DRAFT SECOND READING SPEECH

HON ELISE ARCHER MP

Guardianship and Administration Amendment (Advance Care Directives) Bill 2021

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Madam Speaker, I move that the Bill now be read a second time.

I am extremely proud to be bringing this Bill before the House today. This Bill has been my focus for some time and as we navigated our way through the COVID-19 global pandemic, my Department continued to work hard with our stakeholders to still be able to bring this Bill for Parliament's consideration today.

As Members would be aware, the Tasmanian Law Reform Institute (TLRI) conducted a very lengthy and comprehensive review into the *Guardianship and Administration Act 1995* (Tas).

The Report was completed in December 2018 and given the complex nature of this type of reform and the voluminous nature of Report, as Attorney-General and Minister for Justice, I am taking a staged approach to its implementation to ensure all matters can be progressed in a timely manner.

This Bill draws on the important work delivered by the Tasmania Law Reform Institute (TLRI) in their review and the legislative framework for advance care directives it establishes, and is the first in a number of stages to deal with this substantial and often difficult reform.

As I have stated, this Bill seeks to amend the *Guardianship and Administration Act 1995* (Tas) (the Principal Act) for the purpose of establishing a legislative framework for the making and implementation of advance care directives.

Advance care directives are instructions about a person's future decision for medical treatment or health care made by a person when they have decision making ability in anticipation of a time when they do not have the ability to make those decisions due to injury or illness.

The Bill inserts provisions in the Principal Act that will:

- enable persons with decision making ability to give directions in relation to their future health care;
- ensure that health care is delivered in a manner consistent with those instructions;
- provide protection for health practitioners and other authorised decision makers who give effect to an advanced care directive; and
- facilitate the resolution of disputes in relation to the advance care directive.

The Bill will increase the confidence of those making advance care directives that their directions, values and preferences are respected at a time when they lack decision making ability.

It also enables those who are providing health care to understand the values, wishes and preferences of a person at a time when they have lost the ability to make decisions and communicate those views.

The Bill gives effect to the 2017 Tasmanian House of Assembly Standing Committee on Community Development *Inquiry into Palliative Care Report* which recommended that the Tasmanian Government establish a legislative basis for advance care plans.

It also implements recommendations arising from the Tasmania Law Reform Institute's (TLRI) *Review of the Guardianship and Administration Act 1995 (Tas): Final Report*

The Bill codifies the common law around advance care directives, which are already in use in Tasmania.

This will bring Tasmania into line with most other jurisdictions which have legislation governing the use of advance care directives. A statutory framework for giving advance care directives currently exists in every Australian state and territory except NSW and Tasmania.

Proceeding with legislation to amend the *Guardianship and Administration Act 1995* to provide a legislative basis for advance care directives is the first stage of broader reforms to the *Guardianship and Administration Act* which will be pursued by our Government in successive tranches to fully respond to the TLRI review of the Act.

Consistent with this staged approach, the current Bill advances key approaches recommended by the TLRI which it is envisaged will be reflected in future reforms to the Principal Act. These include a revised test of decision making ability, a consistent definition of health care, and the inclusion of a greater role for the Public Guardian in providing preliminary assistance to resolve disputes between parties. These changes will ensure that key concepts in the Bill are contemporary and reflect best practice.

Madam Speaker, I will now turn to the key provisions of the Bill.

Objects and principles

The objects of the Bill are to enable adults with decision making capacity to give future directions about their health care and to ensure their preferences and values are respected. The Bill also aims to protect health practitioners and others giving effect to those directions and to provide mechanisms for disputes to be resolved.

The Bill is underpinned by a set of overarching principles which provides a contemporary rights-based approach to the provision of health care to those who lack decision-making ability. It does not displace common law rights in relation to future health decisions, but provides mechanisms for greater certainty about how those rights may be exercised.

Decision making ability

The concept of decision making ability, in particular, is central to the way in which the new law in relation to advance care directives will operate. The Bill provides that a person must have decision making ability to give an advance care directive and the advance care directive will only come into effect once that decision-making ability is lost in relation to the decision at hand.

Importantly, the Bill contemplates that decision making ability may fluctuate. It recognises that different decisions require varying levels of decision making ability and seeks to support a person making their own decisions for as long as they are able to, and allows for when a person may regain decision making ability following a period of lost decision making ability, should this occur.

Once the criteria for impaired decision making ability have been met, however, for the purposes of the law of the State, a consent to particular health care given or refused in an advance care directive is taken to be the consent or refusal of the person making the advance care directive. It has the same effect as if the person who gave the advance care directive were capable of giving such consent or refusal at the time the health care decision is required.

The Bill does not allow a person to use an advance care directive to appoint an enduring guardian or power of attorney. Nor does it provide for the appointment of any other substitute decision maker. These appointments will still be made under provisions contained in the Principal Act.

It does, however, require that any person appointed as an enduring guardian must attest that they have obtained a copy of any advance care directive given by the appointer and understood its terms. All other persons providing health care to a person with impaired decision making ability, whether they are an authorised decision maker or a health practitioner, must also take reasonable steps to ascertain whether that person has an advance care directive and is to give effect to its terms.

The Bill recognises that, in the absence of any law to the contrary, an adult is presumed to have decision making ability in respect of decisions about their health care. It provides an approach to determining whether a person has impaired decision making based on their ability to make a decision, not on the outcomes of their decision making process.

The reasonableness of the decisions that they make is irrelevant, as any person with capacity has the right to make the health care decisions they choose to. Decision making ability is determined by whether a person has the ability to understand relevant information, retain that information to the extent necessary to make the decision, use or weigh that information in the course of making the decision or communicate the decision (whether by speech, gesture or other means).

Nor is the existence of a disability a prerequisite for determining whether a person has impaired decision making ability in respect of a health care decision. This approach provides equal rights to people with disability to exercise their legal capacity where they have the ability to make decisions in relation to particular health care matters and ensures that disability is not a stand-alone test for whether a person has decision making ability.

This is consistent with the Convention on the Rights of Persons with Disabilities and represents a significant step towards people with disability being treated equally before the law in respect of future health decision making.

Provisions have also been included to allow children under the age of 18 years to give an advance care directive. Consistent with common law principles, it is proposed that a child who is *Gillick* competent be able to document their wishes and instructions in relation to future health care in an advance care directive.

The *Gillick* principle holds that a child who is a 'mature minor' can consent to their own health care or treatment provided they have sufficient understanding and intelligence to enable them to fully understand what is proposed. Safeguarding provisions have been included to require an advance care directive prepared by a person under 18 years of age to be witnessed by a registered health practitioner, who is qualified to attest that the child is sufficiently mature to make the decision.

Form of Advance Care Directives and Witnessing Requirements

Rather than including a particular form for an advance care directive in the legislation, the Bill provides that a form for completing an advance care directive is to be approved by the Secretary of the Department of Justice. The intention is to ensure that the form is one that has the greatest input from community stakeholders. In fact, a group of health stakeholders has recently updated the current common law advance care directive form used by the Tasmanian Health Service, and this excellent work will inform the development of the new form under the Act.

To promote access to advance care directives, the Bill has not mandated a requirement to seek medical or legal advice to complete the form. This means that individuals can complete the form without assistance. However, a health practitioner may be a witness to the advance care directive and persons making an advance care directive will be encouraged in the written advance care directive form and related material to seek medical or legal advice to ensure that their advanced care directives are clear and effective.

In addition to completing a written advance care directive form, the Bill provides as much flexibility as possible in the way in which an advance care directive can be given. The ability to give oral directives under common law is preserved and it is envisaged that an advance care directive could be completed by other means such as through audio-visual recording. For those who do not have access to the form, a form of similar effect can also be used.

To provide certainty as to the intent of the person making the advance care directive, strict witnessing requirements have been included in the Bill. These provisions have been designed as a protective measure to ensure that no undue influence has been placed on the person giving the advance care directive.

The witnesses must be two people who are not a close relative, carer or person delivering services to the person giving the advance care directive. Witnesses must also certify that the person giving the advance care directive appears to understand the nature and effect of each statement in the advance care directive and that they were not acting under any form of duress or coercion.

In certain circumstances such as in the case of a child completing an advance care directive or a person giving an oral advance care directive, the Bill requires that a registered health practitioner be a witness to the advance care directive. In the case of a person under 18 years of age, the health practitioner will also need to attest that the child has decision making ability to complete the document.

The Bill's definition of health care for the purposes of an advance care directive extends beyond the current definition of medical and dental treatment in the Principal Act to cover any care, health service, procedure or treatment provided by or under the supervision of a health practitioner for the purposes of diagnosing, preventing, assessing, maintaining or treating a physical condition or mental illness.

It also includes a person's ability to give advance care directives in relation to medical research procedure and forensic procedures. This broad definition of health care will enable those making an advance care directive to provide instructions on a wide-range of matters beyond simply medical treatment decisions at the end of life.

Binding, non-binding and void directives

The Bill provides that certain directives will be void or of no effect. This includes:

- instructions that are unlawful or would require an unlawful act to be performed;
- refusals of mandatory health care, such as that ordered under an assessment order or a treatment order under the *Mental Health Act 2013* (Tas); or
- instructions that if given effect would cause a health practitioner or other person to contravene a professional standard or code or otherwise amount to professional misconduct.

If any of these matters are contained in the advance care directive they will not invalidate the advance care directive in its entirety, but will void that part of the advance care directive that is in contravention of the Act.

This will not prevent a person giving directives about their values and goals of care, what is important to them and what factors they wish to be taken into account when their decision making capacity is impaired. No restrictions are placed on what may be included in an advance care directive.

The Bill provides that certain instructions are binding. Refusals or instructions to withdraw health care that are clear and unambiguous are binding. This is consistent with the common law in relation to advance care directives. The Bill provides that health practitioners and authorised decision makers must give these binding directives effect.

All other directives, such as those expressing a person's preferences and values with regard to their future health care are non-binding. Non-binding instructions must be complied with as far as is reasonably practicable. They must guide decision makers and health practitioners in the care they provide.

Certain circumstances may give rise to situations where a health practitioner is not obliged to comply with the terms of an advance care directive, to provide further safeguards. In particular:

- where the health practitioner believes on reasonable grounds that the person who gave the advance care directive did not intend the provision to apply in the particular circumstances or where the provision is ambiguous or does not appear to reflect the current wishes of the person;
- where the instructions contained in the advance care directive seek a particular kind of health care. Such a provision may only be used to guide a health practitioner, but the decision of whether to do so is to be determined by the particular health practitioner on the basis of their clinical expertise and judgment; and
- where the provision of the health care would be futile in the circumstances.

Health practitioners are also not bound to abide by the terms of an advance care directive in circumstances where the health care is urgent or being provided in an emergency. This provision has been included to ensure there is no impediment to health practitioners providing care in circumstances where decisions are required immediately or where it is necessary to administer care to prevent the person from suffering significant pain or distress.

Nor are health practitioners forced to comply with provisions of an advance care directive to which they have a conscientious objection. The Bill requires that in such circumstances the patient must be referred to another health practitioner and that no action is taken to provide treatment that would prevent the provisions of the person's advance care directive being given effect.

Registration and Revocation of Advance Care Directives

Under the Bill a person can seek to have their advance care directive registered by the Guardianship and Administration Board. This is not a mandatory requirement and an advance care directive is not invalid merely because it has not been registered.

The Board may refuse to register the advance care directive if it does not comply with the formal requirements for completing an advance care directive, including the witnessing requirements. A register for this purpose will be maintained by the Board and new regulations will be developed to set out the terms of access to the register.

Madam Speaker, the Bill also includes provisions for a person who wishes to revoke an advance care directive. In the case of a person who has decision making capacity, the matter will be dealt with by a simple process of notification made to those who have been given a copy (including any person appointed as an enduring guardian) and the Board if the advance care directive has been registered.

In circumstances where a person who lacks decision making ability may wish to revoke or vary their advance care directive, provisions have been included for an application to the Board to make a final determination as to whether the advance care directive should be revoked or varied. The Bill sets out principles that the Board must follow in making such decisions to ensure that the revocation or variation genuinely reflects the wishes of the person to whom it relates.

Protection from Liability

Health practitioners, authorised persons or other persons acting under the authority of the Principal Act are afforded protections from civil and criminal liability for acting in accordance with an advance care directive in good faith and without negligence.

Dispute resolution and powers of the Public Guardian and the Board

Madam Speaker, the Bill sets out comprehensive dispute resolution provisions to enable the differences over the effect and application of an advance care directive to be settled.

The Bill confers on the Public Guardian the ability, including through the use of mediation, to provide preliminary assistance in resolving differences between parties. This may include:

- ensuring that all parties are aware of their rights and obligations under the Act;
- identifying issues in dispute;
- canvassing options that may obviate the need for formal proceedings; and
- facilitating full and open discussion between the parties.

If agreement is reached on ways to resolve the dispute through mediation, the Public Guardian is to record the outcomes and cause a copy to be provided to each of the parties and to the Board.

At any time during the course of the mediation the Public Guardian may bring the matter to a close if, in their opinion, the matter is best dealt with by the Board or at the request of a party to the mediation.

Consistent with their current jurisdiction, the Bill provides the Board with more formal powers in relation to setting disputes over advance care directives. On application, the Board may review a matter dealt with by the Board and cancel, vary or revoke the agreement.

The Board also has the power to make binding directions in relation to an advance care directive, including in relation to:

- whether the person making the advance care directive did or did not have decision making ability to make the advance care directive;
- whether an advance care directive is valid; and
- whether a person has authority to make a decision in relation to an advance care directive.

These new powers in the Bill are in addition to those provided under the Principal Act that enables the Board to, for example, appoint a guardian to act on behalf of the person who has made the advance care directive.

Offence provisions

Offence provisions are included in the Bill to provide that:

- a person by dishonesty or undue influence must not induce another person to give an advance care directive (s35G(4));
- a person must not require another person to given an advance care directive as a precondition of providing a service (s35G(5));
- parties must act in accordance with any direction made by the Board to revoke or vary an advance care directive (s35Z(6)); and
- parties must comply with a determination of the Board made in relation to dispute resolution proceedings (s35ZK(9)).

Madam Speaker, as I noted earlier, a statutory framework for giving advance care directives exists in every state and territory except NSW and Tasmania. The Bill enables legal recognition of advance care directives made in other jurisdictions as if they were made here in Tasmania. Provisions contained within those advance care directives that are unlawful in Tasmania will, however, continue to be unlawful regardless of their status in the jurisdiction in which they were made.

Provisions have been included in the Bill to ensure that the authority of superior courts, including the Family Court are maintained and other legal rights, including the right to prepare an advance care directive under common law are not affected.

In order that the legislation remains relevant, provisions have been included in the Bill requiring an independent review of the new Part as soon as practicable after the fifth anniversary of its commencement. This will ensure that provisions contained within the Principal Act continue to meet community expectations into the future.

I am sure that a clear and legally binding framework for giving and implementing advance care directives will be welcomed by many Tasmanians wishing to give instructions about their future health care.

Public consultation was undertaken on a draft version of this Bill and I thank the many individuals and organisations who made comments in response to the draft legislation, and also to Parliamentary Counsel for drafting this legislation which provides a robust and contemporary statutory framework for advance care directives in Tasmania.

The overwhelming sentiment from the public consultation was that the Bill provided a welcome addition to the advance care planning in Tasmania.

I am, therefore, pleased to commend the Bill to the House.