

Our ref: FS/TL

21 October 2020

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*Via email: [HaveYourSay@justice.tas.gov.au](mailto:HaveYourSay@justice.tas.gov.au);*

Dear Ms Craven

## **Guardianship & Administration Amendment (Advance Care Directives) Bill 2020**

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

This submission is on behalf of the Elder Law Committee (**Committee**) of the Law Society of Tasmania.

The sub-committee met with representatives of the Department of Justice (**DOJ**) on 5 October 2020 and provided some initial comments and queries regarding the Bill. Some of those matters are reiterated below.

### **1. Section 35B(h) – Conflicting Directions**

This section provides that in the event of a dispute arising in relation to an Advanced Care Directive (ACD), the wishes of the person who gave the ACD are of paramount importance. The Committee's view is that it should be clearly stated in the Bill which document will take precedence if there is a conflict between the directions contained in an Instrument Appointing an Enduring Guardian and an Advanced Care Directive.

### **2. Advanced Care Directives made prior to the Bill**

Can existing Advanced Care Directives be registered even though they may not comply with the provisions of the Act? It is understood that the Guardianship & Administration Board has discretion to register them, however there may be a need to be a transitional provision to provide for these documents.

### **3. Section 35I – Witnessing of Advanced Care Directive**

This section provides that there must be at least two attesting witnesses to the Advanced Care Directive. Section 35I(2)(e) specifically excludes a health practitioner who is responsible for the healthcare of the person giving the ACD. In other jurisdictions a health care provider can witness an ACD. The Committee notes the DOJ's initial comments that this provision was included to ensure that the witnesses were independent and not anyone providing treatment to the person giving the ACD. This reasoning for the exclusion is acknowledged, however the Committee requests that the DOJ compare the witnessing provisions for similar legislation in other jurisdictions.

#### 4. Terms and duties to “give effect” to an Advanced Care Directive

There is inconsistency between the following sections of the Bill:

- (a) Section 27A(1) provides that: **A person appointed as a guardian** must –
- (a) take reasonable steps to ascertain whether the person under guardianship has given an advance care directive; and
  - (b) if the person under guardianship has given an advance care directive, as far as is reasonably practicable –
    - (i) give effect to any provision in the advance care directive; and
    - (ii) seek to avoid any outcome or intervention that the person under guardianship would wish to be avoided;
- (b) Section 35P provides that:  
*Subject to this Part, if a person has given an advance care directive, **the person responsible for that person**, in making a health care decision in relation to that person –*
- (a) must comply with any binding provisions of the advance care directive that relates to health care of the relevant kind; and
  - (b) is to, as far as is reasonably practicable –
    - (i) comply with any nonbinding provisions of the advance care directive that relates to health care of the relevant kind; and
    - (ii) seek to avoid any outcome or intervention that the person who gave the advance care directive would wish to be avoided (whether such wish is expressed or implied); and
    - (iii) obtain, and have regard to, the wishes of the person who gave the advance care directive (whether such wishes are expressed or implied); and
    - (iv) endeavour to make the decision in a manner that is consistent with the principles in section 35B; and
    - (c) must make the decision that he or she reasonably believes the person who gave the advance care directive would have made in the circumstances; and
    - (d) must act in good faith and with due diligence; and
- (c) Section 35ZD provides that: **The Public Guardian and the Board** must, in performing a function or exercising a power under this Division in respect of an advance care directive, seek, as far as is reasonably practicable, to give full effect to the wishes of the person who gave the advance care directive.

It is the Committee’s view that these clauses provide different and inconsistent requirements that a person appointed as guardian, a person responsible, the Public Guardian and the Board are required to comply with (in order to give effect the ACD). The Bill should ensure that there is consistency.

Furthermore, it is the Committee’s view that the Public Guardian (but not the Board) should be held to the same standard as a person appointed as a guardian and/or a responsible person. A person completing an ACD would not expect that the Public Guardian would be in a position to not comply with a binding provision in an ACD. The Committee recognises that it is not appropriate to force the hand of the Board, but considers further consideration should be given when placing these two entities (the Public Guardian and the Board) together when providing for what effect must be given to the ACD.

#### 5. Division 9- Dispute Resolution: Section 35ZB(e)

Section 35ZB(e) provides that an “eligible person”, in respect of an ACD means the following persons – “..any other person who satisfies the Public Guardian or the Board

*that the person has a proper interest in a particular matter relating to the ACD.”* The Committee’s view is that the Public Guardian is not the Board and that the two bodies should not be bundled together in the same section of the Act. The Board should be the only body to deal with disputes relating to an ACD.

#### **6. Section 35ZI – Advanced Care Directives from other Jurisdictions**

This section provides that an Interstate Advanced Care Directive means an instrument made under a corresponding law that is within a class of instrument that is prescribed for the purposes of this definition. Under some jurisdictions the Advanced Care Directive is referred to as an Advanced Health Directive (see *Power of Attorney Act 1998* (Qld)). This section of the Bill may need amending to ensure that a foreign instrument even if not called an Advanced Care Directive may still be registered under our Act.

#### **7. Advanced Care Directive Form**

The Committee notes that the ACD form was recently amended this year but that there is no mention in this form of whether an Enduring Guardian has been appointed or that the person who makes an ACD should provide a copy to their Enduring Guardian. We note that this was on the previous form and it should be on any new form.

If any matter requires clarification please do not hesitate to contact me.

Yours faithfully



**Francesca Saturno**  
**Deputy Executive Director**