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19 May 2011

Victorian Law Reform Commission
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Re: Consultation on Guardianship

Initial comments

The Australian Christian Lobby welcomes the opportunity to comment on the proposed guardianship amendments in Victorian law.

The ACL acknowledges that many people need to have important decisions made on their behalf due to their incapacity. These decisions will range in importance and complexity and will include financial decisions, living arrangement decisions, and medical decisions, including decisions about palliative care and life-prolonging treatment. The need may be permanent or temporary or there may be a need at some times and not at others.

ACL is particularly concerned that people who have terminal illnesses or are nearing the end of their life be treated with the respect that all humans deserve, regardless of their physical or mental state. No matter how deteriorated a person's condition, he or she still possesses inherent dignity and value. Any legislation which can affect decision-making at the end of a person's life must be made with these considerations.

Inherent dignity

The Australian Christian Lobby recognises the inherent dignity and value of each person, regardless of their mental or physical capacity. ACL believes that care for people with disabilities and palliative care for dying patients are both of paramount importance. The best interests of disabled and dying people must always be the first consideration in medical and other decisions made on their behalf. ACL believes that it is always in the best interests of a patient at the end of life to receive basic care and palliative care. Guardians should not be able to override the best interests of a person by refusing this care on their behalf, even if this reflects the wishes of the patient.

The inherent dignity of each human is recognised by the *International Covenant on Civil and Political Rights* (the ICCPR)[1] and by the *Convention on the Rights of Persons with Disabilities* (the *Convention*),[2] to both of which Australia is a state party. The Victorian Law Reform Commission's (the Commission) Consultation Paper refers to the *Convention* in its purposes and regards it as primary in its approach to guardianship laws.[3]

In particular, Article 12(4) of the *Convention* notes that "all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law". The same section requires that the "rights, will and preferences of the person" are respected by the law and that the exercise of legal capacity is "proportional and tailored to the person's circumstances".[4]

Article 6 of the ICCPR also recognises that the right to life is both inalienable[5] and inherent.[6] It is "the supreme right" according to the Human Rights Committee (the HRC).[7] This right should be upheld and should not be compromised by new legislation.

Some Concerns

In light of the foregoing discussion, ACL believes that the proposed guardianship amendments should avoid certain dangers and ensure certain safeguards.

Euthanasia and assisted suicide

Commenting on the compatibility of euthanasia with the right to life in Article 6 of the ICCPR, specifically in the context of the Netherlands, the HRC expressed "unease" and concern that euthanasia is difficult to safeguard and that safeguards are too readily circumvented.[8] They expressed their doubts that the Netherlands' experience with euthanasia was compatible with the "right to life" first in 2001, reiterating them again in 2009.[9]

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[1] United Nations (1966), *International Covenant on Civil and Political Rights*, http://www2.ohchr.org/english/law/ccpr.htm

[2] United Nations (2006), *Convention on the Rights of Persons with Disabilities*, *http://www.un.org/disabilities/convention/conventionfull.shtml*

[3] Victorian Law Reform Commission (2011), *Guardianship: Consultation Paper 10*, http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/3/1/31011d8045f662e58f04ff51b55034df/Guardianship_CP_ch_1.pdf

[4] United Nations (2006), *Convention on the Rights of Persons with Disabilities*, *http://www.un.org/disabilities/convention/conventionfull.shtml*, Article 12(4).

[5] United Nations (1966), *International Covenant on Civil and Political Rights*, http://www2.ohchr.org/english/law/ccpr.htm, preamble.

[6] United Nations (1966), *International Covenant on Civil and Political Rights*, http://www2.ohchr.org/english/law/ccpr.htm, Article 6(1).

[7] Human Rights Committee, *General Comment No. 06: The right to life (art. 6): 30/04/1982 CCPR General Comment No. 6*, para 1, http://www.unhchr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3

[8] United Nations (2001), *Concluding observations of the Human Rights Committe: Netherlands, CCPR/CO/72/NET*, para 5(b), http://www.unhchr.ch/tbs/doc.nsf/0/dbab71d01e02db11c1256a950041d732?Opendocument.

[9] Human Rights Committee (2009), *Human Rights Committee Considers Report of The Netherlands, The Netherlands Antilles and Aruba*, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9313&LangID=E.

In Australia, euthanasia and assisted suicide are currently illegal in all jurisdictions. In Victoria, aiding and abetting suicide is prohibited under section 6(2)(b) of the *Crimes Act 1958*.[10] The *Crimes Act* also allows force if necessary to prevent suicide.[11]

It is important that these restrictions be acknowledged by any new legislation. The new legislation must allow a Guardian to prevent and treat suicide and suicide attempts, even where the wishes of the patient are known to be suicidal. It is important that the rights of the patient to exercise autonomy not override a Guardian's obligation not to aid or abet suicide.

Advance Directives

ACL understands the concerns that advance directives could be used as a method of allowing euthanasia to occur. ACL believes that advance directives should be able to allow for natural death to occur without medical intervention unduly prolonging a patient's suffering. However, it is vital that legislation provide safeguards to ensure that advance directives are not misused, either by a patient expressing a wish to be euthanised, or by a guardian who may need to make end-of-life decisions.

In addition, doctors must have the freedom to provide what they consider to be appropriate treatment and not be bound by advance directives which may not specifically address a particular situation, such as an unforeseen medical situation. Their freedom must be maintained to conscientiously object to an advance directive if it prevents them from acting in the best interests of a patient.

Importantly, doctors acting in emergency care must be protected. Taking the time to ascertain whether an advance directive is in place and what it says must not compromise the obligation to save a life in an emergency.

Any advance directive which is explicitly suicidal should be set aside.

Advance directives should be drawn up with the assistance of a medical doctor, with the doctor ensuring that the patient understands exactly what the advance directive states and for what circumstances it applies or does not apply.

Advance directives should be kept up to date and, as far as possible, reflect the most recent wishes of the patient.

Best interests and rights

The Consultation Paper states that the Commission is to look at "whether the right balance is struck between the best interests of a represented person and their rights as set out in the *Convention*".[12]

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[10] Section 6(2)(b), *Crimes Act 1958* (Vic).

[11] Section 463B, *Crimes Act 1958* (Vic).

[12] Victorian Law Reform Commission (2011), *Guardianship: Consultation Paper 10*, p. 30, http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/3/1/31011d8045f662e58f04ff51b55034df/Guardianship_CP_ch_1.pdf

ACL considers that the principles of the patient's rights and the patient's best interests are not generally competing principles when it comes to medical decisions for patients who are dying or who are terminally ill.

In cases of end-of-life decisions, including whether to continue providing palliative and general care, ACL submits that, as "the supreme right",[13] the right to life should be regarded as paramount. This right to life is acknowledged specifically in the context of the disabled in Article 10 of the *Convention*.[14] Indeed, the patient's best interests will invariably be consistent with the right to life, and it will be in their best interest to continue the provision of palliative and general care at the end of a patient's life.

Individualism

The new general principles proposed[15] do acknowledge the dignity and value of patients. However, there is an individualism in the principles that does not give due regard to the community in which a patient lives. More acknowledgement in the principles for the role played by family and carers should be included. This is important firstly to promote the principle that disabled adults should be regarded as equal members of their community, consistent with the principles of the *Convention*.[16] Secondly, it is important because it recognises that disabled patients are part of a wider community and acknowledges that the community plays an essential role for these patients. This is especially the case when a person is so vulnerable and dependant on others.

The draft principles currently overly stress the rights and empowerment of the individual patient. The principles should be reworded to acknowledge those on whom the patient is dependent. The principles should be presented in a way that still provides for the patient's values and wishes, as well as any decisions they have made, to be respected, but acknowledges that the patient may be dependent on others and that those others have an important role in decision making also.

Although the individual wishes of the patient are important, they should not be stressed at the expense of recognising that they are a part of a wider community.

Conclusion

It is a difficult task to create legislation that is, on the one hand, clear and efficient and allows for the patient's rights and wishes to be taken into account, and on the other hand safeguards their best interests and acknowledges the role their families and doctors play. This task should nevertheless be approached keeping in mind a patient's position in a wider community and the role that community

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[13] Human Rights Committee, *General Comment No. 06: The right to life (art. 6): 30/04/1982 CCPR General Comment No. 6*, para 1, http://www.unhchr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3

[14] United Nations (2006), *Covenant on the Rights of Persons with Disabilities,* Article 10, *http://www.un.org/disabilities/convention/conventionfull.shtml*

[15] Victorian Law Reform Commission (2011), *Guardianship: Consultation Paper – Summary*, pp. 15-16, http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/9/3/9358388045f678fa8f53ff51b55034df/Guardianship_Summary.pdf

[16] United Nations, (2006), *Covenant on the Rights of Persons with Disabilities, http://www.un.org/disabilities/convention/conventionfull.shtml*

plays, as well as respecting the current law on euthanasia and assisted suicide, including aiding and abetting suicide. The task should also be approached ensuring that respect for the dignity of all persons be maintained.

ACL urges the Commission to proceed with these considerations at the fore. ACL also urges that the Commission be especially careful that the proposed amendments have the strictest safeguards against euthanasia and assisted suicide. The amendments should not only uphold the rights of the patient but also acknowledge the wider community, and protect families and doctors as well as patients. Above all they must reflect and promote the overriding principles that give the highest respect for the inherent dignity and value of all persons, regardless of their physical or mental capacity.

Yours sincerely,

Rob Ward
Victorian Director