DRAFT SECOND READING SPEECH

HON ELISE ARCHER MP

Guardianship and Administration Amendment Bill 2023

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

The Guardianship and Administration Amendment Bill 2023 (the Bill) seeks to amend the *Guardianship and Administration Act 1995* (the Guardianship Act) for the purpose of updating and modernising key concepts in the Act and to establish a new legislative framework for the appointment, review and duties of decision-makers in relation to those under guardianship orders.

The Bill also provides for the regulation of health and medical research, by inserting new provisions for this purpose.

Importantly, the Bill implements a second tranche of key recommendations of the Tasmania Law Reform Institute's (TLRI) *Review of the Guardianship and Administration Act 1995 (Tas): Final Report* (the TLRI Report) which was completed in December 2018. These are complex and numerous and, as I have said, my preference is to legislate in tranches rather than simultaneously.

The Bill also gives effect to recommendations for legislative reform arising from the Independent Review of the Public Trustee, conducted by Damian Bugg AM KC, which our Government commissioned in June 2021 and was released in December 2021.

In respect of these initiatives, the Bill will contemporise Tasmania's guardianship laws and bring them into line with guardianship and administration laws as recommended by the Australian Law Reform Commission and other bodies.

Mr Speaker, Tasmania's Guardianship Act was first enacted almost 30 years ago. At the time, it reflected the view of guardianship and administration within Australia. For the most part, it served this purpose well. However, views on these matters have changed and our Government recognises that the concepts and approaches in the Act are, in some instances, outdated and in need of reform.

For some, the appointment of a guardian or administrator can occur at the most difficult times in their lives and lead to a feeling of disempowerment and loss of control. For many who have lived a full and independent life, it can be difficult to accept that they are in need of support to assist in maintaining their living standard and ensuring that their health and wellbeing is protected.

I wish to again acknowledge community concerns about Tasmania's guardianship laws as they now stand. As I have indicated previously, this second tranche of reform will ensure that improvements are made to address concerns and ensure that the community maintains confidence in these vital services.

Mr Speaker, the first tranche of reforms to the Guardianship Act were passed in 2021 which introduced a legislative framework for the making and implementation of advance care directives. I am pleased to advise the House that those provisions have been operational since 21 November 2022.

Advance care directives enable Tasmanians to give instructions about their future health care for use at a time when they are unable to make those decisions themselves due to a loss of decision-making ability.

This second tranche of reform takes the principles introduced as part of the establishment of a legal framework for advance care directives and applies them across the rest of the Act.

Mr Speaker, public interest in this Bill has been extensive. Indeed, I was pleased to extend consultation on the Bill last year to ensure there was further time for all stakeholders to consider the Bill after it was requested by them. My Department also offered briefings for people with lived experience and their families, and also provided accessible material on the Bill to gain input from a broad range of people.

The Bill covers issues of considerable importance, and I thank the many individuals and organisations who provided submissions in response to the draft legislation, and also to Parliamentary Counsel for their work in drafting the legislation.

I will now provide an overview of some of the Bill's key reforms, namely:

- the Bill clearly establishes that the appointment of a guardian or administrator is to be considered once least restrictive alternatives are no longer considered sufficient. It requires the Tasmanian Civil and Administrative Tribunal (TASCAT) to consider the appointment of the Public Guardian or Public Trustee only in circumstances where another person is not available to undertake that role;
- the Bill establishes a decision-making framework which requires substitute decision-makers to respect and promote a person's decision-making ability, with support to help a person make decisions as far as practicable;
- a decision-maker is to give effect as far as practicable to the wishes, preferences and rights of the represented person, except in limited circumstances such as avoiding serious harm to the person;
- the Bill addresses issues raised by stakeholders, such as improving communication with proposed represented persons, particularly at the stage at which an application to the TASCAT is being considered;

- best-practice concepts are included in the definition of decision-making ability, including identifying circumstances or criteria which in and of themselves must not be used as the basis for determining that decision-making ability is lacking; and
- the Bill also improves arrangements for appeals to the Supreme Court in relation to decisions taken by the TASCAT.

The Bill respects the voice of persons under guardianship or administration. New objects and principles apply the principles of the *Convention on the Rights of Persons with Disabilities*, the principle of supporting persons with impaired decision-making to make their own decisions, and promotes a person's views, wishes and preferences, and their personal and social wellbeing.

Importantly, I have listened to stakeholder concerns that confidentiality restrictions or so called 'gag provisions' can currently limit people under guardianship and administration in telling their stories. I am pleased to share that the Bill explicitly amends the Guardianship Act to allow people under guardianship orders to consent to publication of their information, if they so choose.

The Bill will increase the confidence of those who are placed under guardianship or administration orders. They can have confidence that their directions, values and preferences are respected at a time when they lack decision-making ability.

The Bill places the person with impaired decision-making ability back in the centre. It recognises that decision-making ability is something which may fluctuate according to the nature of the particular decision and the context in which it is being made. Provisions in the Bill encourage those who have authority to make substitute decisions to only do so where the ability of the person, to make the decision with the aid of appropriate supports, is absent. Importantly, it requires those who make substitute decisions to take into account the wishes and preferences of the person with impaired decision-making ability where they are unable to decide for themselves. This approach is a significant departure from the 'best interests' test that is embedded in the current Guardianship Act.

Mr Speaker, a key feature of promoting the 'will and preference' model of decision-making are new provisions to emphasise best practice, namely that the TASCAT ensures orders are proportionate and, where possible, tailored to the needs of the individual.

Importantly, the Bill incorporates a balance between recognising the importance of promoting the rights of persons with impaired decision-making ability to make their own decisions and ensuring that effective safeguarding mechanisms are in place to protect those persons from harm where it is needed.

While the Bill retains the ability of the TASCAT to make emergency orders, these orders will now be known as interlocutory orders. They may only be made in circumstances where there is an immediate risk of harm to the health, welfare, property or financial

situation of a person, including a risk of abuse, exploitation or neglect. This will help to ensure that emergency orders are considered only in the most urgent circumstances.

The Bill also places requirements on those making applications to provide more information to the person and their family about the application, the nature of the issues that give rise to the concern, and options for seeking independent advice and advocacy support prior to any hearings.

Mr Speaker, the Bill also introduces changes to TASCAT procedures when dealing with applications, including by ensuring that the views of any close family members who attend the hearing can be heard.

The Bill also expands the right of appeal to the Supreme Court as a right on the basis of both fact and law in relation to guardianship and administration orders. This will simplify the process of review in circumstances where the represented person disagrees with orders made by the TASCAT.

The Bill also requires the Public Guardian and Public Trustee to establish a best-practice complaints process and to make information on these processes clear and publicly available. The Bill also provides authority to the Public Guardian to provide preliminary assistance in dispute resolution involving private guardians and administrators. This includes the ability to arrange for the conduct of mediation where this may assist in addressing the issues.

Mr Speaker, I wish to take this opportunity to acknowledge the hard work undertaken by the TASCAT to ensure that balanced decisions are made in relation to applications for guardianship and administration, and also the Public Guardian and Public Trustee who provide essential services where few other options are available. These bodies provide services to many thousands of Tasmanians, sometimes at their most vulnerable, and achieve many positive outcomes and results.

Mr Speaker, I also want to spend a few minutes outlining another key reform included in the Bill. This relates to provisions which will regulate the involvement of people with impaired decision-making ability in health and medical research.

By way of background, I note that in recent years it has become clear that approval of a person with impaired decision-making ability's involvement in health and medical research was not able to the authorised by a person responsible, in many instances, under the medical and dental treatment provisions contained in the existing Act. Unfortunately, this led to uncertainty about whether innovative treatments or procedures could be used in situations where the person was not able to provide consent. Often these procedures in emergency and other settings have life-saving outcomes. However, they are not considered 'standard' or 'accepted' treatment because they are subject to clinical trial.

A feature of the first tranche of reforms for advance care directives was to ensure that a person can give consent or refusal to research in circumstances where the person has impaired decision-making ability. As mentioned, these advance care directive reforms have been in operation since 21 November 2022.

This second tranche ensures the benefits of research can be available to people without advance care directives, under the consent of their person responsible, or in other carefully safeguarded arrangements consistent with national research ethics guidance.

Mr Speaker, there were examples raised during consultation on the Bill regarding innovation in treatments being life-saving, which highlights why the inclusion of provisions relating to the regulation of health and medical research are so critical.

One example raised by a clinical research coordinator is the involvement of the Royal Hobart Hospital Intensive Care Unit (ICU) in a research study titled 'the PATCH-Trauma trial' (for short). This study provided that if individuals met the Human Research Ethics Committee approved inclusion criteria, they could receive an injection dose of Transexamic acid by ambulance paramedics or a medical officer attending accident scenes, to stem the risk of significant haemorrhage potentially leading to death. Prior to the trial, Transexamic acid could only be administered by a medical practitioner and this was usually in a hospital emergency department, operating theatre or ICU. The trial allowed the injection to be administered much earlier, with more effect, potentially saving the lives of many Tasmanian trauma victims, many of whom were, at the time, unconscious and had lost their decision-making ability.

Without the regulation of health and medical research, there is uncertainty about whether a person with impaired decision-making ability can be enrolled in such clinical research trials. This impacts on the ability to participate in research in ICU settings and has diminished Tasmania's ability to take part in significant research studies with potential benefits not only to Tasmanians but across the world.

Provisions included in the Bill make clear the criteria for how a person with impaired decision-making capacity is able to be enrolled in research. It provides safeguards to ensure that persons with impaired decision-making can only be enrolled in studies with relevant ethics approval. It further acknowledges the role of advance care directives, and also makes arrangements for the person's person responsible to make decisions on their behalf.

The regulatory framework also provides for circumstances in which an advance care directive, or person responsible, cannot be located, usually because of the need for a time-critical response. As with other changes to the Guardianship Act, our Government considers that the health and medical research provisions contained in the Bill achieve an appropriate balance between safeguarding the will and preference of a person with impaired decision-making who is unable to give or refuse consent, and enabling those persons to receive the benefit of participating in research trials.

Mr Speaker, as I have said, the Bill represents a second tranche of reforms to the Guardianship Act. It does not address all areas of the Act in which there is a need for reform. There are other matters which will require further amendments to the Act, as further tranches of reform.

I will briefly touch on the amendments proposed as part of the next stage of reform.

Work is underway to review and update Tasmania's *Disability Services Act 2011*. As part of this process, arrangements for the regulation and oversight of restrictive practices, and in particular, whether a single authorisation pathway for restrictive practices should be established, is being addressed through that process. Any changes required to the Guardianship Act will be looked at as part of that review.

The issue of whether the State should enact separate legislation regarding medical treatment decisions in relation to children is also subject to further review.

The Bill does not make any substantive amendment to the medical and dental treatment provisions of the Act, other than to address issues relating to the principles that will now underpin the Act, such as the move away from the 'best interests' test.

National consultations are underway to identify law reforms to the way in which enduring instruments are made and executed, particularly in relation to enduring powers of attorney. These consultations are being undertaken in the context of addressing the serious issue of financial elder abuse. It is our Government's expectation that once these processes are completed, changes to both the Guardianship Act and the *Powers of Attorney Act 2000* will be needed for these purposes.

The Bill does not establish a legislative framework for the official appointment of supporters to assist a person with decision-making. As a framework was sought by some submissions during consultation on the Bill, I would like to address this issue in some detail.

The proposal to establish a formal supported-decision making framework was recommended by the Australian Law Reform Commission (ALRC) in its 2014 report *Equality, Capacity and Disability in Commonwealth Law*s. It was also recommended by the TLRI Report. The TLRI recommended that the scheme extend to personal matters and consent to health care and treatment.

Since that time, supported decision-making as a concept has been given consideration across a number of areas where decisions may need to be made for or on behalf of persons with impaired decision-making ability – this includes aged care, disability support, Centrelink services, and the NDIS.

Most recently, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has commenced, examining best practice frameworks for supported decision-making.

The work that the Royal Commission is undertaking is comprehensive. Importantly, the Royal Commission acknowledges that there is currently no shared understanding of supported-decision making across Australia and no agreed approach to reform at this time.

A core principle underlining the current amendments to the Guardianship Act is the prioritisation of supported decision-making as a framework for decision-making. The Bill makes clear that when a guardian or administrator is appointed, the right to legal agency is not extinguished. The represented person has the right to continue to make decisions where they have the capacity to do so and, where this is not the case, decisions made by substitute decision-makers are to be based on the will and preference of the represented person in all but limited circumstances. This approach is what the Disability Royal Commission refers to as 'will and preference substitute decision-making'. It is a principled approach to substitute decision-making that recognises supported decision-making as a continuum of decision support. It includes people being supported to make their own decisions, as well as decisions being made by decision-makers based on an interpretation of the will and preference of the person to whom the decision relates.

Mr Speaker, there are various ways in which supported-decision making can be operational. Victoria, for example, has opted to enable the formal appointment of a supporter as an alternative to the appointment of a guardian or administrators. Whilst this approach embeds a legal framework for supported decision-making in their Guardianship Act, the option of officially appointing a supporters has had little take up in that jurisdiction. In fact, the Royal Commission reports indicate they may have had the perverse effect of deterring the more informal networks of support that surround individuals in many circumstances.

The option that our Government has selected, at this stage, is to embed a requirement that all practical support should be given to a person to assist them maintain their decision-making ability whilst under a guardianship or administration order. That support may come in various forms, from the provision of communication aids, to support that enables the person to continue to be in control of tasks associated with their day-to-day living.

As discussions mature at a national level, our Government will then give consideration to whether the Act should include a more formal legal framework for the appointment of a supporter. We also intend to consider options to embed supported decision-making into enduring instruments in a way that encourages the power of attorney or guardian to assist the person prior to the need for substitute decision-making. Consideration is also being given to how supported decision-making can be embedded in disability law and my Department of Justice is working with the Department of Premier and Cabinet for this purpose.

Mr Speaker, there are several other matters raised during the consultation which I have requested my Department now examine as part of future tranches of reform. These

include whether the Guardianship Act should have additional provisions governing offences and compensation, and whether the penalties in the Act should be revised.

Mr Speaker, I will observe at this stage that arrangements within the guardianship system, in many cases, involve persons freely giving of their time to provide support to a person close to them, when they need that assistance. It is often a resource intensive task. Whilst there is a need to ensure that if anyone misuses the powers given to them under the Guardianship Act, they are able to be brought to account, there is a risk that excessive penalties and offences may act as a deterrent to private representatives being appointed.

The Bill also contains new offences in matters relating to interference with the assessment of decision-making, record keeping, and non-compliance with medical research requirements.

In conclusion, I have directed my Department to further consider stakeholder submissions about enhancing offences, penalties and compensation provisions in Tasmanian law, as part of preparing proposals for future reforms.

Mr Speaker, I commend the Bill to the House.