

Medical Treatment (Enduring Power of Attorney) Bill

EXPLANATORY MEMORANDUM

Outline

The aim of this Bill is to enhance the right, enshrined in the *Medical Treatment Act 1988*, of members of the community to refuse medical treatment.

This will be achieved by extending the scope of that Act so that, in certain circumstances, decisions to refuse medical treatment can be made on behalf of a patient either by an agent appointed under an enduring power of attorney (medical treatment), or by a guardian appointed under the *Guardianship and Administration Board Act 1986*.

Various protections have been incorporated into the legislation to prevent any potential abuse of the powers vested in an agent or guardian.

These include a clear statement of the conditions which must exist before the powers of an agent or guardian are capable of being exercised, and giving the Guardianship and Administration Board the capacity to suspend or revoke the authority of an agent if such action is in the best interests of the patient.

Clause Notes

Clause 1 sets out the purposes of the Act.

Clause 2 provides for the Act to come into operation on a day to be proclaimed.

Clause 3 defines the *Medical Treatment Act 1988* as being the Principal Act.

Clause 4 amends section 1 of the Principal Act to include among the purposes of the legislation enabling an agent to make decisions about medical treatment on behalf of an incompetent person, that sections 6B (2) and 463 (B) of the *Crimes Act 1958* continue to have effect, and that inciting, aiding or abetting suicide or homicide continue to be offences.

Clause 5 anticipates the subsequent insertion of a new section 5B in the Principal Act by making a consequential machinery amendment to the interpretation of "Refusal of treatment certificate" in section 3.

Clause 6 inserts a new section 4 (3) and 4 (4) into the Principal Act.

Proposed new section 4 (3) is the first of the important safeguards to be written into the legislation. It is designed to ensure that agents or guardians do not use their powers to refuse medical treatment in a way which would promote the suicide of a patient.

This will be achieved by making it clear that the *Medical Treatment Act 1988* does not affect section 6B (2) or 463B of the *Crimes Act 1958* (which, respectively, make it an offence to incite or aid or abet a person to commit suicide, and authorize a person to use reasonable force to prevent the commission of suicide).

In addition, the operation of other laws, such as those relating to homicide, is preserved.

Proposed new section 4 (4) goes on to make clear that a refusal of medical treatment does not limit any duty of a medical practitioner, or other person, to advise and inform the patient or his or her agent or guardian, or to provide medical treatment other than medical treatment that has been refused.

Clause 7 inserts six new sections after section 5 of the Principal Act.

Proposed section 5A authorizes decisions to refuse medical treatment of a person to be made by an agent appointed under an enduring power of attorney (medical treatment) or,

if the person is a represented person, by a guardian appointed by the Guardianship and Administration Board.

The new section prescribes the form of an enduring power of attorney. It also makes clear that an enduring power of attorney only takes effect if the person giving the power becomes incompetent.

Proposed section 5B contains further safeguards in the interests of a patient and, in particular, is designed to ensure that any decision to refuse medical treatment on behalf of the patient is only made by his or her agent or guardian on an informed basis.

Firstly, it requires that both a medical practitioner and another person each be satisfied that the agent or guardian has been informed of the nature of the patient's current condition to an extent reasonably sufficient to enable the patient, if he or she were competent, to make a decision whether or not to refuse medical treatment, and that the agent understood the information.

Secondly, it specifies that an agent or guardian can only refuse medical treatment on behalf of the patient if—

- (a) the medical treatment would cause unreasonable distress to the patient; or
- (b) there are reasonable grounds for believing that the patient, if competent, and after giving serious consideration to his or her health and well-being, would consider the medical treatment unwarranted.

A refusal of treatment certificate by an agent or guardian must be in the form of Schedule 3.

Proposed section 5C enables the Guardianship and Administration Board, on the application of the Public Advocate, or a person who has a special interest in the affairs of the donor of the power, or the agent appointed under the power, to suspend or revoke an enduring power of attorney (medical treatment) in the interests of the donor of the power.

Notice of suspension or revocation must be given by the Board to the chief executive officer of any hospital or nursing home in which the donor is a patient. A copy of the notice must be placed with the patient's record.

Proposed section 5D has the effect of revoking any refusal of treatment certificate completed by an agent or guardian if the enduring power of attorney (medical treatment) or the appointment of the guardian is revoked, or suspending a certificate if an enduring power of attorney (medical treatment) is suspended by the Guardianship and Administration Board.

Proposed section 5E requires the board of a public or denominational hospital and the proprietor of a private hospital or nursing home to ensure that a copy of any refusal of treatment certificate applying to a patient or cancellation of such certificate is placed with that patient's record and is given to the chief executive officer of the hospital or home.

The new section also requires that a copy of any certificate be sent to the Guardianship and Administration Board either by the hospital or nursing home or, if the person is not a patient, by the medical practitioner who signs the verification.

Proposed section 5F provides that a person who is a beneficiary under a will, or has an interest under an instrument, or would be entitled to an interest on the death intestate of another person forfeits that interest if he or she procures or obtains the execution of a certificate under the Act by deception, fraud, mis-statement or undue influence.

Clause 8 makes various changes or corrections to sections 6, 7 and 9 of the Principal Act.

Clause 9 amends Schedule 1 to the Principal Act to require the inclusion of a statement of a patient's current condition in the Refusal of Medical Certificate: Competent Person, and to prescribe the form of cancellation of such certificate.

This will mirror a similar requirement included in proposed Schedule 3.

Clause 10 is a machinery provision; it adds two new Schedules to the Principal Act.

Schedule 2 prescribes the form of an Enduring Power of Attorney (Medical Treatment) mentioned in proposed section 5A.

Schedule 3 is the form of the Refusal of Treatment Certificate: Agent or Guardian of Incompetent Person referred to in proposed section 5B, and the form of cancellation of such certificate.

Clause 11 amends section 117 (4) of the *Instruments Act 1958*. The effect of the amendment is to exclude authority for the attorney to make decisions about the medical treatment of the donor from the ambit of any enduring power of attorney made under that Act.

