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

GUARDIANSHIP AND MANAGEMENT OF PROPERTY AMENDMENT BILL 2022

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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Attorney-General**

GUARDIANSHIP AND MANAGEMENT OF PROPERTY BILL 2022

The Bill **is not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

This Bill will amend the *Guardianship and Management of Property Act 1991* (GMP Act) to explicitly introduce the concept of supported decision-making as a consideration in decisions relating to the appointment of guardians and managers, and as a decision-making principle for guardians and managers, to encourage the use of supported decision-making where possible.

Supported decision-making is a framework within which a person with cognitive disability or impairment can be provided support to assist in making decisions, exercising their legal decision-making rights. It is based on the premise that all individuals, including persons with disabilities, have the right to make their own decisions and to receive the support they require to do so.

Supported decision-making is consistent with the United Nations Convention on the Rights of Persons with Disabilities which requires State parties to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities; and to promote respect for their inherent dignity.

A supported decision-making approach is also consistent with the right to equality before the law under the ACT *Human Rights Act 2004* (the HR Act).

An effective supported decision-making model requires both policy and programs that support a supported decision-making cultural shift and a supported decision-making legal framework.

The Bill will amend the GMP Act to require that, before making a guardianship or management order, ACT Civil and Administrative Tribunal (ACAT) consider whether a person is able to make their own decisions with available supports.

To complement this amendment, the Bill will also amend the GMP Act to include an additional supportive decision-making principle to require guardians and managers to provide or facilitate supports for a protected person to understand the decision to be made, to communicate their wishes and to participate in the decision-making process, as far as practicable. This would add to and enhance existing principles in the GMP Act which require a decision-maker to give effect to the person's wishes as far as possible without significantly adversely affecting the protected person's interests; and if that is not possible, to act in the person's interests.

CONSULTATION ON THE PROPOSED APPROACH

The Bill progresses the first stage of legislative reforms to supported decision making as part of commitments made by the government in the ACT Disability Justice Strategy 2019-2029 (*Disability Justice Strategy*). Specifically, Action 4.8 of the Disability Justice Strategy which commits to improvements to the ability of people with disability to exercise decision-making autonomy consistent with their human rights, rather than experiencing ongoing substitute decision-making arrangements.

During 2021 and early 2022, an informal supported decision-making steering group was formed which included representatives from government and advocacy agencies. This group was established to ensure a more coordinated approach to supported decision-making reforms and initiatives under the Disability Justice Strategy, and to test and develop models for reform.

Although supported decision-making is often considered by ACAT under the existing legislative framework, the consultation revealed that the lack of explicit requirements to consider supported decision-making can impact outcomes in guardianship and management applications. The steering group indicated there would be benefits in making the consideration of supported decision-making options explicit.

Consultation also indicated that financial institutions, health services and other service providers may refuse to give effect to a person's decisions unless a guardianship or management order is in place, as risk management and duty of care may be prioritised over a person's decision-making autonomy. Accordingly, this Bill retains ACAT's existing ability to make guardianship and management orders in circumstances where a guardianship or management order is the only practical way to ensure that the relevant decision(s) are able to be made and recognised.

Implementation of this first stage of reforms will be progressed through cross-directorate collaboration between the JACS and the CSD through the Disability Justice Strategy and will focus on training and updated resources for guardians and managers, utilising existing funding for the Disability Justice Strategy.

The next stage of more significant reforms will seek to address systemic issues and structural barriers including how institutions and service providers can reduce reliance on substitute decision-making. Addressing systemic issues is a commitment under the Disability Justice Strategy and will be the subject of further policy work and consultation.

CONSISTENCY WITH HUMAN RIGHTS

The Bill contains measures that engage and promote human rights protected under the HR Act as well as measures that may limit such rights.

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits provided in law.

Section 28 of the HR Act sets out the circumstances in which rights protected under the HR Act may be limited and provides that human rights may be subject only to

reasonable limits set by laws that can be demonstrably justified in a free and democratic society. The criteria for determining whether a limitation is reasonable are:

- a) The nature of the right affected
- b) The importance of the purpose of the limitation (the legitimate objective test)
- c) The nature and extent of the limitation
- d) The relationship between the limitation and its purpose (the rational connection test)
- e) Any less restrictive means of achieving the purpose (the proportionality test).

Rights engaged

The Bill engages and promotes the following rights under the HR Act

- Right to recognition and equality before the law (section 8)
- Right to fair hearing (section 21)

The Bill engages and may limit the following rights under the HR Act

- Right to recognition and equality before the law (section 8)
- Right to respect for family and children (section 11)
- Right to privacy (section 12)

Rights Promoted

Section 8 of the HR Act provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that everyone is equal before the law and entitled to the equal protection of the law without discrimination.

Section 8(1) of the HR Act protects the right to be legally recognised as a person – that is, as the subject of rights and obligations under law. For persons with disabilities, this right extends to equal recognition of legal capacity to act under the law (CRPD General Comment 1 [12]).

As noted above supported decision-making is a framework that enables a person with cognitive disability or impairment can be provided support to assist in making valid decisions, exercising their legal decision-making rights. The measures in the Bill that will include supported decision-making in the principles decisions provides a clear legislative basis and direction for guardians and property managers to promote supported decision-making in the exercise of their functions.

Section 21 of the HR Act – the right to fair hearing – is concerned with procedural fairness, and encompasses notions of equality in proceedings. The Bill engages and promotes the right to fair hearing by ensuring that in proceedings relating to guardianship and property management the ACAT will explicitly consider the

availability of supported decision-making and thus enhance the ability of people with disability to exercise decision-making autonomy consistent with their human rights.

Rights Limited

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Right to recognition and equality before the law

Equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights.

The right to equality encompasses the obligation to respect, protect and fulfil the right of all persons with disabilities to equal recognition before the law. In this regard, governments should refrain from any action that deprives persons with disabilities of the right to equal recognition before the law (CRPD General Comment No. 1 [24]).

The Bill does not replace the current framework of substitute decision-making established under the GMP Act and therefore it may be suggested that the measures as a whole may still limit human rights as they do not fully address inequality in recognition of legal capacity of persons with a disability.

Right to privacy and right to protection of the family

Section 12 of the HR Act protects individuals from unlawful or arbitrary interference with privacy, family, home or correspondence. The right encompasses the idea that individuals should have a separate area of autonomous development, interaction and liberty, free from excessive government intervention and unsolicited intrusion by other individuals. This includes protection for personal autonomy and of individuals living their private life without government interference.

The measures in the Bill would potentially engage and limit this right because they concern legal procedures for the making of a guardianship or management order in respect of decisions concerning a person with cognitive disability or impairment such as those relating to the person's health, welfare or property.

2. Legitimate purpose (s 28(2)(b))

The measures in the Bill are directed at the legitimate purpose of protecting and promoting the rights of enabling persons with disabilities to exercise their legal decision-making rights with appropriate supports and thus promotion recognition and equality before the law. These objectives are set out in the Disability Justice Strategy which commits to improvements to the ability of people with disability to exercise decision-making autonomy and are based on extensive consultation and research.

These reforms are the first step towards greater recognition of supported decision making and building a culture where supported decision making is accepted as a valid form of decision making. It is intended that this initial step will be followed by

more substantial reforms which will involve considerable consultation and planning for implementation.

3. *Rational connection between the limitation and the purpose (s 28(2)(d))*

There is a rational connection between the limitation on the right of recognition and equality before the law and the objective of the Bill.

The amendments provide explicit reference to supported decision-making in both decisions by ACAT on appointing a guardian or manager and in principles that guide the exercise of guardians' and managers' functions. Based on research and consultations with advocates, these measures will assist to achieve the overall objective of ensuring a person with cognitive disability or impairment can be provided support to assist in making valid decisions and exercising their legal decision-making rights.

These reforms advance the recognition of supported decision making, and provide groundwork for more systemic reforms.

There is a rational connection between the limitation on rights in section 11 and 12 of the HR Act and the objective of promoting the rights of persons with disabilities to exercise their legal decision-making rights. The new principles will provide additional guidance to decision-makers are considered an effective means of ensuring guardians and managers will facilitate access to supports to enable supported decision-making.

4. *Proportionality (s 28(2)(e))*

Supported decision-making may not be practicable in all circumstances and for all decisions, and it may still be necessary for the ACAT to appoint a guardian or manager to formally make certain types of decisions. There remain significant systemic issues and structural barriers to adequately facilitating universal supported decision-making.

Further reform would be required to address these systemic issues and structural barriers, noting that more significant reforms will have impacts on government and non-government agencies and will require extensive consultation to develop a workable framework for implementation.

In the interim, it is considered that there is no less restrictive means to ensure that a person's wishes and preferences are given effect to except by retaining ACAT's existing ability to make guardianship and management orders in circumstances where a guardianship or management order is the only practical way to ensure that the relevant decision(s) are able to be made and recognised.

Guardianship and Management of Property Amendment Bill 2022

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Guardianship and Management of Property Amendment Bill 2022**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

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 2022*.

Clause 2 Commencement

This clause provides for the commencement of the Act on 1 January 2023.

Clause 3 Legislation amended

This clause provides that the Act amends the *Guardianship and Management of Property Act 1991*.

Clause 4 Principles to be followed by decision-makers New section 4 (2) (aa)

This clause inserts a new 4(2)(aa) to provide an additional principle to be followed by decision-makers appointed under the *Guardianship and Management of Property Act 1991*. The new principle requires decision-makers to provide or facilitate support as far as practicable that would enable the protected person to understand the decision to be made, to communicate their wishes and to participate in the decision to be made.

The way in which this support is provided or facilitated will depend on the individual needs of the protected person. This support could include a guardian or manager explaining the options available and consequences of those options to the protected person in a way that the protected person can understand, and providing other information that may help the protected person to understand the decision to be made, to express their will and preferences regarding those options and to participate in the decision making process.

Clause 5 New section 4 (2) (c)

This clause inserts the words 'or worked out' in section 4(2)(c) to expand the operation of section 4(2)(c) to provide, also, that if the protected person's wishes cannot be worked out their interests must still be promoted.

Clause 6 Appointment and powers of guardians New section 7 (1A)

This clause inserts new section 7(1A) to provide that ACAT must consider under section 7(1)(c) whether, if support was provided to the person to make, participate in and communicate their own decisions it is reasonably likely their needs would be met, and it is reasonably likely the person's interests would be adequately protected, and whether it is reasonably likely that the support can be facilitated.

Current section 7(1)(c) requires that a guardian may only be appointed for a person with impaired decision-making capacity if the ACAT is satisfied that if a guardian is not appointed the person's needs will not be met, or their interests will be significantly adversely affected.

This new clause will require the ACAT to consider whether it is reasonably likely the person's needs would be met, and their interests adequately protected, if they were able to access available supports to make the relevant decision themselves, and if these supports are likely to be provided. It does not require ACAT to be satisfied of either matter, but this consideration will be relevant to the criteria for appointment in section 7(1)(c).

The availability of appropriate supports for a person will be an important consideration, but may not always be sufficient to enable to person's needs to be met or their interests to be protected. For example, for a doctor to perform a significant surgical procedure, the appointment of a guardian as a person with capacity to formally consent to the procedure may be necessary.

Clause 7 Appointment and powers of managers

New section 8 (1A)

This clause operates in an equivalent manner to clause 6 in respect of appointment of a manager and inserts new section 8(1A) to provide that ACAT must consider under section 8(1)(c) whether if support was provided to the person to make, participate in and communicate their own decisions, it is reasonably likely their needs would be met, and it is reasonably likely the person's interests would be adequately protected, and whether it is reasonably likely that the support can be facilitated. Current section 8(1)(c) requires ACAT to be satisfied that if a manager is not appointed for a person with impaired decision-making capacity the person's needs will not be met, or their interests will be significantly adversely affected.

This new clause will require the ACAT to consider whether it is reasonably likely the person's needs would be met, and their interests adequately protected, if they were able to access available supports to make the relevant decision themselves, and if these supports are likely to be provided. It does not require ACAT to be satisfied of either matter, but this consideration will be relevant to the criteria for appointment in section 8(1)(c).

The availability of appropriate supports for a person will be an important consideration but may not always be sufficient to enable the person's needs to be met or their interests to be protected. For example, where a contract or significant financial transaction is necessary to manage the person's assets, finances or accommodation, the appointment of a manager as a person with capacity to enter into the contract or agree to the transaction may be necessary.