would support the Commission's proposal.

As per feed back from the consultation session on the 28/2/2011 ACAS acknowledge that people may have fluctuating or changing capacity and ACAS endeavour to support people in their decision-making.

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

Yes. In principle we agree with the roles of supporters and co-decision makers. However the additional layers can add complexity and an individual may require a higher level of understanding/knowledge between the two personal appointments.

Also with co- decision makers we do question what process would occur when both parties are not agreeable to a plan.

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

No - OPA should have provision to take on the role of supporter or co decision maker, where there is no other option, though we acknowledge they would require appropriate resources and funding to undertake 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?

Yes - OPA should play a role in training and education of supporters and co decision makers. OPA would require funding and resources to attend to this in effective and timely manner.

There needs to be a mechanism for reporting and monitoring supported decision making arrangements, and OPA are well placed to undertake this role.

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?

OPA should be resourced to expand there existing community volunteer programs.

Question 20 Should 'supporter' or 'co-decision-maker' arrangements apply to financial matters, or be limited to personal decision making?

Yes – These arrangements should apply to financial matters. However the question of how and who monitors these arrangements arises.

Chapter 8: Personal Appointments

Question 28 Should an online registration system be created for enduring powers?

Yes

Question 29 Which organisation should hold the register?

A government organisation that has the capacity to hold and administer a large data base should hold the register.

Question 30 Should registration be voluntary or compulsory?

To reduce confusion and encourage compliance, registration should be compulsory.

Question 31 If registration is compulsory, what effect should this have on the validity of unregistered appointments?

There will need to be 'grand parenting' period for appointments previously made and currently active.

Personal appointments that are not active should become invalid.

Question 32 When is the best time for registration to occur?

Registration needs to occur within 14 days of the appointment being made. However registration process needs to be clear and accessible.

Question 33 Who should have access to the register? What safeguards could be put in place to protect an individual's privacy while allowing appropriate people to access it?

OPA and key personnel in health care services including ACAS, and financial institutions. Access should be via electronic ikeys for verification, similar to what ACAS and residential care providers have in place with Medicare, in accessing ACAS approvals across Australia.

Part 5: VCAT Appointments

Chapter 10: VCAT appointments and who they are for

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?

Yes - ACAS support this proposal, as it removes the perception that a disability on its own is a relevant factor in determining capacity.

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?

Yes - ACAS agrees with the guiding principles and definition provided by the Commission.

However the assessment and determination will still need to be attended by personnel with skills and qualifications to determine capacity. Access to such personnel may vary in regional areas.

Question 52 Do you agree with the Commission's proposal (Option B) that new guardianship laws should allow VCAT to appoint a guardian or an administrator for a person when it is satisfied that the person is unable to make their own decisions because of a disability—and is unlikely to regain or achieve that capacity—and might have some future need for a guardian or an administrator?

Yes – ACAS agree with the removal of the criterion for existing need, and acknowledge that in some cases it is appropriate to appoint a guardian where anticipation of future needs is demonstrated.

An example: A client trialing a return home from hospital with identified risks in the community and interim case management. Where there is a high probability of readmission and requiring access to residential care, appointment of a guardian at this stage could assist with transition to home/residential care; and prevent readmission to hospital and delays with discharge planning.

As a safeguard there should exist reviews at 6 months to determine if there is an ongoing requirement.

Chapter 12: The Distinction Between Guardianship and Administration

Question 55 Should the current distinction between guardianship and administration be retained? If so, do you agree with any of the options (A (i)–(v)) described by the Commission?

Yes - Retain current distinction for clarity & acknowledge the different skills required for each of these roles. We would support dual appointments for private administrators and guardians only [Option A (ii)].

Question 56 Do you agree with any of the suggested ways to manage the overlap between the powers of guardians and administrators? Are there any other ways to manage this overlap?

Yes: Agree with all suggestions

Chapter 13: Powers of Guardians and Administrators

Question 62 Should it be possible for VCAT to order that a guardian or an administrator have the power to make decisions about any of the following matters:

- whether a represented person should continue to hold a driver licence

No - Mechanisms and process are in place to determine person's capacity to hold a driver's licence i.e. Vic Roads/OT driving assessment.

Whilst licenses can be cancelled a person can continue to drive.

The issue is the disablement or removal of the car - A guardian or administrator should have the power to do this.

- a will by the represented person

No - existing legal professional bodies can meet this requirement.

- organ donation by the represented person?

No comment

14: Automatic Appointments—The Person Responsible

Question 70 Do you agree with the Commission's proposal (Option B) that the hierarchy for automatic appointees, as currently set out in section 37 of the Guardianship and Administration Act 1986 (Vic), should be retained?

Yes

Question 71 What alterations (if any) should be made to the list?

Alterations should recognise multiple appointments, aboriginal kinship systems and community elders.

Part 6: Statutory Appointments

Chapter 15: Informal assistance—Admission into Care

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?

Yes - ACAS support formalising existing arrangements to protect people entering residential care arrangements, and those supporting the arrangements. ACAS have supported informal arrangements when it has been in the person's interest and been the least restrictive process. These arrangements have been endorsed in the ACAS – OPA protocols [revised 2010].

Question 75 If yes, do you agree with the Commission's Option E that new guardianship legislation should extend the automatic appointments scheme to permit the 'person responsible' to authorise living arrangements in a residential care facility in these circumstances if there are additional safeguards?

Yes - Automatic appointment provisions should be expanded to permit the person responsible to authorise living arrangements with safeguards. This process informally occurs now where the next of kin/family are asked to accept responsibility for a decision, or carer/family declare they are unwilling to retain a role in caring for the person at home, thus decision is made for residential care. Currently there is no scrutiny of this process.

The additional dilemma exists where people have no recognised relationships as defined in 'person responsible' e.g. marginalised people. The ACAS –OPA protocols and the Department of Health and Ageing support alternative arrangements that should be considered when changing this law.

Question 76 If the automatic appointment scheme is expanded to cover these circumstances, do you agree with any or all of the possible safeguards suggested by the Commission? Are there any other safeguards that should be introduced?

ACAS support all the safeguards outlined in Option E. An additional safeguard may include an ACAS assessment for an opinion and recommendation on type of care.

Question 77 If the automatic appointment scheme is expanded to cover these circumstances, should the hierarchy of automatic appointees be changed?

Yes - The hierarchy needs to be adaptable and reflective of different relationships, including the recognition of multiple decision makers, community elders, and significant formal care relationships. Safeguards where decision makers are not all agreeable also need to be in place.

Question 78 If the automatic appointment scheme is expanded to cover these circumstances, what residential facilities should fall within the scheme?

Any residential facility that can meet the level of care required by the person should fall within this scheme.

To enter Commonwealth funded residential aged care places an ACAS assessment is required which will define level of care and type of accommodation.

As a safeguard an ACAS assessment can be requested for an opinion and recommendation.

An exception to the facilities that fall within this scheme should be psycho geriatric units as they are specialised and most restrictive in their care. Under the Mental Health Act a Consultant Psychiatrist can also recommend accommodation as part of a Treatment Order.

Part 7: Responsibility and accountability under the law

Chapter 17: Responsibilities

Question 88 Does the law currently strike the right balance between following the wishes of the person, including those that involve risk or danger, and other important considerations such as the right of a person to be protected from harm?

No - Society and the service system has become more risk averse which does not encourage the balance between rights and protection.

At times there are also insufficient formal services or long waitlists for services/case management programs to adequately support self determination and manage risk.

Chapter 18: Confidentiality

Question 97 Do you agree with the Commission's proposal that new guardianship legislation should authorise all substitute decision makers, including automatic appointees, to have access to confidential and private information about the represented person on a 'need to know' basis?

Yes - If a person has authority to be a decision maker or is investigating risks / abuse they should have access to information to support an informed decision.

Chapter 19: Accountability and Review of Substitute Decision Making

Question 111 Do you agree with the Commission's proposal (Option B) that new guardianship laws should permit merits review of decisions made by the Public Advocate as a guardian and by State Trustees as an administrator?

Yes - Agree with Option C the need for a transparent review process

Question 112 Who should be entitled to apply for merits review of a guardian's or administrator's decision?

The represented person or any person directly affected by that decision.

Part 8: Implementing and Regulating New Laws

Chapter 20: The Public Advocate

Question 118 Do you believe the Public Advocate's investigation function should extend beyond cases concerning guardianship and administration?

Yes - OPA's investigatory role should be strengthened and broadened in light of proposed changes to guardianship legislation, including personal appointments

Question 119 Do you think the Public Advocate's investigatory powers should be clarified so that she can require people and organisations to provide her with documents and attend her offices to answer questions?

Yes - Her investigatory powers should be clarified and enforceable.

Question 120 Do you think the Public Advocate should have the power to enter private premises with a warrant issued by a judicial officer when there are reasonable grounds for suspecting that a person with a disability, who has been neglected, exploited or abused is on those premises?

Yes - ACAS would support the extension of OPA's power. ACAS appreciated OPA's investigatory function of the past, and would support resourcing OPA to strengthen and broaden this function. ACAS has limited ability to respond where there is suspected neglect or abuse and no consent to access the person and/or their home. ACAS can seek assistance from the police to attend to a welfare/safety check, but there is inconsistent practice and resources across ACAS and community police.

Question 121 Do you think it is necessary to protect the anonymity of people who provide the Public Advocate with information about the possible abuse, neglect or exploitation of people with a disability?

Yes - This may encourage people to come forward & report suspected or actual abuse.

ACAS should also have the ability for anonymity where there is risk / threats to the person or staff – this is heightened in regional areas, where staff may be known locally.

Question 124 Do you think that the legislation should include principles to guide the Public Advocate when undertaking her advocacy functions?

Yes

Question 126 Do you agree that the Public Advocate should continue to be both the guardian of last resort and an advocate?

Yes - Advocacy should be a component of the decision making process.

Question 127 Should the Public Advocate be responsible for training and supporting private guardians?

Yes - to guide good practice and enhance accountability and transparency. ACAS acknowledge the additional resources that would be required to attend to this task effectively.

Question 130 Do you think the Public Advocate should play a role in designing a register of personal appointments?

Yes

Question 131 Do you think the Public Advocate should be given responsibility for monitoring the activities of personally appointed substitute decision makers?

Yes - this would support accountability and transparency.

Question 134 Do you think the Public Advocate should be required to report annually to Parliament?

Yes – to support an accountable system.

Chapter 21: VCAT

Question 135 Should the Guardianship List be supported by a body such as the New South Wales Guardianship Tribunal's Coordination and Investigation Unit so that it can take a more active role in preparing cases for hearing?

Yes - ACAS support a comprehensive preparation of matters presenting to VCAT.

Though this is resource intense, it may reduce unnecessary hearings, and support the proposed represented person in preparing for the hearing.

Question 136 Should the Public Advocate be funded to undertake this role?

Yes - This would support other proposed functions for the Public Advocate, and can expand on their current role at VCAT

Question 137 Do you agree with any of the options proposed by the Commission to improve legal assistance and advocacy support for people in Guardianship List matters at VCAT?

Yes - ACAS agree with all options that promote a persons rights & access to justice.

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

Yes - Multi member panels should be a standard practice especially for initial guardianship applications. Panels that have legal, professional and community representation may also improve the interface between VCAT and the community

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

See Q 150

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

VCAT needs to enhance its accessibility to the community, and continue to hold Hearings at external venues e.g. local courts & health services.

There should also be the option to have a hearing within a persons home if the person is refusing to attend a Hearing.

Use of technology – similar to Tele - health options should be considered.

If person cannot attend there should be evidence of why a person is unable to attend. Whilst we acknowledge that it is inappropriate to have the person experience undue stress this should be balanced with their access to justice.

Question 153 Do you have any ideas about how to make the Guardianship List more accessible to Indigenous people?

Use of ATSI liaison/ support workers and volunteers should be encouraged and alternative venues considered.

Question 154 What can be done to make the Guardianship List more accessible to users who come from culturally and linguistically diverse backgrounds?

Application forms and information should be available in community languages. Enhanced access to interpreters, though we acknowledge this is also a workforce issue.

Proactive access to bilingual VCAT members, volunteers etc would also enhance accessibility.

Question 155 What can be done to make the Guardianship List more accessible to users in regional areas?

Hearings should continue to be held at regional courts and hospital settings.
Hearings could be extended into the person's home.
Use of Tele –health/video conferencing etc would enhance access in regional areas.

Conclusion:

We have no further comments.

ACAS thanks the VLRC for the opportunity to make this submission.