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Comments on the Guardianship and Administration Amendment Bill 2022

Dear Mr Paterson

Many thanks for the opportunity to comment on this important Bill. The Government is to be congratulated for seeking to modernise and update key concepts in the G*uardianship and Administration Act 1995* (Tas) and the *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas). These key pieces of legislation have a dramatic impact on the lives of many Tasmanians and accordingly it is essential that they represent the best approaches possible to the matters that they govern.

The comments here are limited to the reforms to the G*uardianship and Administration Act 1995* (Tas) because it was that Act that the Tasmania Law Reform Institute (TLRI) reviewed in its *Final Report of the Review of the Guardianship and Administration Act 1995.*

If enacted, the Bill will institute many of the reforms recommended by the Tasmania Law Reform Institute and achieve the legislative aims of modernising Tasmanian guardianship law and updating key concepts and approaches to guardianship. Its establishment of a rights-based framework for the way in which guardianship decisions are to be made, and its shift away from a 'best interests' approach to decision-making to a 'will and preference' model which requires decision makers to take account of the wishes and preferences of the represented person, is a major improvement to the current law. The decision-making principles and processes contained in the Bill are also welcomed. But these aspects of the Bill would benefit from some amendments, so that they more tightly align with the specific recommendations made by the TLRI and, consequently, secure the legislative intent of the Bill more firmly.

In this regard the following amendments are recommended:

- **Clause 5 – Meaning of promoting a person's personal and social well-being; Clause 8 - Principles to be observed and Clause 9 – Decision-making process**; It is recommended that these clauses be made to align in their entirety with the ALRC National Decision-Making Principles and the *United Nations Convention on the Rights of Persons with Disabilities* (the Convention) – see, Recommendations 3.1, 3.2, 3.3 and 11.2 of the TLRI Final Report. The components that are not included in the Bill in their entirety are TLRI Recommendation 3.2(a), (c), (f) & (h). Their inclusion would help to ensure that a move to the 'will and preferences' and rights-based model is more firmly entrenched by the Bill. In accordance with this approach, it is recommended that the Bill explicitly mandate 'respect for and promotion of the represented person's own decision-making' to strengthen the 'will and preferences' model the Bill seeks to institute.

- Section 8(2) of the **Principles to be Observed,** which applies to people providing decision-making assistance on an informal basis to someone with impaired decision-making ability, appears to be intended to enact Recommendation 3.4 of the TLRI Report. However, it does not conform to that recommendation. The TLRI Recommendation 3.4 is that the guiding principles of the Act should apply to any person informally assisting a person with impaired decision-making ability in making decisions. The Bill requirement is that they *be encouraged* to apply the guiding principles in the Act. This formulation is more akin to the TLRI Recommendation 3.5 that all members of the community be encouraged to uphold and apply the guiding principles of the Act. Recommendations 3.4 and 3.5 of the TLRI Report deal with distinct situations and it is undesirable that they be conflated. The question is, how recommendation 3.4 might best be legislated. It is submitted that 'encouragement' to apply the principles of the Act does not impose an adequate level of responsibility on the person providing informal assistance. A better formulation would be to require that, when providing informal assistance, people "are to" apply the guiding principles of the Act. It is not proposed that there be any penalty for failing to comply. Alternatively, or in addition, the Government's implementation of the Act (if passed) should be accompanied by a public education campaign on its principles with a particular focus on educating informal decision-makers / supporters and 'persons responsible'. It is also recommended that guidance is provided in the Act as to what constitutes 'assistance provided on an informal basis'.

- Amend s 9(1)(b) of the **Decision-making Process** provisions to strengthen the obligations of substitute decision-makers by replacing the word 'should' with 'must'. Recommendation 11.2 of the TLRI Report is instructive in relation to the desirability of mandating the legislated decision-making process. This approach should be applied throughout the Bill to decision-making by representatives and the Guardianship Board.

- Section 9(1)(d)(iii) of the **Decision-making process provisions** should be deleted. Its inclusion represents a retention of the 'best interests' approach. It was not recommended by the TLRI.

- **Part 2 of the Bill – Decision Making Ability –** for the removal of any ambiguity and doubt it is recommended that recommendations 6.4 and 6.5 of the TLRI Report be included in Part 2, s 10 of the Bill.

- **It is recommended that the Decision-making Ability Part 2, s 10(5)(a) of the Bill be deleted.** It is too vague and open to unguided subjective construction. If retained, then guidance in the interpretation, application and meaning of "sufficiently mature" should be provided.

- **Recommendation 7.2 of the TLRI Report (that adequately funded decision-making support programs be developed ensuring equity of access) should be secured by the Bill.** This major recommendation is essentially the *sine qua non* of the 'will and preferences' and rights-based approach and of supported decision making.

- **Clause 21(4)** - this clause provides for guardians to sign a document consenting to their appointment as guardians. While it is appropriate that this clause allows for other matters to be prescribed (which it does) it is suggested that either this clause or the prescribed form require that guardians agree that they will take all reasonable steps to ascertain whether the represented person has made an advance care directive, and if so, that they obtain a copy of it. That would make these provisions consistent with the recent reforms instituted by the Advance Care Directives Bill, which includes a similar requirement for enduring guardians when accepting an appointment. Notably, a similar provision is included in clause 26(2) of the Bill in relation to medical research practitioners.

- **Part 6A – Medical Research – it is recommended that the implementation of these reforms be delayed and dealt with separately after greater consultation.** The TLRI Report did not deal in depth with issues around medical research, though medical research was flagged in recommendations 13.10 and 13.11. It goes without saying that strong safeguards must apply to medical research. It is recommended that the Bill progress without the medical research provisions until further research and community consultation has been conducted.

  For example, **the provisions relating to consent to medical research** require further careful consideration to understand how they overlap and/or extend existing laws and regulations relating to consent to medical research. It would also be useful to understand how consistent these provisions are with laws in other jurisdictions. For example, Western Australia has recently introduced similar reforms in this area and a comparison of those provisions with the Bill's provisions would inform the debate around and community understanding of the proposed reforms.

  The Bill must provide not only appropriate safeguards in relation to medical research but also oversight of the operation of these provisions and any research undertaken. This is particularly where it is contemplated that a medical research practitioner might undertake research without the personal consent of the participant, or with the consent of a person responsible (who may not have deep knowledge of the principles of the Act and its prescribed decision-making processes). It is difficult to see how such research could comply with national ethics requirements for human

research. Accordingly, it is recommended that, before proceeding with these provisions, further consideration be given to whether they meet national human research ethics requirements in all respects.

- **Section 71** - this clause requires the Public Trustee and Public Guardian to have and publish complaint-handling procedures. This is likely to be well supported. It is recommended that the Bill mandate that information about complaints procedures be communicated in an accessible manner, in order to support people with a decision-making impairment or a represented person to make complaints. It is noted that it is (and will continue to be) possible for the Public Guardian to be appointed as a person's administrator. Accordingly, for the avoidance of doubt, the Bill should provide that the requirement for the provision of accessible information about the complaints process should apply when the Public Guardian is acting as administrator and not only as guardian as the Bill presently provides.

If you have any questions about any aspects of these comments or would like further information, please do not hesitate to contact the Tasmania Law Reform Institute. The author of the TLRI Report, Ms Kate Hanslow, has also indicated her willingness to discuss the Bill and provide further information about these comments.

Kind regards,

Yours sincerely,

Associate Professor Jeremy Prichard
A/Director, Tasmania Law Reform Institute