

ACAS VICTORIA SUBMISSION FOR THE REVIEW OF VICTORIA'S GUARDIANSHIP AND ADMINISTRATION ACT 1986.- May 2010

The Aged Care Assessment Services of Victoria is a statewide group that includes all Aged Care Assessment Services (ACAS). This provides a forum for discussion and review of current activities related to aged care clients, encourages consistent practise and identifies areas of improvement for the implementation of the Aged Care Program.

The Aged Care Assessment Program is responsible for the assessment of frail aged persons and some younger people, and assists in developing an appropriate care plan. This includes the approval for eligibility for Commonwealth funded residential and community services.

ACAS Victoria has developed protocols with the Office of the Public Advocate to guide practise where both services are involved. (These are currently being reviewed.) It also has processes developed when making applications to VCAT for aged care clients. .

This group welcomes the opportunity to comment on the review of the Victorian Guardianship and Administration Act (1986) Consultation through a group of ACAS clinicians and managers have developed the following response on the issues for consideration.

General Overview

The Aged Care Assessment Service (ACAS) acknowledges the vital role that the system of guardianship and administration in Victoria performs to protect the rights of people who have a disability. We welcome this review as an opportunity to highlight the needs of the ageing community and the increasing number of older people requiring protection.

Since the development of the Guardianship Act in 1986, there have been changes to the type of situations where advocacy is required for a person with a disability. There has been an increase in the number of older people with cognitive impairment and acquired injury, assessed by ACAS. The aged care reforms and the legislative requirements of the Aged Care Act (1997) promoted a key role for the Aged Care Assessment Program to assess older people for eligibility to access Commonwealth Government funded residential and community care programs. This resulted in a greater emphasis on the rights of the older person to be able to access the most appropriate care and agreeing to that care. Subsequently, where there is conflicting views between the older person and or the family, carers, hospital or community services about the appropriate plan or level of risk, the decision-making ability of the older person comes into question.

2.

The trend for access to VCAT in these matters will continue to increase in line with the growing numbers of older people with acquired or aged related disability. The guardianship and administration system needs to change to reflect the main users of the system and that **people who have been life long decision makers**, who because of age related changes or acquired injury, **are now requiring support in making decisions in certain areas.**

An underlying issue in addressing this trend for increasing demand for guardianship and administration, is whether the resources of the guardianship and administration system are commensurate to the increasing demands from changes in the users of the system. Maintaining a responsive service is important, but it also requires a service with a consistent approach and adequate knowledge and skills for this group. The tribunal members, guardians and administrators need appropriate resources and skills to address and be aware of the differing needs. This should be reflected in the selection, training and skills of the tribunal members and OPA .

What works well?

- VCAT provides access to an independent body that can judge the available evidence, is not connected to any service, can identify any conflict of interest, and provides a mediation role where there is a conflict between a person with a disability, families and or services.
- The more common practise in the past where ACAS could access the resources of OPA through telephone conferencing or investigations by OPA to attend situations of immediate risk prior to applications to VCAT enhances outcomes for the person with the disability.
- Recent expansion of locations for guardianship hearings which allows easier access for a person with a disability, family and carers and services. This is particularly effective for an frail older person in hospital.

What doesn't work well?

- Wait times for VCAT hearings in urgent situations. Also delays in the allocation of a guardian / administrator after a VCAT hearing which appears more common and reflects the pressure on resources. Hence a client can remain at risk, and this places a burden on ACAS and other services to manage.
- Lack of consistent practise between VCAT members and in some cases assuming a role which appears outside the scope of the Act. Some examples include members making decisions regarding a person's care/treatment plan, and stating this on the Order.
eg. VCAT members authorising that a person enter TCP before a guardian is allocated to make a decision.

3.

- Understanding of the role of VCAT. There is a perception that VCAT members are removed from the community, referred to as “a faceless group of people” who don’t appear to understand the community and visa versa.
- There is sometimes a lack of flexibility and ability for VCAT / OPA to act immediately in urgent situations. It is increasingly difficult to engage OPA to investigate complex situations before the commencement of VCAT proceedings for Guardianship.

Recommendation;

- To strengthen the interface between aged care, mental health, disability and the VCAT, guardianship and administration services and provide clear responsibilities through instructions /protocols that include all sectors.
- To review the Guardianship Act and include advocacy and investigation options as a least restrictive, and a valuable part of the process to assist in determining the need for Guardianship.
- To develop performance indicators regarding timeliness when responding to high risk situations and ensure adequate resources and skills are available for the tribunal members.

Understanding of guardianship and administration laws

Many professionals may have adequate, and in some cases a comprehensive understanding of guardianship laws but in general, members of the community and services do not. Understanding of these laws would be improved via education and information. There is not an adequate understanding of terms; VCAT/OPA/Guardian/EPOA, and are used loosely and interchangeably by the public and by some health professionals and service providers. It is acknowledged that such information is sometimes sought on a ‘need to know’ basis, but when required it needs to be accessible and easily understood.

Recommendation;

- To promote the role of VCAT and OPA within the community and provide information that is transparent regarding the process of Guardianship and Administration.
- That ongoing education for services be developed as part of the Guardianship Act. This needs to include key personnel who can work with agencies (eg. ACAS) to train/educate services, consult with local community groups, and provide a network in the system.
- That the Division of General Practitioners and peak legal bodies be included in education to develop skills in identifying appropriate assessment of a person’s ability to appoint EPOA’s and where decision making is requiring an application to VCAT.

4.

Disability, capacity, vulnerability and risk

Capacity issues are identified as particularly significant for ACAS. The determination of a disability related to age related or acquired cognitive impairment is most often sought around capacity to make decisions where there is a perceived risk or vulnerability for an individual. Increasingly there is a perception in the community that ACAS is a lead agency in assessing capacity. ACAS assessments often uncover situations of risk and vulnerability where an individual is lacking capacity.

In some localities ACAS may not have access to the necessary medical staff to meet this expectation. There are validated tools that GPs and other recognised professionals can use – especially in regional areas where access to Geriatricians, neuropsychologists and psychiatrists are limited

The ACAS may play an important role in some cases in determining capacity. Accessibility and resource issues are clearly fundamental considerations. The perception of others within the community is also significant in this context. Capacity assessments need to be considered in the review of the current guardianship laws to ensure there is a clear and relevant set of indicators to determine where a disability exists and who can attend these assessments.

In relation to situations where ACAS has clearly identified capacity and risk issues requiring an appointment of a guardian, there are occasions when the tribunal member has discounted the evidence provided by ACAS with no available recourse from ACAS. This appears to have increased more recently and there are reports from ACAS clinicians, that some tribunal members do not appear to have an understanding of community issues and service systems. In these cases an ACAS clinician may have extensive knowledge of the person. There appears to be a need for review of such cases within the system.

Another group increasingly referred to ACAS for assessment are people living in squalor and identified vulnerability from homelessness and drug and alcohol issues. This group may still have capacity in accordance with the criteria of the Act, but not have the ability to remove themselves from risk. The trigger for these groups is the perceived vulnerability from their circumstances rather than capacity.

It is difficult to rely on the concept of “Vulnerability” in isolation. How do we assess this and ensure consistency across similar cases? Is there a recognised set of standards?

Consistent collection of evidence is required to demonstrate how conclusions are drawn when assessing vulnerability. The guardianship laws should include a role for VCAT in assisting people with decisions in these cases of vulnerability.

5.

There appears to be increased demand for substituted decision makers related to risk. Two key issues that have emerged over time that appear to impact on the issue of risk are;

- Hospitals are a major source of applications to VCAT – do they have low tolerance for risk taking, concerned about litigation?
- Where services in the community are withdrawn or not offered due to OH&S issues.

. There needs to be a greater understanding in the community of risk taking, and shared responsibility amongst the community and service providers in supporting people in the community.

ACAS supports the concept of the best interest approach to ensure the a represented person's wishes are considered as this remains a fundamental human right, This is assuming such decision making does not pose significant risk to that person

Recommendation;

- VCAT /OPA should be able to act / assist when a person is vulnerable and unable to remove themselves from risk due to circumstances (such as above examples) despite having capacity.
- The concept of "supported decision making" needs to be developed further to reflect the person's ability to participate in their decisions rather than an appointment of a substitute decision maker.
- The service system on the whole needs to be educated/trained/supported The application process needs to be tightened on 4 mandatory items – disability, capacity, need, and what has been trialled?
- OPA to have greater funding/resources to increase community education profile, support services in implementation of least restrictive strategies and increase their role to investigate and assist a person with decisions prior to appointment of a substituted decision maker through VCAT.
- VCAT members need to have adequate training or knowledge of the community and service system that ensures they are able to make appropriate decision. There needs to be a pathway to have a decision reviewed with the Board where a service perceives the member's decision has not adequately considered the evidence presented.

Substitute decision making

Substitute decision-making by only one decision-maker could be effective as it would provide a seamless approach for the client and service providers. There are difficulties negotiating between OPA & State Trustees when a guardian & administrator has been appointed. Often it can be a slow and cumbersome process.

6.

However, such an approach could also prove to be quite overwhelming for the decision-maker. The challenge for one person to have two roles/powers may result in decisions by that person not being in the person's best interest. For example, a decision could be based on financial constraints rather than what is in the person's best interest. It would require finding a person or body that would have the skills to attend to all decisions.

As discussed earlier in this document there is a benefit in having supported decision making to be a recognised role within the Act. Any changes to the law should include a set of criteria indicating when the person requires this type of decision maker, and that no other option exists in the community. The key indicators need to include the level of risk and vulnerability that requires this level of assistance.

Recommendation;

- To develop a working group including service providers, health professionals and consumers to develop a set of criteria around supported decision making taking into account a method of determining the vulnerability, risk and the impediments to effective decision making by a person. This should include a person who has capacity.
- That the current system remain where a guardian and administrator maintain separate roles.

Review;

VCAT should have the power to review decisions made by Guardians and Administrators. All interested parties should have opportunity to request such a review. Appropriate action including criminal redress should be available to deal with abuse of these roles. Such power to review would increase the accountability of Guardians and Administrators. VCAT or another skilled body should have power to review decisions.

There needs to be further discussion regarding the role of an Enduring Power of Attorney (Financial) being potentially immediate regardless of capacity. This is clearly a concern for vulnerable individuals who may not be aware of their rights or be unable to take appropriate action regarding an individual who has potential to abuse the power afforded them.

Another issue is the difficulty for families or carers who have EPOA and not being recognised by organisations or institutions. There needs to be consideration to review the laws governing EPOA. Is there an option to establish a register for EPOA's?

7.

The VCAT process also needs to be open for review through an accessible process for individuals and services. Currently it is unclear if there are processes for appeal.

Recommendation;

- Further education for organisations, legal representatives and the community in the appointment and recognition of the role of an EPOA.
- Transparent and accessible appeal processes for individuals or services regarding complaints about VCAT processes

Terminology;

There does not appear to be any value in changing the terminology of guardian and administrator. Less formal terms reflective of the role/s could be considered for supported decision-making but it may create more confusion for substituted decision makers especially for those who are familiar with the current terms.

The issue of time was noted as an obstacle to achieving best client outcomes. That is, if the process can take considerable time, both in terms of initially awaiting a hearing and subsequently the appointment of a Guardian.

Recommendation:

- To continue with current terminology for guardian and administrators.
- To consider a new terminology for assisted decision makers if this role is developed..

Mental health Act and Guardianship Act

Generally, ACAS supports separate mental health and guardianship laws. Mental health is a specialist area concerning ordering and recommending treatment for a person with an acute or chronic mental health issue that impairs decision-making. However there is a need for clearer protocols and more education for services to clarify the overlapping areas ie accommodation under a CTO.

