CCYP
Commissioner for Children and Young People Tasmania

Your Ref:
Our Ref: 702

21 October 2020

Ginna Webster
Secretary
Department of Justice

By email to: haveyoursay@justice.tas.gov.au

Dear Secretary

**Re: Comment on the *Guardianship and Administration Amendment (Advance Care Directives) Bill 2020* (the draft Bill)**

Thank you for the opportunity to provide comment on the above draft Bill.

Thank you also for agreeing to providing me with a short extension of time within which to provide my comments.

**Role of the Commissioner for Children and Young People**

Under the *Commissioner for Children and Young People Act 2016* (the CCYP Act), I have responsibility for advocating for all children and young people in Tasmania generally, and for monitoring and promoting their wellbeing. Importantly, I am also required by the CCYP Act to assist in ensuring the State satisfies its national and international obligations with respect to children and young people generally.[1]

In performing a function or exercising a power under the CCYP Act, I must do so according to the principle that the wellbeing and best interests of children and young people are paramount, and must observe any relevant provisions of the United Nations *Convention on the Rights of the Child* (the CRC).[2]

Consistent with my statutory functions, this submission focuses on issues of particular importance to children and young people aged less than 18 years. Specifically, the execution of Advanced Care Directives by children and young people with decision - making ability is a matter relevant to their wellbeing and to their exercise of rights guaranteed by the CRC.

[1] *Commissioner for Children and Young People Act 2016* (Tas) s 8.
[2] *Commissioner for Children and Young People Act 2016* (Tas) s 3.

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**General comment**

The draft Bill proposes amendments to the *Guardianship and Administration Act 1995* (the G&A Act) to provide for the giving, recognition and implementation of Advance Care Directives (ACDs).

The draft Bill is intended to progress recommendations of the Tasmanian Law Reform Institute (TLRI) which relate to ACDs in the TLRI Report on the "Review of the *Guardianship and Administration Act 1995* (Tas)" (the TLRI Report).

Before commenting on the draft Bill, I take this opportunity to reiterate my view that consideration be given to the development of legislation governing consent to medical treatment for children generally in Tasmania. This is a position I put forward in my submission to the TLRI reference leading to the TLRI report "Legal Recognition of Sex and Gender". In that Report, the TLRI recommended (Recommendation 9):

> *The Tasmanian Government enact a Consent to Medical Treatment Act that covers the field with respect to children's consent to medical care. The TLRI recommends that this Act should enable a child of 16 years or older to obtain medical treatment and undergo surgical procedures when they consent to treatment and surgical procedures. For children under 16, the TLRI recommends that Gillick competence be enshrined in this Act. The South Australian Consent to Medical Treatment and Palliative Care Act 1995 may provide useful guidance in this regard.*

Provisions governing the execution of ACDs by children could also be included in that legislation governing consent to medical treatment, a position also proposed by Interim Commissioner Clements in his submission to the TLRI review of the G&A Act, where he said specifically in relation to the issue of children being able to execute ACDs:

> *Having regard to the principles of the CRC, particularly article 12, the views of children and young people on all matters affecting them should be given serious consideration and be taken into account. It is a natural consequence of these principles that the views of children and young people be considered in the planning and execution of future medical treatments.*
>
> *Children with capacity to provide informed consent to medical treatment should, in my view, also be able to provide instructions or express preferences etc in relation to their future medical treatment. I would therefore support development of legislation to establish a clear scheme for children to make advance care directives. It would be preferable for any legislative framework regarding advanced care directives to be situated in separate legislation dealing with decisions around medical treatment generally rather than in the G&A Act.*

I also note Recommendation 13.1 of the TLRI review of the G&A Act:

> *That whether the Act should govern consent to health care and treatment for children be the subject of separate review.*

**The Draft Bill**

Children and ACDs – decision-making ability

Proposed section 35G in clause 15 of the draft Bill outlines when a person may give an ACD:

*35G. Giving an advance care directive*

*(1) A person may give an advance care directive containing decisions in respect of the person's future health care if the person –*

*(a) has decision making ability in respect of each provision in the advance care directive; and*

*(b) understands what an advance care directive is; and*

*(c) understands the consequences of giving an advance care directive.*

The draft Bill would allow a child or young person with decision-making ability to give an ACD, a position which is consistent with Recommendation 5.2 of the TLRI Report, and a position I support.

Recommendation 5.2 of the TLRI Report is as follows:

> *That the Act not preclude children with decision-making ability making an advance care directive.*

However, children are presumed to have impaired decision-making ability (sub-section (4) of proposed section 35E):

> *For the purposes of this Part, a child is taken to have impaired decision-making ability in respect of a decision unless a person or body considering that ability is satisfied that the child has decision making ability in respect of the decision.*

I note paragraph (c) of proposed section 35B appears to be inconsistent with the above, in that it includes as a principle a presumption in favour of decision-making ability in relation to "a person". This provision should be limited to "an adult".

Sub-section (5) of proposed section 35E contains a test for determining when a child has decision-making ability:

*A child has decision making ability in respect of a decision if –*

*(a) the child is sufficiently mature to make the decision; and*

*(b) the child is able to –*

*(i) understand information relevant to the decision; and*

*(ii) retain information relevant to the decision; and*

*(iii) use or weigh information relevant to the decision; and*

*(iv) communicate the decision (whether by speech, gesture or other means).*

Sub-sections (6) and (7) of proposed section 35E are also relevant to determining decision making ability. I am generally supportive of the test for decision-making ability contained in the draft Bill.

However, there is no mechanism in the draft Bill for determining whether a child has decision-making ability, a determination which I believe needs to be made given the presumption in favour of children having impaired decision-making ability. It is also unclear who would make that determination, noting that assessment of decision-making ability in relation to a child's ability to consent to medical treatment is usually undertaken by a medical professional. It is not clear to me whether, without such a positive determination of a child's decision-making ability, an advanced care directive duly signed and witnessed (see proposed sections 35H and 35I) is valid, although I note proposed section

35M(1) which provides that an advance care directive is "taken to be in force from the time that the advance care directive is witnessed in accordance with this Part". Further, proposed section 35Y provides for a presumption of validity as follows:

> *35Y. Presumption of validity*
>
> *A health practitioner, responsible person or other person is entitled to presume that an apparently genuine advance care directive is valid and in force unless he or she knew, or ought reasonably to have known, that the advance care directive was not valid or in force.*

In my opinion, consideration should be given to including in the draft Bill a requirement that where an ACD is given by a child, at least one of the witnesses should be a registered medical or health practitioner or other professional who can attest to the decision-making ability of the child at the time the ACD was completed in accordance with the Part. Such a position would be consistent with the position adopted in Victoria where section 17(1)(e) of the Victorian *Medical Treatment Planning and Decisions Act 2016* requires that in the case of an advance care directive being given by a child, at least one of the witnesses must be a registered medical practitioner or psychologist with the prescribed training and experience.

In this respect I note the following extracted from Statement of Compatibility associated with the Victorian *Medical Treatment Planning and Decisions Act 2016:*

> There are stringent requirements that apply to the making of a valid advance care directive. Under clause 13(a), a person must have decision-making capacity in relation to, and understand the nature and effect of, each statement in the directive. Under clause 17, two adult witnesses must certify on the directive that the person appeared to have decision-making capacity in relation to each statement, appeared to understand the nature and consequences of each statement, and appeared to freely and voluntarily sign the document. For a person under the age of 18 years, one of the witnesses must be a medical practitioner or psychologist with prescribed training and experience. This important safeguard reflects the unique challenges in assessing the capacity of children.[3]

Decision making ability and the *Mental Health Act 2013*

I note the recommendation of the TLRI that an advanced care directive not be permitted to contain directions that relate to mandatory treatment, for example under the *Mental Health Act 2013* (recommendation 5.6).

It is important to note that under the *Mental Health Act 2013* (MH Act), informed consent for the assessment or treatment of a child who lacks decision-making capacity may be given by a parent of the child (s.9(1)).

The draft Bill provides in proposed section 35D(2)(a) that 'health care' does not include the assessment and treatment of a patient's mental health under the MH Act (proposed section 35D(2)(a)). Further, an ACD cannot include a provision that comprises a refusal of 'mandatory medical treatment' (proposed section 35K(2)(b)). The term 'mandatory medical treatment' is not

[3] https://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_FIELD_ADVANCE_PHRASE=&IW_FIELD_IN_SpeechTitle=Medical+Treatment+Planning+and+Decisions+Bill+2016&IW_FIELD_IN_HOUSENAME=ASSEMBLY&IW_FIELD_IN_ACTIVITYTYPE=Statement+of+compatibility&IW_FIELD_IN_SittingYear=2016&IW_DATABASE=*

defined in the draft Bill. There is however a reference to 'mandatory health care' in proposed section 35K which is defined as:

> **mandatory health care** means –
>
> (a) health care ordered under an assessment order or a treatment order under the Mental Health Act 2013; or
> (b) health care of a kind prescribed for the purposes of this definition.

The provisions of the draft Bill as they would apply to the assessment and treatment of a child under the MH Act are confusing and perhaps warrant further consideration.

<u>Refusal to comply with a provision of an ACD</u>

Proposed section 35S outlines circumstances in which health practitioners may not be compelled to provide particular health care. Subsections (5) and (6) are as follows:

> *(5) Despite any other provision of this Part, a health practitioner may refuse to comply with a provision of an advance care directive on conscientious grounds.*
>
> *(6) If a health practitioner refuses to comply with a provision of an advance care directive under subsection (5), the health practitioner must notify the Board of the practitioner's decision to refuse to comply with the provision.*

Given the broad definition of "health practitioner" in proposed section 35C, I propose that a positive obligation be placed on a health practitioner to ensure that a referral is made to another health practitioner who would not be constrained by that conscientious objection.

<u>Definition of "person responsible" and why this is important</u>

Proposed section 35O of the draft Bill provides that a "person responsible" for a person who has given an advance care directive may make a health care decision on behalf of that person under the advanced care directive if, at the relevant time, the person who gave the advanced care directive has impaired decision-making ability in respect of the decision. Further, proposed section 35P outlines how a person responsible is to exercise their health care decision making responsibility.

The G&A Act defines a "person responsible" (see section 4 subsections (1) and (2)) in relation to a child as follows:

> *(1) In this Act, person responsible for another person means –*
>
> > *(a) where the other person is under the age of 18 years and has a spouse, the spouse; or*
> > *(b) where the other person is under the age of 18 years and has no spouse, his or her parent;*
> > *…………………………………………………..*
>
> *(2) If a person is under the guardianship of the Secretary of the department administering the Children, Young Persons and Their Families Act 1997 pursuant to a care and protection order made under that Act, the Secretary of that department is, notwithstanding subsection (1) , taken to be the person responsible for him or her.*

As a general point, it may be necessary to consider whether the definition of "person responsible" is appropriate, where it refers to a child's "parent" – it may be preferable to refer to a person who has parental responsibility in relation to a child given the capacity under the *Family Law Act 1975* for orders to be made allocating parental responsibility to someone other than a parent.

**Conclusion**

Thank you for the opportunity to comment on this important draft Bill.

I am strongly in favour of children who have decision-making ability being able to execute an advanced care directive. Although my comments above are not exhaustive, they do focus on issues I believe require further consideration to ensure we have a legislative framework which protects the rights and wellbeing of children. Please note I have not commented on matters of a technical legal nature.

I am available to discuss my comments and I would welcome the opportunity to consider a further draft of this Bill.

Yours faithfully,

**Leanne McLean**
Commissioner for Children and Young People

cc Hon Elise Archer MP, Attorney-General /Minister for Justice
Hon Roger Jaensch MP, Minister for Human Services
Hon Sara Courtney MP, Minister for Health
Hon Jeremy Rockliff MP, Minister for Wellbeing