



Psychiatric Disability Services
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Information Paper Submission

Victorian Law Reform Commission review of Guardianship

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Psychiatric Disability Services of Victoria's (VICSERV) role

Psychiatric Disability Services Victoria (VICSERV) welcomes the opportunity to provide a submission to the Victorian Law Reform Commission's (the Commission) review of guardianship laws in Victoria. The submission focuses on questions 28 to 30 posed by the Commission in relation to the interrelationship of guardianship laws with the *Mental Health Act 1986* (Vic) (MH Act).

VICSERV is the peak body for Psychiatric Disability Rehabilitation Support Services (PDRSS) in Victoria. Our members provide housing support, home-based outreach, psychosocial and pre-vocational day programs, residential rehabilitation, mutual support and self help, employment, training and support, carer education, respite and advocacy.

1) Separation of mental health and guardianship laws

Historically there has been a separation of mental health law predicated on the view that involuntarily psychiatric treatment is required at times when a person may be of harm to themselves or others because of their mental illness.

While the wishes of persons in relation medical treatment appear by and large in law and practice to be respected, the same cannot be said for the wishes of persons with a mental illness in respect of psychiatric treatment. An example of this is the ability for persons to appoint an agent with respect to most medical treatments by way of Enduring Power of Attorney – Medical and to refuse medical treatment in advance via a Refusal of Treatment Certificate. There is no equivalent advance directive in law in relation to psychiatric treatment.

Further, once a person is found to have a mental illness, it is effectively assumed that their capacity to make decisions in respect of psychiatric treatment is impaired due to that illness. This is in contrast with guardianship laws where the suggestion that a person has reduced decision making capacity is thoroughly tested before a substitute decision maker is appointed.

Recommendations

1. That mental health and guardianship laws are integrated into one 'capacity-based' legislative regime ensuring:
 - The removal of the segregation and discrimination of persons with mental illness inherent in the current separation of these laws
 - A common method of appointing a substitute decision maker for all persons irrespective of whether it is in relation to psychiatric treatment or otherwise.
2. That substitute decision making is used only as a measure of last resort unless specified otherwise in an advance directive and that a supported decision making model be established in legislation.
3. That advance directives be legally recognised and enforceable including in relation to psychiatric treatment and advance refusals of that treatment.
4. An explicit recognition that treatment should be voluntary wherever possible and that any decision about any treatment must take into account the patient's views, wishes, beliefs and values to the greatest extent practicable.
5. That any decision making model adopted protect rights, minimise interference with them and promotes rehabilitation and recovery.

2) Overlap of mental health and guardianship laws

As stated above, it is VICSERV's view that mental health and guardianship laws should be combined to ensure the greatest human rights protections for all persons subject to substitute decision making. It is

apparent that in order to give the greatest recognition of human rights that the least restrictive models of decision making be adopted and preferred.

While it is agreed that the laws should be combined, human rights protections should be extended and applied to all mental health patients, not just those subject to involuntary treatment.

Recommendation

6. That the human rights principles currently in the MH Act be incorporated into guardianship laws and applied to all mental health patients, not just involuntary patients.

3) Guardians and consent to psychiatric treatment

The Commission has asked whether guardians should be able to consent to psychiatric treatment in some circumstances.

Under the current MH Act there is no provision for guardians to consent or refuse psychiatric treatment on behalf of the represented person.

The future role of guardians in this respect is ultimately dependent on the model of decision making that is adopted and whether an advance directive has been made. However, it is clear that the current situation whereby the Authorised Psychiatrist is both the substitute decision maker and the person who assesses capacity is unacceptable.

Recommendations

7. Where an advance directive is made in relation to psychiatric treatment that the wishes of person as stated in the instrument are acceded to.
8. Further consideration is given to the role of supported decision making in respect to psychiatric treatment.
9. That the role of Authorised Psychiatrists as substitute decision makers be reviewed and be replaced by an independent person who acts in support capacity to assist the patient to come to his/her own decisions in relation to psychiatric treatment.