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

**GUARDIANSHIP AND MANAGEMENT OF PROPERTY AMENDMENT
REGULATION 2024 (No 1)**

SL2024-24

EXPLANATORY STATEMENT

**Presented by
Shane Rattenbury MLA**

GUARDIANSHIP AND MANAGEMENT OF PROPERTY AMENDMENT REGULATION 2024 (No 1)

INTRODUCTION

This explanatory statement relates to the *Guardianship and Management of Property Amendment Regulation 2024 (No 1)* as presented to the Legislative Assembly. It has been prepared to assist the reader of the regulation. It does not form part of the regulation and has not been endorsed by the Assembly. This statement must be read in conjunction with the regulation. It is not, and is not meant to be, a comprehensive description of the regulation. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

OVERVIEW OF THE REGULATION

The *Guardianship and Management of Property Act 1991* (**GMP Act**) allows for the Public Trustee and Guardian (**PTG**), a trustee company or a private individual to be appointed as a represented person's (also referred to as 'protected person') financial manager in the circumstances set out in section 8 of the GMP Act. A manager is responsible for managing all or part of the represented person's property and is granted the powers necessary or desirable to allow the manager to make decisions in accordance with the decision-making principles set out in the GMP Act, in relation to the property.

This regulation amends the *Guardianship and Management of Property Regulation 1991* (**GMP Regulation**).

Under section 26(1) of the GMP Act, a manager other than the PTG must, in accordance with the regulations, file with the PTG the accounts and other documents relating to the management of the relevant property that are prescribed.

Section 6 of the GMP Regulation requires that a manager must file a statement of the income, the estimated value of the assets, and the liabilities of the represented person. The GMP Regulation does not require that a manager must file information with respect to a represented person's expenditure.

This regulation adopts Recommendation 15 of the Auditor-General's Report No. 3 of 2023, *Financial Management Services for Protected Persons* (**Auditor-General's Report No. 3**). Recommendation 15 was that the PTG should seek an addition to section 6 of the GMP Regulation to explicitly require a private manager to lodge information with respect to a represented person's expenditure.

By giving effect to that recommendation, this regulation seeks to improve the effectiveness of the PTG's examination of accounts and other documents filed by private managers, which the PTG is required to examine under section 27(1) of the

GMP Act, and subsequent reporting of the findings to the ACT Civil and Administrative Tribunal.

This regulation also includes two further changes to facilitate the PTG's oversight of private managers; an amendment to require a private manager to provide information about whether the represented person is a beneficiary of a trust or deceased estate, and a requirement for a private manager to file any other document relating to the management of the property of the represented person requested by the PTG.

CONSULTATION ON THE PROPOSED APPROACH

The PTG provided input into a draft of the Auditor-General's Report No. 3, a draft of this regulation and a draft of this Explanatory Statement. The PTG is supportive of this regulation.

CONSISTENCY WITH HUMAN RIGHTS

Section 30 of the *Human Rights Act 2004* (HRA) requires all Territory laws (that is Acts of the Assembly and statutory instruments) must be interpreted in a way that is compatible with human rights, as far as it is possible. The following analysis is provided to assist the reader.

Rights engaged

- Right to life - promoted
- Right to privacy – limited

Rights Promoted

This regulation promotes the right to life (section 9 of the HRA). The right to life obligates the government to safeguard life by protecting those within its jurisdiction from identifiable risks to life. Represented people under the Guardianship and Management of Property legislation are highly vulnerable members of the ACT community who have impaired decision making capacity and require a substitute decision maker for health, lifestyle and financial matters. This cohort may be susceptible to influence and control by others. They are at risk of being victims to poor or improper financial management when scrutiny of private managers falls short. This can impact the quality of their life and access to life-enabling services and resources.

The Auditor-General's Report No.3 identified that the PTG's lack of explicit power to obtain all relevant information of expenditure can limit the effectiveness of this oversight role. While private managers are required to file information relating to a represented person's income, assets, and liabilities as well as bank statements, this is insufficient to provide the PTG adequate visibility over expenditure.

The PTG has provided guidance to private managers to provide information relating to expenditure, but because this is not explicit in the legislation, there is a lack of clarity, and consequently a lack of compliance with this guidance.¹

This regulation will address the gap to ensure that the PTG does have visibility over expenditure, and therefore can better determine whether a represented person's finances have been properly managed. This level of oversight is essential to prevent improper management and address issues where they may arise. By protecting the finances, assets, and property of represented persons, and preventing poverty and exploitation this regulation promotes the right to life.

Rights Limited

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

Section 12 of the HRA2004 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.²

By mandating that certain information about a person's expenditure, status as a beneficiary, or that certain other documents must be provided to the PTG on request, this regulation may limit that person's right to privacy.

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

This regulation's legitimate purpose is to promote and protect the interests of represented persons, and the policy intent of the GMP Act, by requiring additional scrutiny of how managers are spending the person's funds.

Section 4(2) of the GMP Act requires a manager to give effect to the represented person's wishes as far as possible without significantly adversely affecting the protected person's interests, and if that is not possible, promote their interests as far as possible.

Section 26 of the GMP Act provides for the PTG to examine the financial circumstances and management of a represented person's property by a private manager to ensure that the interests of represented persons are protected. Under section 26, if the PTG identifies an issue, the PTG may apply to the ACT Civil and Administrative Tribunal (ACAT) for a disallowance order of any item in the accounts.

¹ ACT Auditor-General's Performance Audit Report, *Financial Management Services for Protected Persons*, Report No. 3/2023, p.90.

² UN Human Rights Committee, General Comment No. 16: Article 17, the Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (1988) ('General Comment No. 16') [1].

This is to require private managers to act in good faith and with reasonable care in the exercise of their powers and ensure that misuse of property is prevented.

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

The provision of further information and documents to the PTG about a represented persons' accounts, may limit the right to privacy as it involves Government intervention and oversight of an individual's private finances.

However, requiring managers to report on their expenditure of a represented person's funds, or to provide information of whether the represented person is a beneficiary of a trust or deceased estate enables the PTG to undertake a more comprehensive examination of the accounts under section 27(1) of the GMP Act. This will then allow the PTG to determine whether it is appropriate for an application to the ACAT to be made to disallow an item or items in an account and therefore, prevent transactions or use of property that are not in the interests of the represented person. Overall, while the right to privacy may be limited, the right to life and protection from poverty and exploitation are promoted and upheld by the amendments.

Further, the amendment to section 6 in requiring the private manager provide all information and documents requested by the PTG will ensure that the PTG has sufficient information to assess the management of accounts and enough evidence to furnish an application to ACAT for disallowance where necessary.

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

An option that is less restrictive of the right to privacy would be to retain the status quo, which is to rely on non-statutory guidance to encourage managers to file information about their expenditure. However, the Auditor-General's Report No.3 found that although the PTG provided guidance documents to private managers, the optional requirement of providing an expense statement or budget mean there was a lack of clarity and specificity with respect to information to be provided in relation to a represented person's expenditure. This led to a lack of compliance with the guidance material and insufficient information regarding expenditure being provided to the PTG.³ An explicit legislative requirement to provide information about expenditure will more effectively address this issue.

Similarly, while section 6 of the regulation already prescribes a comprehensive list of documents to be provided, there may be circumstances where documents or information outside of the categories in section 6 are necessary for the PTG to conduct a proper audit. The PTG can make requests for further information without statutory authority, but during consultation the PTG identified that this means they are largely reliant on the goodwill of private managers to obtain this additional information, and that the information is often not provided.

³ ACT Auditor-General's Performance Audit Report, *Financial Management Services for Protected Persons*, Report No. 3/2023, p.90.

The PTG further identified that additional information is also often needed as evidence to support an application to ACAT for disallowance, and without the further information, it may be more difficult for ACAT to determine the application. It is important that applications for disallowance are fully substantiated so that ACAT can make a proper assessment of whether disallowance is appropriate. As mentioned, a disallowance order is a key mechanism to prevent the misuse of a represented person's assets and property but should only be utilised where necessary to protect the represented person's interests.

The Auditor-General's Report No.3 found that while the number of represented persons with private managers is increasing, the number of accounts being submitted by private managers for review by the PTG has decreased. Overall, the Report suggested that there is an increasing lack of compliance by private managers with their reporting obligations, and the increase of the use of private managers means that more represented persons in the ACT community may be adversely affected by a lack of effective examination of these accounts.⁴

It is important that the PTG is made aware of the represented person's status as a beneficiary so that the PTG can properly understand and assess the state of a person's financial affairs. The additional information requested by the PTG will only relate to documents on the management of the relevant property of the represented person. This means that the PTG will not be able to use this amendment to access information that is outside of this narrow remit. Similarly, the amendment requesting information about expenditure makes clear that a private manager need only provide a statement of the expenditure of the represented person, including a bank or other financial institution statement for each account of the represented person, or a budget or summary of the persons expenses and a receipt for certain one - off purchases of \$500 or more.

It is clear from the Report that increased oversight is necessary, which means that the right to privacy may be limited by the need to gather and examine additional information relating to a represented persons finances. Making the obligations of private managers explicit in legislation will ensure these obligations are clear and increase compliance. In this way, the amendments are the most reasonable and least restrictive approach to allow the PTG and ACAT to carry out their functions more effectively under the GMP Act, and consequently ensure represented persons are protected from financial harm.

⁴ ACT Auditor-General's Performance Audit Report, *Financial Management Services for Protected Persons*, Report No. 3/2023, p.3.

CLAUSE NOTES

Clause 1 Name of regulation

This clause provides the name of the regulation is the *Guardianship and Management of Property Amendment Regulation 2024 (No 1)*.

Clause 2 Commencement

This clause provides that the regulation commences on the day after its notification day.

Clause 3 Legislation amended

The regulation amends the *Guardianship and Management of Property Regulation 1991*.

Clause 4 New section 6(1)(a)(vi) and (vii)

This clause inserts two new subsections into section 6 of the regulation to prescribe two further pieces of information that a private manager must file with the public trustee and guardian under section 26(1) of the Act.

New subsection 6(1)(a)(vi) provides that a private manager must provide information and documents about a deceased estate of which the represented person is a beneficiary.

New subsection 6(1)(a)(vii) provides that a private manager must provide information and documents about a trust of which the represented person is a beneficiary.

Clause 5 New section 6(1)(aa)

This clause inserts a new subsection into section 6 of the regulation to prescribe that private managers must file statements, accounts, and information regarding the expenditure of the represented person with the public trustee and guardian under section 26(1) of the Act.

New subsection 6(1)(aa) provides that the private manager must file a statement of the expenditure of the represented person.

Subsection (aa)(i) provides that a statement of expenditure includes a statement from a bank, financial institution, or authorised deposit-taking institution for each account held in the represented person's name for each year.

Subsection (aa)(ii) provides that if the private manager has been acting as a manager for a continuous period longer than 1 year, the private manager must also provide to the public trustee and guardian a budget or summary of the person's expenses for

the 1-year period, and receipts for any one-off purchases of \$500 or more. The intention of subsection (aa)(i) is to prescribe that private managers must provide receipts for large one-off purchases, outside of the day-to-day expenses of the represented person. A note provides that examples of one-off purchases may include white goods such as appliances, electronics, or jewellery, however this list is non-exhaustive.

Clause 6 New section 6(1)(d)

This clause inserts a new subsection into section 6 of the regulation to prescribe that private managers must file with the public trustee and guardian, any other document relating to the management of the relevant property requested by the public trustee and guardian.

The intention of this clause is to ensure that the public trustee and guardian is empowered to request additional relevant information regarding the represented person's finances and property to effectively review the management of those finances.