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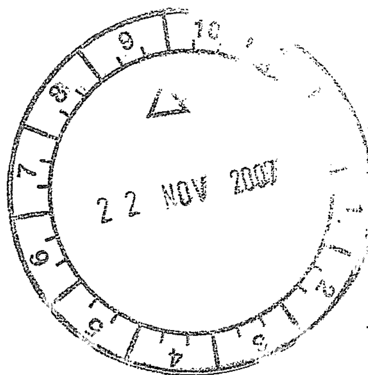


ATTORNEY GENERAL

MINISTER FOR HEALTH; ELECTORAL AFFAIRS

FOR WESTERN AUSTRALIA

Paul Grant
Clerk Assistant (Committees)
Legislative Council
Parliament House
PERTH WA 6000

Dear Mr Grant

Committee Reports – Government Response – Standing Order 337
Acts Amendment (Consent to Medical Treatment) Bill

I refer to your letter dated 5 November 2007 attaching a copy of Tabled Paper 3441, Report No. 10: Acts Amendment (Consent to Medical Treatment) Bill 2006, delivered by the Standing Committee on Legislation.

In accordance with Legislative Council Standing Order 337, please find the Government's Response as follows:

Recommendations 1, 3, 4 (in part), 5, 7 (modified), 8, 10, 12 (modified)

The Government accepts recommendations 1, 3, 4, 8, 10 and 12.

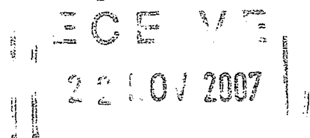
In relation to recommendation 4, the Government agrees to amendments to allow regulations to be made permitting review by the State Administrative Tribunal of register access decisions; and to prohibit the disclosure of information obtained from the register other than for the purposes of the Act. However, it is not necessary to make regulations limiting register access as recommended by the Committee as the foreshadowed regulations would allow regulations in respect of access to the register.

Recommendation 7 is accepted but modified to achieve consistency with existing section 51 and proposed section 110H of the *Guardianship and Administration Act*. The obligation should be to act according to the person's *opinion* of what is in the patient's best interests (s51) in relation to guardians, adopted in relation to enduring guardians proposed by s110H in the Bill.

Recommendations 2, 6, 9 and 11:

The Government does not accept recommendations 2, 6, 9 and 11.

In relation to recommendation 2, proposed section 110Q(1)(a) requires that an advance health directive be "in the form or substantially in the form prescribed by the regulations". Amendment of the Bill to implement this recommendation is not required. It is appropriate that the prescribed form for an advance health directive contain reference to the desirability



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of consideration being given to the maker seeking legal and/or medical advice, though careful thought would have to be given to the final form of the wording.

This recommendation does not require statutory amendment for its implementation and it plainly would not be appropriate to amend the Bill to entrench the recommendation. There can be no objection to the prescribed form containing a statement encouraging persons proposing to prepare advance health directives to give strong consideration to first seeking medical and/or legal advice as to the terms of the directive contemplated. However, to include in forms what might be perceived as advice that advance health directives ought not be completed without a prior legal and/or medical consultation might discourage the making of advance health directives, particularly because of the attendant cost.

The presence of the word "(optional)" in that part of the second sentence of the suggested form inclusion relating to *identification* of the maker's advisers is confusing as it suggests, inappropriately, that it is not optional to state in the directive whether medical or legal advice was sought. That issue aside, there may be some benefit in the maker of an advance health directive being given the option of identifying in the directive his or her advisers so that they can be readily identified and interviewed, if available, in the event of uncertainty or dispute as to the validity or operation of the advance health directive made. However, that benefit would be available only if the advisers were not constrained by confidentiality or privilege obligations from discussing with a health professional the content of their discussions with the maker of the directive or giving such evidence before the State Administrative Tribunal.

Recommendation 6 is to insert subsection (e) in section 110S(4). This recommendation is not supported because it is misconceived. The matters listed in paragraphs (a) to (d) of proposed section 110S(4) are the factors which must be considered when a decision is made as to whether an advance health directive is inoperable, pursuant to section 110S(3), on the grounds that circumstances have since arisen which the maker of the directive did not anticipate but which, if anticipated, would have caused a change in the directive. Typically, compliance with that obligation, and in any event consideration of whether section 110S(3) applies, would involve discussions with persons, such as relatives, able to shed light on the matters listed in paragraphs (a) to (d) and generally on the application of section 110S(3).

The Committee's proposed paragraph (e) would require consideration, as material to the application of section 110S(3), of the views "concerning the [patient's] treatment" of the guardian, enduring guardian and person responsible. What is meant by a view "concerning the treatment" of the patient is far from clear, and why the views of the guardian, enduring guardian and person responsible should be accorded more significance than the views of a spouse or other relative is similarly not apparent from the Report. More significantly, however, the proposed amendment confuses a factor which must be considered in deciding whether section 110S(3) applies with the manner of determining the nature and significance of such a factor. In other words, the views of third parties are not of themselves factors relevant to the operation of an advance health directive but rather one means by which it can be determined evidentially whether, as a matter of fact, the criteria in section 110S(3) have been met.

The Government does not support recommendation 9. The phrase "good faith" appears, without being defined, in many statutes, particularly in protective provisions. Its application to particular circumstances is best left, as is apparent from the State Solicitor's Office's advice reproduced in paragraph 18.9 of the Report, to the common law and the Courts. In

any event that, while the recommendation refers to what is said to be the State Solicitor's Office's advice to the Committee, reproduced in paragraph 18.10 of the Report, the actual advice (which is to be found in Appendix 4, at page 96 of the Report) summarised not the elements of "good faith" but rather the statutory elements (including the existence of good faith) which must be satisfied for the protection given by proposed section 110ZK(2)(ii) to be available.

The Government does not support recommendation 11. Proposed section 110ZK(2)(b) is intended to protect the health professional who participates in treatment of a patient in circumstances where that health professional could reasonably anticipate that consent issues had been resolved and that the treatment was valid. An example would be a scrub nurse assisting at an operation. It is not appropriate that such a nurse should be required, before assisting, to sight a written statement by another health professional that that health professional has satisfied himself or herself that the surgery is in accordance with a treatment decision. In any event, there is no complementary statutory requirement that a health professional reduce to writing his or her belief that the necessary consent is valid.

Further matter – jurisdiction of the SAT in relation to common law directives

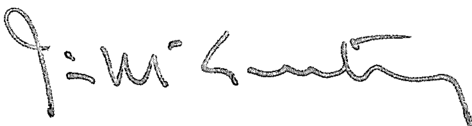
The Committee, at paragraphs 14.5 to 14.12 under the heading "Jurisdictional Questions concerning Common Law and Statutory Advance Health Directions", canvassed the issue of whether SAT should be vested with jurisdiction to determine the validity, construction and operation of common law advance health directives. At present, the Supreme Court has, relevantly, exclusive jurisdiction. This Office's observations in relation to the attendant policy issues are to be found in Appendix 6 to the Report. Ultimately, the Committee made no recommendation but, in paragraph 14.12, indicated its support, on grounds of simplicity and accessibility, for an expanded jurisdiction vested in SAT.

Accordingly, the Government proposes that the Bill be amended so as to vest in SAT jurisdiction to determine whether in a particular case a substitute decision maker is empowered to make a treatment decision in relation to a patient. This will allow SAT, in a case where the power of say an enduring guardian is dependent upon the validity or application of a common law directive, to determine whether the directive is valid and applicable to the treatment proposed - and so whether the enduring guardian can make the required treatment decision.

Amendments

Government amendments have been submitted and appear on the Supplementary Notice Paper.

Yours sincerely



JIM McGINTY MLA
ATTORNEY GENERAL

21 NOV 2007