The Royal College of Pathologists of Australasia
ABN 52 000 173 231

Durham Hall 207 Albion Street Surry Hills NSW 2010 Australia
Telephone **61 2 8356 5858** Facsimile **61 2 8356 5828**

RCPA
The Royal College of Pathologists of Australasia

17 May 2017

NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

Email: nsw-lrc@justice.nsw.gov.au

Re: Revision of NSW Guardianship Act
Question Paper 5 – Medical and Dental treatment and restrictive practices

Thank you for asking the Royal College of Pathologists of Australasia (the College) to comment on the above document. There are several points the College would like to raise.

Treatment by someone other than a medical practitioner

Treatment by someone other than a medical or dental practitioner

3.25 The *Guardianship Act* defines "medical and dental treatment" to include treatment "normally carried out by or under the supervision of" a medical practitioner or dentist. The former Minister for Health submits that it is unclear whether this includes health treatment provided by other registered health practitioners, for example, nurses and midwives, Aboriginal and Torres Strait Islander health practitioners, Chinese medicine practitioners, chiropractors, occupational therapists, optometrists, pharmacists, osteopaths, podiatrists, physical therapists and psychologists.[31]

Question 3.3: Treatment by a registered health practitioner

Should the definition of medical and dental treatment in Part 5 of the *Guardianship Act 1987* (NSW) include treatment by a registered health practitioner?

Yes. In the field of Forensic Medicine there are forensic nurses increasingly responsible for the assessments of patients and for the gaining of consents for the examination, release to police and photography. Patients should have the same protection regardless of who the health professional is.

Special / Major and minor treatment

Major treatment

What is major treatment?
Major treatment is a treatment that includes:

- giving a long-acting injectable hormone for contraception or to regulate menstruation
- giving an addictive drug
- giving a general anaesthetic or other sedative (with some exceptions)
- any treatment used to stop menstruation
- giving a restricted substance to affect the central nervous system (with some exceptions)
- any treatment involving substantial risk to the patient of death, brain damage, paralysis, permanent loss of organ or limb function, permanent disfigurement or scarring, exacerbation of conditions being treated, an unusually prolonged period of recovery, a detrimental change of personality or a high level of pain or stress
- testing for HIV
- any treatment intended or likely to result in the removal of all teeth, or
- any treatment likely to impair significantly for an indefinite or prolonged period the patient's ability to chew food.

Question 4.2: Major treatment

(1) Is the definition of major treatment appropriate? Should anything be added? Should anything be taken out?

(2) Who should be able to consent to major treatment and in what circumstances?

(3) How should a patient's objection be taken into account?

(4) In what circumstances could major treatment be carried out without consent?

The definition is not appropriate.

There should be a clear, broad based definition at the beginning of each category of treatment. For example:

Special:
The most invasive and risky kinds of treatment. Treatments that are likely to result in a permanent change e.g. sterilisation. Where the risk of death, with said treatment, is considered high e.g. removal of brain tumour / surgery for abdominal aneurysm etc.

Major:
Where there is a risk of permanent harm e.g. operations / general anaesthetic / chronic administration of addictive medication etc. Where the risk of death is not high e.g. appendectomy / reduction of dislocated shoulder.

In the College's opinion a HIV test is not a major medical treatment.

The oral contraceptive pill or injectable contraception or implanted contraception, which can be used to stop menstruation, is hardly a major medical treatment.

The College thinks this category is poorly defined.

Minor: All the rest

Sexual Assault Examinations

By definition a sexual assault examination would be a minor treatment. A sexual assault assessment is only ever done if there is a reasonable concern that a sexual assault has occurred. A thorough medical examination necessitates examination of the vaginal vault (using a speculum) to exclude injury if there has been a suggestion that penetration has occurred here.

As there is no risk to the patient's health in doing this, the College can see no reason why an examiner should not be able to collect forensic swabs from areas in and around the vaginal vault at the same time.

The College would suggest there should be no automatic release to police of specimens until the patient is able to consent, consent is provided from a person responsible or an application is made to the Guardianship Tribunal.

In other countries, legislation exists allowing examiners to collect this evidence without risk of further prosecution, assuming there were reasonable grounds for suspecting an assault had occurred. There is no requirement for substitute consent. The risk to the patient is low. Early collection of evidence increases the patient's options for investigation if they desire. Alternatively, they may desire to not keep the samples and they can then be destroyed.

Yours sincerely

Dr Debra Graves
Chief Executive Officer