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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

**GUARDIANSHIP AND MANAGEMENT OF PROPERTY
AMENDMENT BILL 2008**

EXPLANATORY STATEMENT

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GUARDIANSHIP AND MANAGEMENT OF PROPERTY AMENDMENT BILL 2008

Overview of the Bill

The Guardianship and Management of Property Amendment Bill 2008 (the Bill) amends the *Guardianship and Management of Property Act 1991* (the Guardianship legislation) and inserts a new part, 2A, to provide for a scheme of health attorneys.

Where a person who has impaired decision-making ability and has no appointed attorney or guardian is in need of medical treatment, but lacks the capacity to consent to that treatment, a health professional (that is, a doctor or dentist), may seek that consent from a health attorney.

Health attorneys may be domestic partners, carers, close relatives or close friends of the person who needs medical treatment, but in any event must be able to represent the views of the patient. The Bill provides for a process, in addition to existing processes, for obtaining consent to medical treatment on behalf of adults with impaired decision-making capacity (for instance, someone who is in a coma following a car accident). The Guardianship legislation refers to such a person as a “protected person”.

Under current ACT law, consent to medical treatment may be provided by an attorney appointed under an enduring power of attorney made by the protected person before he or she lost decision-making ability. If there is no attorney, a person may apply to the Guardianship and Management of Property Tribunal (the Tribunal) to be appointed as the person’s guardian, and can consent in that capacity. However legislation in other jurisdictions allows close relatives and friends to consent to medical treatment on behalf of the patient. The Bill removes this gap in ACT law and brings it in to line with other jurisdictions.

Under this Bill, a health attorney must have a close relationship with the protected person, and be able to represent their views. The Bill provides for an order of priority among health attorneys when all things are equal, but overall the most appropriate attorney will be that person best able to represent the protected person’s wishes.

Where a health professional believes on reasonable grounds that a person is a protected person and needs, or is likely to need, medical treatment, the health professional may seek consent from a health attorney whom he or she believes on reasonable grounds is best able to represent the views of the protected person. Both the health professional and health attorney must follow the decision-making principles under the Guardianship legislation. These principles are designed to ensure that the wishes and best interests of the protected person are considered and respected.

Under the Bill, a health professional is obliged to give specified information to a health attorney before seeking the required consent. Where the health attorney identified by the health professional refuses consent, or where other health attorneys object to that attorney's decision, the health professional must refer the matter to the Public Advocate. Where medical treatment based on a health attorney's consent continues over a period of 6 months, the health professional must inform the Public Advocate of the situation, in order to ensure ongoing independent review of the rights of the protected person.

The Bill provides that a health attorney acting in good faith will be protected from civil and criminal liability. It also provides protection for a health professional who relies on consent (or refusal) from a health attorney. Nevertheless, the health professional will not be relieved from liability if he or she would have been subject to liability had the protected person not had impaired decision-making ability, and had the medical treatment been carried out with that person's consent.

Human Rights Act 2004

Section 10(2) of the *Human Rights Act 2004* (the HR Act) provides that a person has a right not to be subjected to medical or scientific experimentation or treatment without his or her free consent.

Section 28 of the HR Act provides that human rights may be subject only to such reasonable limits set by Territory laws that can demonstrably be justified in a free and democratic society. According to section 28, in deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose;
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Enabling a health attorney to consent to medical treatment for a person is a limit on this right. A person with impaired decision-making ability is unable to give free consent to medical treatment, and therefore, substituted consent will be needed if they are to be afforded medical treatment. The health attorneys' scheme does not change the existing options for substituted consent to be obtained from an attorney appointed under an enduring power of attorney by the person, or by a guardian appointed for the person. This scheme is an additional, simple option in ordinary cases where there is no guardian or enduring power of attorney, and an appropriate health attorney is available.

The scheme is also be consistent with the general expectation in the community that where a person lacks capacity, a person close to him or her would be involved in decisions relating to provision of their medical treatment.

Domestic partners, carers, close relatives and close friends are likely to be those best placed to understand the wishes, views and feelings of the protected person. On this basis, the limitation placed on a person's right not to be given medical treatment without their free consent is the least restrictive possible.

The Bill provides that a health professional must give specified medical treatment options information to a health attorney, including information on decision-making principles; that the provision of information to a health attorney and the consent will need to be in an approved form (if a form is approved for that purpose); that where there is an objection to a health attorney or disagreement among health attorneys about consent, the health professional must refer the matter to the Public Advocate; that a health professional must inform the Public Advocate if the treatment on the basis of consent obtained from a health attorney continues for 6 months; and that the liability of a health professional is preserved in circumstances where the health professional would have been liable had the person had capacity and had consented to treatment.

The provision for an approved form for information and consent, and the provision for six- monthly reports to the Public Advocate, are consistent with the UN Convention on the Rights of Persons with a Disability. These safeguards, including the role of the Public Advocate, and the availability of recourse to the guardianship system, ensures that the limitation on the section 10(2) right is reasonable and is the least restrictive available.

Clause notes

Clause 1 Name of Act

This clause provides that the name of the Act is the *Guardianship and Management of Property Amendment Act 2008*.

Clause 2 Commencement

Clause 2 provides that the Act commences on a day to be fixed by the Minister by written notice.

Clause 3 Legislation amended

This clause states that the Act amends the *Guardianship and Management of Property Act 1991*. In this document, this legislation is also referred to as the Guardianship legislation.

Clause 4 Section 6A

This clause substitutes a new section 6A. This new section is the redrafting of current section 6A, with a change to refer to the new section 32A.

New section 6A Limits on finding impaired decision-making ability

The Guardianship legislation provides for the appointment of a guardian for a protected person, or of a manager to manage the person's property.

A protected person is a person with impaired decision-making ability (section 4(1), Guardianship legislation). Section 5 of the Guardianship legislation provides that a person has impaired decision-making ability "if the person's 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."

The new section 6A provides that a person should not be treated as a protected person merely because:

- (i) the person is eccentric; or
- (ii) he or she does not express a particular political or religious opinion; or
- (iii) the person is of a particular sexual orientation or expresses a particular sexual preference; or
- (iv) the person engages or has engaged in illegal or immoral conduct; or
- (v) the person takes or has taken drugs, including alcohol (but any effects of the drug may be taken into account).

Clause 5 Section 6A (as substituted)

Clause 5 relocates section 6A to part 1A.

Clause 6 New part 2A

This clause inserts part 2A.

Part 2 A Consent to medical treatment without formal representation

New section 32A Definitions – pt 2A

New section 32A defines the terms used in part 2A. A health professional means a doctor or a dentist. As provided in new section 32B, a child (i.e. a person under 18 years of age) and a person with impaired decision-making ability cannot be a health attorney.

New section 32B Who is a *health attorney* for a protected person?

New section 32B lists the following people in order of priority as health attorneys:

- (a) the protected person's domestic partner;
- (b) the protected person's carer;
- (c) a close relative or close friend of the protected person.

A child (that is, a person below the age of 18 years) or a person with impaired decision-making ability cannot be a health attorney. New section 32A defines the "domestic partner" and "close relative or close friend" as follows:

- a domestic partner is a domestic partner who is in a close and continuing relationship with the protected person;
- a close relative or close friend is a relative or someone else in a close personal relationship with the protected person who has frequent contact with the person and a personal interest in the person's welfare, and does not receive remuneration or reward for the contact.

"carer" is defined in new section 32C.

New section 32A defines "protected person" for the purpose of part 2A. The protected person is an adult who has impaired decision-making ability which makes him or her unable to consent to medical treatment where (a) there is no attorney appointed by him or her under an enduring power of attorney to consent, and (b) there is no guardian appointed with authority to consent.

'Medical treatment' includes a medical procedure or treatment, dental treatment, and a series of procedures or a course of treatments, but does not include a 'prescribed medical procedure' (see, new section 32A).

A prescribed medical procedure is defined in the Guardianship legislation to mean the following:

- (a) an abortion; or
- (b) reproductive sterilisation; or
- (c) a hysterectomy; or
- (d) a medical procedure concerned with contraception; or
- (e) removal of non-regenerative tissue for transplantation to the body of another living person; or
- (f) treatment for mental illness, electroconvulsive therapy or psychiatric surgery; or
- (g) any other medical or surgical procedure prescribed for this definition.

New section 32C Who is a carer for a protected person?

A person who is a carer is defined for the purposes of Part 2A. The two limbs of the definition are that a carer (a) is a person for the purposes of the Guardianship legislation generally, and (b) gives, or arranges for the giving of, care and support in a domestic context to the protected person and does not receive remuneration or reward for that service. A carer generally under the Guardianship legislation is defined in section 6 of the legislation. According to that definition, a person is a carer of someone (the dependant) where the dependant is dependent on the person for ongoing care and assistance; and the care is not a commercial arrangement or substantially commercial arrangement. For a carer to be a health attorney, the carer should also satisfy item (b) stated above. A carer may or may not receive a carer's pension.

However, a person giving, or arranging for the giving of, care and assistance to the protected person in a hospital, nursing home, group home, boarding-house, hostel or similar place, is not a carer for the purposes of the Act.

New section 32D Health attorney may give consent

New section 32D provides that if a health professional believes on reasonable grounds that a person is a protected person, and the person needs, or is likely to need, medical treatment, the health professional may ask for consent that health attorney whom the health professional believes on reasonable grounds is best able to represent the views of the protected person. Note 1 states that if the Chief Executive approves a form for consent under the new section 75A, then that form must be used.

If a health attorney gives consent after receiving information under new section 32G (Health professional must give information to health attorney), the health professional need not obtain any other consent for the medical treatment.

New section 32E Decision-making principles apply

New section 32E obliges both a health professional and a health attorney to follow legislative decision-making principles when making a decision under

part 2A. These principles are set out in section 4 of the Guardianship legislation and are as follows:

- (a) the protected person's wishes, as far as they can be worked out, must be given effect, unless making the decision in accordance with the wishes is likely to significantly adversely affect the protected person's interests;
- (b) if giving effect to the protected person's wishes is likely to significantly adversely affect the person's interests—the decision-maker must give effect to the protected person's wishes as far as possible without significantly adversely affecting the protected person's interests;
- (c) if the protected person's wishes cannot be given effect to at all—the interests of the protected person must be promoted;
- (d) the protected person's life (including the person's lifestyle) must be interfered with to the smallest extent necessary;
- (e) the protected person must be encouraged to look after himself or herself as far as possible; and
- (f) the protected person must be encouraged to live in the general community, and take part in community activities, as far as possible.

New section 32F Decision about health attorney

New section 32F provides that in considering whom is best able to represent the views of the protected person, the health professional must consider the priority order for health attorneys (provided in new section 32B) and may take into account any circumstance that the health professional believes on reasonable grounds is relevant and, in particular, how readily available is a particular health attorney. The health professional need not consider a health attorney whom the health professional believes on reasonable grounds is not a suitable person to give consent to medical treatment for the protected person. In such a case, the health professional must record the reasons for their belief that the health attorney is not suitable.

New section 32G Health professional must give information to health attorney

New section 32G lists the matters about which a health professional must give information to a health attorney. The purpose for this is to ensure that the decision to give or refuse consent is fully informed.

New section 32H Referring matters to the public advocate – refusal of consent

New section 32H provides that if the requested health attorney refuses to give consent for medical treatment for the protected person, the health professional must refer the matter to the Public Advocate. The Public Advocate must take no further action if he or she considers the refusal to be reasonable, or otherwise may apply to the Guardianship Tribunal for an order to be appointed as a guardian for the protected person.

New section 32I Referring matters to the public advocate – disagreement between health attorneys

New section 32I provides that if a health professional becomes aware before he or she obtains the consent of a selected health attorney that one or more of the other health attorneys objects to the giving of consent, the health professional must refer the matter to the Public Advocate, who may try to assist the health attorneys to reach agreement about consent, or apply to the Guardianship Tribunal to be appointed as a guardian for the protected person.

This provision clarifies that the health professional is not required to seek the views of other health attorneys for the protected person before obtaining consent from the health attorney who the health professional believes on reasonable grounds is best able to represent the views of the protected person.

New section 32J Notice to public advocate – long term treatment

There may be circumstances where a health attorney consents to a course of treatment on behalf of the protected person which continues for a lengthy period. Under this provision, if the treatment continues for more than six months, the treating health professional is required to inform the Public Advocate.

New section 32K Protection of health attorney from liability

New section 32J protects a health attorney from civil or criminal liability in relation to a decision made in good faith to consent or not consent to treatment for the protected person.

New section 32L Protection of health professional from liability

New section 32L protects a health professional from civil or criminal liability in relation to the health professional's reliance, in good faith, on consent given by a health attorney or the person the health professional believes on reasonable grounds is a health attorney.

New section 32M Preservation of liability

New section 32M provides that part 2A does not relieve a health professional of liability in relation to the provision of medical treatment if the health professional would have been subject to the liability had the protected person not had impaired decision-making ability and had consented to the treatment.

New section 32N Urgent medical treatment

New section 32N preserves a health professional's common law right to provide urgent medical treatment without consent.

Clause 7 Section 67 heading

Clause 7 substitutes the heading of section 67 with “Temporary appointments”. The current heading is “Emergency appointments”. Section 67 deals with temporary appointment of a guardian or manager, not with an emergency appointment.

Clause 8 New section 75A

Clause 8 inserts new section 75A.

New section 75A Approved forms

New section 75A provides that the Chief Executive may approve forms for the Guardianship legislation, and that if there is an approved form for a purpose that form must be used for that purpose. An approved form is a notifiable instrument.

Clause 9 Dictionary, definition of *carer*

Clause 8 clarifies that section 6 defines carer for the Guardianship legislation generally, and section 32C defines that term for part 2A (Consent to medical treatment without formal representation).

Clause 10 Dictionary, new definitions

Clause 10 inserts new definitions in the dictionary.