Submission No. 22

Epworth HealthCare

Excellence, Everywhere, Every Day

Epworth Corporate
89 Bridge Road
Richmond Vic 3121
T +613 9426 6666
F +613 9427 0363

www.epworth.org.au
ABN 87 420 694 950

13 May 2010

Victorian Law Reform Commission
GPO Box 4637
Melbourne VIC 3001

Dear Sir/Madam,

Review of Victoria's Guardianship and Administration Laws

Epworth Foundation trading as Epworth HealthCare is pleased to make the following submission in relation to the reference from the Attorney General to the Law Reform Commission to review and report on the desirability of changes to the *Guardianship and Administration Act 1986. ("G&A Act")*

The *G&A Act* was amended in 1999 when the concept of a *person responsible* was introduced into the legislation in trying to devise a more practical means for health care practitioners to obtain consent for those patients lacking the capacity to give informed consent to medical or other treatments from a proxy.

Whilst in practice this should work well, the fact remains that many health care professionals are confused about the provisions of the *G&A Act,* the role of the Public Advocate, and the VCAT guardianship list.

While staff attempt to find out if for example, a Medical Power of Attorney has been executed by the patient, in practice these appointments are relatively rare.

In 2009, the Medical Practitioners Board of Victoria disciplined a medical practitioner over his ignorance of the need to have a special procedure (as defined in the G&A Act) be the subject of a VCAT order. The medical practitioner pleaded ignorance of the law and was found to have engaged in unprofessional conduct.

In answer to the questions, posed by the information paper, Epworth Foundation is supportive of the need for the G&A legislation and believes that the law works well when it is understood and there is clear guidance about it given in the policies of a health service. For example, the concept of a *person responsible* works well when there *is* a person responsible for the patient to whom the practitioner may refer for discussion and consent.

Parts of the law that do not work well, and are cumbersome and hard to understand, are those provisions of the *G&A Act* when there is no person responsible and the doctor or healthcare team wishes to proceed in the absence of someone able to give consent for the patient (acting in the patient's best interests) Here, it is submitted that the process needs to be streamlined, and made more user friendly, with new forms devised for easy use with perhaps an online system for communication established.

Epworth has expertise in dealing with age related disabilities and acquired brain injury (ABI) - these patients are now the main users of the guardianship administration procedures of VCAT. Professor John Olver, Medical Director Epworth Rehabilitation has expressed the view that the provisions of the *G&A Act* are rarely required. There is usually a guardian or a person responsible for each patient treated at Epworth Rehabilitation - patients with post traumatic amnesia (PTA) have during this phase no capacity for medical decision making (or any decision making) and was it the case that there was *no* person responsible social workers at Epworth apply for an appropriate guardianship order from VCAT. In Professor Olver's experience the Public Advocate is rarely involved with patients at Epworth and he has never had occasion to utilise a Section 42 M notice in the treatment of patients with ABI or PTA.

Where family members are in disagreement over treatment or other issues where a proxy is required for the incompetent patient, Professor Olver attempts to reach a consensus of opinion. after following a process of involving each family member in the care and treatment plans for their relative.

To answer the specific questions from the terms of reference we respond as follows:

1. Should it be necessary for a person to have a *disability* before a guardianship order or administration order is made or is it preferable to rely on concepts such as lack of *capacity* or *vulnerability?*

   It is preferable to rely on concepts such as a lack of *capacity.* Patients for example with post traumatic amnesia (PTA) have no capacity but are under a *temporary disability* -they rarely accept the reason for their hospitalisation, and can want for example, to discharge themselves. Until they have decision making capacity, they must be sometimes kept in a secure low stimulation environment in the acquired brain injury (ABI) unit at Epworth Rehabilitation.

2. What are the best ways of accessing whether the persons decision making capacity is impaired?

   ABI patients are assessed using the *Westmead scale*- this is a medical tool for assessing a person's capacity.

3. Is "best interests" a useful or appropriate guide for substitute decision makers? Are there better approaches?

   Medical treatment must always be demonstrably in the best interests of the patient and this should guide substitute or proxy decision makers.

4. Does the notion of best interest's decision making allow for the right of a person to take risks and make bad decisions? Should it?

   The proxy decision maker can only make decisions that are thought to be in the *best i*nterests of the affected person.

5. To what extent should a guardian or administrator be required to try to identify the represented person's wishes and follow them whenever possible?

This is theoretically often quite impossible unless of course the person has indicated prior to the temporary disability or permanent incapacity their wishes.

6. Is there a continuing need for substitute decision making laws?

   There is a continuing need for substitute decision making laws. The current laws are predicated on the principle of autonomy of the person to accept or refuse medical treatment. No doctor can treat without evidencing the consent of his or her patient and where the patient lacks the capacity to give informed consent there must be by definition a proxy decision maker.

7. Do we need 2 types of substitute decision makers (administrators and guardians) for financial and personal decisions? Would it be preferable for VCAT to have a range of different financial medical and lifestyle powers it could provide to one decision maker?

   VCAT should be given the flexibility to appoint a range of proxy decision makers depending on each person's needs- be they financial or personal. The medical treatment provisions in the *Guardianship and Administration Act* are very rarely used and **Section 42 K** notices and **42 M** notices are rarely used, however, the concept of a *person responsible* for the patient with a disability is well understood although the selection of the person responsible may require legal advice. The fact that there is a 24 hour help line is a great resource for those an adult patient who is unable to consent to medical treatment.

Please let me know if further information material is required.

Epworth would be pleased to comment on the Consultation Paper containing draft options for reform later in the year.

Yours sincerely

Elizabeth Kennedy
Corporate Counsel