

Serial 206
Powers of Attorney Amendment Bill 2012
Mr Elferink

A Bill for an Act to amend the *Powers of Attorney Act*, and for related purposes

NORTHERN TERRITORY OF AUSTRALIA
POWERS OF ATTORNEY AMENDMENT ACT 2012

Act No. [] of 2012

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NORTHERN TERRITORY OF AUSTRALIA

Act No. [] of 2012

An Act to amend the *Powers of Attorney Act*, and for related purposes

[Assented to [] 2012]
[Second reading [] 2012]

The Legislative Assembly of the Northern Territory enacts as follows:

Part 1 Preliminary matters

1 Short title

This Act may be cited as the *Powers of Attorney Amendment Act 2012*.

Part 2 Amendment of Powers of Attorney Act

2 Act amended

This Part amends the *Powers of Attorney Act*.

3 Long title amended

Long title, at the end

insert

and similar matters

4 Section 5 amended

(1) Section 5

insert (in alphabetical order)

advance health directive, see section 21C(1).

AHD is an acronym for advance health directive.

health guardian, see section 21E(2).

life-sustaining measure, see section 21B.

not legally capable, of a person in relation to particular decisions, means that the person is in such a state of mental or physical incapacity that the person is not capable of making those decisions.

Public Guardian means the Public Guardian as defined in section 3(1) of the *Adult Guardianship Act*.

recovery, in relation to a terminal illness, includes a remission of symptoms or effects of the illness.

special health matter, in relation to a person, means a matter relating to the following:

- (a) removal of tissue from the person while alive for donation to someone else;
- (b) sterilisation of the person;
- (c) termination of a pregnancy of the person;
- (d) participation by the person in special medical research or experimental health care;
- (e) electroconvulsive therapy or psychosurgery for the person;
- (f) any other health care for the person prescribed by regulation.

terminal illness means an illness, injury or degeneration of mental or physical faculties:

- (a) such that death would, if life-sustaining measures were not undertaken, be imminent; and
- (b) from which there is no reasonable prospect of a temporary or permanent recovery, even if life-sustaining measures were undertaken.

(2) Section 5, definition **power**, after "attorney"

insert

other than a power of attorney included in an AHD

5 Part IVA inserted

After section 21A

insert

Part IVA Advance health directives**21B Meaning of *life-sustaining measure***

- (1) A *life-sustaining measure* is a health care measure that is intended to sustain or prolong life, by supplanting or maintaining the operation of bodily functions that are temporarily or permanently incapable of independent operation.
- (2) To avoid doubt, each of the following is a *life-sustaining measure*:
 - (a) cardiopulmonary resuscitation;
 - (b) assisted ventilation;
 - (c) artificial nutrition and hydration.
- (3) A blood transfusion is not a *life-sustaining measure*.

21C Advance health directive may be made

- (1) A person (the *donor*) may make an instrument in accordance with this Part (an *advance health directive*) to operate in relation to decisions about the donor's health care at times when the donor is not legally capable of making the decisions.
- (2) An AHD must include:
 - (a) a statement that it is an advance health directive under this Act; and
 - (b) a statement that it is intended to operate at any time that the donor is not legally capable of making decisions about the donor's health care.
- (3) If an AHD includes an appointment of a health guardian, it must have endorsed on it or annexed to it a statement of acceptance by the health guardian in the form set out in Schedule 1A.

21D AHD – directions

- (1) An AHD may:
 - (a) give directions about matters relating to the health care of the donor, including special health matters, that will operate in accordance with this Part at times when the donor is not legally capable of making decisions in those matters; and
 - (b) give information about the directions.
- (2) Without limiting subsection (1), an AHD may include provisions that:
 - (a) consent, in the circumstances specified, to particular future health care of the donor when necessary and despite objection by the donor when the health care is provided; or
 - (b) require, in the circumstances specified, a life-sustaining measure, or all life-sustaining measures, to be withheld or withdrawn.

21E AHD – appointment of health guardian

- (1) An AHD may:
 - (a) appoint a person as a health guardian; and
 - (b) provide terms for, or information about, how the power as health guardian is to be exercised.
- (2) A person who is appointed as a *health guardian* is the donee of an enduring power of attorney:
 - (a) under which the health guardian may make decisions on behalf of the donor in matters relating to the health care of the donor that are not special health matters; and
 - (b) that operates only at times when the donor is not legally capable of making decisions in those matters; and
 - (c) that is subject to directions made under section 21D; and
 - (d) that is subject to any terms under subsection (1)(b).
- (3) Without limiting subsection (1), an AHD may include provisions that authorise a health guardian to physically restrain, move or manage the donor or have the donor physically restrained, moved or managed, for the purpose of health care when necessary and despite objection by the donor when the restraint, movement or management is provided.

- (4) Without limiting subsection (1), an AHD may include provisions that:
- (a) appoint a health guardian to act only in specified circumstances; or
 - (b) request a court acting under section 21K:
 - (i) to appoint a specified person as health guardian; or
 - (ii) not to appoint a specified person as health guardian;whether generally or in specified circumstances.

21F Effect of AHD

- (1) A direction in an AHD:
- (a) operates only while the donor is not legally capable of making decisions in the matter covered by the direction; and
 - (b) is as effective as if:
 - (i) the donor were legally capable of making decisions in the matter at the time when the decisions needed to be made; and
 - (ii) the donor then gave the direction in relation to the matter.
- (2) A direction to withhold or withdraw a life-sustaining measure does not operate unless, in the opinion of a medical practitioner treating the donor and another medical practitioner:
- (a) one of the following applies:
 - (i) the donor has a terminal illness or condition that is incurable or irreversible, as a result of which the donor may reasonably be expected to die within 1 year even if life-sustaining measures are used;
 - (ii) the donor is in a persistent vegetative state, that is, the donor has a condition involving severe and irreversible brain damage which, however, allows some or all of the donor's vital bodily functions to continue, including, for example, heartbeat or breathing;
 - (iii) the donor is permanently unconscious (in a coma), that is, the donor has a condition involving brain damage so severe that there is no reasonable prospect of the donor regaining consciousness;

- (iv) the donor has an illness or injury of such severity that there is no reasonable prospect that the donor will recover to the extent that the donor's life can be sustained without the continued application of life-sustaining measures; and
 - (b) for a direction to withhold or withdraw artificial nutrition or artificial hydration – the commencement or continuation of the measure would be inconsistent with good medical practice; and
 - (c) the donor has no reasonable prospect of regaining legal capacity for health matters.
- (3) A direction in an AHD has priority over a general or specific power for health matters given to any health guardian.
- (4) A health guardian's power for a health matter under an AHD is exercisable during any or every period that the donor is not legally capable of making decisions in the matter and not otherwise.
- (5) Subject to the terms of the AHD and this Act, the health guardian has power to do, for the donor, anything in relation to the matter that the donor could lawfully do if the donor had legal capacity for the matter.

21G Exercise of health guardian's powers by Public Guardian

If an AHD appoints one or more persons as health guardians of the donor, but, at a time when a decision is required none of the health guardians is available to exercise the power (including because of the death, lack of legal capacity or retirement of a health guardian), then, unless the AHD provides otherwise, the Public Guardian may exercise the powers of a health guardian.

21H Application of various provisions to AHDs

- (1) The provisions mentioned in subsection (2) apply as if:
 - (a) a reference to an instrument creating or revoking a power, or an enduring power, includes a reference to an AHD (whether or not the AHD appoints a person as a health guardian); and
 - (b) a reference to a power, or to an enduring power, includes a reference to an enduring power of attorney created by an AHD.

- (2) For subsection (1), the provisions that apply are the following:
- (a) section 6 (Execution of instruments creating or revoking powers);
 - (b) section 7 (Registration);
 - (c) section 10 (Execution of instruments in pursuance of power);
 - (d) section 12 (Proof of instruments creating powers);
 - (e) section 14 (Execution of instrument creating enduring power);
 - (f) section 21A (Effect of Adult Guardianship Act).

21J Recognition of AHD made under interstate laws

- (1) This section applies to an instrument (the *interstate AHD*) that:
- (a) is executed under the law of a State or another Territory; and
 - (b) deals with matters mentioned in section 21D or 21E; and
 - (c) evidences an intention that the instrument should operate at any time that the person who made the instrument is not legally capable of making decisions about the person's health care.
- (2) The interstate AHD is taken to be an AHD under this Act to the extent that the directions and appointments that it makes could validly have been made in an AHD under this Act.

21K AHD – powers of Supreme Court

- (1) A health guardian under an AHD may not retire without the leave of the Supreme Court.
- (2) The Public Guardian or a person who has a close connection with the donor of an AHD may, if the donor is not legally capable of making decisions in a matter covered by the AHD, apply to the Supreme Court for an order revoking or varying the terms of the AHD in such manner as the Supreme Court thinks fit (including by the appointment of a substitute health guardian).
- (3) The Supreme Court has jurisdiction to make an order sought in an application under this section and to make directions as to the registration of the order.
- (4) The power of the Supreme Court under subsection (3) includes the power to appoint the Public Guardian as a substitute health guardian.

- (5) An order or grant of leave under this section may be subject to such terms and conditions as the Supreme Court thinks fit.

21L Revocation of AHD

An AHD is revoked on the occurrence of the following events:

- (a) the death of the donor;
- (b) the revocation of the AHD by the donor;
- (c) the coming into operation of an order of the Supreme Court under section 21K revoking the AHD.

21M Protection of persons without notice of AHD

- (1) This section applies if a third party, including a hospital, an employee of a hospital or an independent health practitioner (the *protected person*) provides health care to the donor of an AHD in a way that contravenes its terms.
- (2) The protected person is not liable because an action contravenes the terms of an AHD, either to the donor of the AHD or to any other person, unless:
 - (a) the protected person has actual notice of the content of the AHD in its current form, and it would be reasonable in the circumstances to expect the person to take account of the AHD; or
 - (b) it would be reasonable in the circumstances to expect the protected person to be aware of and to take account of the content of the AHD.

Example for subsection (2)(a)

If the care is provided in an emergency, and not within a system designed to alert the provider to the existence and content of AHDs, it might not be reasonable to expect the provider to take account of the AHD even if the provider knows the identity of the donor and had actual notice of the AHD at some time in the past.

Examples for subsection (2)(b)

1 If the AHD has been made or amended very recently, it might not be reasonable to expect a health care provider to be aware of it unless the provider has actual notice.

2 If the protected person is a hospital, it might be reasonable to expect that it has in place an administrative system to check the register for AHDs and amendments of AHDs and to inform individuals providing care to a donor of the current contents of any relevant AHD. In that case it would be reasonable to expect the hospital to be aware of and to take account of the content of an AHD that had been registered for sufficient time. However, if such a system were not in place, or failed in a particular instance, it might not be reasonable

to expect the protected persons who are individuals providing care in the hospital to be aware of and take account of the AHD.

21N Protection of persons acting in accordance with outdated AHD

- (1) This section applies if a third party, including a hospital, an employee of a hospital or an independent health practitioner (the *protected person*) who provides health care to the donor of an AHD that has been amended or revoked does so in a way that complies with the terms of the AHD as they stood before the amendment or revocation.
- (2) This section also applies if a health guardian (the *protected person*) under an AHD that has been amended or revoked purports to exercise his or her powers in a way that complies with terms of the AHD as they stood before the amendment or revocation.
- (3) The protected person is taken to act in compliance with an AHD made by the donor unless:
 - (a) the person has actual notice of the content of the AHD in its amended form or of the revocation, and it would be reasonable in the circumstances to expect the person to take account of the amendment or revocation; or
 - (b) it would be reasonable in the circumstances to expect the person to be aware of and to take account of the amendment or revocation.

Example for subsection (3)(a)

If health care is provided in an emergency, and not within a system designed to alert the provider to the existence and content of AHDs, it might not be reasonable to expect the provider to take account of the amendment or revocation even if the provider knows the identity of the donor and had actual notice of the amendment or revocation at some earlier time.

Examples for subsection (3)(b)

- 1 *If the AHD has been amended or revoked very recently, it might not be reasonable to expect a health care provider or health guardian to be aware of the amendment or revocation unless the provider or guardian has actual notice.*
- 2 *If the protected person is a hospital, it might be reasonable to expect that it has in place an administrative system to check the register for AHDs and amendments of AHDs and to inform individuals providing care to a donor of the current contents of any relevant AHD. In that case it would be reasonable to expect the hospital to be aware of and to take account of an amendment or revocation of an AHD that had been registered for sufficient time. However, if such a system were not in place, or failed in a particular instance, it might not be reasonable to expect the protected persons who are individuals providing care in the hospital to be aware of and take account of the amendment or revocation.*

21P Act does not affect other rights

- (1) This Act does not affect the right of a person who is legally capable of such decisions to refuse medical or surgical treatment.
- (2) This Act, other than section 21Q, does not affect the legal consequences (if any) of taking, or refraining from taking:
 - (a) therapeutic measures (other than life-sustaining measures) in the case of a patient who is suffering from a terminal illness, whether or not the patient made an AHD; or
 - (b) life-sustaining measures in the case of a patient who has not made an AHD.
- (3) This Act does not affect common law recognition of instructions about health care that are not given in an AHD.
- (4) A medical practitioner incurs no liability for a decision made by him or her in good faith and without negligence for section 21F(2) as to whether a donor has an illness or condition mentioned in section 21F(2)(a).

21Q Certain aspects of causation of death

- (1) For the purposes of the law of the Territory, the non-application of life-sustaining measures to, or the withdrawal of life-sustaining measures from, a person suffering from a terminal illness does not constitute a cause of death where the non-application or withdrawal was as a result of, and in accordance with, an AHD made by the person.
- (2) This section does not relieve a medical practitioner from the consequences of a negligent decision as to whether or not a donor has an illness or condition mentioned in section 21F(2)(a).

21R Savings

- (1) Nothing in this Act prevents the artificial maintenance of the circulation or respiration of a dead person:
 - (a) for the purpose of maintaining bodily organs in a condition suitable for transplantation; or
 - (b) where the dead person was a pregnant woman – for the purpose of preserving the life of the foetus.
- (2) Nothing in this Act authorises an act that causes or accelerates death as distinct from an act that permits the dying process to take its natural course.

6 Part VI inserted

After section 24

insert

**Part VI Transitional matters for Powers of Attorney
Amendment Act 2012**

27 Savings

An instrument consisting of directions made under section 4 of the *Natural Death Act* and in force immediately before its repeal:

- (a) may be registered as an AHD; and
- (b) if registered – is taken to be an AHD; and
- (c) if not registered – continues to have effect, and may be revoked (but not otherwise amended), as if the *Natural Death Act* had not been repealed.

7 Schedule 1A inserted

After Schedule 1

insert

**Schedule 1A Form of acceptance by health guardian under
advance health directive**

section 21C(3)

I, _____, appointed as health guardian under the advance health directive on which this acceptance is endorsed/to which this acceptance is annexed*, acknowledge that:

- (a) I may exercise the power of attorney for the donor in a health matter specified in the advance health directive at any time that the donor, _____, is not legally capable, as defined in section 5 of the *Powers of Attorney Act*, of making decisions in relation to the matter, but not otherwise; and
- (b) I must exercise the power of attorney in accordance with the advance health directive and the *Powers of Attorney Act*, and

(c) I will, by accepting this appointment as health guardian, be subject to the requirements of Part IVA of the *Powers of Attorney Act*.

.....
(Health guardian)

* Delete if inapplicable

Part 3 Repeal

8 Repeal

The *Natural Death Act 1988* (Act No. 51 of 1988) is repealed.