December 2008

Nidus Personal Planning Resource Centre and Registry

Feedback to Ministry of Attorney General and Ministry of Health

on Bill 29 Regulations and related issues

GENERAL COMMENTS

Nidus welcomes the introduction of Regulations and standard forms and the opportunity to provide comments. However, as currently drafted, we have serious concerns about the Regulations. Rather than supporting personal planning and alternatives to guardianship, on balance the Bill 29 Regulations create barriers that discourage and prevent British Columbians from taking such initiatives.

It is our view that these Regulations run counter to the principles of guardianship reform and to other values government promotes including de-regulation and building the best system of support in Canada for persons with disabilities, those with special needs, and seniors.

British Columbians have confirmed with each legislative review and consultation that they want to make their own arrangements for support and they want a process and tools that are:

- Accessible;
- Simple;
- Affordable; and
- Private.

These four goals were first identified in 1995 following independent analysis of participatory action research.

We have waited a long time for the certainty which Bill 29 was to provide and to which we contributed. The Regulations are a disappointment from a number of perspectives which are set out below. Most importantly, the proposed limits on Section 7 Representation Agreements are a major impediment to moving forward.

The proposed limits based on the adult's income and possibly also the adult's assets came as a surprise. Given the emphasis on reforming and modernizing the legislative framework, this appears as a sharp contradiction. It also comes on the heels of international recognition for the made-in-BC *Representation Agreement Act* and Section 7 Representation Agreements as a legal model for supported decision-making. Nidus and BC Association for Community Living recently attended a Global Forum in Ottawa to celebrate United Nations Convention on the Rights of People with Disabilities. Article 12 recognizes that people with intellectual disabilities have the same right to personhood and to enjoy legal capacity on an equal basis with other citizens in all aspects of life and

that they should have access to the support they may require in order to exercise their legal capacity. It was Canada that spearheaded this particular Article and it is British Columbia that is considered an example to the world. And of course, this issue is of relevance to all adults.

This submission outlines our comments on the proposed Regulations to Bill 29 and related issues and provides recommendations which we believe will allow us to maintain momentum so that Bill 29 can be proclaimed in a timely manner.

Nidus has years of practical experience and data analysis to guide a number of Regulatory issues such as the development of effective standard forms. Upon resolution of the major obstacle as noted above, Nidus is prepared to put time and energy into facilitating form development and matters related to clarifying the definition of routine management of financial affairs.

SPECIFIC RECOMMENDATIONS

Representation Agreement Act Regulations

Definition of routine management of financial affairs

RECOMMENDATIONS:

1. Do not institute the proposed Regulation Section 1 to limit the use of Section 7 Representation Agreements for routine management of an adult's financial affairs based on the adult's income or assets.
    - We do not agree with income or asset based restrictions being added to the definition of routine management of financial affairs. Such measures eliminate an effective alternative to guardianship and will trigger guardianship for many or leave others in limbo. This proposal is unacceptable to the community groups who initiated and championed Representation Agreements as a tool for supported decision-making.
    - Such limits are arbitrary and cannot take particular circumstances into account.
        - ◊ These restrictions are most likely to affect seniors and middle-aged working adults. Seniors report that their taxable incomes can change from year to year. Working adults who suffer a stroke or accident may have a taxable income of $50,000 or more in the year prior but are likely to have an income of much less in subsequent years if they cannot work and have to manage on disability benefits.
    - Who would 'police' such a requirement? Do people have to submit a copy of the Representation Agreement and a copy of the adult's income tax form?

2. Support Nidus to establish a short-term working group including community groups, the Public Guardian and Trustee and financial institutions to identify items under the definition of routine management of financial affairs that require clarification.
    - The consequence of a list approach to defining routine management of financial affairs means there is a need to constantly review and update the list. Changes in practice, technology and financial planning instruments make this a necessity. The community has identified a number of items to be clarified with respect to the existing list and others to be added such as those to enable dealing with the Registered Disability Savings Plan and direct funding options.

Records of representatives

RECOMMENDATION:

3. Do not institute the proposed Regulation (1.2) which sets out additional record keeping requirements for representatives.
    - These requirements are a barrier and discouragement to potential representatives.
    - The detail of these requirements set representatives up for failure because many of these decision points will be difficult to record in a clear way. These types of decisions characteristically do not occur in a linear fashion.
    - The requirements in the *Representation Agreement Act (Section16)* and in the current Regulation are sufficient and manageable. Education materials can offer examples on how to meet the statutory obligations.

Certificates (for Section 7 Representation Agreements)

RECOMMENDATIONS:

4. Eliminate the term 'Form' in the name of the Certificates.
    - Many people interpret the 'Forms' as being the actual Representation Agreement and some have tried to use them as such. It is a big shock when they discover they have not made a valid Agreement.

5. Modify the Certificates to make them simpler and more logical to follow. For example, remove repetitive statements in the Certificate of Witnesses. Change the format so it is easier to complete.
    - Nidus' own research revealed that of 32 completed Representation Agreements (Section 7) in a one-month period, 56% had errors in completing the Certificates with 34% of the errors attributed to Form 5 (Certificate of Witnesses).

6. Modify the Certificates to make the prescribed content more realistic.
   - Although an attorney named in an Enduring Power of Attorney have more authority than a representative under Section 7, they do not have to sign that they have read, understand and accept their duties.
   - Nidus is the main source of hard copies of Certificates for the public and has always included the Sections of the Act referred to in the Certificates, even though these references are no longer required by Regulation. However, with a standard form and the use of websites for distribution, there is not guarantee that the Sections referred to will be reasonably available.

7. Support Nidus to develop drafts and use Nidus' community contacts to field test the revised Certificates.

Standard Optional Forms

RECOMMENDTATIONS:

8. The standard forms should constitute an actual form for a specific situation. For example, there would be one form for one attorney and a separate form for two attorneys. Or, produce one standard form and include wording for specific clauses in an accompanying Guide.
   - Providing options within the form, in our experience, causes confusion and leads to incorrectly prepared documents. It is important that any standard optional form, especially if it is to be posted on the government's website, has a good chance of being completed correctly.
   - Nidus has extensive feedback for each tool, based on its hands-on practice of supporting the public in a self-help model through Kits and at Legal Clinics. Some brief comments are provided in Appendix A, page 13.

9. Based on Nidus' experience and analysis of its data-bank, the standard forms should be for the following arrangements:
   - RA7 – 1 representative, 1 alternate, monitor and for all powers.
   - RA9 – 1 representative, 1 alternate representative, plenary powers.
   - RA9 – 1 representative, 1 alternate representative AND reference to AD
   - EPA – 1 attorney, 1 alternate attorney, no restrictions or conditions.
   - AD – see recommendations for the AD form under the next bold heading

10. The RA9 standard form should provide for plenary authority for health and personal care.
    - Nidus recommended provision of plenary authority in its September 2006 proposal called *Charting the Course Ahead*.

11. Do not produce a combined Advance Directive and Section 9 Representation Agreement standard form. Reference the AD in the Section 9 RA.
    - It is our view that this will create extreme confusion and unnecessary complexity. The necessity to combined witnessing requirements makes execution overwhelming. Revocation of the AD could mean revocation of the RA9 and vice versa.

12. The EPA standard form should not include a springing clause.
    - Such clauses are difficult to draft and will be subject to confusion. Adults who wish to have springing clauses should get specific assistance.
    - There are numerous difficulties implementing a springing authority. People often do not understand, without explanation, the steps involved satisfy the condition outlined in the springing clause.
    - What if the incapability is gradual or temporary?

13. The RA9 standard form should not include a trigger event.
    - Health care consent has a 'built-in' trigger event as it is a health care provider who determines whether the patient is capable or not of informed consent. If the adult is incapable, the health care provider turns to the representative.
    - There is no reason to add another hoop for representatives to jump through; this would be more than a Temporary Substitute Decision-Maker has to satisfy under the default scheme.
    - When amendments to care facility admission are enacted (Bill 26), representatives would only be asked for consent after a health practitioner or prescribed health care provider has determined the adult incapable of giving or refusing consent.

14. Support Nidus to facilitate a process with various stakeholders to re-draft standard forms and Certificates and to field-test with potential users.
    - Nidus believes there is value in the advisory group approach. It assists to create common understanding, build relationships to facilitate public and professional education and develop practical standard forms within the context of legal and community resources.

Health Care Consent Act and Care Facility Admission Act

Health Care Consent Regulation – Advance Directives

RECOMMENDATIONS:

15. Regulations should prescribe wording for Advance Directives in order that an instruction for health care is clear and can be relied on and avoids confusion and potential liability. For example, prescribe:
    - Wording that will constitute an instruction for giving consent to health care as well as for refusing consent to health care. This wording should address both the specific treatment and the circumstances.
    - A check box must be included on any AD form so that the adult can indicate s/he has a Representation Agreement. It will not matter if this box is ticked at the time the AD is made or after because an RA takes precedence in either case.
    - An AD must not include any reference to the naming of a representative or potential Temporary Substitute Decision-maker or any other person other than the adult and the witnesses.

- With an open-ended approach, health care providers will shoulder a lot of responsibility for interpretation.
- Nidus informally tried out the AD draft form provided for consultation. The standard response from people was to ask what they should write in the blank lines. One person who did write in the blanks put “DNR” under “I consent to the following health care…”
- The risk for the public with this approach is that people will think they have addressed critical issues in their AD and not do other planning such as choosing a representative. If the adult’s attempts to draft the AD instructions are not clear, the health care provider will need to select a TSDM. One reason problems can arise is because TSDMs may not be as prepared as a representative would be.
- If there is no leadership from the Ministry of Attorney General and Ministry of Health, each Health Authority or possibly even individual hospitals and palliative care programs will produce their own forms. Nidus has raised concerns about this approach in previous communications.
- Some questions about wording in existing forms would be assisted by standard wording. Will the terms “such as” and “etc.” be acceptable as an instruction in an AD? How would consent for a ‘trial period’ be worded? Is it both an instruction to consent and to refuse health care? Who decides when the trial is over? Can this be addressed in an AD or does it need a TSDM? And how do instructions apply in examples where people choose to give consent or refuse consent based on circumstances? Many

circumstances involve value-based judgement of what the adult would find intolerable.

- Lawyers and notaries are new to the field of health care planning. Will they be able to advise clients on how to draft open-ended AD forms?
- Nidus has also raised the issue of hybrid forms which invite the adult to list the name of a person on the AD form. This is misleading to adults and has been misinterpreted by health care providers. At the least, government should prescribe in Regulation that this cannot be done in an AD.
- Another area to clarify is that wishes are instructions but guidelines are not. Some Health Authorities are talking about documenting patients wishes as guidelines. In other cases there is talk of having 'conversations' with patients. Health care providers need to understand the legal framework and be able to correctly explain it to patients. Patients need to know how any documented information they provide will be used. This of course, speaks to the need for professional education.

16. Support a provincial Registry for all personal planning documents and prescribe a duty on health care providers to search.
    - A centralized Registry facilitates communication and provides a safeguard.
    - The Nidus Registry is a source of education as well. Adults contact the Registry for information on revoking their documents and making new ones. Representatives and attorneys seek information on their duties.
    - The advantage of the Nidus Registry is that it is centralized and ensures the maker retains custody of the information which is especially critical for keeping contact information up-to-date and communicating revocations and replacement documents.
    - Nidus provides a way to communicate information with registrants about new legal tools, practice issues and new resources.

Care Facility Admission legislation

RECOMMENDATIONS:

17. Do not proclaim Section 37 of the *Health Statues Amendment Act 2007* (Bill 26) which amends the *Representation Agreement Act* Section 7(2).
    - This amendment would prevent representatives from consenting to admission to a long term care facility admission for an adult. This does not fit with current needs. Please see Appendix B, page 16, for more details.

- For clarity, at the earliest opportunity, the *Representation Agreement Act* Section 7(2) should be amended to ensure it is inclusive of all types of facilities.
- It is also important to note that since the legislation governing care facility admission was not proclaimed and no one knew when or if it would be enacted and if it was, what changes would be made, the reference in the *Representation Agreement Act* has had no effect for nearly nine years. Given that Section 7 (1) (a) refers specifically to authority for 'where an adult lives and with whom,' this has been seen to cover consent to various types of facilities.

18. Rectify what appears to be a serious drafting error in Bill 26 Section 8 which amends Part 3 of the *Health Care Consent and Care Facility Admission Act*.
    - Representatives are listed within the ranked list of substitute decision-makers that comprise the default scheme for care facility admission. This makes representatives subject to the same conditions that are applied to the default substitute decision-makers. This is not appropriate.
    - Representatives are a separate category of substitute decision-maker and should be listed separately in Section 22 after court-appointed personal guardian (Sec. 22 (1)(a)) and before reference to the default list of decision-makers.

19. For clarity and accuracy, ensure that in any communication and education uses the term Temporary Substitute Decision-maker (TSDM) is used when referring to default decision-maker for health care. It would be easy to get mixed up with term substitute decision maker for care facility admission.

Power of Attorney Regulation

Records of attorneys

RECOMMENDATION:

20. Section 1.1 (2) (h) should be the only prescribed record in the Regulation. Delete (2) (a) to (g).
    - The point has already been made under the Representation Agreement Regulation concerning onerous reporting requirements that also apply here.
    - The proposed Regulation would hold an individual (spouse, family member or friend) to the same standard of record-keeping as a professional (lawyer, notary or accountant) or a financial institution.

Incapability Assessments Regulation

RECOMMENDATION:

21. Revise the wording related to the determination of incapability in the proposed Regulation 10 (1) and (2) and 11 and 12 (1) and (2) and 14 (a). The wording is not clear. For example:

> 12 (1) For the purposes of determining whether an adult is incapable of making decisions about the adult's financial affairs, a qualified health care provider must make the determination based on whether the adult demonstrates an understanding of all of the following:
> (a) the nature of the adult's financial affairs, including the approximate value of the adult's business and property;
> (b) the obligations owed to the adult's dependants;
> (c) the decisions or actions respecting the adult's financial affairs that must be made or taken for the reasonable management of the adult's financial affairs;
> (d) the risks and benefits of making particular decisions or taking particular actions in respect of the adult's financial affairs;
> (e) information given to the adult respecting the matters set out in paragraphs (a) to (d);
> (f) that the information referred to in this subsection applies to the situation of the adult.

- Does the above mean that the determination of incapability requires the adult to 'fail' to understand in all of the areas? And therefore, if the adult understands one of the areas then the assessment ceases?
    - ◊ If this is the case, then adults who need help in some areas and not other may well end up in limbo if there is a ceiling applied to the definition of routine management of financial affairs under Section 7 Representation Agreements. This tool, which was designed as an alternative, will not be available.
- Or does it mean that the determination of incapability requires that the adult fail to understand in only one of the areas and then the assessment moves on to the requirements in subsection (2) cited below?
    - ◊ If this is the intent of the Regulation, this is sure-fail and regressive approach to incapability assessments.
- With respect to 12 (2) below, what does "personally able to take steps" mean? Where is this defined?

> (2) In addition to the matters set out in subsection (1), a qualified health care provider must make the determination of incapability based on whether the adult demonstrates that he or she is personally able to take steps to ensure that his or her decisions respecting financial affairs can be implemented.

COMMENTARY ON REGULATIONS RELATED TO ADULT GUARDIANSHIP ACT

Incapability Assessments Regulation

The Regulation does not recognize the multi-faceted nature of capability or the interdependent nature of decision-making.

- Assessments are cognitive-based; not functional. As shown above, they require the adult to "demonstrate an understanding."
- In the second part of the assessment procedure, the adult must demonstrate s/he is "personally able to take steps." Not knowing what this meant, we asked someone involved with the PGT's Committee on Incapability Assessments. When asked whether the adult could demonstrate this by saying or indicating "my friend is going to help me..", the response was that the adult would have to 'understand' that the friend might not do it.
- Another example of this limited view of capability is found in the draft information material prescribed for the court process. It says that one of the factors the judge will consider when deciding whether to appoint a guardian is "that you are incapable of making those decisions – in other words, you cannot make those decisions or carry them out by yourself;" If this is the real test of in/capability; most British Columbians will fail. While this is only one condition a judge considers, it perpetuates old and outdated ideas about capability and the nature of decision-making which seems to underlie these Regulations.

We understand that there is intent to develop Practice Guidelines and possibly a course being developed for assessors.

1. Given there is no requirement for assessors to follow guidelines, how will these be used? How much is being spent on this effort?
2. Assessing incapability by assessing an adult's cognitive function is the traditional approach based in the medical model. Any number of health care providers are doing this now for court applications. The new Regulations don't appear to propose any different practice or skill-base than currently used under the outdated *Patients Property Act*.

It is concerning that the proposed Regulation 5 (3) allows that assessors may require a person, other than the adult, not to be present during the assessment EVEN IF the adult requests the person to be there. While there may be some concern of undue influence in a minority of cases, this must be balanced against the entirely 'abnormal' experience of being assessed and the potential this has for skewing the adult's responses. An assessor can always note their concerns about the other person but to deny an adult's request suggests that the assessor has already determined the adult incapable because they 'do not know what is good for them.'

A medical examination is required (Section 6) to presumably rule out physical or medical causes (such as medications) that may affect an assessment? The proposed Regulation 6 (1) (b) (also referenced in 6 (2)) allows for a medical practitioner to review the adult's medical status in lieu of a medical examination. Why is there no time frame for this? How old may the record of the adult's medical status be?

Regulation 8 says that an assessor must complete a report with details of the assessment, including the factors that were considered in making a determination of the adult's capability or incapability. But how is it that we can prove an adult is capable? Isn't an adult presumed capable and the onus is on the assessor to prove that the adult is incapable? The finding is either that the adult is incapable or that the adult is not incapable.

With respect to Regulation 8 (c), it says that upon completing an assessment, the health care provider (assessor) has to 'advise the adult of their determination of capability or incapability.' Does this mean the adult is not entitled to a copy of the entire report? Also, any attorneys under an Enduring Power of Attorney or representatives and monitor under a Representation Agreement should be copied; unless there is proof that they have abused their duties.

The report form completed by an assessor for court appointed guardianship has one box to tick for personal care. However, unlike other areas, personal care is not automatically a plenary authority. Therefore assessors must assess and report accordingly (See Bill 29, Section 4 amending Part 2 Section 16 (1) (b)).

On Form 3, Certificate of Incapability, will anyone other than the Public Guardian and Trustee himself sign this form? If so, you need to provide space under the signature for person to print their name and title.

Is there a reason to label the forms used as Form 1, Form 2 and Form 3? This is meaningless. It also looks quite strange that those are the titles and appear in such a large font when they don't describe the purpose. Why not title them:

- Assessment Report for Court Appointed Guardianship
- Assessment Report for Statutory Property Guardianship
- Certificate of Incapability for Statutory Property Guardianship

Prescribed information material (Adult Guardianship Act, Section 5(3))

The draft information material provided for consultation needs considerable work on the wording, headings and formatting.

It must contain information about Representation Agreements, particularly as an alternative to guardianship and include referral to the community for information.

Are the assessment reports going to accompany this information? The information should refer to the assessments in any case.

The example does not answer some basic questions such as:

- What is the effect of having a guardian? People make assumptions about the term guardian. It needs to be explained.
- What is a hearing? When is it? How do I get there? Can I speak at the hearing? Can someone speak on my behalf?
- Who will help me find a lawyer? How much will it cost?

The material should be field tested. Did people who have the experience of being served as part of the Committeeship process help to put this together?

Adult Guardianship Regulation

Prescribed reporting and record-keeping requirements are very detailed. What are the consequences of failing to meet the requirements? What if records are in the custody of another party? Is it appropriate that a spouse, family member or friend who is acting as a property guardian or statutory property guardian is required to keep the same level of detail as required of a financial institution? Reviewing all these records will take considerable PGT staff time and expense. Likely there will be compromise on the amount and frequency of such oversight.

Affidavits and Guardianship Plans

These documents contain a lot of personal information and subjective comments about the adult. There are some questions to be answered:

- How private is this information?
- Who defends the adult in this? Who ensures the information is accurate?
- Under what authority can an application gather this information and release it to others? Does the applicant have to get authority from the adult? From relatives?
- Why are the ages of the adult's relatives requested?
- We know there is a tendency when designing such documents to ask for more information than is really required. Has anyone reviewed this from the privacy and freedom of information perspective?

APPENDIX A

Feedback on Draft Standard Forms – see Recommendations 8 to 15

Following are some brief notes as feedback. Nidus has more ideas and suggestions which we hope we will be able to share as proposed in Recommendation 14.

GENERAL COMMENTS:

- Suggest "In Accordance with" rather than "pursuant to"
- Need to reference that adult, attorney, representative, monitor is 19 years of age or older. The public does not know definition of adult. Also, Nidus gets calls from parents who have a son or daughter who is 18 and applying for disability benefits. The Ministry will often tell the parent to get a Power of Attorney or Representation Agreement if the parent wants to sign on behalf of the child.
- Capitalization is not always consistent.

RA7 – 1 representative, 1 alternate, monitor, for all powers.

- Putting the notes at the beginning is redundant. They are already provided under authority which is the appropriate place.
- Instead, at the top of page one put "This form is for naming one representative and one alternate and a monitor."
- Don't include revocation.
- When referencing routine management of my financial affairs suggest adding "as defined in the Regulation in effect on the date this Agreement was signed." Nidus (RARC) had this discussion with representatives of some key financial institutions on the eve of proclamation in 2000 and agreed this wording would be facilitative.
- Because a monitor is named you don't need the note. In any case, the description of when a monitor is required is rarely understood without verbal explanation. It is just too complicated.
- Don't include options such as conditions and instructions or instructions and wishes.
- Only list the Certificates that apply to the example. Do not include Form 4.

RA9 – 1 representative, 1 alternate representative, plenary powers.

- At top put "This form names one representative and one alternate representative."
- Be careful about revocation clause. Some people may have used a Section 7 RA for finances because they don't own real estate, they like the idea of a monitor and that the representative must make decisions according to their

- wishes and they like the idea that everything is under the same rules (the same Act).
- There may be other documents to add to the revocation clause. Some lawyers use a standard revocation clause that includes all previous living wills and advance directives.
- Don't include options such as conditions and restrictions and instructions and wishes.
- Why is the notice to witnesses on the page where the representative and alternate sign? They don't need witnesses.

RA9 with reference to AD

- Same as for RA9 except, use the following under Instructions and Wishes section: *"A health care provider may act in accordance with the health care instructions set out in my advance directive without the consent of my representative."*
- It is important to not that people put Instructions and Wishes in their RA9 for representatives to follow. Many also refer to wishes expressed in a living will or advance directive, again for the representative to follow. We hesitate to introduce options in this form only because we know it increases the possibility of making a mistake. However, it might be important to provide something like the following in order to demonstrate the choice:

  I have outlined instructions about certain health care in an Advance Directive. These instructions are to be carried out by: (Check one.)

  ☐ My representative, when making decisions on my behalf according to my pre-expressed wishes.

  OR

  ☐ A health care provider, who may follow the instructions without obtaining consent from my representative.

  This issue requires more discussion.

NOTE: on the draft form for Combined AD and RA9, it is titled Advanced Directive but the term is Advance Directive.

EPA – 1 attorney, 1 alternate attorney, no restrictions or conditions.

- State at the top, "'This form is for naming one attorney and one alternate."
- Revocation statement is not complete. Need to include financial authority in a Representation Agreement. Would revocation of all previous Enduring Powers of Attorney apply to limited EPAs such as 'Bank' Power of Attorney or given to an investment advisor?

- Delete options including directions. State that the authority of the attorney is not subject to any conditions or restrictions.
- Delete reference to compensation. The Act doesn't require mention unless you are going to compensate the attorney. As it is now, it is confusing because people think it means the attorney cannot be paid for out-of-pocket expenses.
- Suggest you do not provide the Officer Certification form unless you have assurance from lawyers and notaries public that they will sign a form brought in by a client. We have had a number of calls from the public saying the notary public will not sign if they have not drafted the form. This has even included the Declaration forms used for Land Title. It may be the same with lawyers; the public tends not to go to a lawyer for such matters.
- Include mention of limits on authority such as attorney cannot make a Will. (To be consistent with other documents.)
- On the list of who cannot be a witness, add 'alternate attorney' after attorney to be absolutely clear.
- Need to repeat the witnessing requirements at the places where the attorney and alternate sign.

AD – see comments under Recommendation 15

- Need to mention limitations on authority of AD. For example, can't make decisions a TSDM cannot make. See Bill 29, Section 21 which amends *Health Care Consent and Care Facility Admission Act* Section 9 (1.1).
- Also in note on limitations should reference Section 19.2 (2) (people often ask about euthanasia so this is important) and Section 19.8 (1). It is especially important on the AD form to list limitations so people have some guidance on what they can or cannot write on the blank lines.
- Include a box to check that asks if adult has a Representation Agreement.
- On the draft form #3 should read: *"If I need health care and a health care provider determines I am incapable of giving or refusing consent to health care in accordance with the Health Care Consent and Care Facility Admission Act, I give the following instructions:"* It is important to use correct description of who determines incapability and where the test is defined.
- On the draft form #4. b. should read: "*A health care provider will not select someone to be a Temporary Substitute Decision-maker to make decisions on my behalf in respect of the health care matters for which I consent or refuse consent in this Advance Directive."* It is important to use accurate terms such as TSDM.

APPENDIX B

Discussion for Recommendation 16 – Care Facility Admission Legislation

AMENDMENT TO REPRESENTATION AGREEMENT ACT SECTION 7:

Bill 26, Section 37, amends Section 7 (2) of the *Representation Agreement Ac*t as shown by striking out reference to facility care proposal and replacing with reference to admitting the adult to a care facility (see wording in bold type):

> (2) An adult may authorize a representative under subsection (1) (a) ~~to accept a facility care proposal under the *Health Care (Consent) and Care Facility (Admission) Act* for the adult's admission to a care facility~~, **to admit the adult under the *Health Care (Consent) and Care Facility (Admission) Act* to a care facility**, but only if the facility is
>
> (a) a family care home,
>
> (b) a group home for the mentally handicapped, or
>
> (c) a mental health boarding home.

THE PROBLEM:

While this amendment would appear to be a simple replacement of the new term for the old term, this change does not take into account the background related to the original wording nor the current context and trends.

Because the legislation governing care facility admission is currently not in effect, this amendment would prevent representatives from consenting to admission to long term care facilities. This is critical for some seniors.

Original provision did not include the needs of seniors

When the *Representation Agreement Act* was passed in 1993, a last minute negotiation led to the provisions governing a representative's authority being divided between two different sections of the Act. This negotiation was done under pressure with no opportunity for broader consultation. Those involved in the negotiation were predominately from the community living sector. However, during implementation of the Act and since its proclamation, seniors have emerged as a large user group of Representation Agreements, particularly Agreements under Section 7.

Some seniors, especially those who are diagnosed with or may develop Alzheimer Disease or other form of dementia or Parkinson's or other debilitating conditions, may require admission to a type of care facility other than those listed in (a) to (c) of Section 7 (2).

If the amendment is proclaimed, their chosen representative will not have authority to consent on the adult's behalf in this respect.

Instead, a substitute decision-maker will need to be selected under Part 3 Section 23 of the *Health Care Consent and Care Facility Admission Act* (as amended).

While the representative and the selected substitute decision-maker may be the same person, this explanation and procedure are confusing for the adult and the representative and adds complexity for service providers. This confusion and complexity are unnecessary.

Current context

Given that the process of consent for facility care placement, as outlined in Bill 26, includes a number of parameters, there is no reason a representative under Section 7 should be restricted to consenting only to certain types of care facilities.

Bill 26 provides that:
1) an application for admission to a care facility must be based on the adult's need for the type of care provided, and
2) a medical practitioner or a prescribed health care provider must assess the adult prior to a substitute decision regarding facility placement, and
3) the care facility manager has authority to intervene if he or she believes the adult needs protection from the decisions made by the substitute.

Representatives have other significant authorities and responsibilities

Given the nature of other matters covered under Section 7 which will affect the adult, such as routine management of financial affairs which includes arranging for payment of care facility fees, as well as health care and other personal care matters, it is logical to include authority for consent to care facility admission.

Representatives are better prepared than other substitutes

And given that the issue of facility care usually arises nearer the end of the care continuum, representatives will likely have had many experiences in their role prior to this decision-point and their knowledge and involvement will be invaluable at such a time. On the other hand, selecting a family member to give substitute consent for the purpose of care facility admission may be the first time that family member is involved.

Current trends

The aging of BC's population dictates that more and more seniors will need assistance with decision-making prior to and at end-of-life. While promotion and education increasingly focuses on planning well in advance of disability, the reality is that this notion will take some time to become second nature for citizens. Fortunately BC's legislation provides that seniors whose cognitive capacity may already be compromised may make a Representation Agreement under Section 7 to ensure that trusted family and friends can help preserve personhood and provide safety. Having authority to consent to care facility admission is consistent with the experience of aging and the duties of representatives.