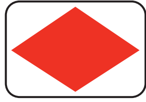 Office of the Public Advocate

Guardianship and the ageing population: Profile of Victorian guardianship clients aged over 65 years

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1. Introduction

The issue of the ageing population and its impact on the provision of guardianship has emerged as a matter of concern in Australian guardianship circles. There are predictions of an exponential rise in the numbers of older Australians requiring guardianship due to cognitive disabilities associated with ageing.

The Victorian Law Reform Commission is currently reviewing the *Guardianship and Administration Act* 1986. Its Terms of Reference are to review and report on the desirability of changes to the Act and include having regard to:

> *d) the increase in Victoria's ageing population and the changing demographic nature of the clients of the Office of the Public Advocate.*

The purpose of this paper is to develop the profile of guardianship clients of the Office of the Public Advocate in Victoria who are over the age of 65 years. Only a very small proportion of people with cognitive disabilities will ever have a guardian appointed for them. The Office is therefore seeking to understand the characteristics of this demographic group and what distinguishes them from those over 65 with cognitive disabilities for whom a guardian is not appointed.

This paper refers only to cases where the Victorian Civil and Administrative Tribunal (VCAT) has appointed the Public Advocate as the person's guardian. The Public Advocate is appointed where there is no other suitable person available to act as guardian and is appointed in approximately 65% of cases. In the other 35%, a family member or friend is appointed.

2. Context

2.1 International

The age profile of a country is a reflection of several factors. The health of its people and their life expectancy, the level of development, the fertility rate and the level of immigration are the main influences on demographic profile.

It is a frequently quoted statistic that the proportion of the Australian population aged 65 and over is increasing. In Australia in 2010, the percentage of Australians aged 65 and over was 13.7% and life expectancy was 82 years. This is similar to Canada (14.1% and 81.4 years) and New Zealand (13% and 81 years).

Most Western European countries and Japan have a higher proportion of their population over 65 years and have a similar life expectancy to Australia. These countries have a similar level of development to Australia, Canada and New Zealand but a slightly lower fertility rate and a lower immigration rate. Amongst developing countries, the proportion of the population over 65 is significantly lower, as is life expectancy. At the same time, the proportion of the population under 15 is much higher.

The table below shows the percentage of the population under 15 years, over 65 years, the life expectancy in years and median age for each country.

International population comparisons: 2010[1]

	Aged 0-14 %	**Aged 65 and over %**	Life expectancy	Median age
Sweden	16.5	**18.3**	81.6	41.6
Italy	14.2	**20.4**	81.6	45.1
France	18.4	**17.0**	81.9	41.3
United Kingdom	17.4	**16.6**	80.1	40.3
Japan	13.2	**22.6**	83.7	46.6
Australia	**18.9**	**13.6**	**82.0**	**39.9**
Canada	16.3	**14.1**	81.4	40.9
New Zealand	20.2	**13.0**	81.0	37.4
USA	20.2	**13.0**	79.9	37.2
South Africa	30.3	**4.6**	52.9	25.7
Philippines	33.5	**4.3**	72.9	24.5
Indonesia	26.7	**6.1**	72.2	30.1

From this brief demographic overview, it can be seen that European countries generally have an older demographic profile than Australia but a similar life expectancy, level of development. They also have similar cultural values and legal systems. There is no reason to believe that the number of older people with cognitive disabilities is any different. To some extent, Australia can look to Western Europe to see how these countries are providing for an increased number of people with cognitive disabilities associated with ageing and at their legal guardianship and other substitute decision-making mechanisms.

However, the guardianship system of a country is more than a simple legal substitute decision-making mechanism. It sits within the social, political and community institutions and reflects the values and mores of the society. Thus, whilst the demographic profile of Australia and the USA are similar, their response to the support and care of older people with disability is going to be different. Guardianship systems will also operate differently to meet the needs of each society.

2.2 Australian guardianship comparisons

Guardianship systems in Australia are set up under State legislation and there are therefore differences between them. The legislation is, however, similar in several key areas:

- The appointment of guardians is made through a Tribunal, not a Court.
- There is a separation between guardianship (life matters) and administration (financial matters) with separate orders made for each.
- Guardianship orders are generally limited in scope (there are few plenary or full orders) and are made for a limited period (generally a maximum of three years before review).

[1] Australian bureau of statistics data http://www.abs.gov.au/AUSSTATS/abs@.nsf/productsbyCatalogue/B52C3903D894336DCA2568A9001393C1?OpenDocument

- There is no provision for guardians to be paid for by the Represented Person. Guardianship is either undertaken by the Public Advocate (paid from the public purse) of by a family member or friend who carries out the responsibility on a voluntary basis.

There are some significant differences between the Australian States. Data collection in each State varies and data is not reported in a uniform manner. Age groupings may be different or not reported, therefore firm comparisons cannot be made. However, we can say that in Victoria there are generally a greater proportion of guardianship clients over 65 than in other States.

3. Profile of the 386 Victorian guardianship clients over 65 years 2009/2010

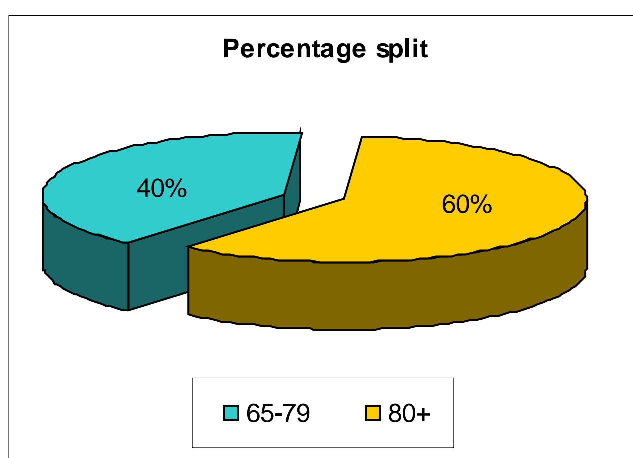
To explore the profile of Victorian guardianship clients further, this paper examines certain aspects of clients over 65 who had a standard guardianship order made by VCAT during the 2009/2010 year. The number of orders made was 386, 66.4% of total standard orders for all ages.

In addition to these orders, VCAT may make temporary orders for 21 days. These orders are usually made in emergencies where action must be taken immediately because of the level of risk to the Represented Person. A large proportion of people who first have a temporary order will have a standard guardianship order made when the matter goes to a full hearing. In 2009/2010, temporary orders made up 10.5% of the total number of new orders made by VCAT.

An analysis of these orders by age distribution, statutory disability and issue type is given below.

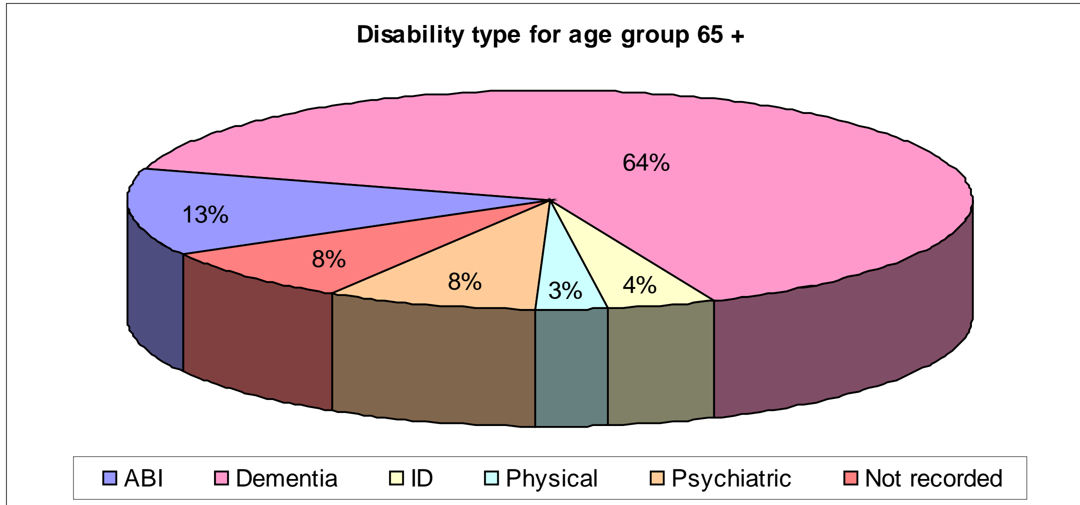
3.1 Age

Of clients aged 65 and over, 40% were aged 65-79 years and 60% were aged over 80 years.

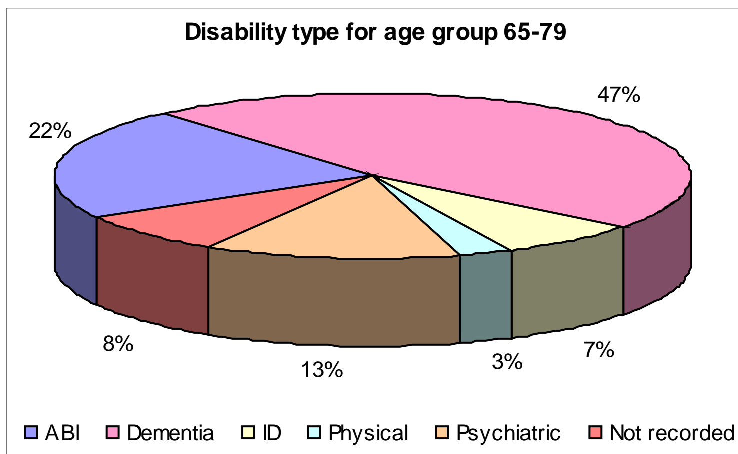


3.2 Disability type

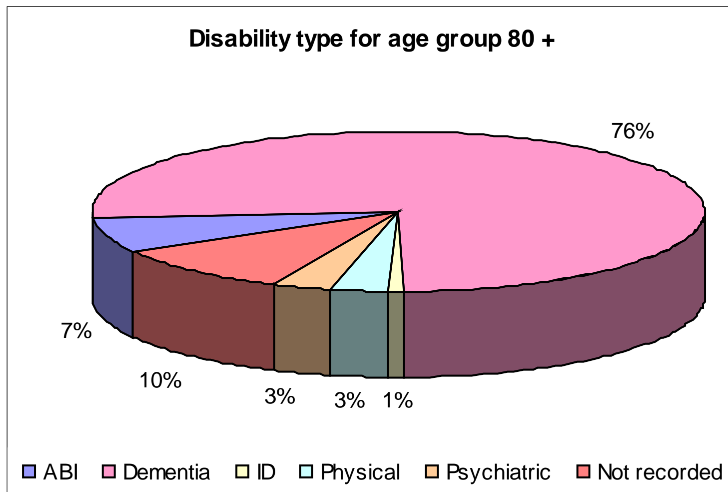
For the age group as a whole, 64% of clients over 65 had dementia. The next largest group was acquired brain injury with 13% overall.



For those aged 65-79, slightly under half had dementia (47%) and there was a larger percentage with acquired brain injury (22%) than in the age group as a whole.



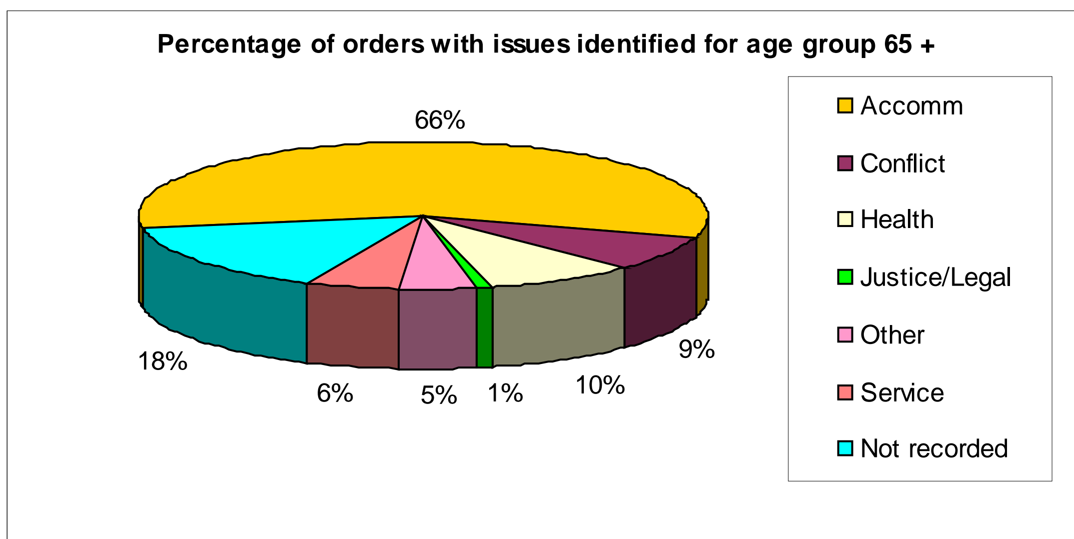
For those over 80 years, 76% had dementia and only 7% had an acquired brain injury.



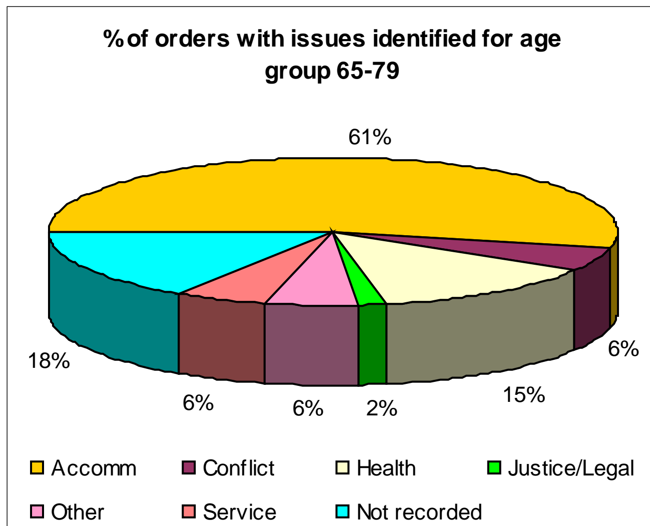
3.3 Issue type

The following charts show the percentage of orders with the major issues identified. Each chart adds to slightly over 100% because multiple issues were identified in some cases.

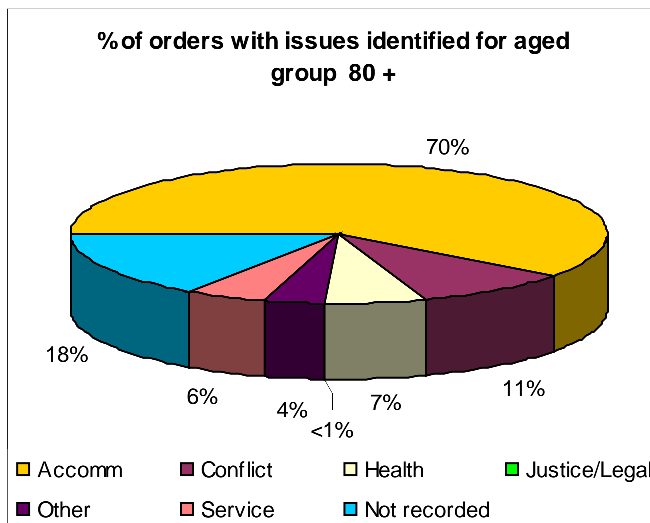
For the age group as a whole, the major issue was accommodation (66%) with conflict and health care the next most commonly identified issues (10% and 9%).



For the 65 – 79 age group, there was a significantly greater proportion with health care issues (15% compared to 10% for the group as a whole).



For those over 80 years, accommodation (70%) and health care (11%) are the dominant issues.



4. The first 100 OPA guardianship clients over 65 years in 2009/2010

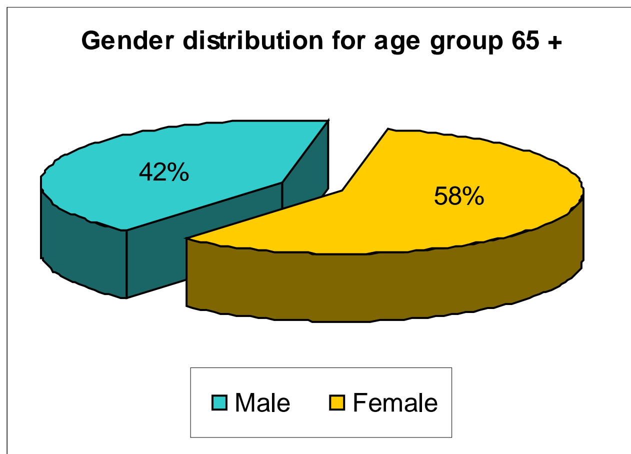
In this section, the profile of the first 100 clients over 65 years who had guardianship orders made during 2009/2010 is explored in greater detail. This is 26% of the total number of orders made for those over 65. In addition to the areas above, the role of the applicant, the location of the client at the time the application was made, the reason identified for the application and the view of the proposed represented person about the issues to be determined is analysed.
In each area, the analysis is provided for the full cohort, for those aged between 65 and 79 years and for those aged 80 years and over.

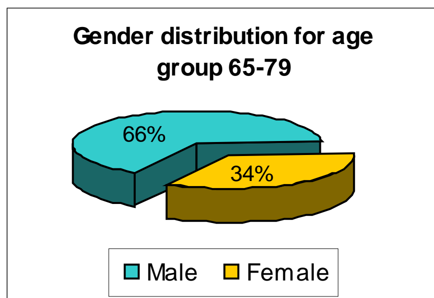
4.1 Age

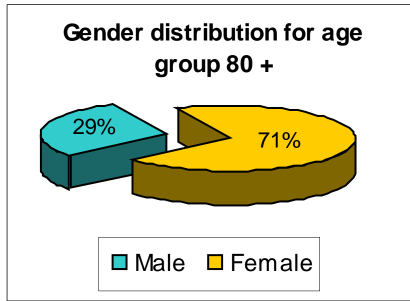
Of the 100 clients, 35% were aged 65-79 years and 65% were aged 80 years or over. The preponderance of clients in the over 80 group reflects both increasing life expectancy and the reality that the effects of disability and the need for health care and support is concentrated in the last few years of a person's life.

4.2 Gender

For the age group overall, 42% were male and 58% were female. The majority of guardianship clients (65.8%) between 65 and 79 years were male, whilst the majority of clients over 80 years (70.8%) were female. Whilst the proportion of females in the over 80 years group is expected, to find that almost two-thirds of the clients between 65 and 79 years were male was completely unexpected.



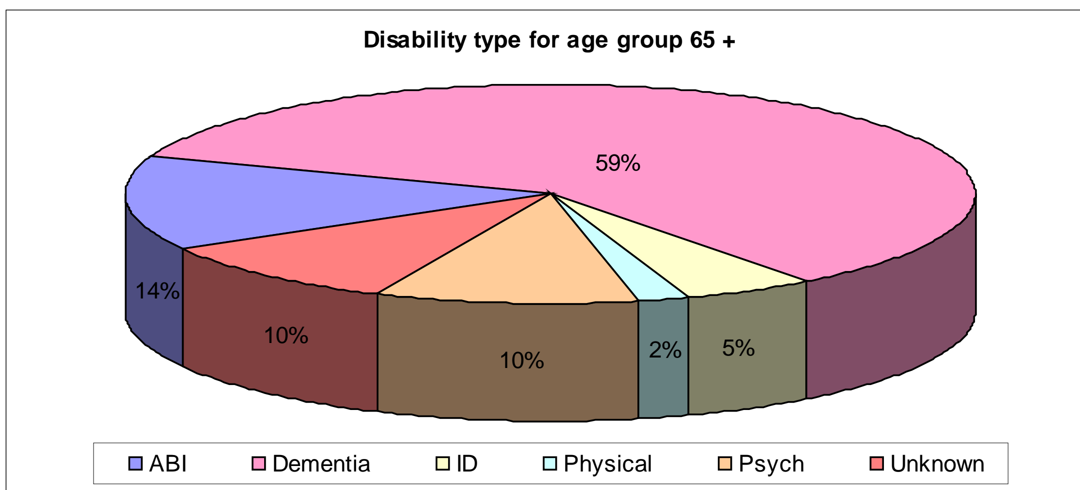


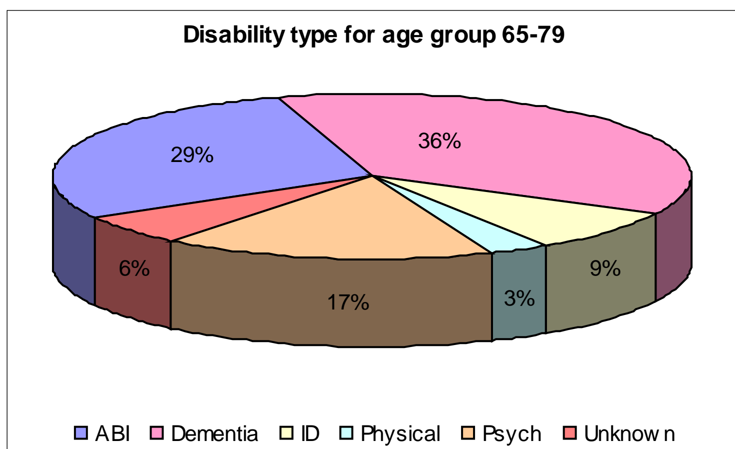


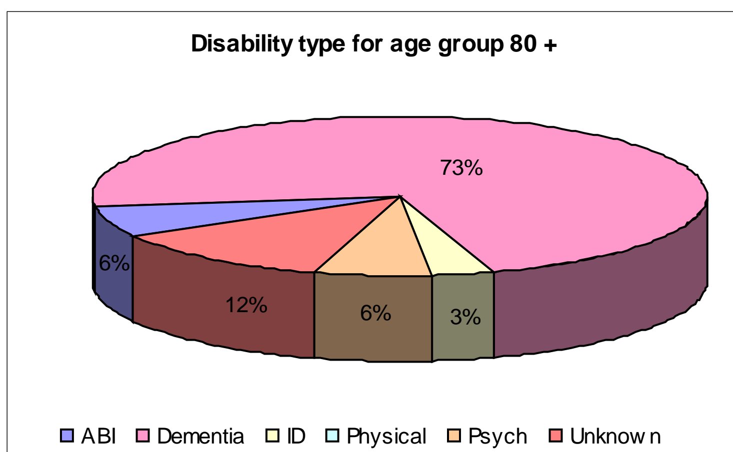
4.3 Disability type

As expected, dementia is by far the most common disability type for this age group, over four times as common as acquired brain injury, which is the next largest category.

Within the age groupings, however, there is a striking difference. In the younger group (65-79), 29% had an acquired brain injury compared to 36% with dementia. In the older age group (80+), only 6% had acquired brain injury compared to 73% with dementia.





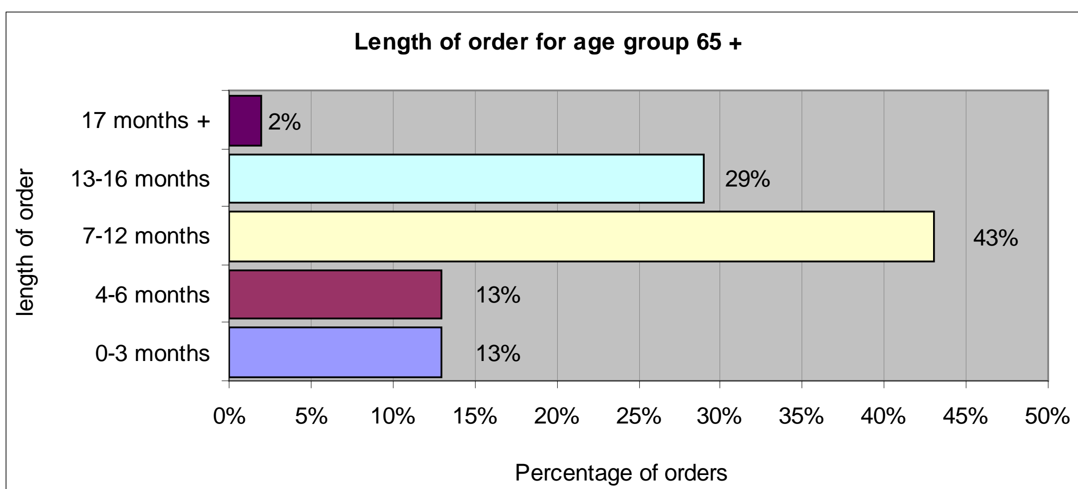


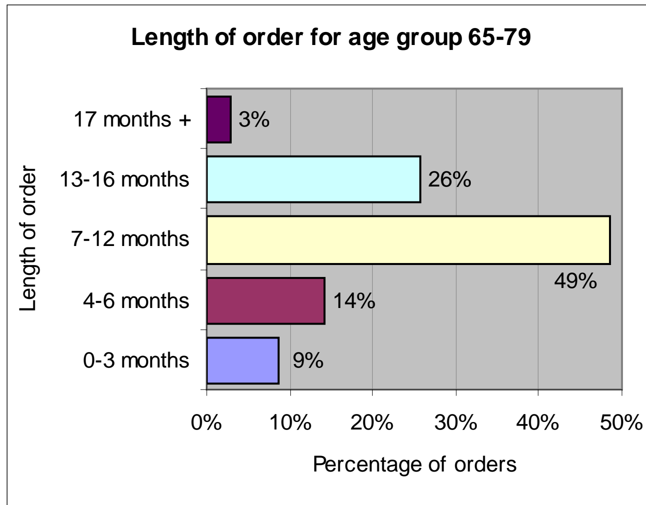
4.4 Length of order

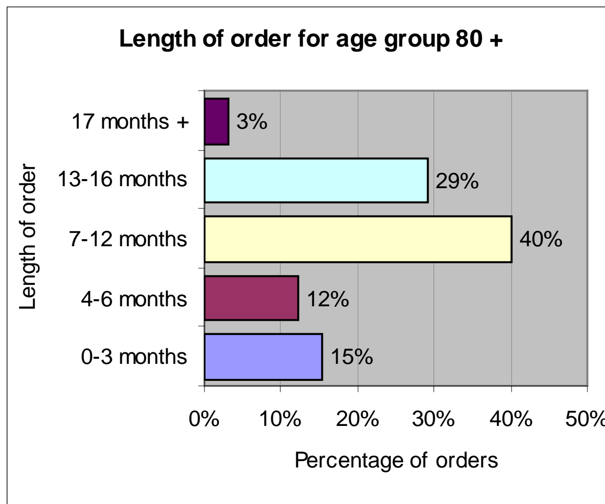
The graph below shows the length of time for the guardianship order as specified by the Victorian Civil and Administrative Tribunal before review by the Tribunal. In comparison with other States, Victorian orders are short. This is in keeping with the legislative requirement that a guardianship order should be made when there is a specific issue to be determined and the order should be revoked when the issue is resolved or the decision made and implemented.

In Victoria, VCAT can make an order for up to three years at which time it must be reviewed. The graph does not show the length of time that the order is actually in place but is an estimate of the time the Tribunal member considers necessary to deal with the issue. In recent years, VCAT orders have been set down to be reviewed by the end of the quarter in which the review falls. Thus, a guardianship order made on 20 November 2009 would be given a review date of 31 December 2010 if the Tribunal member intended the order to be for one year.

The graphs below indicate that over 70% of guardianship orders are made for between 7 months and 16 months. In practice, VCAT sets down reviews close to the anniversary of the date of the order and the closure rate of 50% of OPA guardianship orders each year confirms that the average length of a guardianship order is, indeed, one year. There are no significant differences in the length of the orders made for the two age groupings.



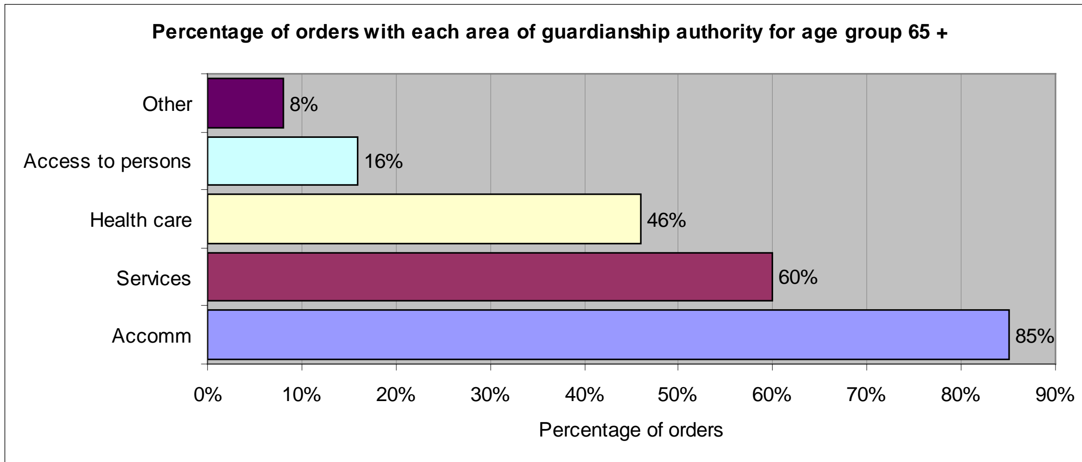




4.5 Terms of the guardianship order

There are very few plenary guardianship orders made by the Victorian Civil and Administrative Tribunal. None of the 100 clients reviewed in this study had a plenary order. The terms of the order identify the areas of the person's life where the guardian has authority and responsibility. The numbers add to more than 100 because there are usually two or more areas of responsibility given to the guardian. The graph shows that decisions about accommodation are the most common area of guardianship for those over 65, followed by decisions about access to community services. Health care is the third most common area of decision-making. Interestingly, "access to persons" authority, generally made in the context of interpersonal conflict, was included in only 16% of orders.

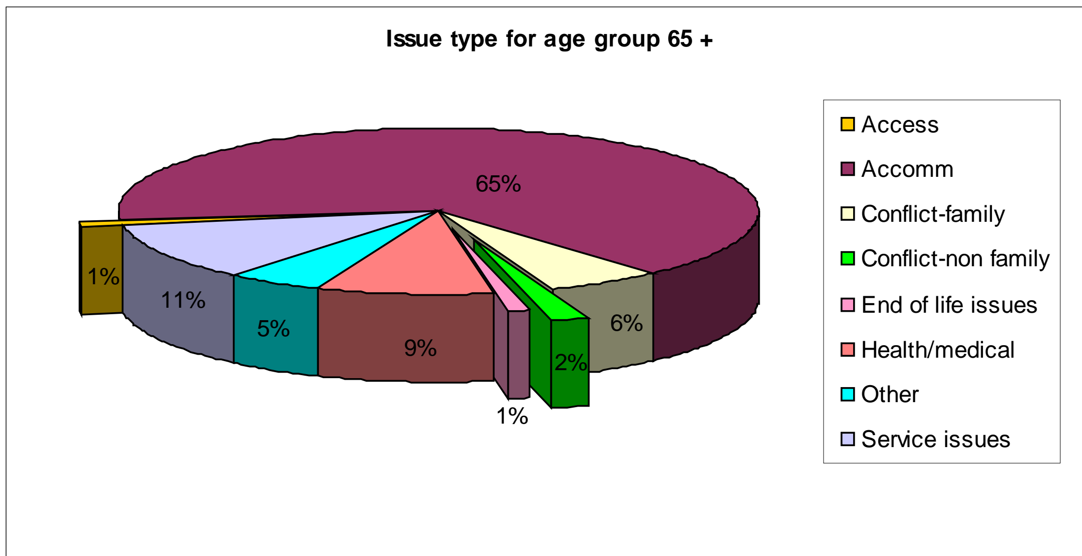
Within the sub-groups, the pattern remains the same with accommodation being the most common order made. There are no significant differences between the two groups.

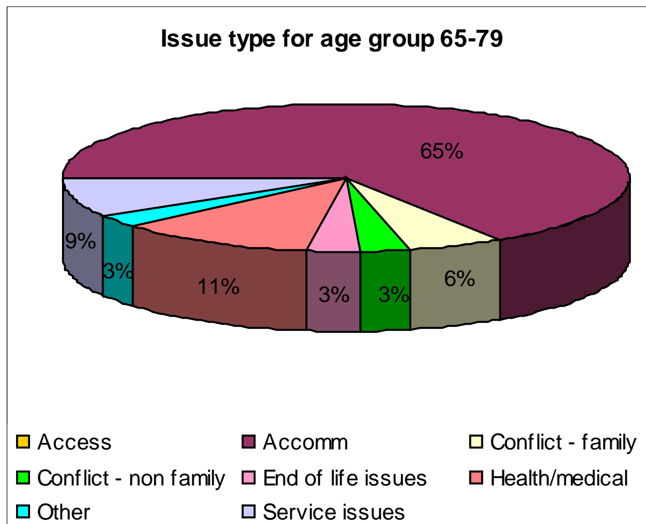


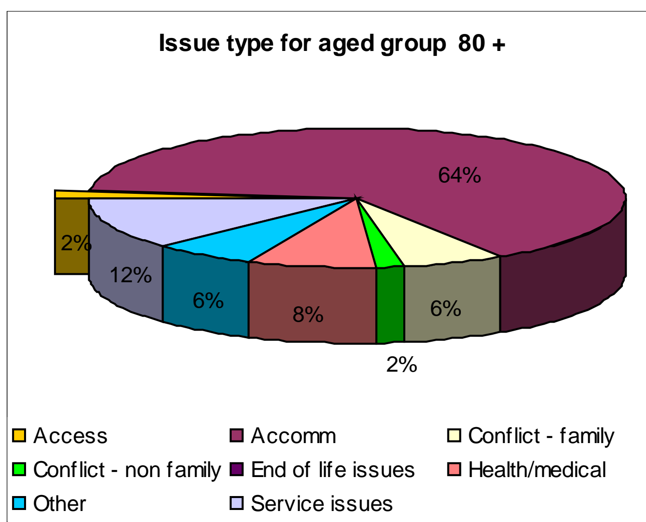
4.6 Issue type identified by guardian

When the details of an order are entered on the OPA case management system, the delegated guardian identifies the major issue in the case. The graph below shows that in 65% of cases, the identified issue was accommodation. Service issues were identified in 11%, health and medical treatment 9%, and conflict 8% (family plus non-family).

There were no significant differences between the two sub-groups.





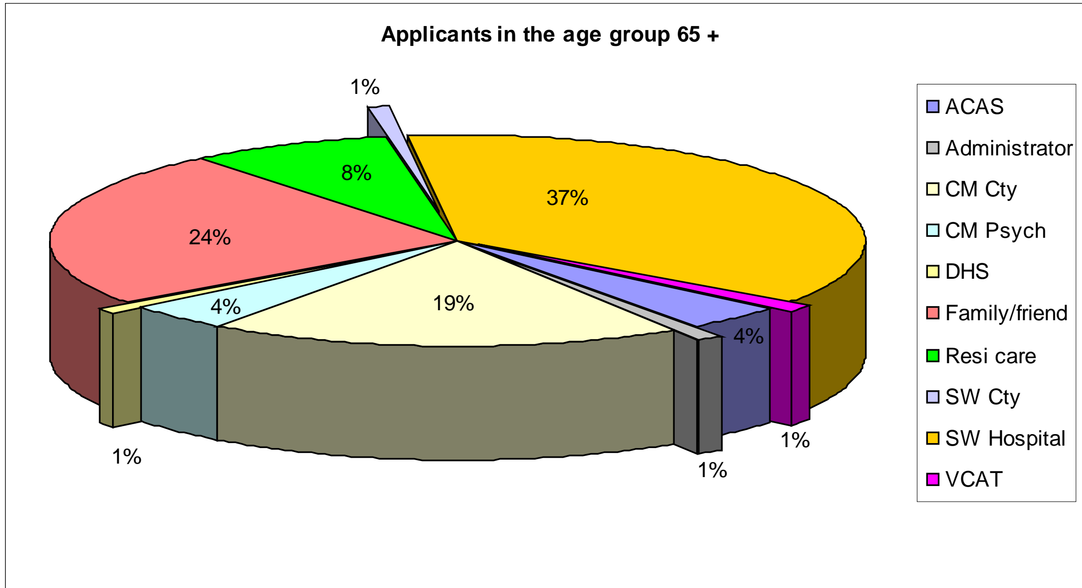


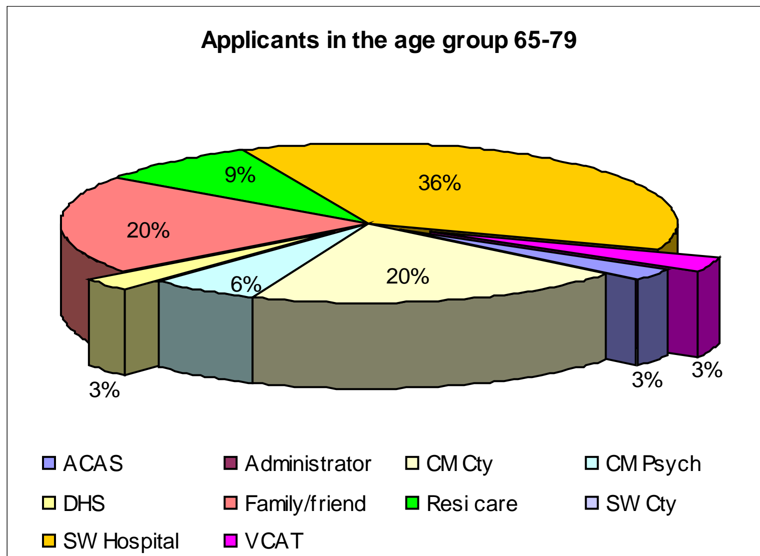
4.7 Issues identified by the applicant

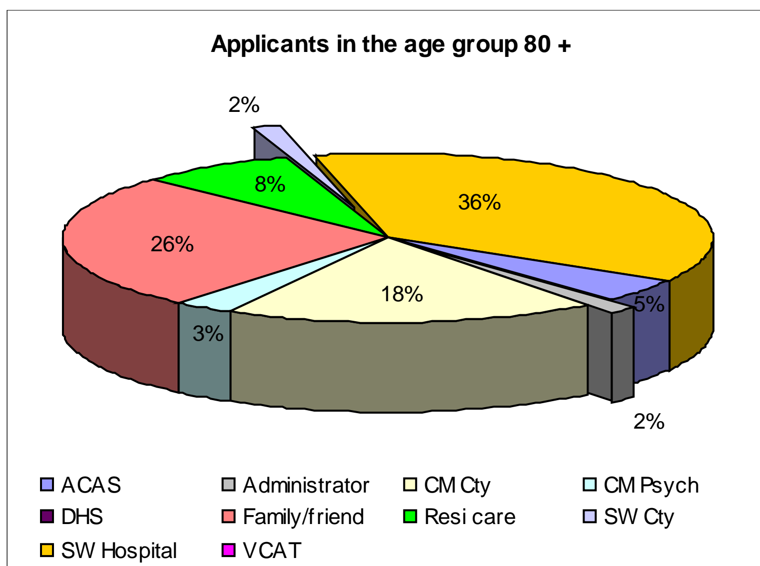
The dominance of accommodation issues in driving guardianship applications was confirmed in the research by looking at the reason identified by the applicant for making the application. In 71% of cases, the applicant identified the need for a decision about accommodation as the reason for making the application. In 40% of cases, this could be characterised as "discharge accommodation" from a hospital. In 31% of cases it could be characterised as a decision about residential care, either entry to a residential care facility, transfer to another residential care facility or returning to family care.

4.8 The applicant

Applications for the appointment of a guardian are generally made by professionals. Family or friends were the applicants in 24 % of cases. Amongst professionals, hospitals (usually social workers) were applicants in 37% of cases, community support agencies, including mental health agencies, in 24% and residential care facilities in 8%.

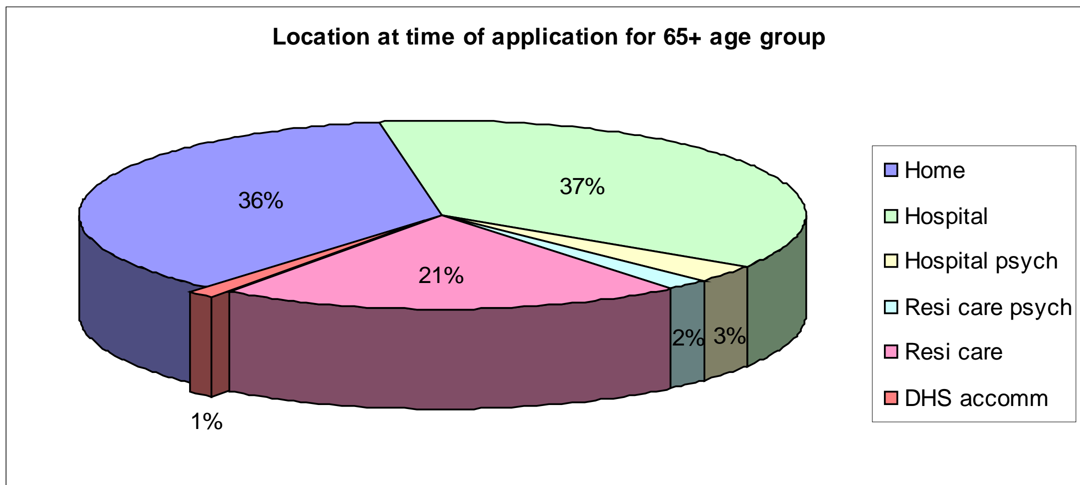

Applicants in the age group 65 +
1%
8%
37%
24%
4%
19%
4%
1%
1%
1%
ACAS
Administrator
CM Cty
CM Psych
DHS
Family/friend
Resi care
SW Cty
SW Hospital
VCAT

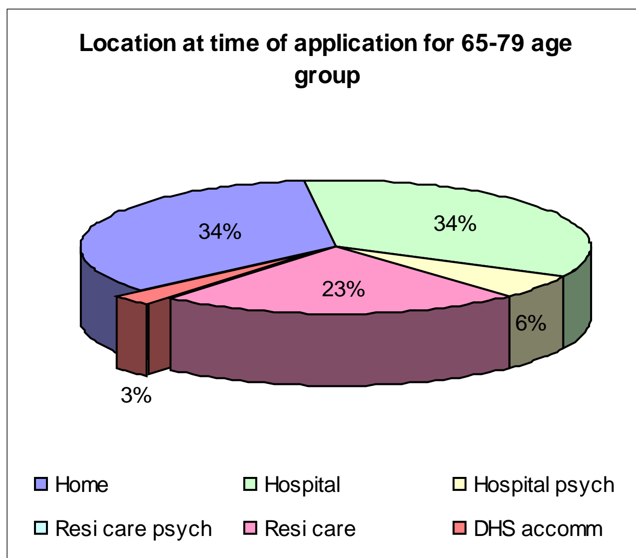

Applicants in the age group 65-79
9%
36%
20%
6%
20%
3%
3%
3%
ACAS
Administrator
CM Cty
CM Psych
DHS
Family/friend
Resi care
SW Cty
SW Hospital
VCAT

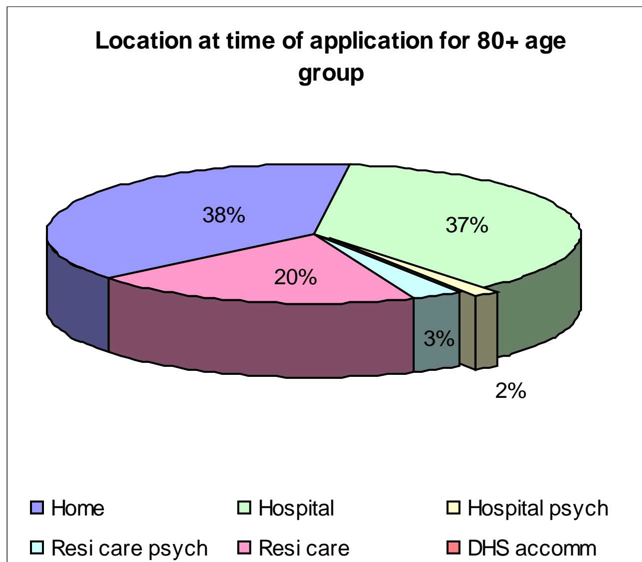

Applicants in the age group 80 +
2%
8%
36%
26%
18%
5%
3%
2%
ACAS
Administrator
CM Cty
CM Psych
DHS
Family/friend
Resi care
SW Cty
SW Hospital
VCAT

4.9 Location at the time of the application

We looked at each application to identify where the proposed represented person was at the time the application was made. The person was in the hospital system in 37% of cases, at home in 36% of cases and in residential care (either respite or permanent) in 21% of cases.



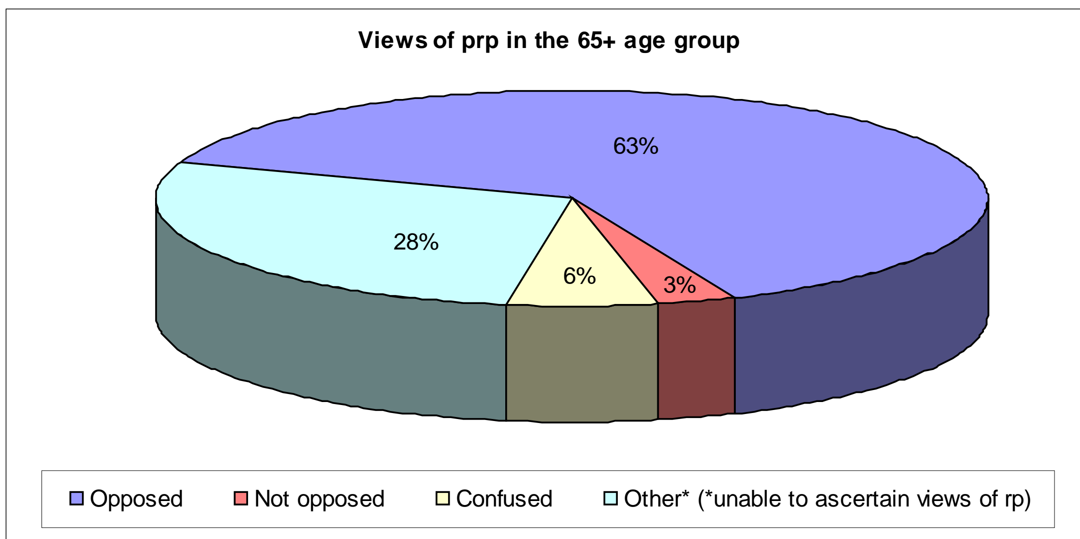


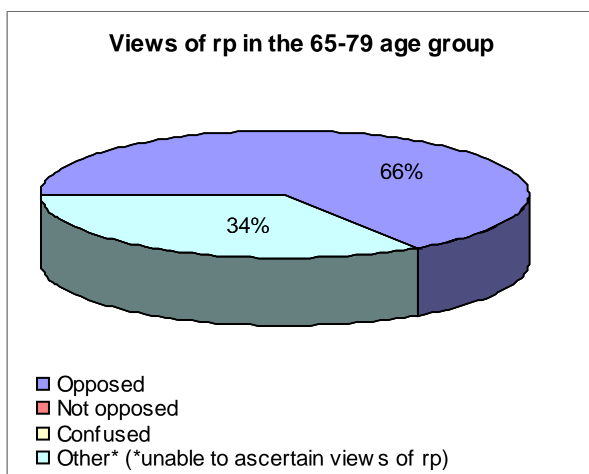


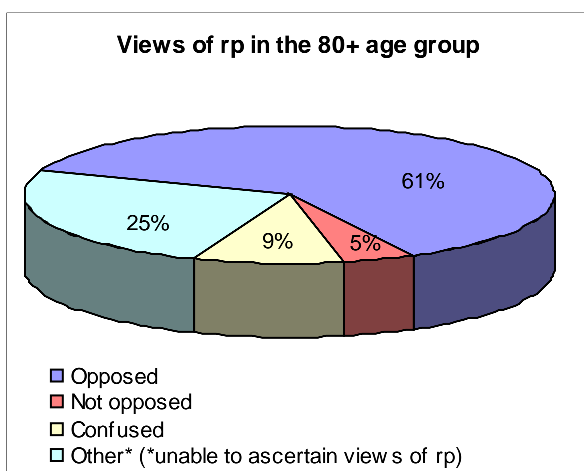
4.10 View of the Proposed Represented Person

Applicants to VCAT for the appointment of a guardian are not required to provide the Tribunal with the views of the person about whom they are making the application. When the Office of the Public Advocate does an investigation and provides a report to VCAT, the views of the Proposed Represented Person are always included in the report; however, investigations are done only in a small number of cases.

It is rare that the person about whom the application is made is expressing a view about actually having a guardian appointed. It is quite common, though, for the person to have a view about what is being recommended by the applicant. The figures below are general only. In 63% of cases the applicant, the investigator or, occasionally the Tribunal Member indicated that the person was opposed to the recommendations of the applicant, other professionals or their family. In 6% of cases, it was noted that the person was confused or changed their minds. In 3%, the person was not opposed to the recommendation. In the other 28%, there was either no indication of the person's views or the person was unable to hold or express an opinion about their future.







5. The perspective of professional applicants

In this section, we report on discussions with some professional applicants. The majority of applicants for clients over 65 year are professionals working in the hospital or community support sectors. Within the hospital system, social workers commonly make applications: in the community sector, case managers generally make applications.

Five interviews were conducted: three with senior hospital social workers and two with the managers of community support organisations. The major purpose of the interviews was to understand how the circumstances of people with guardianship orders differed from those without a guardianship order. Another purpose was to gauge the degree of consistency of approach across those making applications.

5.1 The typical situation

When asked about a typical situation in which they would make an application, most responded that they would make an application if the person or their family was consistently opposed to the professional recommendations. Disagreement amongst family members was another trigger, as was vulnerability to exploitation and abuse. The safety of a person putting himself or herself at risk in the community was another reason given for making an application.

All responses confirmed that guardianship was a last resort after other options had been fully considered. In particular, discussion and mediation with the person and others in their network in the context of care planning is the favoured approach. In hospitals, applications are usually made in the context of planning the person's discharge from hospital, however one community organisation working with disadvantaged people commented that their focus was generally on people who were not prepared to accept the services necessary for them to continue to live in the community.

5.2 Number of applications made

Asked to estimate the proportion of their clients for whom guardianship applications would be made, all agreed that it would be a small minority. More applications are made for administration orders because of the more rigid requirements of banks and financial institutions. In guardianship areas, there was generally confidence in relying on professional care planning and on informal agreement amongst those involved, notwithstanding the inability of the person to make their own decisions.

In medical matters, it appears that the Person Responsible provisions have formalised "next-of-kin" consents and obviated the need for healthcare guardianship in most cases. It is questionable, however, whether a similar provision for accommodation decision-making would reduce the number of guardianship orders, as applications are not generally made to determine accommodation unless there is significant opposition.

5.3 Organisational policies

Two hospitals stated that they have clear written policies within the Social Work Department about how and when to make applications to VCAT. In one hospital and in the community organisations, decisions are made within the professional team working with the client but there is no written policy. All those interviewed indicated that a clear, consistent approach based on professional judgment was adopted within their organisation. Several indicated that they frequently used the OPA Advice Line to help them decide whether to make an application. Hospitals tended to have legal input where necessary but this did not happen in community organisations.

5.4 Alternative legal decision-making authority

Alternative legal decision-making mechanisms are available in Victoria. These include the Enduring Power of Attorney (Financial), Enduring Power of Guardianship, the appointment of an agent under the Medical Treatment Act, Administration Orders (made by VCAT for financial matters) and the Person Responsible provisions for medical decision-making under the *Guardianship and Administration Act* 1986. Those interviewed had a clear understanding of the differences between these authorities and made sure that there was an appropriate legal authority in place when this was necessary. They did not suggest that an EPA (financial), for example, could be used as an authority for making health, access or accommodation decisions. It is not known, however, the extent to which those who hold such authority attempt to use it to make

decisions not covered by that authority. One organisation indicated that they would certainly apply for an Administration Order if they had doubts about the person holding the EPA (Financial). Another indicated they would make an application for a guardianship order so as to have an "independent investigation" of a situation.

6. Conclusions

1. Australia has a demographic profile comparable to Canada, New Zealand and the USA. It will be decades before Australia has the same proportion of its population over the age of 65 as the UK and Western European countries such as Sweden, France, Italy and Germany.

2. The majority of people over 65 years with cognitive impairment in Victoria do not have a guardian appointed. Only 386 new orders were made in Victoria in 2009/2010 for people with cognitive impairment in this age group. The average length of time for a guardianship order is 12 months.

3. People over the age of 80 years are the largest group amongst Victorian guardianship clients, comprising 41% of the total in 2009/2010. They are more likely to be female and have dementia as their major disability. For those between 65 and 79 years of age, there are more male than female clients and a greater proportion of them will have an acquired brain injury than will those over 80 years.

4. The issue that brings about the application for guardianship for the 65+ age group is most likely to be the recommendation of professionals for residential care. It is more likely that the person will be in hospital or some form of residential care when the application is made than that they will be at home.

5. Most applications for a guardianship order are made by professionals at a time when the person with a disability is faced with a situation that is likely to involve a significant and difficult change of circumstances. Opposition from the person or from those within their social network (family etc.) to what is being proposed is generally present.

6. There is an effective care planning and support process in place in health and community organizations through which most issues are resolved. These processes involve the client's social network and family and decisions are effectively made by consensus.

7. Professional applicants from health and community organisations rely on good professional practice to work with clients and their families and avoid the need for legal guardianship in most situations. This means that where there is adequate community, family and service support available for a person with a disability, guardianship applications are not made, even though the person lacks capacity to legally consent.

8. The availability of personal appointments such as EPAs, EPGs and Medical Power of Attorneys have strengthened this process and work well in Victoria although the level of uptake is not known.

9. The evidence we have indicates quite strongly that the community has confidence in professional planning processes adopted by hospitals and community agencies as well as in the current informal decision-making arrangements. The community also has confidence

in the safeguards that are present through the guardianship system for people with impaired decision-making capacity. The interview responses indicate that if more formal requirements for legal consent were introduced (in line with the *Bournewood* decision in the UK), there would be a significant rise in the number of guardianship orders, length of orders and the use of plenary orders. There is no indication that improved outcomes for the person would result.