

# **Inquiry Into Guardianship**

**Submission to the Parliament of Victoria Law Reform Committee**

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## **Submission by Alfred Health to the Victorian Law Reform Commission Review of Guardianship.**

### **Background**

Alfred Health makes between 70 – 80 applications for Guardianship and/or Administration on behalf of patients each year. Decisions to make these applications are made by the interdisciplinary treating team when a situation of conflict is identified in conjunction with the patient lacking capacity to make their own decision. The Applicant is usually a social worker attached to the interdisciplinary team or a case manager working with one of the community based outreach services.

As Applicant the social worker completes the Application, ensures that the patient and family / representative has a copy of it and requests reports from relevant members of the interdisciplinary team – eg medical staff, neuropsychologist, occupational therapist. These reports are provided to VCAT in confidence. However hospital staff understand that VCAT is prepared to release copies of material to be used in the Hearing to the patient / family / representative following a request in writing giving reasons. This is a matter of concern.

This submission wishes to address two areas:

1. Legal representation at VCAT
2. Release of confidential medical information by VCAT to interested parties.

#### **1. Legal representation at VCAT.**

Families and other interested parties sometimes engage a lawyer to represent them and by extension believe that the lawyer is also representing the person about whom the application has been made. There are usually medical and psychological reports lodged to support the contention that the person lacks capacity to make decisions in regard to financial or lifestyle issues but interested parties and sometimes members of the legal profession proceed on the basis that the family / interested parties can speak for the person about whom the application is made. This issue is not usually clarified by the VCAT Member and if the Hospital does not have legal representation the social worker as applicant may not feel able to challenge this. The issue of whether a person who is deemed incompetent in these circumstances needs separate legal representation to ensure that their interests are upheld

warrants exploring and also raises the question about an incompetent person being able to instruct counsel.

Children's lawyers are now common in the family law jurisdiction despite the fact that a child lacks legal capacity. There seems to be no reason why this could not be used as a model at VCAT where a lawyer could be appointed (by the family, or if not, by the Tribunal) to represent the interests of the person who is the subject of the Hearing despite the fact that the person has limited or no capacity.

Often the Hospital is the only voice in support of the interests of the person who is the subject of the VCAT Hearing. In the absence of the Hospital (and even at times when Hospital representatives are present), elder abuse can go undetected if an abusing family member is the only party present at a VCAT Hearing (especially if the family member is legally represented) and the VCAT Member assumes that the interests of the person who is the subject of the VCAT Hearing are the same as those of the family member present.

If the person who is the subject of the VCAT Hearing is not legally represented, VCAT should be required to make it clear in VCAT Hearings that the person does not necessarily have the same interests as other people involved, such as the person's family members.

## **2. Release of hospital reports to interested parties.**

This is a vexed issue. There has been occasion in cases brought by Alfred Health where although no request has been made in writing to the Tribunal for the release of confidential material provided by the Hospital prior to the Hearing, at the beginning of the Hearing a family member or legal representative for the family / interested party asks for the material to be released. The matter is then adjourned whilst this occurs resulting in further delay. On one occasion in 2008, material was released to everyone present – one of whom was a neighbour who had behaved in an aggressive manner towards hospital staff. Not only did he then have possession of confidential and sensitive medical and neuropsychological reports but the fax from the Alfred Health staff member to the Tribunal administration requesting extra security because of concerns about his inappropriate behaviour was also released to him and all other parties present.

Confidentiality of Hospital records is enshrined in s.141 of the *Health Services Act 1988* (Vic), s.120A of the *Mental Health Act 1986* (Vic), the *Health Records Act 2001* and the *Privacy Act 1988* (Cth). Within the Hospital environment, these reports would not be made

available to many of the people present at a VCAT Hearing even if they made an application under the *Freedom of Information Act 1982 (Vic)*. When there is legal counsel present at a Hearing who is representing a family / interested party, the situation arises where a party other than the person who is the subject of the Application is applying for reports about the person which the Hospital has provided to VCAT in confidence. Alfred Health provides a person's private medical information to VCAT to assist VCAT in making a decision in the best interests of the person. Given the sensitive nature of the information, it may be unnecessary and, in some cases, contrary to the person's best interests to release the information more widely at the VCAT Hearing. Alfred Health believes that VCAT Members should be more circumspect about the release of private medical information and when there is a decision to release the information, the VCAT Member should require the return of the reports at the conclusion of the Hearing.

### **Conclusion**

In general, Alfred Health social workers report that the Tribunal is very responsive to the issues presented by patients and their families / representatives. In our experience of Hearings patients and families / representatives are given every opportunity to present their case as is the Applicant. There has been an historical problem with very frail patients or those with challenging behaviours being able to attend the King St. complex for a Hearing; however that has now been solved for Alfred Health with proceedings being held monthly at Caulfield Hospital.

Alfred Health considers that the two issues set out above should be addressed by the Law Reform Commission in its review of Guardianship.