

Submission to the Victorian Parliament Law Reform Committee's Inquiry into Powers of Attorney

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The Victorian Section of the College of Clinical Neuropsychologists (CCN) of the Australian Psychological Society (APS) welcomes the opportunity to provide input into the Victorian Parliament Law Reform Committee's Inquiry into Powers of Attorney.

The contributors to this submission were:

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As a representative group of Clinical Neuropsychologists we intend to focus our submission on issues in relation to the Law Reform Committee's task to:

- 1) establish whether the donor of a power of attorney has capacity to create a legally enforceable document and differing execution requirements and the different tests that apply; and
- 2) consider the issue of legal capacity in the context of when an enduring power of attorney is executed and activated

The purpose of this submission is to provide information about the neuropsychological method of assessing a person's capacity to appoint an enduring power of attorney (EPA). It is the opinion of neuropsychologists, based on professional expertise and clinical experience, that a simplified or formulaic approach to assessment of this type of capacity is unlikely to be adequate. This is especially the case for individuals who have disabilities such as intellectual impairment, dementia, acquired brain injury or psychiatric disorder. Many such individuals require a specialised procedure for assessing capacity to appoint an enduring power of attorney, due to possible impairment in attention, processing information, remembering and problem solving.

WHEN DO NEUROPSYCHOLOGISTS ASSESS CAPACITY TO APPOINT AN EPA?

Most neuropsychologists who work in acute hospitals, rehabilitation facilities, aged care, psychiatry, memory clinics and community settings will at times be asked to assess a person's capacity to appoint an EPA. This is primarily limited to times when the person's capacity is deemed borderline by other health care or legal professionals, or when there is a particularly conflictual situation requiring an objective expert opinion. Referrals often occur in contexts where healthcare staff have concerns about potential exploitation of vulnerable patients. Neuropsychological assessments are a scarce resource and therefore only used when less specialised methods are considered inadequate.

See Appendix 1 for examples of situations where neuropsychological assessments have been considered helpful in determination of capacity to appoint an EPA.

WHAT DOES A NEUROPSYCHOLOGICAL ASSESSMENT INVOLVE?

The day to day work of neuropsychologists involves assessing cognitive ability in order to clarify diagnosis and to provide opinions about various types of capacity. Neuropsychologists routinely provide opinions about whether patients with various types of neurological and psychiatric disabilities can (for example):

- manage independent living
- re enter the workforce
- continue to drive a motor vehicle
- benefit from rehabilitation

Assessment of decision-making capacity is an extension of the practices used in assessing other types of capacity.

Neuropsychologists conduct highly specialised cognitive assessments that are tailored to take into account variations in age, education, verbal skills, cultural and linguistic background. Neuropsychologists go beyond the use of simple "one size fits all" cognitive measures (such as the Mini Mental State Exam) and explore various relevant aspects of cognition such as memory, language and reasoning in detail, using scientifically reliable and valid instruments appropriate to the background of the person being assessed.

Neuropsychological methodology incorporates careful gathering of relevant background information and consideration of the person's functioning in real-life situations in addition to formal assessment results. Neuropsychologists devote an average of six to eight hours to the process of gathering the relevant information, carrying out the interview and assessment, then interpreting and formulating an opinion before preparing a written report. Neuropsychologists consult closely with medical and allied health colleagues.

WHAT SPECIFIC APPROACH IS TAKEN BY NEUROPSYCHOLOGISTS WHEN ASSESSING CAPACITY TO APPOINT AN EPA?

Neuropsychologists recognize that capacity is not an all or none construct. Assessment of capacity must be based on the presumption of capacity and on the concept that capacity is time- and task-specific. The adaptive approach used by neuropsychologists in the assessment of capacity is not based on the disability alone, or the outcome of the decision alone, but on an evaluation of the person's cognitive and functional resources in light of the complexity of the specific decision(s) to be made.

When asked to assess decision-making capacity specifically, neuropsychologists take into account and are guided by relevant legislation, such as the Guardianship & Administration Act 1986 and the Instruments Act 1958.

After developing rapport and gaining assent, neuropsychologists conduct an interview with the person about the decision under consideration, and observe the process of decision-making. The neuropsychologist's training helps them to make judgements about the person's understanding and reasoning abilities and their capacity to look ahead to evaluate the likely consequences of their actions. Neuropsychologists avoid using the outcome of the decision (e.g. whether the decision itself appears logical or wise) to inform their opinion of the person's decision-making abilities.

Neuropsychologists will also usually assess cognition using objective measures as a way of providing additional information about cognitive abilities important for decision-making such as memory, problem-solving, reasoning and comprehension. This assessment throws light on the cognitive processes observed during the interview and provides the neuropsychologist with a firmer foundation on which to base their opinion. Neuropsychologists look for a convergence of evidence from the interview and the formal assessment.

When specifically assessing capacity to appoint a financial EPA, neuropsychologists take into consideration the factors listed in the Instruments Act 1958 (Vic) s118. Neuropsychologists consider whether the person generally understands the nature and effect of signing an EPA (as specified in s118 (1) and the six specific matters dealt with in section 118(2) a-f. In practice neuropsychologists find that few individuals can demonstrate an immediate understanding of these points and some education is required. When assessing capacity to appoint an EPA for guardianship or medical treatment, neuropsychologists consider the individual's understanding of the general nature and effect of their decision.

Neuropsychological assessments can assist not only in determining capacity but also in finding ways to enhance decision making capacity (or compensate for specific problems).

DOES A SIMILAR PROCESS OCCUR WHEN NEUROPSYCHOLOGISTS ASSESS WHETHER A POWER SHOULD COME INTO FORCE?

When an individual has signed a valid EPA in the past, neuropsychologists are sometimes asked to comment on whether the individual has now lost capacity to make certain decisions and whether the attorney should begin assisting with decision-making. For example, when an individual is diagnosed with dementia in a memory clinic setting, having previously appointed a

child as a financial EPA, that child may be advised of their parent's likely difficulties with management of financial affairs and advised to begin overseeing bill-paying and other relevant financial matters.

CAN NEUROPSYCHOLOGISTS GIVE RETROSPECTIVE OPINIONS?

Neuropsychologists can sometimes use their knowledge of disease processes to give opinions on likely capacity at an earlier point in time.

WHAT TRAINING DO NEUROPSYCHOLOGISTS RECEIVE?

Neuropsychologists are specialist psychologists who are qualified at masters or doctoral level. In practise this amounts to six or seven years of full-time tertiary study. Neuropsychology students now routinely receive input during their professional training about appropriate approaches to assessing decision-making capacity. Position descriptions for neuropsychology jobs often specify knowledge of relevant legislation and knowledge of decision-making assessment as requirements for selection. Applicants for neuropsychologist positions are frequently asked to demonstrate a sound knowledge of assessment of decision-making capacity at job interview. Opportunities for ongoing professional development are plentiful and assessment of decision-making capacity is a common topic at professional conferences and seminars run by the Society's College of Clinical Neuropsychologists and other bodies such as the Australian Society for the Study of Brain Impairment.

The Australian Psychological Society has recently published Guidelines for Preparation of Neuropsychological Reports for the Guardianship List of the Victorian Civil and Administrative Tribunal (2009). These guidelines were prepared with input from the Office of the Public Advocate and the Guardianship List. This publication offers information specific to assessment of capacity to appoint an EPA (see attachment).

Less experienced neuropsychologists are able to access supervision from more experienced colleagues and this acts as a further safeguard for quality assurance and best practice.

HOW ARE NEUROPSYCHOLOGICAL ASSESSMENTS ACCESSED?

Neuropsychologists are employed in most public hospitals and subacute facilities and are accessed by healthcare teams in these settings. These institutions fund neuropsychological assessments of decision-making capacity (when required) as part of safe discharge planning. Neuropsychology resources are limited in these settings and waiting times for assessments sometimes delay discharge and other formal processes.

Neuropsychologists also work in private practice and receive referrals to assess decision-making capacity (including capacity to appoint an EPA) in the community from family members, lawyers, the Office of the Public Advocate, GPs and specialists. The cost of such an assessment is usually borne by the individual concerned and can be a limiting factor (\$500->\$800).

Community teams such as Aged Care Assessment Teams and community case managers sometimes have difficulty accessing and funding neuropsychological assessments of capacity.

The referral rate for assessments of decision-making capacity has risen exponentially over the past decade due to greater awareness of the complexity of the area and the aging population. Inadequate neuropsychological workforce may become a problem in future years.

RECOMMENDATIONS

The CCN considers that:

An outcome of this enquiry might be the development of specific criteria to establish EPA and guidelines for the procedures to follow when there may be doubt. In particular, if the area of concern is one of cognitive functioning, a referral for a more complex assessment of cognition should be sort.

Some capacity assessments are so complex that specialised neuropsychological assessments may be needed to provide an adequate determination.

Neuropsychologists should participate in the education of legal and healthcare professionals about assessment of capacity and raise awareness of when a specialist assessment is required.

The profession of neuropsychology should recognise its own important role in this process and continue to ensure that its members are adequately and appropriately trained.

APPENDIX 1

In early Alzheimer's disease, individuals have well preserved conversational abilities and social skills and often provide logical-sounding justifications for their decisions and appear to be generally aware of their circumstances. However, closer questioning, once cognitive assessment has uncovered significant episodic memory impairment, will frequently establish that decisions are being made on the basis of circumstances that applied well in the past and that the person has lost the capacity to retain relevant information pertinent to the current situation.

Case Example: *Mrs S was assessed in a memory clinic. She had a three year history of gradual cognitive decline despite good health. She had four adult children who had come into conflict over the best approach to her care needs. One daughter had recently taken her to a solicitor to have her sign an Enduring Power of Guardianship (EPG) but the lawyer and other siblings requested that her capacity be assessed. Mrs S was pleasant, co-operative and aware of her surroundings. She did not appear confused on the surface and she carried out superficial social conversation without difficulty. Her neuropsychological results showed preservation of long term (remote) memories but severe impairment of recent memory and new learning. Other mild cognitive difficulties were present, including problems with reasoning, and the results suggested established Alzheimer's disease. There was no evidence of fluctuation in mental state. Close questioning revealed that she had a very general understanding of the meaning of an EPA but she had no appreciation that her children were in conflict about her care and she had no appreciation of the basis of that conflict (ie her increasing care needs and how they could best be met). Explanation did not help because she was unable to retain the information. She tended to operate on the basis of a long term tendency to be agreeable. The neuropsychologist considered that her formal cognitive assessment results were consistent with her performance when interviewed about the matter under consideration. The neuropsychologist felt that Mrs S was unable, on the basis of her memory impairment and her problems with reasoning, to appreciate the likely effect of signing an EPG to one daughter over and above her other children.*

It is possible that if Mrs S had been subjected to a brief structured discussion using leading questions in the presence of her daughter she may have appeared to have had the requisite understanding to sign. Her cognitive impairment was not readily apparent at a superficial conversational level but the neuropsychological assessment raised concerns that were subsequently confirmed by a more detailed discussion of her circumstances and wishes.

Individuals who have frontal lobe impairment as a result of brain injury, multiple sclerosis, stroke, and certain types of dementia will sometimes appear to be operating on the basis of strongly held beliefs and convictions. Neuropsychological results that suggest significantly impaired reasoning, judgement and insight as well as mental rigidity provided an opportunity to carefully explore the underlying basis of the person's decisions and the possibility of questioning the adequacy of the reasoning process.

Individuals who have damage to language areas of the brain due to stroke or certain types of dementia may have difficulty expressing their wishes and are likely to require specialized assessment to determine whether memory and thinking abilities have also been affected or whether the person will be able to communicate well reasoned decisions using an augmented communication system.

Case Example: *Mrs K had a large stroke affecting the areas at the front of her brain on the left side. In the early months, her husband was appointed administrator as she had never signed an EPA and lacked the capacity to do so. Twelve months later she was attending rehabilitation. She continued to have considerable problems with expression of ideas but she had reasonable comprehension of language and she could read. A specialised neuropsychological assessment using yes / no responses to a series of questions (following education) suggested that she had regained the capacity to appoint a financial EPA and she indicated that she would choose to appoint her husband. Her administration order was subsequently revoked.*