

ACTS AMENDMENT (ADVANCE HEALTH CARE PLANNING) BILL 2006

EXPLANATORY MEMORANDUM

Part 1 – Preliminary matters

Part 1 contains the title of the Act and the commencement provision.

Part 2 – *Guardianship and Administration Act 1990* amended

Part 2 amends the *Guardianship and Administration Act 1990* (the Act).

Clause 5 amends section 3(1) of the Act by deleting the definition of "treatment" and inserting definitions of "advance health directive", "enduring guardian", "enduring power of guardianship", "life sustaining measure", "palliative care", "substitute enduring guardian", "treatment" and "treatment decision".

A "**treatment decision**" is defined to mean a decision to consent or refuse consent to the commencement or continuation of any treatment of a person. "**Treatment**" means any medical or surgical treatment including a life sustaining measure and palliative care, dental treatment or any other health care. A "**life sustaining measure**" means a medical, surgical or nursing procedure directed at supplanting or maintaining a vital bodily function that is temporarily or permanently incapable of independent operation and includes assisted ventilation and cardiopulmonary resuscitation. "**Palliative care**" means a medical, surgical or nursing procedure directed at relieving a person's pain, discomfort or distress but does not include a life sustaining measure.

Clause 6 provides that section 45(2(d) of the Act (which currently provides that a plenary guardian may consent to any treatment or health care of a represented person) is to be deleted and replaced with a provision which authorises a plenary guardian to make treatment decisions for a represented person.

Clause 6 also makes a number of minor drafting revisions to section 45 of the Act.

Clause 7 amends section 50 of the Act to include a reference to a refusal of consent. Section 50 currently provides that an action taken, decision made, consent given, document executed or thing done by a guardian in the performance of the functions vested in him has effect as if it had been taken, made, given, executed or done by the represented person and he were of full legal capacity.

Clause 8 inserts a new section, **section 55A**, into the Act. **Section 55A** provides that the priority to be given to a guardianship order in relation to treatment decisions and other functions is dealt with in **clauses 110ZJ** and **119** respectively.

Clause 9 amends section 104 in Part 9 of the Act, which makes provision for enduring powers of attorney. Consistent with the provisions in the Bill for enduring powers of guardianship, the donor of an enduring power of attorney will have to be 18 years or over and have full legal capacity and the witnesses to the signature of the donor will not

be required to be authorised by law to take declarations, will have to be 18 years or over and cannot be the donee or substitute donee of the power.

Clause 10 inserts a new section, **section 104C**, into Part 9 of the Act. Consistent with the provisions in the Bill for enduring powers of guardianship, a person will be eligible to be appointed as a donee or substitute donee of an enduring power of attorney if the person is 18 years or over and has full legal capacity.

Clause 11 inserts **Parts 9A to 9D** into the Act.

Part 9A - Enduring powers of guardianship

Part 9A comprises **clauses 110A to 110O**.

Division 1 - Preliminary matters

Clause 110A defines "**appointor**" to mean the maker of an enduring power of guardianship.

Division 2- Making of enduring power of guardianship

Clause 110B provides that a person who is 18 years or over and has full legal capacity may make an enduring power of guardianship appointing a person as an enduring guardian or two or more persons as joint enduring guardians.

Clause 110C provides that an appointor may appoint one or more persons to be substitute enduring guardians in the circumstances specified in the enduring power of guardianship.

Clause 110D provides that an enduring guardian and a substitute enduring guardian must be 18 years or over and have full legal capacity.

Clause 110E provides that an enduring power of guardianship must be in writing, in accordance (or substantially in accordance) with a statutory form to be prescribed in regulations, signed by the appointor or by another person in the presence of and at the direction of the appointor, and witnessed by two persons aged 18 years or over. It must also be signed by each person being appointed as an enduring guardian or substitute enduring guardian to indicate acceptance of the appointment and their signatures must also be witnessed by two persons aged 18 years or over. There will be no requirement for any of the witnesses to be authorised by law to take declarations. The appointor, the person who signed the enduring power of guardianship at the direction of the appointor and an appointee cannot be witnesses.

Division 3 - Operation of enduring power of guardianship

Clause 110F provides that an enduring power of guardianship comes operation, subject to its terms, at any time that the appointor is unable to make reasonable judgments in respect of matters relating to his or her person.

Clause 110G provides that an enduring guardian will have the same functions, and is subject to the same limitations, as a plenary guardian appointed by the State Administrative Tribunal under the Act. However, an appointor may limit the functions of the enduring guardian and the circumstances in which the enduring guardian may act. An appointor may also give directions about how the enduring guardian is to perform any of the functions.

Clause 110H provides that a number of provisions in Part 5 of the Act relating to guardians will apply with necessary changes to enduring powers of guardianship.

Clause 110I provides that the priority to be given to an enduring power of guardianship in relation to treatment decisions and other functions is dealt with in **clauses 110ZJ** and **119** respectively.

Division 4 – Jurisdiction of State Administrative Tribunal

Division 4 deals with the jurisdiction of the State Administrative Tribunal in relation to enduring powers of guardianship.

Clause 110J provides that a person who, in the opinion of the Tribunal, has a proper interest in a matter may apply to the Tribunal for a decision under **Division 4**.

Clause 110K provides that the Tribunal may make a declaration as to the validity of an enduring power of guardianship.

Clause 110L provides that the Tribunal may make a declaration that an appointor is unable to make reasonable judgments in respect of matters relating to his or her person.

Clause 110M provides that the Tribunal may give directions as to matters connected with the exercise of or the construction of the terms of an enduring power of guardianship.

Clause 110N provides that the Tribunal may revoke an enduring power of guardianship in its entirety, revoke the appointment of one or some of the persons who are joint enduring guardians or revoke or vary any of the terms of an enduring power of guardianship. The appointment of a joint enduring guardian may be revoked where an enduring guardian wishes to be discharged, has been guilty of neglect, misconduct or default such that the Tribunal is of the opinion that the enduring guardian is unfit to continue in this role or appears to the Tribunal to be incapable, by reason of mental or physical incapacity, of carrying out the duties of enduring guardian. On the revocation of an appointment, the remaining enduring guardian/s may continue to act unless precluded by the terms of the power. An order to revoke or vary may be given retrospective effect.

Clause 110O provides that the Tribunal may make an order recognizing an instrument created under a law of another jurisdiction as an enduring power of guardianship under **Part 9A** if satisfied that the instrument corresponds sufficiently, in form and effect, to an enduring power of guardianship made under **Part 9A**.

Part 9B – Advance health directives

Part 9B comprises **clauses 110P to 110ZB**.

Division 1 – Making of advance health directive

Clause 110P provides that a person who is 18 years or over and has full legal capacity may make an advance health directive containing treatment decisions in respect of the person's future treatment.

Clause 110Q provides that an advance health directive must be in writing, in accordance (or substantially in accordance) with a statutory form to be prescribed in regulations, signed by the maker or by another person in the presence of and at the direction of the maker, and witnessed by two persons aged 18 years or over. There will be no requirement for any of the witnesses to be authorised by law to take declarations. The maker and the person who signed the advance health directive at the direction of the maker cannot be witnesses.

Clause 110R provides that a treatment decision in an advance health directive is invalid if the treatment decision is not made voluntarily or is made as a result of inducement or coercion and if, at the time the directive is made, its maker does not understand the nature of, or the consequences of making, the treatment decision.

Division 2 – Operation of advance health directive

Clause 110S provides that a treatment decision in an advance health directive operates in respect of the treatment to which it applies at any time the maker is unable to make reasonable judgments in respect of that treatment and as if the treatment decision had been made by the maker with full legal capacity at the time the treatment is required. A treatment decision will only operate in the circumstances specified in the directive.

Clause 110S also provides that a treatment decision will be deemed to have been revoked if, at the time the treatment is required, circumstances exist or have arisen which 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.

Clause 110S also provides that, subject to **clause 110T**, a treatment decision will be deemed to have been revoked if the maker has changed his or her mind about the decision since making the directive.

Clause 110T provides that a treatment decision will not be deemed to have been revoked and the maker will not be deemed to have changed his or her mind about the decision merely because the maker subsequently makes an enduring power of guardianship (whether about the same matter as the treatment decision or a different matter).

Clause 110U provides that the priority to be given to a treatment decision in an advance health directive is dealt with in **clause 110ZJ**.

Division 3 – Jurisdiction of State Administrative Tribunal

Division 3 deals with the jurisdiction of the State Administrative Tribunal in relation to advance health directives.

Clause 110V provides that a person who, in the opinion of the Tribunal, has a proper interest in a matter may apply to the Tribunal for a decision under **Division 3**.

Clause 110W provides that the Tribunal may make a declaration as to the validity of an advance health directive or a treatment decision in an advance health directive.

Clause 110X provides that the Tribunal may make a declaration that the maker of an advance health directive is unable to make reasonable judgments in respect of the treatment to which a treatment decision applies.

Clause 110Y provides that the Tribunal may give directions as to matters connected with the giving of effect to a treatment decision in an advance health directive or the construction of the terms of an advance health directive.

Clause 110Z provides that the Tribunal may make a declaration that a treatment decision in an advance health directive is deemed to have been revoked under **clause 110S**.

Clause 110ZA provides that the Tribunal may make an order recognising an instrument created under a law of another jurisdiction as an advance health directive made under **Part 9B** if satisfied that the instrument corresponds sufficiently, in form and effect, to an advance health directive made under **Part 9B**.

Division 4 – Treatment decisions under common law

Clause 110ZB provides that the common law is preserved so that a person will be able to make treatment decisions, either in writing or orally, about his or her future treatment other than by means of the formal advance health directive provided for in the Bill

Part 9C – Persons responsible for patients

Part 9C comprises **clauses 110ZC to 110ZG**.

Division 1 – Preliminary matters

For the purpose of **Part 9C**, **clause 110ZC** defines an "**advance health directive**" to include a common law directive and a "**patient**" to mean a person who needs treatment.

Division 2 – Treatment decisions by persons responsible for patients

Clause 110ZD provides that if a patient is unable to make reasonable judgments in respect of any treatment proposed to be provided to the patient, the person responsible for the patient may make a treatment decision. A person responsible is first in order of priority of the persons in the following list who is of full legal capacity, is reasonably available and is willing to make a treatment decision at the time the treatment is required: the de facto partner of the patient; the spouse of the patient; a person who

regularly provides, or arranges for the provision of, domestic services and support to the patient, but is not remunerated for doing so; the nearest relative of the patient (other than the spouse or de facto partner) who maintains a close personal relationship with the patient (defined in **clause 110ZD(4)**); any other person who maintains a close personal relationship with the patient; a person prescribed by the regulations.

Clause 110ZD also provides that a person responsible cannot consent to the sterilisation of a patient.

Clause 110ZD also provides that a treatment decision made by a person responsible has effect as if the treatment decision had been made by the patient with full legal capacity.

The scheme in **clause 110ZD** is similar to that in the current section 119 of the Act but, for purposes of statutory consistency, clarifies the identity and authority of persons responsible. Section 119 is to be repealed.

Clause 110ZE provides that the priority to be given to a treatment decision of a person responsible for a patient is dealt with in **clause 110ZJ**.

Division 3 – Jurisdiction of State Administrative Tribunal

Division 3 deals with the jurisdiction of the State Administrative Tribunal in relation to a person responsible.

Clause 110ZF provides that a person who, in the opinion of the Tribunal, has a proper interest in a matter may apply to the Tribunal for a decision under **Division 3**.

Clause 110ZG provides that the Tribunal may make a declaration that a patient is unable to make reasonable judgments in respect of the treatment proposed to be provided to the patient and that the person identified in the declaration is the person responsible for the patient.

Part 9D – Treatment decisions in relation to patients under legal incapacity

Part 9D comprises **clauses 110ZH to 110ZL**.

For the purpose of **Part 9D**, **clause 110ZH** provides that an "**advance health directive**" includes a common law directive, "**health professional**" has the same meaning given to that term in section 5PA of the *Civil Liability Act 2002*, "**patient**" means a person who needs treatment and "**urgent treatment**" means treatment urgently needed by a patient to save the patient's life, to prevent serious damage to the patient's health or to prevent the patient from suffering or continuing to suffer significant pain or distress (but does not include the sterilisation of the patient).

Clause 110ZI provides that a health professional may provide urgent treatment to a patient if the patient is unable to make reasonable judgments in respect of that treatment, it is not practicable for the health professional to determine whether or not the patient has made an advance health directive containing a treatment decision that is inconsistent with providing the treatment and it is not practicable for the health professional to obtain a treatment decision from the patient's guardian or enduring guardian or the person responsible for the patient.

Clause 110ZJ provides an order of priority of persons who will be able to make a treatment decision in relation to a patient who is unable to make reasonable judgments in respect of any treatment proposed to be provided to the 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". The advance health directive must contain a treatment decision in respect of the proposed treatment and the enduring guardian and guardian must be authorised to make a treatment decision in respect of the proposed treatment. 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 in the list and so on until a person is found to make the decision. 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 in the list in relation to that particular treatment decision.

Clause 110ZK defines "**take treatment action**" for the purpose of the section to mean "to commence or continue any treatment of a patient" or "to not commence or to discontinue any treatment of a patient".

Clause 110ZK provides that if a consent or refusal of consent to treatment in an advance health directive or by an enduring guardian, a guardian or a person responsible is not valid, it is to be regarded as valid in two circumstances. The first is where a health professional takes treatment action reasonably believing that the patient is not competent and relying 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 is where a health professional takes treatment action in circumstances where it is reasonable for that 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 action is in accordance with a treatment decision.

Clause 110ZL provides that a consent to palliative care or a refusal of consent to the commencement or continuation of treatment (given in an advance health directive or made by a guardian, enduring guardian or person responsible) will, from the perspective of a health professional, be valid for all purposes even if an effect of the palliative care or of the withholding or withdrawal of treatment will be to hasten death.

Clause 12 repeals section 119 of the Act and inserts **clause 119** in its place.

Clause 119 provides an order of priority in decision making, other than for treatment decisions, where a person has an enduring guardian and a guardian with the same authority. The enduring guardian will have priority provided that he or she is authorised to make the decision in question and is reasonably available and is willing to make that decision.

Part 3 - *Civil Liability Act 2002* amended

Clause 14 makes a minor amendment to section 5PA of the *Civil Liability Act 2002*. Section 5PA provides a definition of "health professional" which, by **clause 110ZH**, is to be used for the purposes of the reforms to the *Guardianship and Administration Act*. The definition currently "includes" twelve individual health professionals such as a

medical practitioner and a nurse. It also lists as a final category "any other discipline or profession practising in the health area which applies a body of learning." Section 5PA is to be amended to restrict "health professional" to only those persons in the list (by changing "includes" to "means") and, for consistency, to describe the final category as "any other person who practises a discipline or profession in the health area that involves the application of a body of knowledge."

Part 4 – *The Criminal Code* amended

Clause 16 amends section 259 of the *Criminal Code* to put it beyond doubt that the present exemption from criminal responsibility for the administration in good faith of reasonable medical treatment, even where death ensues, encompasses the provision of palliative care. The clause also inserts section 259(2) in the *Criminal Code* to extend protection from criminal responsibility to the withholding or withdrawal of medical treatment in good faith, even where death ensues, where the non-provision or cessation of that treatment is reasonable in all the circumstances.

Clauses 17 and 18 amend sections 265 and 275 of the *Criminal Code* respectively to put it beyond doubt that medical treatment encompasses the provision of palliative care.