TASMANIA
LAW REFORM
INSTITUTE

Private Bag 89,
Hobart, TAS 7001

Phone: (03) 62262069, fax: (03) 62267623
law.reform@utas.edu.au
www.law.utas.edu.au/reform

16 October 2020

Brooke Craven, Director
Department of Justice
Office of Strategic Legislation and Policy
By Email.

Dear Director,

Guardianship and Administration Amendment (Advance Care Directives) Bill 2020

Thank you for inviting the Tasmania Law Reform Institute (TLRI) to comment on the *Guardianship and Administration Amendment (Advance Care Directives) Bill 2020* (the Bill).

The TLRI is supportive of the Bill and the approach taken by the Government to implementing its recommendations in tranches.

The Institute considers that the Bill is important to ensuring that people have the right to have their intentions about their medical care respected regardless of their personal circumstances.

Our further responses are directed to:

1. Highlighting recommendations which are not included in the Bill; and
2. Suggesting minor amendments to the text of the bill to ensure the purpose behind the Bill is effectively achieved in practice; and
3. Raising a potential conflict with Criminal Code Provisions.

1. Recommendations not included or partially included in Bill

REC 5.3(2) That legislation contemplate a person making a valid advance care directive orally.

This recommendation appears not to be included in the Bill. Reasons for allowing a person to make a valid oral directive are set out at paragraphs 5.5.7 – 5.5.9 of the TLRI Final Report no 26 on the Review of the *Guardianship and Administration Act 1995* (Tas) ("Final Report").

REC 5.4 (2) That the Board be able to declare an advance care directive valid despite any non-compliance with formal requirements.

This recommendation appears not to be included in the Bill. Reasons to provide the Board with this discretionary power are set out at 5.5.10-5.5.14 of the Final Report.

REC 5.5 (2) That there is strong community and stakeholder engagement and consultation in relation to the development of the form advance care directive including consumer, medical and legal input

This recommendation appears not to be included in the Bill, insofar as no form is included in a schedule to the Bill. Reasons to provide the Board with this discretionary power are set out at 5.5.15-5.5.19 of the Final Report.

The TLRI understands from the Department that the present template form is in fact being developed with a range of expert and stakeholder input and that flexibility to further update the form is important. However, the Institute considers that it is appropriate to set out basic conditions for when the form should be updated in the future; for instance, to reflect changing medical knowledge or social conditions. It would also be appropriate to set out the types of experts and stakeholders who should be involved in the future updating of the form.

REC 5.10 (5) That an online search function be developed to search the register of advance care directives.

This recommendation appears to be partly included in the cl 35V of the Bill. However, TLRI was not able to identify any provisions relating to who may access the register, how it

will be published, in what form it will be published and what limitations or conditions will be placed on access.

2. Minor amendments to the text of the Bill

Certain fundamental principles should apply generally to Principal Act

The TLRI considers that some principles set out in clause 35B should apply to the entirety of the Principal Act and not the specified part of the Act within which those sections are contained. Specifically:

- cl 35B(c), (d), (e), (g), (h) and (i), and
- cl 35ZD, applied to the whole Act and not just that Part of the Bill (as is currently stated).

These principles should be expressed generally to avoid any inconsistency with ss 6 and s 27(1) of the Principal Act.

Certain terms should apply generally to the Principal Act

Health Care. Clause 35D defines "health care", but only for the purposes of that part of the Principal Act. The term is also used in s 25(2)(e) of the Principal Act to describe authority of the full guardian. As the present Bill is likely to be only the first stage of amendments to the Principal Act it may be that other references to health care are also included. So as to ensure consistency and purpose throughout the act the term should be defined within the definition section (s 3) of the Principal Act, rather than for the purposes of one part of it.

Reasonable judgments. In the Principal Act, guardianship decisions must be based on upon "reasonable judgements" (s 20(1)(b). Cl 35E of the Bill relevantly describes what decision-making ability means and therefore to ensure continuity of approach throughout the whole Act it would be useful if that provision applies to the entirety of the Principal Act – especially as it is relevant to and may provide greater precision and clarity to the guidance in cl 35E(6).

Rights and freedoms: clause 35B should be expressed with greater clarity and certainty about the rights and freedoms to which it relates. As it is presently stated the principle may be unworkable or cause confusion and uncertainty, particularly as Tasmania has no articulated charter of rights and freedoms and the common law must be relied on. The Institute recommends either:

- Inserting a reference to the relevant international conventions (at the very least the *International Covenant on Civil and Political Rights* and United Nations *Convention on the Rights of Persons with Disabilities*) – i.e. in line with *Evidence Act,* s 138 (f); or

- Adding the relevant international rights laws/conventions to interpretation clause 5, by defining "basic rights and freedoms" to include those set out in the international laws identified in the TLRI Final Report at para 2.2.1; or
- Amend the long-title of the Principal Act to include a reference to the relevant international laws relating to guardianship and administration i.e. in line with the long title of the *Child Protection (International Measures) Act 2003*.

Fees and administrative burdens

The Institute considers that any prescribed fee (see cl 35ZG(3)(c)) to apply to the Board may serve to divert people from applying to protect certain rights and interests. That is particularly the case where the person making the application may be a third-party medical profession (i.e. the person's treating doctor who has no other interest). Charging a fee would be inconsistent with other provisions of the Act relating to applications to the Board.

Relatedly, whilst the Institute considers it important that an advance care directive may be made independently of an instrument appointing an enduring guardian, there are administrative and practical reasons which support allowing a person to make an advanced care directive *within* such an instrument. This would reduce legal and administrative costs to a person who would otherwise need to instruct lawyers to prepare separate documents and pay more than one set of fees. At present cl 35K(2)(c) and 35ZJ appear to restrict this possibility.

Alignment of conscientious objection provisions to equivalent Tasmanian law

Clause 35S sets out conditions for conscientious objection by health care practitioners to an advanced care directive. The Institute supports the inclusion of this provision with the caveat that it should not serve to undermine the overarching purposes of the bill or the wishes of the patient. The Institute therefore recommends including clearer and more precise rules about the nature and form of the objection and the requirements to obtain an alternative non-objecting health practitioner within reasonable time limits.

The onus to notify the Board and identify alternative practitioners should fall on the objecting practitioner rather than the patient's next of kin or those responsible for the care of the patient. The Institute suggests that there should be alignment between this Bill and the equivalent conscientious objection provisions of the *Reproductive Health (Access to Terminations) Act* Tas.

3. Potential conflict with Criminal Code provisions

Clause 35K, in combination with 35C(2) precludes any advanced care directive which specify *acts, omissions, and refusals to act* which are unlawful or would require the performance of an unlawful act to be performed. The conflation is likely to cause practical problems and is contrary to the recommendation of the Institute that the legislation distinguish between *non-performance* and *performance* (see para 5.5.27 of Final Report).

The Tasmanian criminal code, ss 144 & 146, makes failure to supply medical and surgical aid and medicine (referred to as "necessaries of life") unlawful. As such, an advance care directive could not specify that medicine or health care be withdrawn in certain circumstances. Indeed, in the wider setting it would raise questions of criminal and medical liability across a range of advanced care directives and generate uncertainty for medical professionals. To avoid this situation the Institute recommends that, an additional subsection might by inserted in clause 35K to the effect that,

> *subsection (2) does not apply to health care comprising the withdrawal, or withholding, of health care to the person. In accordance with an advance care directive.*

Additionally, the Criminal Code may be amended to clarify that the relevant provisions do not apply to lawful advanced care directives.

___

We thank you for your consideration of the Institute's views on this important legislative reform.

Yours sincerely

Brendan Gogarty
Acting Director
16 October 2020