

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

**GUARDIANSHIP AND MANAGEMENT OF PROPERTY AMENDMENT BILL**

**2001**

**EXPLANATORY MEMORANDUM**

**Circulated by authority of  
BILL STEFANIAK MLA  
ATTORNEY-GENERAL**

# GUARDIANSHIP AND MANAGEMENT OF PROPERTY AMENDMENT BILL

2001

## OUTLINE

The *ACT Guardianship and Management of Property Act 1991*, which this Bill amends, provides for those who are unable to make appropriately reasoned decisions about their welfare or personal affairs. It establishes the Guardianship and Management of Property Tribunal, which can, for someone for whom an application is made (referred to in the Act as the 'represented person') appoint-

- a *guardian*, to make decisions about matters involving day-to-day living and medical treatment on the person's behalf; or
- a *manager*, to manage all or some of the person's property, and to enter into transactions on behalf of the person for his or her benefit.

Section 8 of the Act sets out the current criteria for appointment of managers. These are that, because of a physical, mental, psychological or intellectual condition the person is legally incompetent to enter into a transaction relating to the person's property, and either—

- “ (i) it is likely that the question whether the person should enter into the transaction will arise; or
- (ii) it is in the person's interests to preserve the person's property by preventing a purported disposition of the property;”

In contrast, section 7 of the Act sets out the grounds for appointment of a guardian. These are that, because of a physical, mental, psychological or intellectual condition the person's health or welfare is, or is likely to be, substantially at risk because he or she is unable—

- “(i) to make reasonable judgments about matters relating to his or her health or welfare; or
- (ii) to do anything necessary for his or her health or welfare.”

This Bill addresses two issues that arise from the Act.

### 1. CRITERIA FOR DECISION MAKING

The Act provides that in making decisions under the Act about people, their wishes should receive paramount consideration, and their welfare and interests should be appropriately protected. This creates conflict between the person's wishes and their welfare. Giving effect to the former may endanger an individual's personal and financial welfare.

This Bill clarifies the principles for decision making to be observed by those acting under the *Guardianship and Management of Property Act 1991*. For the purpose of the Act, the person's interests would include (but not be limited to) the preservation of his or her safety, prevention of physical and mental deterioration, the ability for self-care and to live in the general community and participate in community activities, to maintain the non-harmful aspects of the person's preferred lifestyle, the promotion of financial security, and prevention of dissipation of financial resources or destitution.

Decisions are to be made according to the person's wishes, unless to do so would significantly adversely affect his or her interests, which are defined in the Act. Where the person's wishes cannot be determined, then decisions are to be made in accordance with his or her interests. Autonomy, self-care and community participation are the basis for making and applying decisions. These are called the **decision-making principles**.

## **2. APPOINTMENT OF GUARDIAN/MANAGER**

The Act establishes different tests for the appointment of a guardian and the appointment of a manager. This creates potential difficulties in protecting such people from destitution and need.

This Bill provides similar criteria for the appointment of both guardians and managers, based on the represented person's decision-making capacity, rather than on him or her having a particular condition. Appointment of a guardian or manager may be made where the Guardianship and Management of Property Tribunal is satisfied that a person has impaired decision-making capacity in relation to a matter relating to his or her health or welfare (for a guardian), or financial matters (for a manager) and, while that incapacity endures. Additionally, the person must be likely to do something in relation to that matter that involves, or is likely to involve, unreasonable risk to his or her health, welfare or financial well-being, and without the appointment the person's needs will not be met or the person's interests will be significantly adversely affected.

The impaired decision-making capacity may be due to a physical, mental, psychological or intellectual condition or state, which need not be a diagnosable illness as such. However, the limits on findings of decision-making impairment as currently set out in section 5 of the Act are retained. This provides that a person shall not be taken to have a physical, mental, psychological or intellectual condition merely because the person—

- (a) is eccentric; or
- (b) does or does not express a particular political or religious opinion; or
- (c) is of a particular sexual orientation or expresses a particular sexual preference; or
- (d) engages or has engaged in illegal or immoral conduct; or

- (e) takes or has taken drugs, including alcohol (but any effects of a drug may be taken into account).

**Other Amendments**

Other amendments to the Act are made, but these are matters of formality, and do not make any substantive changes.

**Revenue/Cost Implications:** This Bill has no revenue or cost implications.

## Formal Clauses

**Clauses 1 2 and 3** are formal requirements. They refer to the short title of the Bill, commencement and definition of the Principle Act. The Bill commences on the day it is notified in the Gazette.

### Part 1A Important concepts and principles

**Section 4: Substitution - What are a person's interests?** The definitions set out in section 4 are transferred to a Dictionary at the end of the Act and a definition of 'person's interests' inserted. A person's interests include:

- (a) protection from physical or mental harm and prevention of physical or mental deterioration;
- (b) the ability to look after himself or herself, live in the general community, take part in community activities and maintain the non-harmful aspects of his or her preferred lifestyle;
- (c) promotion of financial security, and prevention of the wasting of financial resources or destitution.

### Section 5 – Substitution: Principles to be observed by decision-makers

This section currently sets out limits on findings of disability, which are moved to become section 6A. The substituted section introduces principles to be observed by those making a decision in accordance with the Act (*decision-makers*) in relation to a person with impaired decision-making ability (*protected person*). The principles provide that:

- decisions must be made according to the protected person's wishes, insofar as they can be determined. This does not apply, however, if doing this is likely to significantly adversely affect his or her interests;
- if giving effect to the protected person's wishes is likely to significantly adversely affect the person's interests the decision-maker must follow the protected person's wishes as far as possible without significantly adversely affecting the protected person's interests;
- if the protected person's wishes cannot be given effect to at all—the interests of the protected person must be promoted;
- the protected person's life (including the person's lifestyle) must be interfered with to the smallest extent necessary;
- the protected person must be encouraged to look after himself or herself as far as possible and encouraged to live in the general community, and take part in community activities, as far as possible.

## **Section 6: Substitution - When does someone have impaired decision-making ability?**

The current section 6 "Jurisdiction of the Supreme Court not affected" becomes section 3, and is substituted by a provision that a person suffers from impaired decision-making ability if his or her decision-making ability is impaired because of a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness.

## **Amendment of Section 7: Appointment and powers of guardians and managers**

The Act currently applies different criteria for the appointment of guardians. It is intended to provide similar criteria for the appointment of both guardians and managers, based on the represented person's decision-making capacity, rather than on him or her having a particular condition.

Section 7 is amended to provide for appointment of a guardian if the Tribunal is satisfied that, in relation to a matter relating to his or her health or welfare:

- the represented person has impaired decision-making ability; and
- during this time, a decision is likely to be required about that matter, or the person is likely to do something that involves, or is likely to involve, unreasonable risk to his or her health, welfare or property; and
- unless a guardian is appointed the person's needs will not be met, or the person's interests will be significantly adversely affected.

The Tribunal may provide the guardian with powers that it determines are necessary or convenient to make decisions for the person in accordance with the decision-making principles. However, the powers that may be given to a guardian are restricted under section 7B.

The new section 7(3) lists the powers that may be given to a person's guardian, which remain the same as in current section 7(2). These include the power:

- (a) to decide where and with whom the person is to live;
- (b) to decide what education or training the person is to receive;
- (c) to decide whether the person is to be allowed to work;
- (d) if the person is to be allowed to work—to decide the nature of the work, the place of employment and the employer;
- (e) to give for the person a consent required for a medical procedure or other treatment (other than a prescribed medical procedure);
- (f) to institute or maintain legal proceedings for or in the name of the person.

The amendments also rationalise the subsections of section 7 and other provisions by making them separate sections, without changing their meaning or effect.

#### **New section 7A: Appointment of guardians under direction**

The current section 7(5) is moved to form a new section 7A. That section provides that if the Supreme Court gives a direction under the *Crimes Act 1900*, section 428J (2A) (Nature and conduct of a special hearing), the Tribunal must appoint a guardian for the accused with power to make an election mentioned in that section.

#### **New section 7B: Restriction on powers of guardians**

The current section 7(3) is moved to form a new section 7B. The powers that may be given to a person's guardian do not include the power to discipline the person or the power to do any of the following things for the person:

- (a) vote in an election;
- (b) make a will or other testamentary instrument;
- (c) consent to the adoption of a child;
- (d) give a consent in relation to a marriage;
- (e) give a consent required for a prescribed medical procedure for the person.

#### **Amended section 8: Appointment and powers of managers**

This section applies the same criteria to the appointment of managers as those applying to the appointment of a guardian, where decision-making involves financial or property matters. Thus section 8 is amended to provide for appointment of a guardian if the Tribunal is satisfied that, in relation to a matter relating to his or her property:

- the represented person has impaired decision-making ability; and
- during this time, a decision is likely to be required or the person is likely to do something that involves, or is likely to involve, unreasonable risk to his or her health, welfare or property; and
- unless a guardian is appointed the person's needs will not be met, or the person's interests will be significantly adversely affected.

The Tribunal may provide the manager with powers that it determines are necessary or convenient to make decisions for the person in accordance with the decision-making principles. The powers that may be given to a person's manager are the powers that the person would have if the person were legally competent to exercise powers in relation to the person's property.

### **New section 8A: Restriction on power to appoint a manager outside the ACT**

The current section 8(3) becomes the new section 8A. This provides that if the protected person lives outside the ACT, the Tribunal may only appoint a manager for property in the ACT if it is impracticable for a manager to be appointed in the other jurisdiction. An order appointing a manager for the property under the law of the other jurisdiction cannot be registered under section 12 (Recognition of interstate etc guardians and managers).

### **New section 8B: May a guardian or manager be appointed for a child?**

The current sections 7(4) and 8(4) are combined in a new section 8B. Whilst the Act does not provide for the appointment of guardians or managers for children (those under 18), this section allows the appointment of a manager for a minor in anticipation of him or her turning 18 years. The appointment does not take effect until the represented person reaches majority.

**Amendment of Section 10(3):** This subsection is reworded but otherwise unchanged.

### **Amendment of Section 11: Powers to be least restrictive**

Section 11 limits restriction of the represented person to the least amount necessary. A note is inserted that states that the guardian or manager should also exercise the powers in accordance with the decision-making principles (see section 5).

### **Substitution: s.14 Restrictions on manager about property**

Because Decision-Making Principles are established and must be followed by all those who make decisions under the Act, subsections (1), (2) and (3) are deleted and subsection (4) recast but unchanged in meaning.

### **Schedule 1 Amendments**

These amendments are minor, changing the style and presentation of some sections of the Act, to establish consistency with legislation generally. Section 73 is substantially reworded and split into 2 sections, to bringing it into line with general standards of responsibility of corporations. There is no new policy development in these amendments.