

GUARDIANSHIP AND ADMINISTRATION AND OTHER ACTS AMENDMENT BILL 2001

EXPLANATORY NOTES

GENERAL OUTLINE

OBJECTIVES OF THE LEGISLATION

The objective of this Bill is to amend the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* to clarify that a health provider may withhold or withdraw life-sustaining measures when the commencement or continuation of those measures is inconsistent with good medical practice. Section 102A(2) of the *Public Trustee Act 1978* will be amended to ensure the *Public Trustee Act 1978* complies with the relevant provisions of the *Commonwealth Superannuation (Unclaimed Money and Lost Members) Act 1999*.

REASONS FOR THE OBJECTIVES AND HOW THEY WILL BE ACHIEVED

The *Guardianship and Administration Act 2000* commenced operation on 1 July 2000. That Act, in conjunction with the *Powers of Attorney Act 1998* established a comprehensive regime for substituted decision-making for adults with impaired capacity.

The *Guardianship and Administration Act 2000* also created the Guardianship and Administration Tribunal that has the power to appoint guardians and administrators for persons with impaired capacity. Another function of the Tribunal is to consent to special health care. Special health care is defined in the *Guardianship and Administration Act 2000* to include the withholding or withdrawing of special life-sustaining measures. Special life-sustaining measures include assisted ventilation, cardio-pulmonary resuscitation and artificial nutrition and hydration. The same definition also appears in the *Powers of Attorney Act 1998*.

Section 65 of the *Guardianship and Administration Act 2000* sets out a hierarchy for dealing with special health care. Some concern has been

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expressed that section 65 requires that all decisions regarding the withholding or withdrawing of special life-sustaining measures must be referred to the Guardianship and Administration Tribunal. Such an interpretation would place an unreasonable burden on the Tribunal, health providers, adults with impaired capacity and their families.

Before the commencement of the *Guardianship and Administration Act 2000* it was not the practice of Queensland health providers to seek the sanction of the Supreme Court to withhold or withdraw life-sustaining measures. This was because a series of common law decisions (for example, *Auckland Area Health Board v The Attorney-General* [1993] 1 NZLR 235) had determined that the cessation of futile treatment was not unlawful.

This Bill clarifies the circumstances in which a health provider may withhold life-sustaining measures without reference to the Guardianship and Administration Tribunal. The Bill will allow a guardian or attorney for a person with impaired capacity to consent to the withholding or withdrawing of life-sustaining measures when a health provider reasonably considers the commencement or continuation of those measures is inconsistent with good medical practice. An attorney includes a statutory health attorney. The term statutory health attorney is defined in the *Powers of Attorney Act 1998*.

An adult always has a statutory health attorney even when they have not made an enduring power of attorney or an advance health directive. A statutory health attorney is, in listed order, a spouse (including de facto spouse), a carer of an adult (not paid), a close friend or relation of the adult. Where there is no person of the mentioned categories readily available or culturally appropriate then the Adult Guardian becomes the statutory health attorney.

The Bill also includes provision for health providers to act in an emergency to withhold or withdraw a life-sustaining measure when good medical practice dictates a decision must be made immediately and the commencement or continuation of that measures is inconsistent with good medical practice.

The *Powers of Attorney Act 1998* already allows an adult to make an advance health directive that may include directions for when life-sustaining measures may be withheld or withdrawn.

Nothing in this Bill will affect the operation of the criminal law or in any way provides authorisation for euthanasia. Section 238 of the *Guardianship and Administration Act 2000* provides that nothing in the Act

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authorises, justifies or excuses killing a person or affects the *Criminal Code*, section 284 (Consent to death immaterial) or chapter 28. This Bill does not alter the operation of section 238.

The amendment to the *Public Trustee Act 1978* s will ensure that the *Public Trustee Act 1978* complies with the relevant provisions of the *Commonwealth Superannuation (Unclaimed Money and Lost Members) Act 1999*. This compliance is essential in order for unclaimed superannuation moneys to continue to be able to be paid to the State rather than the Commonwealth after 1 January 2002.

ADMINISTRATIVE COST TO GOVERNMENT OF IMPLEMENTATION

As the objective of the Bill is to state the jurisdiction of the Guardianship and Administration Tribunal that was originally intended by the *Guardianship and Administration Act 2000* there is no anticipated cost for the Government due to this Bill.

FUNDAMENTAL LEGISLATIVE PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of the individual?

The Bill allows a health provider to withhold or withdraw life-sustaining measures in an acute emergency. The purpose of this amendment is to allow health providers to take decisions immediately without subjecting persons, in violation of good medical practice, to futile and invasive procedures.

The provision allowing a health provider to withdraw or withhold life-sustaining measures without consent also provides protection for vulnerable people. Firstly, the measures must not be withheld or withdrawn in the face of an objection from the adult. Secondly, the person's health provider must document in the person's clinical records the various things enabling the decision to be made. Thirdly, the scope of the provision only applies to decisions that good medical practice dictates must be taken immediately. Fourthly, the commencement or continuation of artificial nutrition and hydration is exempted from the operation of the emergency provision.

Section 66A will now allow a guardian or attorney to consent to the withholding and withdrawing of life sustaining measures where the adult has previously objected. If an objection, previously expressed could

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operate, regardless of the circumstances, the health provider is in the potential position of having to perform procedures that are inconsistent with good medical practice. The principal, with impaired capacity, cannot reassess a choice they may have articulated some years previously. However, a guardian or attorney can now decide, in light of the prevailing circumstances, whether the measures should continue. The adult's wishes are still highly relevant to the guardian or attorney, because the health care principle requires the guardian or attorney to take those wishes into account when making any decision (see schedule 1, section 12(2) of the *Guardianship and Administration Act 2000*).

A guardian or attorney's consent is only operative to allow the withholding or withdrawing of life-sustaining measures when the health provider reasonably considers the commencement or continuation of the measures for the adult would be inconsistent with good medical practice.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?

The new Bill will provide retrospective protection for health providers who withdrew or withheld life-sustaining measures for an adult on or after 1 July 2000 where the health provider reasonably considered that the adult had impaired capacity for a health matter at the time the measures were withheld or withdrawn and the commencement or continuation of the measures would have been inconsistent with good medical practice.

The retrospective protection will apply to Queensland health providers who have continued to act according to good medical practice when making decisions about the withholding or withdrawal of life-sustaining measures rather than referring every case to the Tribunal for consent to the withholding or withdrawal of life-sustaining measures.

CONSULTATION

A draft consultation Bill was released for consultation to the Australian Medical Association (Qld), Queensland State Committee Royal Australian College of Physicians, Queensland Faculty Australasian College of Emergency Medicine, Royal Australian College of Psychiatrists (Qld Branch), Queensland State Committee Royal Australasian College of Surgeons, Faculty of Intensive Care, Mt. Olivett Hospital, Alzheimers Association of Queensland, Queensland Council of Carers, Australian Pensioners and Superannuants League (Qld), Queensland Advocacy Inc, the Adult Guardian, the President of the Guardianship and Administration Tribunal, Queensland Health, the Queensland Law Society, the Public

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Trustee, the Queensland Bar Association and the Queensland Council for Civil Liberties.

The responses to that Bill informed the drafting of the present Bill. Consultation has also been undertaken during the drafting of this Bill with the Adult Guardian, the Public Advocate, the Chief Health Officer, officers of Queensland Health, the Guardianship and Administration Tribunal, the Department of Premier and Cabinet, Disability Services Queensland and Crown Law.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 sets out the short title of the Act as the *Guardianship and Administration and Other Acts Amendment Act 2001*.

Clause 2 provides that Part 4 of the Act [that amends the *Public Trustee Act 1978*] commences on assent. The remaining provisions of the Act will commence upon proclamation.

PART 2—AMENDMENT OF GUARDIANSHIP AND ADMINISTRATION ACT 2000

Clause 3 provides that this part amends the Guardianship and Administration Act 2000.

Clause 4 amends section 11 (Principles for adults with impaired capacity) to clarify that persons performing a function or exercising a power under the Act must apply the “health care principle” for a special health matter as well as a health matter.

“Special health matter” is defined in schedule 3, section 6 of the *Guardianship and Administration Act 2000*.

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Clause 5 amends section 61 (Purpose to achieve balance for health care) to provide that health care for an adult is only health care that is necessary and appropriate to maintain or promote the adult's health or wellbeing or health care that, in all the circumstances, is in the best interests of the adult.

This amendment acknowledges that it may be in the adult's interest to have health care for a reason other than for promoting and maintaining the adult's health or well being (the previous wording). For example, it may be in the adult's interests for the natural processes of dying not to be interfered with by the futile administration of artificial measures.

Clause 6 amends section 63 (Urgent health care) to insert the word "reasonably" before considers. The dictionary (schedule 4) defines "reasonably considers" to mean considers on grounds that are reasonable in the circumstances.

Section 63 is further amended by inserting a new sub-section (5) that excludes from the definition of "health care", in section 63 only, the withholding or withdrawing of a life-sustaining measure for the adult. The new section 63A will govern the urgent withdrawal or withholding of a life-sustaining measure.

There is a different regime provided in s 63A for the withholding or withdrawing of a life-sustaining measure because of the seriousness of the decision to be taken with respect to those measures.

The footnote in section 63(2) is omitted. The footnote is potentially misleading as "object" as defined in schedule 4 (dictionary) is wider than an objection in an advance health directive.

Clause 7 inserts a new s 63A (Life-sustaining measure in an acute emergency).

Section 63A allows a life-sustaining measure (now defined in schedule 2, section 5A) to be withheld or withdrawn for an adult with impaired capacity without consent if the health provider reasonably considers that commencement or continuation of life-sustaining measures would be inconsistent with good medical practice and good medical practice mandates that the decision to withhold or withdraw the life-sustaining measure be made immediately. Section 63A will ensure that persons are not subject to futile and invasive procedures when a health provider must make an immediate decision whether the life-sustaining measures should be commenced or continued.

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Section 63A(2) will not allow the withholding or withdrawing of a life-sustaining measure, under this section, when the health provider knows that an adult objects.

Section 63A(3) requires that a health provider certify in an adult's clinical records the various things enabling the measure to be withheld or withdrawn.

Section 63A(4) exempts, only for the purposes of the acute emergency provision, artificial nutrition and hydration from the acute emergency regime. A decision in relation to this measure will not generally have the same urgent nature as cardio-pulmonary resuscitation or assisted ventilation.

Clause 8 amends section 64 (Minor and uncontroversial health care) to insert the word “reasonably” before considers. The amendment will make section 64 consistent with sections 63 and 63A.

Clause 9 inserts a new subsection (6) to section 66 and clarifies that the order of priority in section does not prevent a health provider dealing with a matter under the provisions of section 63(Urgent health care), section 63A (Life-sustaining measures in an acute emergency) and section 64 (Minor, uncontroversial health care).

Clause 10 inserts a new section 66A and section 66B.

Section 66A makes a consent to the withholding or withdrawing of a life-sustaining measure (according to the hierarchy set out in section 66) operative only if the health provider reasonably considers that the commencement or continuation of the measures for an adult with impaired capacity would be inconsistent with good medical practice.

This section, in conjunction with section 66, will enable a guardian or attorney (including statutory health attorney) to consent to the withholding or withdrawing of a life-sustaining measure when the commencement or continuation of those measures is inconsistent with good medical practice. Every adult person with impaired capacity will now have a person who must consent before life-sustaining measures are withdrawn or withheld under this provision. As a last resort, the Adult Guardian will act as the statutory health attorney when there is no other appropriate person.

Good medical practice is defined in schedule 2, section 5B.

The new section 66B will require a health provider to certify in an adult's medical records the various things that enabled the health provider to withhold or withdraw a life-sustaining measure.

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This may include, when the health provider relies on sections 66(2) of the *Guardianship and Administration Act 2000* and 36(2) of the *Powers of Attorney Act 1998*—

- The existence of an advance health directive;
- That the adult had impaired capacity for the health matter concerned;
- That the advance health directive authorised the withholding or withdrawal of a life-sustaining measure; and
- The reason why the advance health directive was operative.

When the health provider relies upon sections 66(3), (4), (5) and 66A the various things might include—

- The adult had impaired capacity for the health matter concerned;
- That the health provider did not know of any advance health directive;
- The name of the person consenting to the withholding or withdrawal of life sustaining measures and the reason why they could consent; and
- The commencement or continuation of a life-sustaining measure was inconsistent with good medical practice.

Clause 11 omits section 67(3)(c). Section 67 sets out the effect of an adult's objection to health care. It provides that generally an exercise of power for a health matter, or special health matter, is ineffective to give consent for health care if the health provider knows the adult objects. Section 67(2) sets out the circumstances where the exercise of a power is effective despite objection. Previously section 67(3) had exempted the withholding or withdrawing of special life-sustaining measures from section 67(2). However "object" is defined very widely in section 67 and is not subject to any qualification that the withholding or withdrawing of special life sustaining measures must be consistent with good medical practice. The amendment ensures health providers are not obligated, by law, to subject an adult with an incapacity to continued futile interventions that are inconsistent with good medical practice and against the wishes of the adult's guardian or attorney when the health provider is aware of some objection the adult had made previously.

The "health care principle" (schedule 1, section 12) already requires that the adult's views and wishes are taken into account when a guardian,

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attorney (including statutory health attorney) the adult guardian, tribunal or other entity exercises power for an adult.

Clause 12 now amends the footnote in section 79(1)(a) to include the new section 63A inserted by this Bill.

Clause 13 amends section 82 (Functions). Section 82 sets out the functions of the Guardianship and Administration Tribunal. The amendment clarifies that the Tribunal can make declarations, orders or recommendations, or give directions or advice in relation to attorneys without the requirement that an enduring document must also be involved.

The section is also amended to insert a new section 82(1)(f) to ensure that the Tribunal retains the capacity to consent to the withholding or withdrawing of life-sustaining measures for an adult with impaired capacity.

Clause 14 amends s 198 (Health providers may advise adult guardian) to require any consideration to be on reasonable grounds. The amendment makes the drafting of section 198 consistent with the remainder of the Act.

Clause 15 inserts transitional provision section 262A. Section 262A provides that a health provider who has withheld or withdrawn a life-sustaining measure for an adult with impaired capacity, before the amendments have commenced, in circumstances where the health provider reasonably considered the commencement or continuation of the life-sustaining measure was inconsistent with good medical practice is taken to health care to which consent was properly given under the Act (for the purposes of section 79 of the Act) and health care authorised by this Act (for the purposes of section 80 of the Act).

Clause 16 amends schedule 1, section 12 (Health care principle) to apply the health care principle to special health care. The health care principle requires the exercise of a power to be either necessary or appropriate to maintain or promote the adult's health and wellbeing or, in all the circumstances, in the best interests of the adult. This amendment is consistent with the amendment to section 61 of the Act and acknowledges that there may be other reasons for consenting to health care than solely to maintain or promote the adult's health and wellbeing.

Clause 17 amends schedule 2, section 5 (health care) to include the withholding or withdrawal of a life-sustaining measure for an adult within the definition of health care. The definition makes clear that the withholding or withdrawal of a life-sustaining measure will only be health care if the commencement or continuation of measures for an adult would be inconsistent with good medical care.

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Clause 18 inserts sections 5A and 5B in schedule 2. Section 5A defines life-sustaining measure. This definition is the same as that of “special life-sustaining measures” (schedule 2, section 16) in the present Act. However the prefix of “special” has now been deleted.

Section 5B defines “good medical practice”. Good medical practice is defined as good medical practice having regard to the recognised medical standards, practices and procedures of the medical profession in Australia and the recognised ethical standards of the medical profession in Australia.

Clause 19 omits the withholding or withdrawing of special life-sustaining measures from the definition of special health care.

Clause 20 omits section 16 (Special life-sustaining measures) from schedule 2. The definition of a life- sustaining measure is now in section 5A.

Clause 21 amends the dictionary in schedule 4. The definition of “special life sustaining measures” is omitted. Definitions in relation to “good medical practice” and “life-sustaining measure” reflect the amendments in schedule 2, sections 5A and 5B. “Reasonably considers” is also now defined.

PART 3—AMENDMENT OF POWERS OF ATTORNEY ACT 1998

Clause 22 provides that this part amends the *Powers of Attorney Act 1998*.

Clause 23 amends section 6A (Relationship with *Guardianship and Administration Act 2000*) to include within the Tribunal’s functions the power to consent to the withholding or withdrawal of a life-sustaining measure.

Clause 24 amends s 35(2)(b) by omitting “particular special life-sustaining measures” and inserting “life-sustaining measure” so the term is the same as is used in the *Guardianship and Administration Act 2000*.

Clause 25 amends section 36(2) (Operation of an advance health directive). Section 36(2) is amended by omitting “special” before the words “life-sustaining measures” so the term is the same as is used in the *Guardianship and Administration Act 2000*.

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Section 36(2)(b) has been redrafted in the language used in the *Guardianship and Administration Act 2000*. Section 36(2)(b) now requires that for a direction in an advance health directive in relation to the withholding or withdrawal of artificial nutrition or hydration to operate the commencement or continuation of the measure must be inconsistent with good medical practice.

Clause 26 amends section 103 (Protection of health provider for non-compliance with advance health directive) to insert the term “inconsistent with” good medical practice. The words “contrary to” are omitted. This is to ensure the language of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* are consistent.

Clause 27 inserts two new transitional provisions. Section 165 (References to special life-sustaining measures) provides that a reference to “special life-sustaining measures” used in an enduring document that is made before the commencement of these amendments has the same meaning as life-sustaining measure or life-sustaining measures in these amendments.

Section 166 (Power for health matters excludes power for withholding or withdrawal of life-sustaining measures) clarifies that this Bill is not retrospective.

In cases where a health attorney, appointed in an enduring document exercised before this Act commenced, is not authorised to consent to the withholding or withdrawing of life-sustaining measures the hierarchy in section 66 will operate to enable the statutory health attorney to consent.

Clause 28 amends schedule 1, section 12 (Health care principle) to make that section consistent with the definition in the *Guardianship and Administration Act 2000*.

Clause 29 amends schedule 2, section 5 (health care) to include the withholding or withdrawal of a life-sustaining measure for an adult within the definition of health care. The definition makes clear that the withholding or withdrawal of a life-sustaining measure will only be health care if the commencement or continuation of measures for an adult would be inconsistent with good medical care.

This definition is the same as the amended definition in the *Guardianship and Administration Act 2000*.

Clause 30 inserts sections 5A and 5B in schedule 2. Section 5A defines a life-sustaining measure. This definition is the same as “special life-

sustaining measures” (schedule 2, section 16) in the present Act. However the prefix of “special” has now been deleted.

Section 5B defines “good medical practice”. Again, these definitions are the equivalent definitions as used in the *Guardianship and Administration Act 2000*.

Clause 31 omits the withdrawal or withholding of special life-sustaining measures from the definition of special health care in schedule 2, section 7. Again, this definition is consistent with the amended definition as used in the *Guardianship and Administration Act 2000*.

Clause 32 omits the definition of “special life-sustaining measures” from schedule 2. The equivalent definition of “life-sustaining measure” is now in schedule 2, section 5A.

Clause 33 amends the dictionary (schedule 3) to reflect the amendments made in this Bill.

PART 4—AMENDMENT OF PUBLIC TRUSTEE ACT 1978

Clause 34 provides that this Part of the Bill (Part 4) amends the *Public Trustee Act 1978*.

Clause 35 amends section 102A(2) of the *Public Trustee Act 1978* by deleting the words “less the public trustee’s reasonable expenses”. This amendment ensures that the *Public Trustee Act 1978* complies with the relevant provisions of the *Commonwealth Superannuation (Unclaimed Money and Lost Members) Act 1999*. This compliance is essential in order for unclaimed superannuation moneys to continue to be able to be paid to the State rather than the Commonwealth after 1 January 2002.