

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

MEDICAL TREATMENT BILL 1994

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

Circulated by authority of
Terry Connolly, Attorney General

OUTLINE

The Medical Treatment Bill 1994 was prepared for the Legislative Assembly Select Committee on Euthanasia. This Bill :

- provides for the making of an oral or written direction by an adult that medical treatment not be given;
- provides for the making of an enduring power of attorney for refusing treatment on behalf of an incompetent person;
- grants immunity from prosecution or civil litigation for doctors who carry out the above activities in good faith under prescribed conditions; and
- provides for the right of a patient to be given adequate pain relief, based on the patient's perception of pain.

These amendments amend the Bill in a number of ways including:

- clarifying the relationship between the Bill and the *Powers of Attorney Act 1956* and ensuring consistency between both pieces of legislation;
- clarifying the relationship between the Bill and the *Guardianship and Management of Property Act 1991*;
- extending the means by which a person can communicate a direction;
- providing that directions are to be made in relation to a current condition and that they cease to have effect when that condition is no longer current;
- modifying the offence of dishonestly procuring a direction or power of attorney under the Bill and increasing the penalty pertaining to that offence; and
- qualifying a patient's right to maximum pain relief to give a patient the right to receive relief to the maximum extent that is reasonable in the circumstances.

FINANCIAL IMPLICATIONS

There are no financial implications arising from these amendments.

NOTES ON AMENDMENTS

Amendment 1 amends the definition of "direction" in clause 3 by omitting the reference to "written or oral". The purpose of this amendment is to make the definition consistent with the amendment 3 which extends the means by which a direction can be communicated.

Amendment 2 amends clause 4 which sets out the objectives of the Act. It qualifies the objective of ensuring the right of patients to receive maximum relief from pain and suffering by providing that pain relief should be provided "to the maximum extent that is reasonable in the circumstances". This is consistent with amendments to Clause 22.

Amendment 3 amends clause 6 in a two of ways. Firstly, it extends the way in which a direction to withhold or withdraw medical treatment can be made. The clause as it stands provides that a person can make "an oral or written direction" about medical treatment but excludes people who cannot speak or write, but can nonetheless communicate a decision regarding medical treatment. This is amended to allow a direction to be made orally, in writing or "in any other way in which the person can communicate". The second way clause 6 is amended is to require a direction to be made in relation to a current condition.

Amendment 4 amends clause 8 to make it consistent with the amendment to clause 6 which extends the way in which directions can be made. The Bill provides that oral directions should be witnessed by two health professionals. The amendment extends the witness requirement to any direction other than a written direction.

Amendment 5 amends subclause 9(1) of the Bill to take account of the fact that directions can be given in any way a person can communicate, not just orally or in writing.

Amendment 6 inserts a new clause, clause 9A in the Bill which provides for the cessation of a direction where the medical condition of the person has changed to such an extent that the condition could no longer be considered current. This amendment was necessary as a consequence of Amendment 3 which requires that a direction should be made in relation to a current condition.

Amendment 7 amends subclause 10(2) of the Bill which provides that a health professional shall not give effect to a direction "unless the person appeared" to understand the information provided and has properly weighed his or her options. The amendment omits the reference to the person's appearance and provides the more objective standard that the health professional should form a reasonable belief in relation to these matters.

Amendments 8, 9 & 10 are simple grammatical amendments to clause 10 which are necessary as a consequence of amendment 7.

Amendment 11 amends clause 11(1) which provides that a health professional should not act in accordance with a direction unless satisfied that the direction complies with the Act and that it has not been revoked or that the person has not changed his or her mind. The standard that the health professional be "satisfied" regarding a matter of law has been lowered to the standard of that professional having a reasonable belief of those matters.

Amendments 12, 13 & 14 amend clauses 12(1), 13 and 17(1) of the Bill to substitute the word "incompetent" with the word "incapacitated" in each of the clauses. This is to make the Bill's language consistent with that of the *Powers of Attorney Act 1956* which interrelates with this Bill.

Amendments 15 & 16 amend clause 17 by changing the impact of directions and powers of attorney made under the Bill on powers of guardianship exercised under the *Guardianship and Management of Property Act 1991* and powers of attorney exercised under the *Powers of Attorney Act 1956*. The Bill provides that where a direction or power of attorney has been made and the person becomes incompetent, then any power of a guardian or attorney to consent to medical treatment provided under the other Acts is automatically revoked. This is amended because powers under those Acts are wider than the Bill's which are confined to the withholding and withdrawal of medical treatment.

Amendment 15 narrows the effect of subclause 17(1) to provide that a guardian shall exercise the power consistently with a direction or power of attorney under the Bill, rather than revoking the power of the guardian to consent to medical treatment altogether. Amendment 16 amends clause 17 to make provision for the circumstance where a person has made both a power of attorney under the Bill and a power of attorney under the *Powers of Attorney Act 1956* ("the Act"). As discussed

under the notes for amendment 19, the power of attorney form under the Act is amended to include those matters in Form 2 of the Bill, that is the power to request the withholding or withdrawal of medical treatment.

Amendment 16 provides that where a person makes a power of attorney under the Act, but had previously executed a direction or power of attorney under the Bill, then the power of attorney under the Act supersedes the one made under the Bill. It further provides that where a person makes a direction or grants a power of attorney under the Bill after granting a power of attorney under the Act, then the power of Attorney under the Act is valid except for the clause relating to the withholding or withdrawing of medical treatment which is superseded by the direction or power of attorney made under the Bill.

Amendment 17 amends subclause 18(1) which provides that it is an offence to obtain a direction under certain circumstances in a number of ways. It:

- deletes the current penalty and provides a penalty of a term of imprisonment not exceeding 5 years;
- deletes the reference to "misstatement" because this would be covered by the other behaviour described in the subclause; and
- removes the reference to "undue influence" and provides that it is an offence for a person to use violence, threats, intimidation or to otherwise hinder, or interfere with another person with the purpose of procuring or obtaining a direction.

Amendment 18 amends subclause 22(1) which entitles a patient to receive maximum relief from pain and suffering. This amendment qualifies the subclause so that the patient can receive relief to the maximum extent that is reasonable in the circumstances.

Amendment 19 provides for amendments to the *Powers of Attorney Act 1956*. It:

- amends section 13 of the Act which describes the powers which may be conferred with regard to consent to medical treatment under a power of attorney under the Act. This section is amended to expressly include the withholding or withdrawal of medical treatment; and
- amends Part C of Form 2 of the Schedule of the Act (which provides for an enduring power of attorney to consent to medical treatment and medical donation) to duplicate the powers of attorney provided in the Bill (that is the withholding and withdrawing of medical treatment) in paragraph 15A.

Further explanatory notes in the body of the form have been added as a consequence of this change, and to explain the relationship between directions and powers of attorney under the Bill with Form 2 of the Act's Schedule.

Amendment 20 amends Form 1 in the Schedule of the Bill to provide explanatory material regarding the effect of making a direction before or after giving a power of Attorney under the *Powers of Attorney Act 1956*.

Amendment 21 amends Form 1 in the Schedule of the Bill to relate the form to a current condition, consistent with amendment 3 to clause 6.

Amendment 22 amends Form 2 in the Schedule of the Bill to provide explanatory material, including the effect of making a power of attorney under the Bill before or after granting a power of attorney under the *Powers of Attorney Act 1956*.

Amendment 23 amends Form 2 of the Schedule by substituting the word "incompetent" with the word "incapacitated". This is consistent with amendments 12, 13 and 14.