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20 MAY 2011

Submission No.

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Ad Hoc Interfaith Committee

C/o Rob Ward, PO Box 455, Flinders Lane, 8009

Friday 20th May 2011

Prof Neil Rees
Victorian Law Reform Commission
PO Box 4637
Melbourne Victoria 3001
law.reform@lawreform.vic.gov.au

Dear Professor Rees,

Re: Guardianship Consultation Paper

1. Introduction

The Ad Hoc Interfaith Committee is a group of people of several different faiths who share common concerns about the issues raised in relation to the needs of people who have disabilities who because they are vulnerable to neglect or exploitation, including elderly people, may need representation. As religious people we strongly support people with disabilities and their families and the need to protect their inherent worth and dignity and their equal and inalienable rights.

2. Streamlining

We note the complexity of reviewing several pieces of legislation at the one time indicated by the multitude of questions generated in the Consultation Paper. In fact there were too many questions for this Committee to deal with the issues question by question. We note that there may be advantages in replacing several pieces of legislation with one streamlined Act, but are concerned that oversimplification may not best protect people with disabilities.

3. The Need for Different Requirements

There are significant differences between decisions about medical treatment and mental health matters on the one hand and decisions about finance and property. A person may well choose a person to represent them on health matters or even accommodation for very different reasons than those that they may have for choosing a representative for property or finance.

Second, the State has an interest in the life and well-being of its citizens and obligations to ensure that third party decisions are in the best interests of the represented person. This is most evident in relation to the law in relation to suicide. For practical reasons there is no offence of attempting suicide, but there is an offence

for aiding or abetting suicide¹ and every person is justified in using such force as may reasonably be necessary to prevent the commission of suicide or of any act which he believes on reasonable grounds would, if committed, amount to suicide.²

Respect for human life is a very different matter from property and finance. The community, through its government and public authorities does have obligations to the health and life of a person with a disability but not to his or her property. The manner of appointment, the accountability for decisions and the criteria to be applied need to be very different. For example, a frail person with dementia and other life-threatening co-morbidities needs an advocate to ensure he or she is not denied the full benefits of a palliative approach to end-of-life care.³ Substituted consent can too easily assume the person with such disabilities would not want to continue living.

4. Scope of the Legislation

The Commission proposes limiting the need for representation to those who are cognitively impaired. If a person has a disability and is in danger of neglect or exploitation and thus needs a representative to assist with decisions, application can be made. Often a person may not be cognitively impaired but through their disability needs the assistance of others and struggles because of the inequalities that disability and dependence can create. It would be a great loss to many people with disabilities if representation were available only for those with cognitive impairment.

5. Substituted Consent and Best Interests

Obviously vitally involved in these matters are the health and caring professions and their vocation to serve health and life. We are deeply concerned about the Commission's controversial proposal to revise the legislation on the basis of substituted consent rather than the current requirement that a representative, the tribunal and the courts seek to protect the best interests of a person with a disability. The current definition of best interests considers the person's values and wishes, their family and culture and the likely outcome that permits a balanced decision.

Substituted consent would greatly reduce the protection for someone with a disability and create a tension between the representation and the health and caring professions. Currently, health professionals can challenge representation if the representative makes decisions that endanger health or life. Substituted consent would empower the representative to make decisions on the basis that that would have been the wishes of the patient. It is not uncommon for representatives, either appointed by the patient or by the tribunal or automatically appointed as the senior available next of kin, to have a conflict of interests. It is not uncommon for a family member representing a person with dementia to want to move on in their lives. It is important that those caring for the patient are able to assert that the patient's best interests take priority, and are not discouraged from having representation reviewed if there is concern.

6. Living Wills and Future Care Planning

We are also concerned about the proposal to give advanced directives or living wills a statutory status. A directive issued ahead of health care developments is unlikely to

¹ Victorian *Crimes Act 1958*, section 6B

² Victorian *Crimes Act 1958*, section 463B

³ Commonwealth of Australia (2006 enhanced version) *Guidelines for a palliative approach in residential aged care*.

be adequately informed. It would also place health professionals and others in a difficult predicament having to carry out directives with no opportunity to discuss them with the patient, including directives to act unethically or which fail to take into account the needs of others in the circumstances.

It is sensible for people to appoint someone to make decisions for them in whom they would have confidence and to discuss with that person their values and wishes and what they would consider to be overly burdensome. That person can then make a decision with accurate information in the actual circumstances when they arise. Best interests allow for decisions supported by professional clinical judgement and evidence-based practice where relevant.

7. Living in Community

The response of the Commission to all these issues is troubling and controversial because it focuses heavily on the individual in isolation rather than on the individual as a member of a community. A representative is likely to be a family member with commitments not just to the person who represented but also to others members of that community. What happens to one person affects others. Basing that decision on the represented person's best interest according to the way they are currently defined takes into account not just the person's values and wishes but also those of the family and the likely outcome. Best interests allows for balance that is not permitted in substituted consent.

A person with a significant disability usually needs the assistance of others. Decisions in their best interests will need the cooperation of others and thus involve their interests also. To treat decisions individually as required by substituted consent is simply not appropriate.

8. Conclusion

The aim for legislation for people with disabilities is to respect their inherent worth and dignity by upholding their equal and inalienable rights. To do that requires a collaborative approach involving family and the wider community. Representation is complex but must take into account the person's unique context and dependencies. Governments have obligations to protect the health and life of vulnerable persons. Legislation needs to facilitate the task of those who care for them, not create more difficulties by removing the best interests criterion. The culture of care, support and respect depends not on aggressive individualism but on the goodwill and cooperation between all those involved. We support the current legislation and the balance achieved by the Medical Treatment Act 1988 and the current protections afforded by the Guardianship and Administration Board Act 1986.

Yours sincerely,

On behalf of the signatories below

Signatories:

Maurice Benington, Executive Pastor C3Whitehorse

Marlene Pietsch, Lutheran Church of Australia, Victorian District

Rosalie Hudson, consultant nurse educator palliative care and aged care.

Rev Ross Carter, Congregation of Paul the Apostle, South Melbourne Uniting Church.

Rob Ward, State Director, Australian Christian Lobby.

Marcia Riordan
Life, Marriage and Family Office Catholic Archdiocese of Melbourne

Rev Geoff Harvey, Orthodox Chaplain, Monash University

Rev David Palmer
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A/Prof Nicholas Tonti-Filippini
John Paul II Institute for Marriage and Family

Metropolitan Archbishop Paul Saliba
Primate of Australia, New Zealand and the Philippines

Imam Riad Galil
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