



Guardianship and Administration
Amendment (Advance Care Directives)

Bill 2020

16 October 2020

About COTA Tasmania

COTA Tasmania (Council on the Ageing [Tas] Inc) is a not-for-profit organisation, operating as a peak body for a wide range of organisations and individuals who are committed to encouraging our community to think positively about ageing. This involves promoting and encouraging social inclusion and championing the rights and interests of Tasmanians as they age.

The vision of COTA Tas is that ageing in Australia is a time of possibility, opportunity and influence.

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Introduction:

COTA Tasmania has been advocating for greater awareness and adoption of the suite of end-of-life documentation (Wills, Powers of Attorney, Enduring Guardianship and Advance Care Directives) for some time. It has been our experience in working with older Tasmanians and their families that there is limited awareness of these four key documents and their respective roles in end-of-life planning. This was underscored in the Tasmanian Law Reform Institute (TLRI) Review of the Guardianship and Administration Act.

In our submission to the TLRI review, COTA Tasmania advocated for legislative status for Advance Care Directives. Our organisation is pleased to see the development of the Advance Care Directives Amendment Bill and to have the opportunity to make comment.

We see this as a positive step toward achieving greater awareness in the community about the important role that end-of-life documents play in ensuring that an individual's wishes are known and are acted upon.

We look forward to a Tasmania where conversations about end-of-life are an accepted part of life; where Tasmanians understand how to express their wishes and have them documented; and there is the legislative, administrative and community support to enable those wishes to be carried out.

Principles in relation to the Bill:

COTA Tasmania believes that the following principles should be reflected in the design of the Bill. We believe that if these principles are not observed in the drafting of the Bill, then the objectives of the final legislation are unlikely to be achieved.

1. Education is key to community involvement and take up

COTA Tasmania believes that education and awareness is critical to the adoption of Advance Care Directives and other end of life documentation in our community.

2. Barriers to completion of ACD's should be minimised

The Bill should seek to make it as easy as possible for individuals to make an Advance Care Directive. Unnecessary barriers such as fees and cumbersome processes are likely to mean that people will find an already challenging process too hard.

3. Access to ACD documentation must be made easy

Once an ACD is in place, it is critically important that it is readily accessible when required. A clear process is required that will allow ready access to ACD's by health professionals, guardians and the person responsible in the ACD. To underline the importance of ease of access and understanding of ACD's, we have included as an appendix a letter from 

█ that outlines the distress caused by a failure to access and act on a current ACD.

4. *Individuals are empowered and have confidence their wishes will be respected.*

The provisions of the Bill should seek to give confidence to the person concerned that their wishes will be respected and observed.

Specific issues in relation to the Bill:

The following comments are provided in relation to specific aspects of the Bill that we believe require further consideration prior to finalisation.

Section/Part	Comments
<p>Section 8 Functions of the Board and Section 15 Functions and Powers of the Public Guardian</p>	<p>COTA Tasmania believes strongly in the need for an education and awareness program to support people in the preparation of ACD's and other end of life documentation.</p> <p>The current Act and the amendments in this Bill do not appear to include any requirement for community education and support for people wishing to prepare an ACD. We believe that the Bill should include such a requirement to ensure people are well informed and supported to prepare an ACD.</p> <p>One option for addressing this issue in the Bill would to be enhance the functions and powers of the Board and/or Public Guardian to include such a community education role.</p> <p>Adequate resourcing should be provided to support this role.</p>
<p>Section 27A Guardian to give effect to ACD</p>	<p>This new section outlines how a Guardian is to give effect to ACD's and is supported. However, the Bill appears to be silent on whether health instructions provided in an ACD or Enduring Power of Attorney have pre-eminence if they are in conflict. Currently both documents can include such instructions. The relationship between Enduring Powers of Attorney and ACD's should be clarified in the Act to avoid confusion.</p>
<p>Section 35B (i) Principles to be observed</p>	<p>Clause 35B (i) indicates that in determining the wishes of the person who gave the ACD, consideration may be given to <i>(i)</i></p>

	<p><i>any past wishes expressed by the person in relation to the matter: and (ii) the person's values as displayed or expressed during the whole or any part of his or her life and (iii) any other matter that is relevant....</i></p> <p>While the majority of the sections is supported, we have some concern around 35B (l) (ii).</p> <p>While the intent seems to be to help decision makers to call on their knowledge of the person in making decisions, we note that while people's values tend to remain consistent over time, how these values are practiced does change.</p> <p>It is possible this clause could be used to make a decision contrary to the person's current wishes. For example, if the person to whom the ACD relates has changed their views on an issue in relation to quality of life in recent years due to changed circumstances, could clause (ii) be used to justify a decision that they may have held earlier in their life?</p> <p>This section could lead to unintended consequences and redrafting may be required.</p>
<p>Section 35H Requirements for an ACD</p>	<p>This section states that an ACD requires the completion of an ACD form. While an ACD form is in existence in Tasmania, it has not hitherto been a requirement that the form is used for a valid ACD to be given.</p> <p>This raises the larger issue of the status of existing ACD's created under Common Law that will have only one witness, may not be on a specified form, and may not be registered. While we understand that Acts do not displace Common Law but operate alongside it, we recommend that the status of existing ACD's made under Common Law should be clarified in the Bill to avoid future confusion. Existing ACD's should continue to be valid.</p> <p>We note that substantial consultation has gone into the development of the current ACD form. A representative of COTA Tasmania has participated in this valuable work as a member of a sub-committee of the Partners in Palliative Care group. As the Bill requires new elements to be included in the ACD form, we strongly recommend that a further consultation</p>

	<p>is undertaken prior to finalisation of the new form to ensure that it is user friendly and easy to understand.</p>
<p>Section 35I Witnessing of ACD's</p>	<p>This section requires two witnesses sign the ACD form.</p> <p>Given the lessons learned through the COVID pandemic about the difficulties faced in bringing three people together to sign a form, provision should be made to allow for signatures to be provided digitally and witnessing to be carried out via some form of video conference. This may be written in as an option under exceptional circumstances.</p> <p>It is also noted in relation that section 35I (2) outlines who may not witness an ACD. While this section is useful and supported, we note that clause 35I (2) (f) states that witnesses may not be in a position of authority in a hospital, hospice nursing home or other facility at which the person giving the ACD resides. This clause is supported but we note that finding a witness may be challenging if the residential aged care facility is locked down for a range of reasons and is not allowing visitors.</p> <p>As outlined at the beginning of this submission, COTA Tasmania is very keen to see a balance struck between appropriate safeguards and not creating additional barriers to a process that is already quite challenging.</p>
<p>Section 35L Binding and non-binding provisions</p>	<p>It is not clear what type of provisions of an ACD would be non-binding and how non-binding provisions may be treated differently to binding decisions.</p> <p>Given the general expectation that wishes expressed in an ACD will be followed as closely as possible, further clarity around this provision is required.</p>
<p>Section 35Q – Requirement to make reasonable inquiries</p>	<p>It is not clear if this section applies to Ambulance personnel. The ambiguity around this issue should be clarified in the Bill.</p> <p>The term 'health practitioner' is defined in s35C which requires you then to refer to the definition of health profession in the Health Practitioner Regulations (National Law) Tas but this then refers you to the same regulations in force in Qld. This definition does not include Ambulance personnel on the face of it (unless by default the Ambulance</p>

	<p>personnel has one of the qualifications listed in the definition.) See https://www.legislation.qld.gov.au/view/pdf/inforce/2018-03-01/act-2009-hprnlq</p> <p>Notwithstanding the above, the Bill refers in the definition of health practitioner to the ability to define certain professions under the definition if included in the regulations.</p> <p>Is there an intent to bring in amendments to the regulations that would enable Ambulance personnel to be included as a profession to which the provisions apply?</p> <p>We also note that Section 35Q (1) refers to residential aged care facilities. In other sections of the Bill there is reference to nursing homes [35I (2) (f) and 35K (3)] The principal Act also refers to nursing homes.</p> <p>We believe there should be clarity about whether there is an intent to distinguish a nursing home from a residential aged care facility. If there is such an intent, then this should be further clarified, as both are commonly understood to be the same type of facility. If not, then the language used should be consistent throughout.</p> <p>We also note that Section 35Q (3) refers to a health facility and we believe that should read health care facility.</p>
<p>Section 35V Registration of Advance Care Directives</p>	<p>We note that this section requires the Guardianship and Administration Board to keep a register of ACD's. We support 35V (3) that states an ACD is not invalid merely because it is not registered.</p> <p>In line with our view that barriers to making ACD's should be minimised, we strongly suggest that registration of ACD's should be free. We note that this view is supported in the Tasmanian Law Reform Institute Review of the principal Act.</p> <p>Given that no changes can be made to an ACD and they may require updating from time to time, a fee that has to be paid each time an update is made would present a significant barrier for many Tasmanians.</p>

	<p>Further, it is not clear how this register will operate and if it will be readily accessible by health practitioners and decision makers appointed under an ACD. To be fully effective it needs to be easily accessible and searchable by name, address and other identifying factors, not just by the number of the ACD, which is currently the case for most users of the register of Powers of Attorney in the LIST. Ready access to ACD's is a key to effective implementation.</p>
<p>Section 35ZI Advance Care Directives from Other Jurisdictions</p>	<p>COTA Tasmania supports the intent of this section to give effect to ACD's made in other States and Territories. While we recognise that a move to a national register is outside the scope of this Bill, we would like to register our support for a national register of all end-of-life documentation.</p>

Appendix 1: Suuplied as an attachment to our submission - Letter from [REDACTED] forwarded at her request.