

Your Ref:
Our Ref: 924

18 November 2022

Ginna Webster
Secretary
Department of Justice

By email to: secretary@justice.tas.gov.au
legislation.development@justice.tas.gov.au

Dear Secretary

Re: *Guardianship and Administration Amendment Bill 2022*

Introductory comments

Thank you for the invitation to advocate on behalf of all Tasmanian children and young people by commenting on the Guardianship and Administration Amendment Bill 2022 (the draft Bill).

Before commenting on the draft Bill, I take the opportunity to reiterate my view that there is a pressing need to consider the development of specific legislation governing consent to medical treatment for children in Tasmania generally. I have raised this issue on several prior occasions¹ (as have other Commissioners).

Relevantly, in its *Final Report of the Review of the Guardianship and Administration Act 1995* (Final Report),² the Tasmania Law Reform Institute (TLRI) examined the application of the *Guardianship and Administration Act 1995* (the principal Act) to children, and its inter-relationship with the *Family Law Act 1975* (Cth), and the *parens patriae* jurisdiction of the Supreme Court of Tasmania. It is beyond the scope of this submission to outline the range and complexity of issues canvassed by the TLRI in Part 13 of its Final Report. However, I

¹ I have raised the need for broader consideration of the law relating to consent to medical treatment for children in Tasmania in several previous submissions. See, for example: [CCYP-Submission-to-Tasmanias-Child-and-Youth-Wellbeing-Strategy-Discussion-Paper.pdf \(childcomm.tas.gov.au\)](#); [2020-10-21-Comment-Guardianship-and-Administration-Amendment-Advanced-Care-Directives-Bill-2020-FINALdocx..pdf \(childcomm.tas.gov.au\)](#); [Submission-Mental-Health-Act-Amendments-Bill-2022.pdf \(childcomm.tas.gov.au\)](#); [KM_C224e-20190903160121 \(childcomm.tas.gov.au\)](#)

² Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas): Final Report No. 26*, December 2018; accessed at [Completed Law Reform Projects - Tasmania Law Reform Institute | University of Tasmania \(utas.edu.au\)](#).



note the TLRI identified the need for improved clarity around consent to medical treatment for children in this context and recommended this issue be a matter for separate review and consideration:

Recommendation 13.1

- (1) That whether the Act should govern consent to health care and treatment for children be the subject of separate review.
- (2) That, if the Act continues to apply to the giving of substitute consent to health care and treatment for children with disability:
 - (a) the Act contain a similar section to s219 of the *Mental Health Act 2013* (Tas), confirming that the Act does not affect the jurisdiction of the Supreme Court and Family Court to give or refuse consent to health care and treatment; and
 - (b) confirming the effect of valid consent or refusal to consent under the jurisdictions of either the Supreme Court and Family Court upon the operation of the Act.

It is disappointing that the review recommended by the TLRI in 2018 has not occurred, and that - given the principal Act will apply to children with impaired decision-making ability - the draft Bill does not respond to the TLRI's recommendations in 13.1(2) that the principal Act be amended to resolve jurisdictional complexities.

I would welcome further discussion on these and related issues.

Role of the Commissioner

My role as Commissioner for Children and Young People is governed by the *Commissioner for Children and Young People Act 2016* (CCYP Act).

Section 8 of the CCYP Act outlines some of my functions as follows:

- (a) *advocating for all children and young people in the State generally;*
- (c) *researching, investigating and influencing policy development into matters relating to children and young people generally;*
- (d) *promoting, monitoring and reviewing the wellbeing of children and young people generally; and*
- (f) *assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally.*

In performing my functions, I am required to:

- do so according to the principle that the wellbeing and best interests of children and young people are paramount;
- observe any relevant provisions of the United Nations *Convention on the Rights of the Child*; and



- give special regard to the needs of children and young people who are disadvantaged or vulnerable.

I note that the draft Bill aims, amongst other things, to provide for the implementation of reforms arising from the TLRI's Final Report and the *Final Report of the Independent Review of the Public Trustee* conducted by Damian Bugg AM KC. Accordingly, the draft Bill sets out provisions that:

- establish rights-based principles as a framework for the way in which decisions under the Guardianship and Administration Act are to be made;
- provide a legislative basis for a shift away from a 'best interests' approach toward decision-making to a 'will and preference' model, which requires decision-makers to take account of the wishes and preferences of the represented person; and
- consider the views, wishes and preferences of the proposed represented person and the desirability of preserving existing relationships when determining who to appoint as a guardian or administrator.

Comment

My comment is focussed on how these draft laws potentially affect children and young people. It is not intended to be exhaustive and should be considered in the context of the views I have expressed above regarding the pressing need for a broader consideration of the law relating to consent to medical treatment for children in Tasmania.

That being said, I note that it is especially pleasing to see that the draft Bill reflects, to a large degree, several of the reforms proposed in the TLRI's Final Report. It is also pleasing that clause 7 of the draft Bill proposes to amend the "Objects of Act" provision of the principal Act by referring explicitly to the application of principles contained in the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

Principles

Recommendation 3.2 of the TLRI's Final Report states that the "principles of the Convention be included in the Act."³ The Final Report then goes on to list the principles as follows:

- a) there must be respect for the inherent dignity of persons with disability and their individual autonomy including the freedom to make one's own choices, and their right to independence;
- b) persons with disability are not to be discriminated against;
- c) persons with disability are to be given the opportunity for full and effective participation and inclusion in society;
- d) there must be respect for difference and acceptance of persons with disability as part of human diversity and humanity;
- e) people with disability must have equality of opportunity;

³ *Final Report*, p. xii.



- f) services are to be as physically and technologically accessible as possible to persons with disability;
- g) equality between men and women is to be promoted; and
- h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.⁴

Noting that the “Objects” clause specifically refers to the application of the principles of the CRPD, it would be appropriate to set out the principles of the CRPD either in the body of the Act or as a schedule to it. This is particularly important in the absence of any overarching human rights legislative framework in Tasmania.

Including the principles would also align with the spirit of the policy behind the legislation, including the “need to support persons with impaired decision-making ability to make, participate in and implement decisions that effect their lives” (s7(a) of the proposed amended Act). Otherwise, persons reading the principal Act would need to undertake their own search for the principles of the CRPD.

In this context it is worth noting that the *Disability Services Act 2011* (Tas) (Disability Services Act), in s5, directly legislates “the general principles that are to guide actions” under that Act. The Disability Services Act sets out those principles, which echo those contained in the CRPD and some of which are directly relevant to children and young people. For ease of reference, I have set out s5(1) of the Disability Services Act below:

s. 5(1) The following are the general principles that are to guide actions under this Act:

- (a) people with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development;*
- (b) people with disability should be supported to participate in, and contribute to, social and economic life to the extent of their ability;*
- (c) people with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime;*
- (d) people with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports;*
- (e) people with disability should be supported to receive reasonable and necessary supports (including early intervention supports) within the meaning of the National Disability Insurance Scheme Act 2013 of the Commonwealth;*
- (f) people with disability have the same right as other members of Australian society to be respected for their worth and dignity and to live free from abuse, neglect and exploitation;*

⁴ *Final Report*, p. xii.



- (g) *people with disability have the same right as other members of Australian society to pursue any grievance;*
- (h) *people with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity;*
- (i) *people with disability should be supported in all their dealings and communications so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs;*
- (j) *people with disability should have their privacy and dignity respected;*
- (k) *the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected;*
- (l) *the role of advocacy in representing the interests of people with disability is to be acknowledged and respected, recognising that advocacy supports people with disability by –*
 - (i) *promoting their independence and social and economic participation;*
 - (ii) *promoting choice and control in the pursuit of their goals and the planning and delivery of their supports; and*
 - (iii) *maximising independent lifestyles of people with disability and their full inclusion in the community;*
- (m) *innovation, quality, continuous improvement, contemporary best-practice and effectiveness in the provision of supports to people with disability are to be promoted;*
- (n) *positive personal and social development of people with disability, including children and young people, is to be promoted.*

It is my view that Recommendation 3.2 of the TLRI Final Report should be implemented entirely and that, like the example set in the Disability Services Act, the draft Bill should explicitly state the principles of the CRPD to be observed in any action under the amended Act.

Best interests of the child

The draft Bill proposes a shift away from a ‘best interests’ approach as the legislative basis for substitute decision-making to a ‘will and preference’ model, which requires decision-makers to take account of the “views, wishes and preferences” of the represented person with impaired decision-making ability. While this change is in line with the key recommendations of the TLRI Final Report, it should not occur at the expense of the right of the child to have their best interests considered in any decisions that affect them. In fact, the TLRI Final Report recommended:

“That, if the Act continues to apply to children with disability, it provide that the best interests of the child must be the *paramount consideration* in relation to



any exercise of function or power under the Act.” (Recommendation 13.2, my italics).⁵

It appears to me that the ‘will and preference’ model and the ‘best interests of children model’ can co-exist in relation to any exercise of a function or power under the Act that apply to children (Parts 5A, 6 and possibly 6A of the principal Act). I am concerned that circumstances may arise with respect to the consent to health care for a child or young person with impaired decision-making ability and there will not be a legislative obligation for actions taken under the Act to be in the best interests of the child and young person.

As noted in the TLRI Final Report, the former Interim Commissioner for Children and Young People expressed support for continuation of the ‘best interests’ principle in the Principal Act in relation to children.⁶ Article 7(2) of the CRPD in fact requires that “in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.”⁷ Given the draft Bill seeks to expressly apply the principles of the CRPD, there appears to be an overwhelming policy imperative that the ‘best interests’ principle in relation to children continues to apply in the relevant Parts of the Act that affect them. The TLRI has acknowledged and agreed with this position.⁸

This approach would also assist in harmonising the principal Act with the Disability Services Act. Sections 5(2)(f), 5(3) and 5(4) of the Disability Services Act recognise the importance of the ‘best interests’ principle as it relates to children:

s. 5(2) If this Act requires or permits an act or thing to be done by or in relation to a person with disability by another person, the act or thing is to be done, so far as practicable, in accordance with both the general principles set out above and the following principles...

(f) if the person with disability is a child – the best interests of the child are paramount, and full consideration should be given to the need to–

(i) protect the child from harm; and

(ii) promote the child’s development; and

⁵ *Final Report*, p. xxxii.

⁶ *Final Report*, p. 20.

⁷ *Convention on the Rights of Persons with Disabilities (CRPD)*, art. 7(2). While children with disabilities enjoy all the rights set out in the CRPD, article 7 is focussed of specifically on children. It provides that:

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

⁸ *Final Report*, p. 20.



(iii) strengthen, preserve and promote positive relationships between the child and the child's parents, family members and other people who are significant in the life of the child.

s. 5(3) It is the duty of a person who may do a thing on behalf of a child to ascertain the wishes of the child concerned and to act in the best interests of the child.

s. 5(4) It is the duty of a person who may do a thing on behalf of a child to provide disability, and age-appropriate, assistance in decision making by the child personally and to have regard to, and give appropriate weight to, the views of the child.

The above provisions and principles should operate in harmony and be consistent with the terminology in the draft Bill. Reflecting Recommendation 13.2 of the TLRI Final Report, if the Act is to continue to apply to children, the draft Bill should provide separate guiding principles for decisions involving children, providing for the 'best interests' of the child as being the paramount consideration. The 'best interests' of the child principle should be retained in the principal Act as it applies to children and young people with impaired decision-making ability.

Medical Research

Finally, I note the draft Bill proposes inclusion of Part 6A – Medical Research. This Part would apply to the conduct of medical research on an adult with impaired decision-making ability in respect of decisions relating to the conduct of that medical research. I understand some stakeholders have questioned, in the context of consultation on the draft Bill, whether this Part should also apply to children. Noting my introductory comments above, I suggest this matter be the subject of separate review and consideration in the context of the development of specific legislation governing consent to medical treatment for children in Tasmania generally.

Conclusion

I thank you for the opportunity to comment on this draft Bill. I am available to discuss my comments if that would be of assistance.

Yours sincerely

Leanne McLean

Commissioner for Children and Young People

cc *Hon Elise Archer MP, Attorney-General and Minister for Justice, Minister for Corrections and Rehabilitation*

cc *Hon Roger Jaensch MP, Minister for Education, Children and Youth*