



Submission No. 58



**The Australian Psychological Society Ltd**

**Submission  
In Response To The  
Victorian Law Reform Commission's  
Guardianship: Consultation Paper**

Gloria Smith-Tappe

Elizabeth Mullaly

Katie Kirby

Luke Delaney

David Stokes

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**The Victorian Section of the College of Clinical Neuropsychologists (CNN) of the Australian Psychological Society (APS)** welcomes the further opportunity to provide input into the Victorian Law Reform Commission's review of the Guardianship and Administration Act (GAA).

The main contributors to this submission were:

- **Gloria Smith-Tappe** (Manager of Psychology Services and Senior Clinical Neuropsychologist, Austin Health-Royal Talbot Rehabilitation Centre).
- **Elizabeth Mullaly** (Member of CCN Course Approval Committee and Manager of Psychology Services and Senior Clinical Neuropsychologist Caulfield Hospital).
- **Katie Kirby** (Neuropsychologist, Private Practice).
- **Luke Delaney** (Chair of the "Guidelines for Preparation of Neuropsychological Reports for the Guardianship List of the Victorian Civil and Administrative Tribunal "Working Party and Senior Clinical Neuropsychologist, ARBIAS).
- **David L Stokes** (APS Senior Manager Professional Practice and Clinical Neuropsychologist).

Contributions to the submission were also made by other CCN members working in fields such as aged care and mental health.

As a representative group of Clinical Neuropsychologists, we intend to focus our submissions on the following specific questions from the Guardianship: Consultation Paper.

## Submission in response to the Victorian Law Reform Commission's Guardianship Consultation Paper

### Questions Addressed

- **Question 10 (p109):** Do you have any specific ideas about how to better target education about guardianship laws towards health and community sector professionals?
- **Question 22(p134):** What safeguards do you think are necessary to protect supported people from abuse?
- **Question 28(p 158):** Should an online registration system be created for enduring powers?
- **Question 50 (p200):** 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?
- **Question 51(p202):** 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?
- **Question 52(p204):** 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?

### Responses

#### **Question 10 (p109): Do you have any specific ideas about how to better target education about guardianship laws towards health and community sector professionals?**

Neuropsychologists play a key role in educating patients, their families and other health and community professionals regarding the practical workings of the Guardianship and Administration Act. We would strongly support any initiatives to educate the health and community sector and the public about changes in the Victorian guardianship laws. The creation of educational materials that are easily accessible and web- and paper-based will need to be factored into the roll-out of changes to the Guardianship Act. To ensure that education regarding the changes continues to remain available beyond the roll-out period, we would support the provision of comprehensive web-based information incorporating updates as required.

We support the Office of the Public Advocate continuing to be adequately funded to provide ongoing education and information packages regarding the guardianship and administration laws. The current range of educational resources and information packages provided by OPA are excellent and widely known and used in the community. In our opinion, OPA would be best placed to continue to produce

educational resources to assist with informing the community about changes to the guardianship laws.

**Question 22(p134): What safeguards do you think are necessary to protect supported people from abuse?**

We note the Commission's recommendation to introduce new supported decision-making arrangements and the potential advantages and disadvantages of these changes to the legislation. We would like to reiterate the concerns outlined in our initial submission, particularly for individuals with moderate-to-significant cognitive disability. In some situations, additional professional advice and support may be required to determine how best to support individuals undertaking supported and co-decision-making arrangements, particularly if there are significant cognitive and communication issues present. We would support the inclusion of more formalised accountability mechanisms for supported and co-decision-making orders to ensure that these new arrangements are used appropriately.

**Question 28(p 158): Should an online registration system be created for enduring powers?**

An on-line registration system for guardianship and administration orders would greatly enhance the capacity of health and community providers to support their clients, particularly in healthcare situations where there is the need to address these issues in a timely way. Under the existing framework, uncertainty regarding whether an individual has an existing enduring power results in unnecessary investigations and assessments being conducted because the paperwork needed to confirm these arrangements cannot be provided. An on-line registration system would be a welcome initiative, provided there are relevant safeguards ensuring confidentiality of client information.

**Question 50 (p200): 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, we do agree with the Commission on this point. As outlined in our initial submission, we support the requirement to establish that a person has a disability as a valid, but not separate, criterion for determining need for a substitute decision maker. We believe that the establishment of a causal link between cognitive disability and impaired decision-making capacity should remain a key safeguard for individuals with a disability.

Just as a person should not be considered to have incapacity solely because they have a disability, they should also not be considered to have a disability because they have an apparent incapacity. A formal finding of incapacity should only be made where there is independent evidence of a disability. This is in accord with the

concept that a person "of sound mind" should be able to make autonomous decisions without giving rational reasons.

We also support "disability" being defined in the new legislation and that the definition should remain unchanged, that is, listing "intellectual impairment, mental disorder, brain injury, physical disability or dementia." Our reasons are as follows. First, the current definition provides a comprehensive prompt regarding conditions causing disability. Second, the term "mental disorder" is broad enough in its recognition that people with some disorders, such as certain personality disorders or substance abuse disorders, that might not strictly speaking be called mental illnesses, may benefit from coming under the protective jurisdiction of the Act. Third, physical disability may sometimes need to be recognised as exacerbating brain-related disability, such as when cognitive changes co-occur with severe visual impairment in the context of managing financial affairs.

**Question 51(p202): 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?**

We strongly support the inclusion of the capacity principles as outlined in Option A 10.133. The inclusion of these principles will provide a clear framework for the application of the new guardianship laws.

We also support the Commission's attempts to provide a clear framework and guidelines for the determination of incapacity through a legislative definition, Option B. However, after reviewing the literature and the suggested guidelines set out by the Commission to guide the assessment of capacity (p. 202), our working group would like to propose the following alternative framework:

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

- a) to understand the information relevant to the decision
- b) to retain that information for as long as is relevant to the decision and its implementation
- c) to appreciate the potential consequences of the decision on themselves and their situation
- d) to weigh the risks and benefits of the options as part of making the decision
- e) to communicate the decision in some way (whether by talking, using sign language or any other means)

Thus, we are suggesting an additional point and modifications to the wording of the checklist of matters suggested in the consultation paper (p. 202). With regard to wording, we have expanded 'b' to clarify that retention is needed for both the decision and its implementation. This is because, while retention may need to be only relatively short term for many medical decisions, which are the main type of decision dealt with in the decision-making literature, lifestyle and financial decisions usually need to be retained in the longer term.

We are also suggesting an additional point, 'c', which stipulates the ability to appreciate the potential consequences of the decision on the person themselves and their situation. It is our opinion that this additional point may help to identify those

individuals who lack insight into the potential consequences of the decision – this is especially relevant to those with damage to the frontal regions of the brain. The assessor needs to examine the person's awareness of the potential consequences of their decision, otherwise the individual may be able to weigh up the information, but not acknowledge the potential consequences of the decision on themselves and their situation.

We recognise that there are risks associated with offering a 'checklist' of matters to be considered, because they may be applied in a simplistic or formulaic manner. As indicated in our initial submission, the process of assessing decision-making capacity can be a complex and multi-layered process. However, we believe that the advantages of offering a guiding checklist would offset the disadvantages.

A checklist would also provide a useful framework to guide appropriate support in supported and co-decision-making arrangements.

**Question 52(p204): 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?**

We agree with the Commission that appointment of a guardian or administrator should be allowed in anticipation of future need as outlined in Option B. However, in cases of acquired brain injury (ABI) it can be difficult to predict the likelihood of someone regaining capacity. Many people with an ABI are likely to have had many years of competent decision-making, and so the chances of future capacity are much greater than if competent decision-making has never developed. Many younger people with severe cognitive deficits and persisting lack of capacity are now surviving. They may have a long lifetime of decision-making ahead, so that this can be an important issue in determining the need for a guardian or administrator until such time as capacity may be regained. Only in very severe ABI may it be possible to offer an opinion regarding the likelihood of someone regaining capacity a year or two after their injury. Thus, if a guardian or administrator is appointed for someone with severe ABI, on the basis of future need and likelihood that capacity may not be regained, the person's decision-making capacity should be kept under review in the context of a continuum of decision-making model.