HEALTH SERVICES COMMISSIONER

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SUBMISSION TO THE LAW REFORM COMMISSION ON GUARDIANSHIP

DATE: 24th May 2011

Introduction

SUBMISSION TO THE LAW REFORM COMMISSION ON GUARDIANSHIP

The Office of the Health Services Commissioner (OHSC) was created by the *Health Services (Conciliation and Review) Act 1987* (Vic) (HSCRA).

The OHSC is established to:
- Deal with user's complaints; and
- Suggest ways in which the guiding principles may be carried out; and
- Help service providers to improve the quality of health care.

The Guiding Principles promote:
- Quality health care, given as promptly as circumstances permit; and
- Considerate health care; and
- Respect for the privacy and dignity of persons being given health care; and
- The provision of adequate information on services provided or treatment available, in terms which are understandable; and
- Participation in decision making affecting individual health care; and
- An environment of informed choice in accepting or refusing treatment or participation in education or research programmes.

The OHSC also administers the health privacy legislation in Victoria, the *Health Records Act 2001* (Vic) (HRA). The HRA does this by promoting fair and responsible handling of health information by –

(a) protecting the privacy of an individual's health information that is held in the public and private sectors; and
(b) providing individuals with a right of access to their health information; and
(c) providing an accessible framework for the resolution of complaints regarding the handling of health information.

The OHSC is promotes the parties to a grievance resolving the complaint between them by mediation and conciliation.

Introduction:

Thank you for the opportunity to contribute to this important work. The Health Services Commissioner sits as a member of the Victorian Disability Services Board and supports the Board's submission to this consultation. HSC has also had an opportunity to read the

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Submission by OPA with which we are in broad agreement. Given the scope of the discussion document and of OPA's response the HSC is confirming our response to those aspects of the discussion document directly relevant to our work. The OHSC is supportive of the changes suggested and supports the underlying principles upon which the changes are based.

Part 3:

The OHSC supports Option C related to the consolidation of all the substitute decision-making laws into a single Act and the replacement of "person responsible" with "medical decision maker" or "health decision maker". Options B and A both favour the medical treatment laws being incorporated into the guardianship laws. While Option C will result in a large piece of legislation it should nonetheless be workable provided there are adequate resources available for training and education.

The OHSC supports the proposal to replace the terms "guardian" and the term "administrator" with the terms "adult guardian" and "financial guardian" respectively.

Part 4:

The OHSC would support the activation of all enduring powers at the same time as the person making the appointment becomes incapable of decision making. We also support the streamlining of personal appointments. Difficulties arise when multiple appointments exist and clinical personnel need to consult with multiple parties, sometimes in different states/territories or overseas.

The OHSC supports the establishment of a register of personal appointments and believes that if the scope of that appointment is included in the register and identifies potential health information of the appointer, the *Health Records Act 2001* (Vic) would apply.

The OHSC supports broadening and clarifying the statutory right to make instructional medical directives to provide people with increased certainty their instructions will be followed. Specifically, allowing refusal for future as well as current conditions, allowing advance consent as well as advance refusal, removing the requirement that the person making the certificate must receive information about the nature of the condition and retaining the common law right to make advance directives. HSC also supports extending the scope of instructional directives to include welfare and lifestyle matters. The introduction of a statutory requirement that instructional directives made as part of a hybrid directive (combination of personal appointment and instructional directive) are binding on personally appointed decision makers, but are displaceable in certain circumstances is supported but what those circumstances are needs to be clearly defined.

Registration of advance directives is a sensible option and should decrease future confusion. Such directives may be classified as health information and, as such, become subject to the provisions of the *Health Records Act 2001*.

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Part 5:

The OHSC supports the establishment of capacity principles and a legislative definition of incapacity.

The introduction of guidance to VCAT in relation to the appointment of guardians is supported. The intervention of the state in relation to such appointments should be minimised. As such, there should be clearly defined laws to outline when it is appropriate for VCAT to appoint the Public Advocate.

The OHSC gives in-principle support for the establishment of a scheme of enforcement powers against represented persons, however, such powers should not be used in situations where the represented person has an advance directive or it can be established they have expressed a strong view when competent in the past.

Part 6:

The OHSC supports the proposal to substitute "best interests" tests for "substitute judgement" as the paramount consideration. This should apply for all decisions, including medical decision making. We agree that detailing a substitute decision maker's authority to access confidential and private information should be set out in legislation and misuse by substitute decision makers of that confidential information should be sanctioned by statute.

The OHSC supports the preferred option of the Commission to allow merits review of decisions made by the Public Advocate and State Trustees. It is important in such arenas to allow scrutiny of public bodies.

Part 9:

It is difficult to determine what is in the best interests of patients with a mental illness that affects their decision making capacity. The circumstances surrounding the limited use of guardianship for non-consensual psychiatric treatment and place of residence would need to be clearly defined and compliment the *Mental Health Act 1986* and any subsequent review of that Act.

Thank you for the further opportunity to respond to this important area of law reform.

Prepared by G Davies
16 May 2011

Beth Wilson

Health Services Commissioner