

RECEIVED
20 MAY 2011

Submission No. **43**

AlfredHealth

66 Commercial Road
Melbourne Vic 3004
PO Box 315 Prahran
Victoria 318 Australia
Telephone 03 9076 2000
www.alfred.org.au

**VLRC Review of
*Guardianship and Administration Laws***

**Response of Alfred Health to Victorian Law
Reform Commission Consultation Paper
dated 14 February 2011**

**Bill O'Shea
General Counsel
Alfred Health**

**Stephen Taffe
Legal Counsel
Alfred Health**

**Sally Costar
Manager
Patient and Family Services
Alfred Health - Caulfield Hospital**

20 May 2011

Alfred Health incorporates
The Alfred
Caulfield General Medical Centre and
Sandringham & District Memorial Hospital
ABN 27 318 956 319

Response of Alfred Health to VLRC Consultation Paper dated 14 February 2011

Background

Alfred Health made a submission to the VLRC review of the *Guardianship and Administration Act 1986* (Vic) ("Act") on 14 May 2011.

Alfred Health has received a copy of the Consultation Paper dated 14 February 2011.

Alfred Health has noted the contents of the Consultation Paper and wishes to make the comments set out below.

These comments address

1. the two issues raised by Alfred Health in its initial submission:
 - 1.1 legal representation for represented persons at VCAT; and
 - 1.2 release of hospital reports to interested parties; and
2. Alfred Health's view on the complexity of the current legislation as perceived by clinicians, nurses and allied health staff and the need for simplification; and
3. Alfred Health's response to Questions 5, 6, 26, 38, and 75 in the Consultation Paper.

Response from Alfred Health to VLRC Consultation Paper

1.1 Legal representation for represented persons at VCAT

Alfred Health's submission argued for a represented person at VCAT to be provided with legal representation – especially when a family member has legal representation and there is a conflict of interest preventing the family member's lawyer from also acting for the represented person. This would be analogous to a child being offered an independent children's lawyer in a Family Court hearing. The Consultation Paper puts forward three options:

21.139 Option A: *Provide all proposed represented people with information and referrals around advocacy services prior to hearings*

21.140 Option B: *Amend section 62 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) to give a represented person or a proposed represented person a right to legal representation in all Guardianship List matters*

21.141 Option C: *Create a statutory power for VCAT to order that a person be provided with representation when VCAT believes this step is necessary*

21.142 Option D: *Establish a network of community volunteers to provide assistance at VCAT hearings*

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?

Alfred Health supports all these options but especially Option C.

1.2 Release of hospital reports to interested parties.

1.2.1 Release to the substitute decision-maker

The Consultation Paper addresses two key issues:

- the right of substitute decision makers to access confidential and private information about the person they represent, and the authority of the holder of that information to release it to the substitute decision maker;
- the obligations of substitute decision makers to maintain the confidentiality of information they receive about a represented person.

Alfred Health agrees with the VLRC that these reforms should extend to all substitute decision makers appointed under guardianship laws.

Two options are provided:

Option A: *Detail a substitute decision maker's authority to access confidential and private information in VCAT orders and personal appointments;*

Option B: *Detail a substitute decision maker's authority to access confidential and private information in the legislation (preferred).*

It then asks the following question:

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?

Alfred Health agrees with Option B.

1.2.2 Providing information to VCAT to determine the need for a substitute decision maker

The Consultation Paper sets out proposals for access to information provided to VCAT for use when determining whether a person needs a guardian or administrator. Alfred Health is concerned to protect the privacy of represented persons particularly when there is a risk that persons with no direct interest in the VCAT proceedings, such as neighbours, could be given access to personal information of the represented person.

The Consultation paper sets out two options:

Option A: *Require VCAT and the Public Advocate to advise people that the information they provide to assist VCAT may be disclosed to others and made available on VCAT's file.*

Option B: *The onus is on the person providing confidential information to VCAT to justify why it should not be available to the parties.*

It then asks the following question:

Question 142:

Should VCAT advise a person who provides them with confidential information that the information may be made available to the proposed represented person and other parties?

Chapter 21 – VCAT – also deals with this issue. It provides two options:

Option A: *No change—maintain open VCAT files (with restrictions); Currently any person may inspect or obtain copies of the register of proceedings or files or documents lodged in a proceeding, except if otherwise directed or ordered by VCAT, or otherwise prohibited by the VCAT Act.*

Option B: *Close VCAT Guardianship List files to the public (with exceptions). The right to inspect or copy files could be limited to the parties to any proceedings in the Guardianship List. VCAT could also be permitted to limit any party's access to materials in exceptional circumstances.*

Alfred Health believes that:

- (a) VCAT should only permit disclosure of personal information relating to a represented person where disclosure is essential to the decision-making process;
- (b) the default position ought to be that VCAT treats all information provided to it relating to the represented person as *prima facie* confidential and that it protects that information on the basis that it is only disclosed on a need to know basis; and
- (c) the information should not be retained on VCAT's file but returned to the person who provided it after the hearing.

Question 98

Do you believe that new guardianship legislation should contain a provision similar to section 101 of the Guardianship Act 1988 (NSW) for dealing with misuse of confidential or private information?

Alfred Health agrees with this suggestion.

2. The complexity of the current legislation as perceived by clinicians, nurses and allied health staff and the need for simplification

Doctors, nurses and allied health staff at Alfred Health find the substitute decision-making provisions of the Act confusing. They are often faced with situations of family conflict over medical consent for an incompetent patient where it would be preferable if the law was clear and they were not forced to seek legal advice. There are also cases where a substitute decision-maker refuses to consent or no substitute decision-maker can be found.

There is also confusion between the powers of an Agent and the person responsible. Hospital staff frequently report cases of a person responsible purporting to refuse medical treatment on behalf of a patient.

There are many cases where a person responsible and an Agent attempt to direct treatment in the belief that their role extends this far. Some staff are unsure of the law when placed under pressure by family members who attempt to interfere in treatment. This can lead to decisions being taken which are not in the patient's best interests.

Alfred Health would like to see:

- greater clarification around the powers and responsibilities of the person responsible under the Act; and
- the appointment, powers and duties of the Agent being governed by the Act rather than the Medical Treatment Act 1988 as currently.

The Act should contain a clear statement to the effect that only the patient's medical practitioner can:

- make decisions on the appropriate course of treatment for a patient; and
- decide when further treatment is futile - and that this decision does not require consent from the patient or a substitute decision-maker.

3. Alfred Health's response to Questions 5, 6, 26, 38 and 75 in the Consultation Paper.

3.1 Question 5:

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

For the reasons given above, Alfred Health's answer to this question is 'yes'.

3.2 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?

Alfred Health believes that the term 'person responsible' is confusing and does not adequately describe the role of the substitute decision-maker. Alfred Health's view is that 'medical decision maker' is preferable.

Further, Alfred Health believes that the reference in section 37(1)(f) of the Act to 'the patient's spouse or domestic partner' should be amended to clarify the uncertainty where a patient has a spouse and a domestic partner. The current lack of clarity causes confusion among hospital staff and patients' relatives, and often leads to avoidable confrontation.

The problem has been addressed in legislation in other states (for example, in the definition of 'spouse' in the *Guardianship Act 1987* (NSW) and in subsection (b)(i) of the definition of 'senior available next of kin' in the *Human Tissue and Transplant Act 1982* (WA)). A similar issue has also been addressed in section 3 of the *Guardianship and Administration Act 1986* (Vic), where the definition of 'nearest relative' clarifies which relative is preferred where there are two or more relatives in any one paragraph. Alfred Health suggests that the Act be amended so that where more than one person qualifies as the patient's spouse or domestic partner under section 37(1)(f) of the Act, the last person to qualify as the spouse or domestic partner should be preferred.

3.3 Question 26:

Should the number of enduring appointments be reduced from three to two by removing the option of appointing an agent under the Medical Treatment Act 1988 (Vic) and by requiring people to use an enduring guardianship appointment for medical treatment matters?

Alfred Health supports the reduction of the number of enduring appointments from three to two.

3.4 Question 38:

Do you think that the law concerning instructional medical directives should be set out in legislation?

At present the law does not deal directly with instructional medical directives other than refusal of treatment for a current condition in the *Medical Treatment Act 1988* (Vic). There is no legislative requirement that medical practitioners pay any attention to medical directives given by a patient before their current illness. These directives can be a useful way for a medical practitioner when treating an incompetent patient, to know what the patient would have wanted.

Alfred Health supports the law concerning instructional medical directives being set out in legislation provided it is clear and those responsible for the care of an incompetent patient are able to easily understand their legal obligations to give effect to the directive.

3.5 Question 75:

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?

Alfred Health is concerned at the current lack of a clear decision-maker in resolving accommodation options for incompetent patients. This often results in delay and uncertainty about accommodation. Option E would provide more certainty and Alfred Health supports it.