

ACTS AMENDMENT (CONSENT TO MEDICAL TREATMENT) BILL 2006

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Sue Ellery (Parliamentary Secretary)**, read a first time.

Second Reading

HON SUE ELLERY (South Metropolitan - Parliamentary Secretary) [7.50 pm]: I move -

That the bill be now read a second time.

Western Australia presently has no legislation providing for advance health care planning in the event that a person loses the capacity to make his or her own decisions regarding medical treatment. Furthermore, the law in relation to the withdrawal or withholding of life-sustaining measures in circumstances of terminal illness or permanent unconsciousness, and the provision of palliative care, is perceived as uncertain and as not providing sufficient protection to health professionals involved in end-of-life decision making and treatment.

The principle of personal autonomy is central to the bill. The bill establishes a simple, flexible scheme whereby persons can ensure that in the event of their becoming mentally incompetent and requiring medical treatment for any condition, including a terminal illness, their consent or otherwise to specified treatment can be made clear in an advance health directive and/or alternatively treatment decisions can be made by an enduring guardian chosen by them. The bill also clarifies the circumstances in which consent can be given or refused in the absence of an advance health directive, a guardian or an enduring guardian, and clarifies and expands the protection from criminal and civil liability given to health professionals. The bill, however, will not change the position at common law whereby a health professional is under no obligation to provide treatment that is not clinically indicated. Similarly, the legal position in relation to euthanasia is not to be changed, and it is to be emphasised that the bill will not permit euthanasia.

The bill includes a number of significant definitions. For example, a “treatment decision” is defined to mean a decision to consent or refuse consent to the commencement or continuation of any treatment; and “treatment” means any medical or surgical treatment, including a life-sustaining measure and palliative care, dental treatment or any other health care. A person who is 18 years of age or over and has full legal capacity will be able to make and register an advance health directive containing treatment decisions in relation to his or her future treatment. A treatment decision will operate in respect of the treatment to which it applies at any time when its maker is unable to make reasonable judgments about that treatment. Provided that a person makes a sufficiently clear decision that is applicable to the clinical circumstances that have arisen, a health professional will be obliged to comply with the decision. However, a treatment decision in an advance health directive must be made voluntarily and without inducement or coercion. The maker must also understand the nature of the decision and the consequences of making it. A decision will not operate if at the time the treatment is required circumstances exist or have arisen that the maker did not anticipate when the directive was made and which would have caused the maker to change his or her mind about the decision. The common law will be expressly preserved to enable a person to make treatment decisions about his or her future treatment, other than by means of the formal advance health directive provided for in the bill. This will enable an informal direction to be given either in writing or orally; for example, in circumstances in which it may not be practicable to comply with the statutory requirements.

A person called an “appointor”, who is 18 years or over and has full legal capacity, will be able to appoint in writing an enduring guardian or two or more joint enduring guardians to make personal and lifestyle decisions, including treatment decisions, on his or her behalf. An enduring power of guardianship will be operative only when the appointor is unable to make reasonable judgments about matters relating to his or her person. Where a patient is unable to make reasonable judgments about proposed treatment, has made no relevant advance health directive and has no enduring guardian or guardian, the bill provides a mechanism whereby a “person responsible” may make treatment decisions on behalf of the patient. A “person responsible” is the first in order of priority of the persons in the following list who is of legal capacity; is reasonably available and is willing to make a treatment decision at the time the treatment is required; the patient’s spouse or de facto partner, if that person is 18 years or over and is living with the patient; the patient’s nearest relative who maintains a close personal relationship with the patient; the person who is 18 years or over and is the primary provider of care and support, including emotional support, to the patient but is not remunerated for providing that care and support; and any other person who is 18 years or over and maintains a close personal relationship with the patient.

The bill will provide an order of priority of persons who will be able to make a treatment decision in relation to a patient. The treatment decision is to be made by a person first in order of priority in the following list: the patient through an advance health directive, an enduring guardian, a guardian and a “person responsible”. If the first substitute decision maker in order of priority is not reasonably available and is not willing to make the

treatment decision, the decision falls to the person next in order on the list and so on until a person is found to make the decision. It is to be emphasised, however, that once a person has made a decision, whether it is a decision to consent or refuse consent to the treatment, there is no role for other persons on the list in that particular treatment decision.

The State Administrative Tribunal is to be vested with additional powers that will come into effect only on an application made by a person with a proper interest in the subject matter of the application. The tribunal will have authority, for example, to make a declaration on the validity of an enduring power of guardianship or an advance health directive, the incapacity of the appointor under an enduring power of guardianship or the maker of an advance health directive at the time treatment needs to be given and the identity of the person responsible for making a treatment decision on behalf of a patient.

The Guardianship and Administration Act and the Criminal Code are to be amended to provide protection for health professionals. The bill will provide an appropriate measure of protection for health professionals from civil actions and criminal prosecutions. If, at the time that treatment is required, there is a valid treatment decision in a valid advance health directive or by an enduring guardian, a guardian or a person responsible, the decision to consent or refuse consent to treatment is deemed to be a valid consent or a valid refusal of consent by the patient as if the patient were of full legal capacity. A valid consent will be a defence to trespass and assault, and a valid refusal of consent precludes treatment being given. Moreover, even if the relevant consent or refusal of consent is not valid, it is to be regarded as valid in two circumstances. The first situation is when a health professional reasonably believes that the patient is not competent, and relies in good faith on what is purportedly a valid treatment decision in an advance health directive or made by a guardian, an enduring guardian or a person responsible. The second situation is when a health professional takes treatment action in circumstances in which it is reasonable for the health professional to rely on some other health professional, having ascertained whether the treatment action is in accordance with a treatment decision, and to assume that some other health professional has ascertained that the treatment is in accordance with a treatment decision.

The bill will also enable urgent treatment to be lawfully provided when it is not practicable to determine whether there is a relevant treatment decision in an advance health directive, or to obtain the consent of an enduring guardian, a guardian or a person responsible. Further, a health professional will be able to override a treatment decision in an advance health directive or made by a guardian, enduring guardian or person responsible and provide treatment if a patient needs urgent treatment, the patient is unable to make reasonable judgments in respect of the treatment and the health professional reasonably suspects that the patient has attempted to commit suicide and needs the treatment as a consequence.

The Criminal Code will be amended to protect health professionals when consent or refusal of consent has not been given. An amendment will be made to section 259 to put it beyond doubt that the present exemption from criminal responsibility for the administration in good faith of reasonable medical treatment, even when death ensues, encompasses the provision of palliative care. Further, protection from criminal responsibility will be extended, by the inclusion of section 259(2) in the Criminal Code, to the withholding or withdrawal of medical treatment in good faith, even when death ensues, when the non-provision or cessation of that treatment is reasonable in all the circumstances.

An amendment is also to be made to the Office of the Director of Public Prosecutions' Statement of Prosecution Policy and Guidelines 2005 to include paragraph 33A as follows -

33A. Relevant Factor in Special Cases

In considering the public interest in prosecuting a person arising out of a failure to disclose an advance health directive, it is not in the public interest to prosecute a person for any offence arising out of a failure to disclose an advance health directive if the non-disclosure was motivated by love and affection for the dying person, to extend the life of the dying person and without any intention to benefit financially.

I commend the bill to the house.

Debate adjourned, pursuant to standing orders.