national RIGHT TO LIFE committee, inc.
1446 Duke Street | Alexandria, Virginia 22314
(202) 626-8800 (voice) | www.nrlc.org | nrlc@nrlc.org

July 11, 2023

To: Members of the Uniform Law Commission
From: Robert Powell Center for Medical Ethics at National Right to Life
Re: Potential revision of the Uniform Determination of Death Act (UDDA)

Founded in 1968, National Right to Life is the nation's oldest and largest pro-life organization. National Right to Life is the federation of 50 state right-to-life affiliates and more than 3,000 local chapters. For over 50 years, National Right to Life has closely collaborated with our state affiliates on thousands of pieces of legislation and has long taken a position on issues related to the denial of life-saving medical treatment and issues related to the medically vulnerable.

We have been closely observing the deliberations of the Uniform Law Commission regarding the Uniform Determination of Death Act (UDDA). National Right to Life strongly opposes the language in Section 3, Option 2 of the proposed revision and, if adopted, would face significant opposition from our state network across the nation.

The proposed changes in Section 3, Option 2 read as follows:

> Section 3. Determination of Death
> (a) An individual is dead if the individual has sustained: (1) permanent cessation of circulatory and respiratory functions; or (2) permanent (A) coma, (B) cessation of spontaneous respiratory functions, and (C) loss of brainstem reflexes.
> (b) A determination of death under subsection (2) must be made in accordance with accepted medical standards.

These proposed changes would permit an unacceptable array of subjective judgments in determining death, permanently changing the Uniform Determination of Death Act. The changes would transform determinations of death from an objective biological standard (while currently imperfectly applied throughout the country) to a standard that is inappropriately subjective and reliant on potentially discriminatory quality-of-life judgments.

Even under the current UDDA definition there is already undesirable variability in the standards being employed by different doctors and health care facilities for the determination of brain death. The proposed changes would exacerbate an already contentious issue.

Under the current, more objective biological standards, there are an unacceptable number of publicly reported instances in which brain death determinations turned out to be erroneous. Further, as it relates to uniformity of determinations, one recent study from Neurology concluded:

> There is substantial variability in how physicians approach the adult brain death examination, but our survey also identified lack of training in nearly 1 in 4 academic physicians. A formal training course in the principles and proper technique of the brain

> death examination by physicians with expert knowledge of this clinical assessment is recommended.[1]

It is vitally important that physicians and health care facilities abide by the best available standards for determination of brain death and those who are to make such determinations are made fully aware of and properly trained in the application of those standards. The proposed changes will likely result in the inappropriate inclusion of value judgments of the treating medical team.

Of significant concern is replacing the term "irreversible" with "permanent."A loss of a function is "irreversible" if that function cannot possibly be regained spontaneously or restored through medical intervention. This is an appropriate standard. In contrast, a loss of function can be said to be "permanent" if that function is not either spontaneously restarted or restored on its own or is not restarted or restored *because of a lack of medical intervention*. If medical personnel do not attempt resuscitation or restorative measures, then a condition is "permanent." This new definition will lead to more overly-quick judgments from medical staff and steer patients to receive less care—or no care at all—leading to a premature death.

In conjunction, the proposed changes replace the current "irreversible cessation of all functions of the entire brain, including the brain stem" with "permanent coma, permanent cessation of spontaneous respiratory functions, and permanent loss of brainstem reflexes…"The first problem is the large number of patients whose brain injuries are misdiagnosed, and the second is that these improper diagnoses lead to patients who could greatly benefit from therapies being denied on the mistaken basis that they would not work. The proposed new criteria will invite more, not less of these quick diagnoses.

According to the 2019 report from the National Council on Disability:

> When physicians diagnose PVS or "brain death," sometimes they rush to make this determination and do not properly follow the AAN well-established and widely respected guidelines. In too many cases, people who have sustained severe brain injuries are not given adequate time to heal and recover before their medical team moves to withdraw life sustaining treatment. Indeed, one retrospective study found up to 43 percent of patients are misdiagnosed with PVS. Other studies have increasingly found that late-stage recovery from disorders of consciousness is more common than once understood in the medical community….Considering the irreversible consequences of withdrawing life-sustaining treatment, such determinations should not be made in haste. People experiencing unconsciousness should be given the proper time and support that they need to recover…Individuals should not be robbed of their chance to recover. [internal citations omitted][2]

National Right to Life urges you to reject the proposed changes to the UDDA. The determination of death should be one where the condition is irreversible and a scientific judgment that is not made in haste.

Should you have any questions, please contact Jennifer Popik, J.D., director of the Robert Powell Center for Medical Ethics at (202) 378-8863, or via e-mail at jpopik@nrlc.org. Thank you for your consideration of NRLC's position on this important matter.

[1]Braksick, Sherri A., et al. "Variability in reported physician practices for brain death determination." *Neurology* 92.9 (2019): e888-e894.
[2]National Council on Disability. "Medical futility and disability bias: part of the bioethics and disability series." (2019). https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf