

COMMUNITY LEGAL CENTRES TASMANIA

18 November 2022

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001

via email: legislation.development@justice.tas.gov.au

To the Department of Justice,

Re: *Guardianship and Administration Amendment Bill 2022*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to respond to the *Guardianship and Administration Amendment Bill 2022* ('the Bill').¹

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

Australia's ratification of the United Nations *Convention on the Rights of Persons with Disabilities* ('the Convention') in 2008 has seen greater community recognition of the human rights of persons with disabilities. Relevantly, the Convention has been interpreted to mean that a person's will and preferences must form the basis of a decision and must only be overridden to prevent harm.² The reforms set out in the Bill are welcomed because they broadly align with the Convention's human rights focus. However, we believe that the Bill can be strengthened by formally recognising a legislated supported decision-making scheme, incorporating a decision-making process and providing improved accountability mechanisms.

- ***Meaning of promote the personal and social wellbeing of a person***

The definition of "personal and social wellbeing of a person" set out in clause 7 of the Bill is closely modelled on section 4 of the *Victorian Guardianship and Administration Act 2019* (Vic). The one exception is the Bill's failure to explicitly recognise companion animals.³

¹ CLC Tas would like to acknowledge those persons and organisations who gave freely of their time in assisting with our submission.

² Australian Law Reform Commission (ALRC), *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, Report 124 (2014) Recommendation 3-3(2).

³ According to the RSPCA companion animals "provide emotional support for people with a diagnosed mental health condition in the home setting but who may not have been specifically trained and/or

Whilst it is arguable that “recognising the importance to the person of any supports that are required to exercise the person’s autonomy” would include a person’s companion animal, for clarity we recommend that clause 7 of the Bill is amended to explicitly recognise companion animals.⁴ As the Victorian provision observes, the personal and social wellbeing of a person may be promoted by “recognising the importance to the person of any companion animal the person has and having regard to the benefits that may be obtained from the person having any companion animal”.⁵

- ***Principles to be observed***

Section 6 of the of the *Guardianship and Administration Act 1995* (Tas)(‘the Act’) sets out three core principles which are to guide the functions, powers and duties imposed under the Act, namely that:

- decisions made are the least restrictive of a person’s freedom of decision and action; and
- take the person’s wishes into account and; and
- are in their best interests.

The importance of the principles as the Tasmania Law Reform Institute (TLRI) has emphasised is the recognition that they “provide the basis upon which decisions are made and actions taken under the Act”.⁶ In practice, taking into account a person’s wishes can be overridden if the Guardian or Administrator determines that it is not in the person’s best interests.⁷ For example, a 2021 review of the Public Trustee by Damian Bugg AM KC found that statutory duties such as empowering the represented person to become capable of administering their own estate and acting in consultation with the represented person were often ignored.⁸

As well, both the Guardianship and Administration Board and the Supreme Court of Tasmania have commented on the failure of both Guardians and Administrators to act in the person’s best interests by failing to consult or ignoring the person’s decision-making. In *SBE (Review of Administration)* for example the Guardianship and Administration Board noted its concern that the Administrator had done the bare minimum when it had a statutory obligation to consult with the represented person about improving his quality of life:⁹

The Board was concerned about the lack of evidence about how the Public Trustee is discharging its obligations under section 57 of the Act. The Public Trustee is required to consider and act in the best interests of SBE at all times, and not just when its account manager hears from a support person for SBE.

certified”. As found at RSPCA, ‘What is an assistance animal?’. As found at <https://kb.rspca.org.au/knowledge-base/what-is-an-assistance-animal/> (accessed 15 November 2022).

⁴ See also clause 8.

⁵ Section 4(e) of the *Guardianship and Administration Act 2019* (Vic). Also see section 9(1)(d) of the *Guardianship and Administration Act 2019* (Vic).

⁶ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995* (Tas) (Final Report No 26: December 2018) at 14.

⁷ Sections 27 and 57 of the *Guardianship and Administration Act 1995* (Tas).

⁸ Damian Bugg AM QC, *Independent Review of the Public Trustee Tasmania* (November 2021) at 23.

⁹ *SBE (Review of Administration)* [2021] TASGAB 29 at paras. 33-34.

Acting in SBE's best interests not only includes ensuring that he receives maximum income entitlements, that assets are prudently managed and debts and expenses are responsibly controlled. There is also an obligation to actively ensure income and accumulated funds are being expended to improve SBE's quality and enjoyment of life. It appears on the limited available evidence that SBE's basic needs are being met but no more, and instead funds are being allowed to accumulate by default.

A similar finding was made in the later case of *TKH (Advice and Direction)* where the Guardianship and Administration Board observed:¹⁰

If there is no direct communication between the Public Trustee's account manager and the Represented Person or if that is not possible a support person, family member or advocate for the Represented Person, it is difficult to see how the Public Trustee could be discharging its obligation to act in consultation with the Represented Person and to take his wishes into account in relation to the administration of his estate, and thereby acting in his best interests. The Public Trustee should instigate regular communication with the Represented Person (or his representative) that would allow the Public Trustee to understand the Represented Person's wishes, particularly as to expenditure that might improve his quality of life.

In the Supreme Court decision of *J v Guardianship and Administration Board and Tasmanian Health Service* it was observed by Wood J:¹¹

Giving full effect to the principles in s6, I reject the submission that poor decisions cannot be taken into account, or must necessarily be given limited weight in determining whether someone has a disability and the extent of their decision-making capacity. Each case will turn on its own facts. Restriction of an individual's cognitive ability may, depending on the case, be revealed by the types of decisions that they have made. However, it is important to bear in mind that ultimately the issue is ability and capacity to make reasonable judgements, rather than the judgements themselves.

The impact of the discretion provided to Guardians and Administrators in section 6 of the Act to override a person's wishes on the basis that the decision is not in their best interests, demonstrates that reform is necessary. The introduction of a will and preference model of decision-making in the Bill is strongly supported because it "recognises the importance of offering support to people who require support to make decisions affecting their lives",¹² and also aligns with article 12 of the *Convention on the Rights of Persons with Disabilities* and recent legislative reforms in Victoria and Queensland.¹³

- *Explicit recognition of decision-making ability*

We support TasCOSS's recommendation that the clause 8 principles commence with the overarching recognition of a person's right to make decisions that affect their lives and to have those decisions respected. As TasCOSS have noted, this would align with the

¹⁰ *TKH (Advice and Direction)* [2021] TASGAB 50 at para. 10.

¹¹ *J v Guardianship and Administration Board and Tasmanian Health Service* [2019] TASSC 15 at [42].

¹² Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995* (Tas) (Final Report No 26: December 2018) at 14.

¹³ Sections 8-9 of the *Guardianship and Administration Act 2019* (Vic); section 11B(9) of the *Guardianship and Administration Act 2000* (Qld).

Australian Law Reform Commission's recommendation that all Australian jurisdictions enact laws consistent with the National Decision-Making Principles.¹⁴ Queensland's *Guardianship and Administration Act 2000* for example explicitly recognises "an adult's right to make decisions is fundamental to the adult's inherent dignity".¹⁵

- ***Least restrictive of a person's freedom of decision and action***

Whilst clause 8 of the Bill requires that the Act be applied in a manner "least restrictive of a person's freedom of decision and action" the process for determining decision-making ability or whether an order is required could be clarified. The need for clarification is particularly important given that the principle is already legislatively mandated but has been repeatedly ignored in the past.¹⁶

We endorse Advocacy Tasmania's recommendation that an "all reasonable steps have been exhausted" safeguard should be introduced; a recommendation also endorsed by TasCOSS. We also note that the Office of the Public Guardian appeared to recommend a formalised process in its submission to the TLRI.¹⁷

Prior to making an application to the Board for appointment of a guardian or administrator, the applicant should be required to thoroughly explore whether all supported decision-making options have been attempted. There should be a requirement for the applicant to document the process and outcome of such investigations. As noted, the Board should only proceed to make an appointment of a substitute decision-maker if it is satisfied that all other reasonable options have been tried and failed. The OPG considers such requirements would be a significant move towards recognition of informal supports, and much stronger and more concrete than the current Act's requirement that the principle of the least restrictive alternative is observed.

The Tasmanian Law Reform Institute recommended the incorporation of a 'Decision-Making Process' into the Act, a separate section that would outline when and how representatives and the Board are to make decisions. The TLRI emphasised that including a decision-making process would "provide ease of reference, ensures consistency and avoids unnecessary duplication".¹⁸ As a result, the TLRI recommended the following process be explicitly included in the Act:

That the Decision-Making Process require the Board and representatives (the decision-maker) to adopt the following process when making any decision on behalf of a person who does not have decision-making ability to make their own decision about the matter:

1. *First, the decision-maker must consider whether there is a need for a decision. There is no need for them to make a decision where the person has made a binding*

¹⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws - Final Report* (August 2014) at 24.

¹⁵ Section 5 of the *Guardianship and Administration Act 2000* (Qld). See also section 5(2) of the *Guardianship and Administration Act 2019* (Vic) which provides that "a person is presumed to have decision-making capacity unless there is evidence to the contrary".

¹⁶ See, for example sections 6, 20(5), 51(4) of the *Guardianship and Administration Act 1995* (Tas).

¹⁷ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995* (Tas) (Final Report No 26: December 2018) at 121.

¹⁸ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995* (Tas) (Final Report No 26: December 2018) at 182.

direction in advance that applies to the circumstances, including in a valid advance care directive.

2. *Second, the decision-maker must consider whether the person is likely to become able to make their own decision, and if so, when. If the decision-maker considers that a decision can be delayed until the person gains the ability to make the decision, without that delay causing harm, then the decision should be delayed.*
3. *If the decision-maker considers that a decision needs to be made, then the person's views, wishes and preferences must be given all practical and appropriate effect. A person may communicate their views, wishes and preferences by any means.*
4. *Where the person's views, wishes, and preferences cannot be determined, the decision-maker must give all practical and appropriate effect to what the decision-maker reasonably believes the person's likely views, wishes and preferences are, based on all the information available, including by consulting with family, carers and other significant people in the person's life that the decision-maker reasonably believes the person would want to be consulted.*
5. *A decision-maker may not give all practical and appropriate effect to the person's views, wishes and preferences only where:*
 - (a) *it is necessary to prevent unacceptable harm to the person or another person; or*
 - (b) *it would be unlawful.*

In any of these cases, a representative must adopt Step 6 whilst continuing to give as much effect as possible to the person's views, wishes and preference.

6. *If it is not possible to determine or apply the person's views, wishes and preferences, a decision-maker must act to promote and uphold the person's personal and social wellbeing and act in a way least restrictive of their human rights.*

We strongly recommend the adoption of the TLRI's decision-making process into the Act.

- ***A legislated supported decision-making scheme***

Supported decision-making describes decision-making where a person makes their own decisions but with support. Support could include assisting a person to obtain or explain information, discuss options or providing advice in relation to personal, financial and legal matters or supporting a person to communicate or implement a decision. Supported decision-making is recognised in article 12(3) of the Convention which emphasises that support must be available for persons to make decisions about matters affecting their lives. In other words, the focus of the Act should be on recognising a person's ability to make decisions with support as well as the need to make available the supports necessary for a person to make their own decision. Whilst there is some reference in the Bill to supported decision-making,¹⁹ we are concerned by the omission of a legislated supported decision-making scheme. As the Tasmania Law Reform Institute has observed, the importance of a formal, legislated supported decision-making scheme is its formal recognition of an 'in between' between a person making their own decision and the making of a representative decision.²⁰ The other advantages according to the TLRI is that it provides a less restrictive alternative to the appointment of a representative and

¹⁹ See for example, sections 7(a) and 10(6)(n), 10(7) of the Bill.

²⁰ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995* (Tas) (Final Report No 26: December 2018) at 123.

ensures that representative decision-making occurs as a last resort.²¹ We strongly believe that Part 4 of the Victorian *Guardianship and Administrative Act 2019* should be used as a template for the inclusion of a legislated supported decision-making scheme in the Bill.

- **Compensation**

We strongly believe that the Tribunal should have the power to award compensation where the guardian or administrator has acted outside their powers and caused loss. This has been recommended by the Tasmania Law Reform Institute,²² and the Australian Law Reform Commission who observed that providing the Tribunal with jurisdiction would act as a deterrent against the misuse of funds as well as providing a “just, quick and economical resolution of proceedings with a more flexible and informal approach to procedural and evidentiary matters than a court”.²³ A model that could be adopted is section 181 of the *Guardianship and Administration Act 2019* (Vic):

181 Compensation for acts of guardian or administrator

(1) The Supreme Court or VCAT may order a guardian or administrator to compensate the represented person or missing person for whom the guardian or administrator is appointed for a loss caused by the guardian or administrator contravening this Act when acting as guardian or administrator.

(2) Subsection (1) applies even if—

(a) the guardian or administrator is convicted of an offence in relation to the guardian's or administrator's contravention; or

(b) the represented person or missing person has died, in which case compensation is payable to the estate of the represented person or missing person; or

(c) the order appointing the guardian or administrator is no longer in force or is revoked or set aside.

- **Mediation**

Amongst the many functions and powers of the Public Guardian is the promotion and protection of the rights of Tasmanians with disability.²⁴ However, the Public Guardian also acts as a guardian, a challenging role as was noted in the most recent *Office of the Public Guardian Annual Report*:

Guardianship practice is at the most complex end of the social and statutory service spectrum and deals with not only the most vulnerable Tasmanians but the most complex social issues including acute mental illness, behavioural disturbance, and responding to situations of significant abuse, neglect and exploitation.

²¹ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995* (Tas) (Final Report No 26: December 2018) at 130.

²² Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995* (Tas) (Final Report No 26: December 2018) at 256.

²³ Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Final Report 131 (May 2017) at 179.

²⁴ Section 15 of the *Guardianship and Administration Act 1995* (Tas).

With the Public Guardian making decisions on behalf of 318 Tasmanians on where they live and what care and services they receive,²⁵ we do not believe it is appropriate that they are appointed as mediator as has been proposed in section 70 of the Bill. In circumstances where the Public Guardian is a party to the dispute, there would be a conflict of interest if they were also to act as a mediator in an attempt to resolve the dispute. We are also concerned that Public Guardian staff may not have recognised training and qualifications as mediators. We strongly believe that mediation should be provided by mediators independent of the Public Guardian and with recognised alternative dispute resolution training and qualifications.

- **Resourcing**

The modernising of the Act through legislative reform must be accompanied by appropriate resourcing to ensure that people have access to effective support to realise their rights and make decisions. First and foremost, we strongly endorse the Tasmanian Law Reform Institute recommendation of a public education campaign which will ensure that all members of the Tasmanian community better understand the rights of people with disability. This will in turn avoid breaches of the Act and reduce the burden on advocacy services and the Tribunal.²⁶

As well, the TLRI emphasised the importance of ensuring that culturally appropriate decision-making supports are available to all members of the community, an important policy in the Tasmanian context with many Tasmanians living in regional, rural and remote areas. As the TLRI observed “decision-making supports must be able to be utilised at low or no cost to ensure that an individual’s financial position does not preclude equal access to support”.²⁷

Decision-making support must also include the option of representation. The importance of representation is that it can act as a safeguard that both protects and promotes a person’s will and preference. Whilst many represented persons will not want or need representation, it must be freely available. The shift from a best-interests to a will and preference model of decision making, will mean that in many cases decision makers will be assisted by representation who can speak to the wishes and preferences of the represented person. A significant increase in funding to representation services will be necessary given the paucity currently being provided, with the most recent Tasmanian Civil and Administrative Tribunal *Annual Report* noting that representation was only provided in 3.6 per cent of cases in 2021-22.²⁸

As well, whilst the Tasmanian Civil and Administrative Tribunal has the power to appoint a person to represent a party,²⁹ we strongly believe that there are circumstances

²⁵ Office of the Public Guardian Tasmania, *Annual Report 2019-20* (September 2020) at 6. As found at https://www.publicguardian.tas.gov.au/_data/assets/pdf_file/0011/630011/OPG-Annual-Report-19-20-Accessible-Version.pdf (accessed 12 November 2022).

²⁶ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26: December 2018) at 428.

²⁷ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26: December 2018) at 122.

²⁸ Tasmanian Civil and Administrative Annual Report 2021-22. As found at <https://tascat.tas.gov.au/publications/annual-reports/annual-report-2021-2022> (Accessed 13 November 2022).

²⁹ Section 98(4)(b) of the *Tasmanian Civil and Administrative Tribunal Act 2000* (Tas).

warranting the appointment of representation and this should be expressly set out in the Act. We strongly support the TLRI's recommendation that the Act contain an equivalent provision to that found formerly in the *Mental Health Act 2013* (Tas); namely that the Tribunal have the power to appoint representation "if it considers that the patient is, or may be, personally incapable of making such arrangements and is not, or may not be, receiving useful assistance elsewhere in that regard".³⁰

Finally, it is imperative that all organisations directly involved in administering the Act are provided with the resourcing they need to effectively perform their functions, duties and powers. These organisations include the Tasmanian Civil and Administrative Tribunal, the Office of the Public Guardian, the Public Trustee, community legal centres and Legal Aid Tasmania. Two years ago, the President of the Guardianship and Administrative Board emphasised that the number of applications would continue to grow based on modelling provided by the Department of Justice:³¹

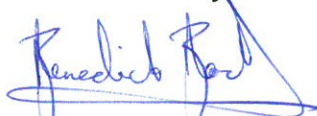
The majority of applications before the Board involve people over 65 years of age, with the most common disability being dementia. The modelling showed the predicted growth in application numbers will continue due to increased dementia and mental health disabilities, and an ageing population. The modelling indicated the Board will require additional funding for hearings and additional administrative staff to meet its statutory functions. The financial and human resource risk associated with the increased demand on the Board was highlighted. The human resource risks currently could not be clearer.

- **Statement of Reasons**

There is no requirement in the Act that represented persons receive a statement of reasons explaining the Tribunal's decision. In practice, both attendee and non-attendee represented persons receive a copy of the Tribunal's order and informed that they have a right - within 21 days of the Tribunal's decision - to apply for a written statement of reasons. We strongly support written statement of reasons being provided to the represented person as a matter of course. In our opinion, this will provide greater accountability and transparency of decision-making, meaning that represented persons, families, friends and advocates are aware of how and why decisions were arrived at.

If you have any queries, or would like to discuss our submission further, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

³⁰ Clause 7(4) of Schedule 4, Part 2 of the *Mental Health Act 2013* (Tas).

³¹ Guardianship and Administration Board *Annual Report 2019-20* at 3. As found at https://www.tascat.tas.gov.au/_data/assets/pdf_file/0006/597084/FINAL-Annual-Report-2019-20-25-September-2020.pdf (accessed 13 November 2022).