



SOCIAL ISSUES COMMITTEE

19 NOV 2009

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Mr Jonathon Clark
Principal Council Officer
Legislative Council Standing Committee on Social Issues
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr ~~Clark~~ *Jonathon*

Inquiry into substitute decision-making for people lacking capacity

Thank you for your correspondence of 11 November 2009 for matters to be addressed further to our appearance before the Standing Committee on Social Issues on 5 November 2009.

Ms Gillian Lawson, Manager Guardianship and I have both amended the transcript and our feedback is attached. I note that my references to "Advance Health Directive" have been routinely incorrectly reproduced as "Advanced Health Directive". In the Western Australian legislation, the term is "Advance" rather than "Advanced" which is used in some other jurisdictions. I have amended this accordingly on the transcript record.

Responses to Questions on Notice

Question from the Hon Trevor Khan: You have given an indication of the introduction of what I think were described as advance care directives with regards to health care. Are those directives anticipated to deal with only existing conditions or existing conditions and unanticipated future medical care?

Answer: Part 2 of the Acts Amendment (Consent to Medical Treatment Act) 2008 which is yet to be proclaimed will amend the Guardianship and Administration Act 1990 to introduce Enduring Powers of Guardianship and Advance Health Directives in Western Australia.

These two tools will enable people to plan for how decisions about their future lifestyle and health care decisions will be made. They provide the opportunity for individuals to state their preferences about their future lifestyle and treatment decision-making including choosing the people they would like to make such decisions on their behalf, should they later become unable to do so.

73

Upon proclamation, making an Advance Health Directive will enable an adult with full legal capacity to set out what treatment and other health care they want, or would not want to receive, if and when they are unable to make the treatment decision.

Treatment is defined as:

- " (a) medical or surgical treatment, including-
- (i) a life sustaining measure; and
 - (ii) palliative care;
- or
- (b) dental treatment; or
 - (c) other health care;
- and
- 'treatment decision', in relation to a person, means a decision to consent or refuse consent to the commencement or continuation of any treatment of the person. "

The Advance Health Directive will apply only to the treatments specified. Any decisions made in the Advance Health Directive must be followed by health professionals except in very limited circumstances. For example, the Advance Health Directive may not be followed if there is a new treatment that can successfully treat the condition and this treatment was not available at the time the Advance Health Directive was written.

Question from the Hon Trevor Khan seeking a copy of the discussion paper released prior to the legislation for advance health directives.

Answer: A copy of the Medical Treatment for the Dying Discussion Paper issued by the former Attorney General/Minister for Health dated May 2005 has been emailed to you on 17 November 2009.

Questions on Notice (Remaining from questions spent pre-hearing)

6. In relation to 'assisted' decision-making the issue has been raised as to whether an assisted decision-maker would support decisions that they (the assisted decision-maker) thought were right, or that were the wishes of the person being assisted, even if they might not be perceived as being in the person's best interests.

- *Can you comment on this issue?*
- *If legislation providing for assisted decision-making were to be introduced in NSW how do you think it should address this issue?*

Answer: The following comments which relate to the Western Australian legislation may be of assistance in consideration of assisted decision-making in the NSW context.

The *Guardianship and Administration Act 1990* (WA) recognises that people who are not capable of making reasoned decisions for themselves may need additional support and assistance not only to ensure their quality of life is maintained but also to protect them from the risk of neglect, exploitation and

abuse. In addition, a guardian or administrator will only be appointed if the State Administrative Tribunal considers it is necessary to safeguard the best interests of the person whose decision-making is impaired and if other "less restrictive" options are not available or appropriate.

Under section 51 of the Act, a guardian has a statutory mandate to act in a person's "best interests". The principles guiding a guardian to make decisions in accordance with section 51 of the Act include:

- advocating for the person
- encouraging the person to participate as much as possible in community life
- encouraging and assisting the person to care for themselves and make decisions about their own life
- protecting the person from neglect, abuse and exploitation
- consulting with the person and considering their wishes
- maintaining any supportive relationships the person may have
- maintaining the cultural, linguistic and religious environment of the person.

This means that while the guardian will take into account, as far as possible, the wishes of that person as expressed, in whatever manner, or as gathered from their previous actions, ultimately the guardian will make a decision that protects and promotes the person's health and well being, even though the represented person may be opposed to this decision.

The *Acts Amendment (Consent to Medical Treatment) Act 2008* provides the same powers in the operation of an Enduring Power of Guardianship as for the functions of a guardian set out in section 45 of the *Guardianship and Administration Act 1990*. The "best interests" provisions in section 51 will also guide an enduring guardian appointed under an Enduring Power of Guardianship (when proclaimed).

Family and friends may give informal assistance to a person with a decision-making disability to make daily decisions and carry out the activities of daily life. Through its role of providing advocacy and information on how to protect people with decision-making disabilities, the Office provides advice to people who are assisting the person with the decision-making disability (often their family member), to make decisions.

The Office has not considered the policy implications of assisted decision-making in terms of any legislative changes and envisages that this may be explored in the next review of the WA Act.

7. In practice, how could substitute decision-making arrangements be constructed to accommodate the fact that a person's capacity may vary from time to time and situation to situation?

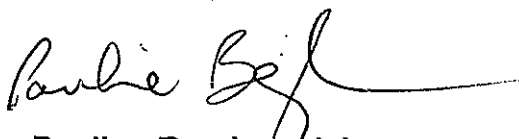
Answer: It is the Public Advocate's experience that occasionally people, for whom the Public Advocate is the guardian, either regain capacity, (for example further to rehabilitation following a stroke, or other type of acquired

brain injury), or display intermittent gaining of capacity often as a result of a fluctuating mental state caused by a mental illness such as bipolar affective disorder. In these situations the Public Advocate takes the following action:

- Where a person appears to have regained mental capacity the guardian will seek a specialist assessment to verify this situation. Where capacity is verified, the guardian will immediately seek a guardianship review hearing before the State Administrative Tribunal and seek a revocation of the order.
- Where a person has intermittent capacity as a result of a fluctuating mental illness, and possibly non-compliance with medication, the Public Advocate will undertake the same steps as stated above. In the event of a revocation of a guardianship, and /or an administration order, and the possibility that the person may still be vulnerable, every effort is made to link that person to appropriate services and support to ensure every chance of their success without a substitute decision-maker.

Copies of the *Guardianship and Administration Act 1990*, and the *Acts Amendment (Consent to Medical Treatment) Act 2008*, and the *Guardianship and Administration Amending Regulations 2009* (which contain the Enduring Power of Guardianship and Advance Health Directive forms, yet to be proclaimed) are available on the State Law Publisher website www.slp.wa.gov.au

Yours sincerely



Pauline Bagdonavicius
PUBLIC ADVOCATE

17 November 2009