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Submission No. 50

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Professor Neil Rees
Chairperson
Victorian Law Reform Commission

Dear Professor Rees

Thank you for the invitation to provide comments on the Consultation Paper on the Review of Victoria's Guardianship and Administration laws.

General Comments

In principle, I agree with the proposed new legislation – in particular, promoting the participation of people with impaired capacity in making decisions for themselves. I also endorse the proposed new decision-making continuum, which includes supported and substituted decision-making, instead of the current 'best interests' model.

I believe it is essential to improve the safeguards and accountability of decision-making arrangements as identified in the Consultation Paper.

Terminology – It is important that, where possible, there is nationally consistent use of terminology. The draft National Framework for Advance Care Directives, which is expected to be approved this year, will provide guidance on the appropriate definitions.

Specific questions

Q10-12 - Community education

I recommend the 'Proposals for implementation and communication strategies: Second Report of the Review of South Australia's Advance Directives'. The recommendations in this Report are comprehensive and may assist the Law Reform Commission. Clear, accessible information for the community, health professionals, and lawyers is very important for any new legislative arrangements about decision-making. From my research in the community and with health professionals in SA, I consistently find there is confusion and misunderstanding about the SA advance directive and guardianship legislation.

Q26-27 - Streamlining of personal appointments

In my view, personal appointments should be streamlined so that the individual can appoint a decision-maker for financial, personal and medical decisions in the one instrument, but there should be the option to appoint two decision-makers, for example, one for personal and health decisions and another for financial decisions, if that is what they chose. I understand that this is your Option B.

Q28-33, 46-49 - Registration of personal appointments and advance directives

As a result of my research and as a member of the SA Advance Directive Review Committee, I strongly recommend against registration. It is more important to focus on improved documentation, accountability and witnessing arrangements.

Registration will not work unless it is free and compulsory. For example, in SA there is voluntary registration of medical powers of attorney and the anticipatory directive – take up has been poor and the register has never been consulted to assist with decision-making.

However, if registration is compulsory, then this will act as an additional barrier to people using these instruments. I believe this will also be the case for on-line registration – there will be significant difficulties for some members of the public in accessing the registration system. My concern is that people will be discouraged from using these documents, both because registration will create a practical impediment, and because of concerns about use of their personal information. It would be a shame if this were to deter people from exercising their right to appoint a decision-maker or make an advance directive. I favour the least restrictive approach in order to encourage uptake of these important documents.

As you may be aware, the SA Advance Directive Review Committee recommended against establishing a register of advance directives. (See discussion of Recommendation 19 in 'Proposals for implementation and communication strategies: Second Report of the Review of South Australia's Advance Directives'.)

Question 38 – Instructional medical (health) directives

There are significant difficulties with the current refusal of treatment certificate scheme under the *Medical Treatment Act 1988* (Vic). I therefore do not support Option A.

Broadly, I agree with Option B. The new legislation should provide for a broader range of binding instructional directives about health care (which is broader than just medical care). For that reason, I suggest the use of the term 'instructional health directive', rather than 'instructional medical directive'. The directives should allow for consent and refusal of treatment for future as well as current conditions (but not for individuals to demand future treatment).

I recommend that any existing common law right to make advance directives be retained as a safeguard. The displacement of common law rights by the Queensland legislation has created significant difficulties.

Q51 – Capacity

I support the inclusion of a definition of incapacity along the lines of that in the UK *Mental Capacity Act 2005* (Option B) and the inclusion of the principles suggested in Option A. In relation to additional resources, I have been impressed with the NSW Government's *Capacity Toolkit* which is a practical guide to assist people working in the area, as well as families and carers, and also the resources available on the UK Government's website.

Please do not hesitate to contact me about any of my comments.

Yours sincerely

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