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SUBMISSION OF THE HEALTH SERVICES COMMISSIONER, VICTORIA, TO THE VICTORIAN LAW REFORM COMMISSION'S REVIEW OF THE *GUARDIANSHIP AND ADMINISTRATION ACT 1986* (VIC)

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Thank you for the opportunity of commenting on the Guardianship Information Paper. The Office of the Health Services Commissioner (HSC) is an independent statutory authority established to receive and resolve complaints from users of health services with a view to improving the quality of the health services. The HSC receives complaints from families of people who have guardians and sometimes from guardians. We have developed a constructive and cooperative relationship with the Office of the Public Advocate and the guardians. They are often involved in very complex health decision making and it is in everyone's interest for the two offices to work closely together.

1. *What parts of the law work well? What parts of the law don't work well and why? Your ideas to improve the law.*

In general terms, the laws related to guardianship work well in protecting some of the most vulnerable people in Victoria. There is a clear need for legislative frameworks, such as those that exist in Victoria, to safeguard those people and the current framework has worked well up to this point. However, as elucidated in the discussion document, the views and concerns of Victorians have shifted while the legislation has remained relatively static. The review is, therefore, welcome. It is however, unfortunate that it did not go further. I was a member of the Department of Human Services' Advance Care Planning Advisory Group and I hope the ideas generated by it will not be lost but picked up in the future. The capacity to make advanced directives is an area that requires updating.

There should be capacity within the legislative framework for individuals not only to nominate what should happen in the terminal stages of a current illness but also in circumstances individuals may find intolerable but are currently not experiencing, for example, persistent vegetative states and such wishes should have legal force.

Throughout the discussion document, reference is made to capacity to make decisions. This is only one part of the decision making process. The other aspect necessary to take into account is competence to make a particular decision. For example, I may have the capacity (intelligence, comprehension, maturity) to undertake neurosurgery but unless I have the relevant knowledge, skills and abilities to operate, I do not have the competence to do it. So while I have capacity I can make assessments on whether I have the competence to make a particular decision. When my capacity fluctuates (as is the case in dementia or acquired brain injury), the more challenging task is to determine whether I have the competence to make that decision. The current iteration of the guardianship legislation is a blunt instrument in this regard and needs to reflect this complexity.

More transparent and accessible review mechanisms for Public Advocate decisions and VCAT decisions should also be a feature of the new framework.

2. ***Is a system of guardianship and administration the best way to ensure the needs of people with impaired decision-making ability are met and their rights are protected? What other approaches might better achieve these goals?***

The current mechanism is an appropriate regulatory response.

3. ***Is there an adequate understanding of guardianship laws in the community? What could be done to improve this?***

While knowledge of the general existence of a guardianship framework may be known, the specifics of the system may be difficult for the general public to negotiate and have knowledge about. The Department of Human Services (as it then was) established a Planning Group of which I was part and provided useful education packages aimed principally at General Practitioners. Further education and training is always required. The Guardianship laws seem to be little understood by the general community. It is particularly important for Enduring Guardianship law to be well appreciated so the generality of adults can plan for the future. It would greatly assist ordinary people if the documents for appointing enduring power of attorney (financial) enduring power of attorney (medical treatment) and enduring guardian were streamlined so they could easily be presented as a

package, and considered, signed and witnessed at the same time. While it would not be unusual to appoint different people to the first and second or third of these roles, the documents should make it easy to appoint the same person when this is desired. It could be useful to have a single document, with the various spheres of decision-making (financial, residence, health, refusal of medical treatment, etc) spelt out and the various attorneys, guardians, and agents specified for each sphere.

4. How should developments in policies and practices for people with disabilities be reflected in guardianship and administration laws?

Attitudes to people with disabilities are changing and there is a move towards looking not only at disability but also ability. In other words we should not just take account of what people cannot do but also what people can do. Even where a person is subject to a guardianship order their views and desires should be taken into account. This is consistent with Victoria's Charter of Human Rights and Responsibilities aspirations that all people should have as much freedom as possible and be treated with dignity and respect. The regulatory framework needs to take this into account and incorporate it ensuring there are adequate avenues of internal and external review.

5. People with age-related disabilities and acquired brain injuries are now the main users of guardianship and administration. Do you think the system needs to change to reflect this situation and prepare for the future? If so how should it change?

A more flexible approach to the way in which individuals may retain control of decision making, for example through joint guardianship arrangements between themselves and a guardian appointed by the office of the Public advocate or with a privately appointed guardian.

The appointment of guardians by the Public Advocate or VCAT of guardians with specific aged care or acquired brain injury (ABI) expertise would assist in this regard. Historically it has been very difficult for people (and their families) who experience ABI to access appropriate or even any services. There is inadequate bureaucracy to support ABI and inadequate career paths for those who work with ABI. At times people with ABI have been diagnosed as having mental illness solely so as to be able to access services which are available for mental illness but not ABI.

SPECIFIC QUESTIONS FROM THE TERMS OF REFERENCE

DISABILITY

6. Should it be necessary for a person to have a 'disability' before a guardian or administrator is appointed, or is it preferable to rely on concepts such as lack of 'capacity' or 'vulnerability'?

Using criteria such as capacity provides a more flexible approach for people in need of assistance with their decision making. Particularly given the demography of those requiring that assistance, supported assistance in decision making is a better approach than one based on disability. The notion of decision-making capacity is a more appealing one than disability, not because the latter is wrong, but because it evokes permanence. Vulnerability is a vague term. One would have to state whether the person was vulnerable to financial exploitation, sexual exploitation, harm, abuse, neglect or some other wrong.

7. What are the best ways of assessing whether a person's decision-making capacity is impaired?

In the aged care area, tools such as the 'mini-mental' psychometric test assess the level of cognitive impairment experienced by older people suffering dementia. Perhaps a similar, standardised and valid instrument could be developed to assess capacity for the purposes of guardianship legislation? An assessment of the person's decision-making capacity would need to include their social comprehension, insight and ability to plan ahead. Special procedures would need to be used for those with specific communication problems. Many people who are bi-lingual or multi-lingual retain their first language as they age, even while they have increasing difficulty with a later acquired language such as English. Assessment in the person's preferred language could be indicated.

BEST INTERESTS

8. Is 'best interests' a useful or appropriate guide for substitute decision-makers? Are there better approaches?

It is difficult to envision any other prism through which substitute decision makers should make a decision. Acting as the *alter ego* for an individual with impaired capacity requires substitute decision makers to 'stand in the shoes' of the individual and make decision that impaired person would, to the best of their knowledge.

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

How much risk a substitute decision maker takes would depend on how the impaired person behaved when they were competent to make a decision. If the impaired person was a risk taker, it would seem reasonable for a substitute decision maker to take some risks. However there are obvious tensions here between risk and duty of care. Clearly, and in the absence of any prior advanced directive, the risk taking would need to be modified in proportion to the harm likely to occur to the impaired person. The notion of 'bad decisions' is an interesting one. Even competent, capable individuals may make bad decisions and the state does not try to interfere with that process. It is also a subjective notion. A bad decision for me may not be a bad decision for you. Who would be the arbiter to determine what a bad decision is? A bad decision in an unimportant area of life needs to be distinguished from a catastrophic decision, one in which the person's health or long term future is jeopardised. A pensioner who spends a disproportionate amount on lottery tickets may be imprudent, but can be seen as exercising autonomy. A victim of head injury who wished to spend a million dollar compensation cheque on lottery tickets would need to be protected from the consequences of such an action.

10. What extent should a guardian or administrator be required to try to identify the represented person's wishes and follow them wherever possible?

This approach should be the primary approach adopted by guardians or administrators. A guardian or administrator should be required to try to identify the person's wishes. The guardian or administrator should record the results of such an attempt, and if the wishes are not followed, should record the reason, or at least the fact that they took the expressed wishes into account.

Substitute Decision-Making

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

Yes.

12. Do we need to have two 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?

For represented persons, having the capacity to appoint different people to different roles provides some comfort about their welfare when they are unable to make decisions for

themselves by sharing the responsibility among two or more individuals rather than concentrating powers in one individual. The current arrangements should remain. However, the appointment of joint guardians or administrators by VCAT responsible for the same suite of decisions should be avoided. Sometimes the same person is suitable to act as substitute decision making in many areas of life, sometimes different people are needed. VCAT needs to be able to be flexible.

13. Should plenary guardianship and administration orders be retained? Or, should VCAT be required to identify in each case the range of decision which can be made on a person's behalf?

The current arrangements should remain. Increasing the complexity of decision making required by VCAT, may increase the delays in appointing guardians which may have detrimental outcomes for the represented person.

14. Are there any decisions substituted decision-makers cannot make at the moment that you think they should be able to? Are there some decisions that substituted decision-makers should not be able to make?

Substitute decision makers ought to be able to make all the decisions the represented person could make when they had capacity to do so.

15. Is there a need for new laws that formally recognise supported decision-making? How should any supported decision-making laws operate?

This could be a role adopted by the Public Advocate. Rather than becoming the plenary guardian or administrator for an individual, VCAT could appoint a private individual as guardian with a guardian from the Public Advocate available to provide support and guidance. The UK requirement that 'all practical steps to help someone make a decision have been taken without success before finding that someone is unable to make a decision' sounds very useful. This presents a technique for assessment of decision-making capacity (see question 7 above). The UK model deserves detailed scrutiny.

REVIEW

16. Should VCAT have the power to review individual decisions made by guardians and administrators? If so, who should be able to ask for a review of a decision?

Utilisation of the scarce resources of VCAT in this way would seem to be both inefficient and unwarranted. Perhaps this could be a role played by the Public Advocate?

17. What powers, if any, should VCAT have to deal with substitute decision-makers who abuse their power?

VCAT should be able to remove substitute decision-makers who clearly do not act in the best interests of the represented person. I would not support punitive measures resting with VCAT.

PUBLIC ADVOCATE

18. Should there be any changes to the functions and powers of the Public Advocate?

A mechanism for greater scrutiny of Public Advocate decisions should be established. Given the high proportion of cases where the Public Advocate is the guardian or administrator, an administrative review mechanism not requiring recourse to VCAT or the courts should be developed and implemented to provide a cheap, accessible and timely review of Public Advocate decisions under dispute.

Capacity should be established for the Public Advocate to be a joint guardian/administrator with private individuals. This will promote flexibility in substitute decision making processes.

VCAT

19. Should there be any changes to the functions, powers or procedures of VCAT?

VCAT should be required to be timely, user friendly, provide written reasons for its decisions to enable the parties an adequate opportunity to understand the reasons for a decision. Decisions of VCAT should also be appealable.

AGE

20. Should VCAT have the power to appoint a guardian or administrator for a person under 18 years old?

Consideration should be given to allowing VCAT the power to appoint a guardian for a person who is 16 or 17. It is essential to plug the 17 year olds gap in the provisions for appointing a guardian. It would be preferable to amend the *Children Youth and Family Act* to allow a guardian to be appointed to the age of 18. It would not be appropriate for 17 year olds to be able to appoint an enduring guardian.

CONFIDENTIALITY

21. Should there be any changes to the way the law operates to ensure the right balance is struck between privacy and transparency?

The current legislation strikes the right balance.

TERMINOLOGY

22. Should the terms 'guardian' and 'administrator' be retained? If not, what term or terms should replace them?

They should be retained.

MEDICAL TREATMENT

23. Do the 'medical treatment' provisions in the G&A Act work effectively?

Yes, apart from an advanced directive provision.

INTERACTION OF LAWS

MEDICAL TREATMENT

24. Do the medical treatment provisions in the G&A Act and the MT Act work together effectively? If not, how could the law be improved?

The Office of the Health Services Commissioner receives very few complaints about this aspect of medical treatment.

ENDURING POWERS

25. Do the laws concerning enduring powers of guardianship, enduring powers of attorney (financial) and enduring powers of attorney (medical treatment) work effectively? Do these powers operate in harmony with VCAT appointments of guardians and administrators?

The laws work as far as they go. Advance medical treatment decisions possible for future conditions not only current ones. We would recommend the capacity for the Public Advocate or VCAT appointees to support privately appointed guardians or attorneys formally as another option.

26. Directions provided by people in enduring powers or other documents are generally not legally binding. Should 'advanced directives' about personal, medical or financial matters have more authority?

Yes, they ought to be legally binding, unless there is a compelling argument against following those wishes, e.g. a cure is found to an illness. Advance directives should be able to be appended to an appointment of enduring power of attorney or enduring guardian. The attorney, medical agent of guardian should be required to document the fact that they took such a directive into account when making a decision in the best interests of the donor.

CRIMES (MENTAL IMPAIRMENT AND UNFITNESS TO BE TRIED) ACT

27. What role should guardians have for people who may be affected by this Act?

Guardians should be engaged as partners in treatment and care for the represented person.

MENTAL HEALTH ACT

28. Should there be separate mental health and guardianship laws?

Yes, there should and the laws should be complementary rather than overlap.

29. How should mental health and guardianship laws overlap?

They should not.

30. Should guardians be able to consent to psychiatric treatment in some circumstances?

If the person is an involuntary patient under the *Mental Health Act* then the treating psychiatrist is responsible for treatment decisions, however the views and concerns of the guardian and the protected person should be heard and taken into account. When guardians are included in treatment decisions their consent or failure to consent should be recorded. A health professional should be obliged, when treating an apparently vulnerable person, to include the 'responsible person' in discussion about what should be done, and should be protected from accusations of breach of confidentiality and the like if acting in good faith. Health professionals are often ignorant of the laws about guardianship and appointment of attorney (medical treatment). This is an area of increasing concern because of the growing numbers of older people and growing incidence of dementia.

Only in circumstances that require relatively simple intervention.

DISABILITY ACT

31. Is the law clear about when to seek a Supervised Treatment Order and when to seek a guardianship order?

This aspect of the legislation could be made explicit.

32. What do you think is the best legislative approach for people who are a serious risk to themselves or others but are not covered by the involuntary treatment provisions of the Mental Health Act 1986, or the compulsory treatment provisions of the Disability Act 2006?

A separate regime is required so that people who are dangerous but not mentally ill or disabled are appropriately cared for and the community is protected.

Beth Wilson
Health Services Commissioner