

NORTHERN TERRITORY LAW  
REFORM COMMITTEE:

REPORT ON THE POWERS OF  
ATTORNEY ACT AND MEDICAL  
ENDURING POWERS OF  
ATTORNEY

'The undiscover'd country from whose bourn  
No traveller returns'

*(Hamlet, Prince of Denmark, William Shakespeare)*

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE  
("NTLRC")

The Hon Austin Asche AC QC	Mr Nikolai Christrup
Mr Max Horton OAM	Ms Alison Worsnop
Ms Jenny Blokland CM	Assoc Prof Matthew Storey
Ms Carolyn Richards	Ms Peggy Dwyer
Ms Barbara Bradshaw	Mr John Hughes
Mr Tim Pritchard	

MEMBERS OF THE NTLRC SUB-COMMITTEE

The Hon Austin Asche AC QC	Mr Max Horton OAM
Ms Melanie Little SM	Ms Alison Worsnop
Ms Sally Gearin	Assoc Prof Matthew Storey
Mr Adam Harwood	Mrs Sue Bradley

PERSONS ASSISTING THE SUB-COMMITTEE

Mr Kelvin Currie	Barrister (formerly with the Health Department)
Ms Meribeth Fletcher	Health Department
Ms Liz Kasteel	Senior Policy Officer with Health Department
Dr Mark Boughey	Health Department (Palliative Care)

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## INTRODUCTION

### Terms of Reference

The enquiry of the Attorney-General is to report on possible amendments to the NT *Powers of Attorney Act*, taking into consideration that the NT does not presently have legislation which allows a person to make a Medical Enduring Power of Attorney (MEPA)<sup>1</sup>. "In the Northern Territory, enduring powers of Attorney are limited to financial and property matters. Issues of health and welfare decisions cannot be directed in this way and must be dealt with (by the court) by appointment of a guardian under the *Adult Guardianship Act*."

Other than the limited provisions of the *Natural Death Act*, there is currently no legislative capacity for individuals to make medical directives which have binding power on others or to appoint substitute decision makers of their own choice to look after their future medical needs when they are not able to do so themselves.

Substituted decision makers may be appointed by the court under the *Adult Guardianship Act* but that Act does not allow for competent individuals to appoint substitute decision makers of their own choice. When a guardian is appointed by the court, the guardian may be granted capacity to make financial, medical and general welfare decisions.

### The Present Position in the Northern Territory

At present an enduring power of attorney in the NT is consonant only with a power long recognised by the law that is, basically, contractual and dealing with matters relating to finances and property and is embodied in the NT *Powers of Attorney Act*.

By the *Natural Death Act* a person of "sound mind", who does not want to be subject to "extraordinary measures" (as defined in s.3), may "make a direction in the prescribed form" that he desires not to be subject to extraordinary measures "in the event of his or her suffering from a terminal illness" (s.4(1). "Terminal illness" is defined as "such illness, injury or degeneration of mental or physical faculties —

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

The medical practitioner responsible for that person's treatment is bound to act in pursuance of that direction (s.4(3)). But a person "of sound mind" always has the right to revoke any such direction. Hence if he then becomes incompetent no presumption can be made whether he would continue the direction or revoke it.

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<sup>1</sup> Letter from A-G. Appendix A

Note also summary of State legislation Appendix B

Also the Hong Kong Law Reform Commission Report on "Enduring Powers of Attorney" Chapter 2, summarises the relevant legislation of the various jurisdictions in Australia, Canada, UK and NZ.

Only the individual can give the direction, and only with respect to a terminal illness. In borderline cases, and where the patient has become incompetent, the doctor may properly consider that he has no authority to proceed, and no authority to withdraw measures, extraordinary or otherwise, to enable death to occur more simply or more peaceably. In other words there remain areas where a decision must be made on behalf of the patient by someone else. In some other jurisdictions an alternate substitute decision maker can be appointed<sup>2</sup>, but this does not apply in the NT save by recourse to the *Adult Guardianship Act*.

That statute acknowledges the common law right of the patient to refuse medical or surgical treatment (s.5(1)), but this is of little use if the patient is incompetent to do so. However, note that some members of this Committee consider that the NT *Natural Death Act* can be interpreted as allowing a direction under that Act to continue even if the person giving the direction has ceased to be of sound mind. (See later, under "Legislative Labyrinth" paragraph A(2), (ii) pp. 18 -19).

Application must therefore be made to the Local Court for the appointment of a guardian (s.8). If the Court is satisfied that the patient is "a person under an intellectual disability" and in need of an adult guardian it will appoint one (s.15).

"Intellectual disability" is widely defined as: -

"a disability in an adult resulting from an illness, injury, congenital disorder, or organic deterioration or of unknown origin and by reason of which the person appears to be unable to make reasonable judgments or informed decisions relevant to daily living".

The application to the Court may involve the appearance of various other parties interested or claiming to be interested (s.13).

Upon application, the Court may make a full order, a conditional order or a temporary order. The latter two orders are within the compass of the powers granted under a full order, but, under a conditional order, are restricted in scope, and, under a temporary order, are restricted in time. Both of these may subsequently be converted into a full order.

The full guardianship order confers on the appointed guardian various powers of decision making set out in s.17.

Section 17 (2)(d) confers power " to consent to any health care that is in the best interests of the represented person", but the proviso is, "except as otherwise provided in s. 21". (Emphasis added).

"health care" is not defined, but, presumably is something less than a "major medical procedure" which is defined by s. 21(4) as

- "(a) a medical or dental procedure that does not remove an immediate threat to a person's health and which is generally accepted by the medical profession or, as the case may be, dental profession as being of a major nature; and
- (b) a medical procedure relating to-

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<sup>2</sup> Supra p.6

- (i) contraception; or
- (ii) the termination of a pregnancy."

While s. 21(1) preserves the right of a medical practitioner to act in an emergency to save life, s. 21(2) provides that a medical practitioner must not otherwise carry out a major medical procedure on a represented person without the consent of the Court.

### Response in Other Jurisdictions

Some States already have legislation providing for the appointment by the individual of "decision makers" or "persons responsible" who can consent to such procedures on behalf of the individual; but their powers are subtly different in every jurisdiction, and, in some jurisdictions there appear doubts as to whether the power extends to withdrawal of life sustaining treatments.<sup>3</sup>

### Recent Proposals in the Northern Territory

1. In July 2008 the NT Department of Health and Families published a Discussion Paper on the topic: - "End of Life Decision Making – Advance Directive".

The Department had earlier participated in a national program, "Respecting Patient Choice".

The Discussion Paper noted that, "the Program Report recommends for the Northern Territory to review its existing legislation the *Natural Death Act* 1989, and to provide individual(s) with a legal framework when appointing a Medical Enduring Power of Attorney".

In its Introduction, the Discussion Paper commented that "the medical model of health care has moved in the direction of respecting a competent patient's right to control medical intervention", and noted that "[m]any countries, including Australia, have introduced advance directive legislation in recent years". (Note that the expression "including Australia" should more precisely mean, "Including certain States and Territories in Australia").

The expression "advance directive" is defined, for the purposes of the Discussion Paper, as, "a decision making instrument that can be used by a competent individual before a serious illness or condition occurs which will result in an inability to make decisions".

The Discussion Paper emphasises that, "[t]he underpinning principles of advance directive are on value of respect, dignity and autonomy. This allows individuals to determine and provide input into their future plan when they can no longer make their own decisions".

The Discussion Paper notes the various and varying legislation of the Australian State and Territories on or concerning this topic. The full text of this Discussion Paper appears at Appendix C.

2. A Memorandum to the NTLRC from the Department of Health and Families

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<sup>3</sup> Supra p.6

records that the Department "is in favour of the general notion that Enduring Medical Powers of Attorney should be introduced legislatively into the Northern Territory". The full text of the memorandum appears at Appendix D

Representatives of the Department of Health and Families have considerably assisted the NTLRC in the preparation of this Report and we record our appreciation and thanks to Ms Meribeth Fletcher, Ms Liz Kasteel and Dr Mark Boughey.

3. In March 2007 four community members of the Adult Guardianship Panels, and two "interested persons" wrote to the then Attorney-General, the Hon Syd Stirling MLA asking, as a matter of urgency that he sponsor legislation to enable competent adults to make provision for future life issues<sup>4</sup>. The "interested persons" were indeed of considerable experience in this field, including, Mr John Flynn, a former Public Trustee and Mr Hugh Bradley, former Chief Magistrate. Mr Stirling reported that the matter would be considered by the Department of Justice<sup>5</sup>.

One of the writers of the letter mentioned above was Mrs Sue Bradley, a regular member of Adult Guardianship Panels. She is a member of this NTLRC sub-committee considering the present Attorney-General's Reference on this subject.

### **COMMITTEE RESEARCH**

The Committee considered the following issues and they are addressed below:

- Power of Attorney and Enduring Power of Attorney encompassing financial and property issues.
- Advance directives and MEPA encompassing medical decisions and end of life treatment directions.
- Enduring Power of Guardianship encompassing medical decisions where no MEPA has been appointed and general welfare and lifestyle issues.

#### **The Power of Attorney**

The general power of attorney has long been known to the law as a useful attribute to the law of contract. It is created by an instrument by which a person (the donor) gives to another person (the donee or attorney) power to act on his behalf for a specific period, and in specific areas of contract. Provided the instrument is in proper form, the attorney is then recognised as possessing all the rights and obligations which the donor possessed in respect of the matters specified in the instrument. At common law the power ceased on the death of the donor or donee, and could be revoked by the donor. It was also automatically revoked on the "legal incapacity" of the donor or donee; the argument being that a person under a legal incapacity no longer had the power to contract. "Legal incapacity" was defined in various ways by the common law, and the definition appearing in s.5 of the NT *Powers of Attorney Act* sufficiently agrees with the common law concept. That definition is: -

"legal incapacity, in relation to a person, means such a state of mental or physical

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<sup>4</sup> See Appendix E

<sup>5</sup> See Appendix F

incapacity that he is not capable of managing his affairs."

The irony of this situation was that a donor, rationally foreseeing that he might suffer some incapacity, and desiring, for that very reason, to appoint some trusted person to look after his affairs if that event occurred, could not effectively do so. As one law reform agency has put it: -

"[a] client requesting that a power of attorney be prepared appointing a close friend or relative to conduct his affairs because the client fears or feels that his mental powers are weakening. It is not easy to explain that at the very moment he would wish such a power to become operative, it would in law be terminated<sup>6</sup>."

This problem was solved in most common law jurisdictions by the statutory creation of an "enduring power of attorney" which allows the power to continue beyond the mental incapacity of the donor if that is what the donor expressly directs. But an enduring power of attorney is only an extension of the original power to act in business or contractual matters. It cannot extend into matters not within the ambit of the original power. Some jurisdictions state expressly that an enduring power is restricted to the donor's property and financial affairs, and cannot empower the attorney to make decisions relating to the donor's health care<sup>7</sup>. In the NT legislation this is necessarily implied.

The Committee considered an extension of the power, but the general consensus was it is so entrenched in contractual matters it would be better left untouched and an MEPA established under new legislation.

#### Advance Directives and Medical Enduring Power of Attorney

Developments in medical treatment and medical science over the last century have been remarkable and beneficial; but have revealed certain problems unknown, or, at least, unconsidered in earlier days. In those times a serious illness or accident might occasionally lead to recovery, but, more likely, to death, swift and inevitable, because the doctor had limited means to prevent it. The common law right of an adult patient of sound mind to refuse treatment was always recognised. But there was little point in giving directions to others about one's treatment when the time for that would be only a few days at most. Modern medicine has created situations where the patient may last for months or years in a comatose state although the chance of a full recovery is almost non-existent. An increasing number of people now find that a prospect they do not wish to contemplate; and they desire to give directions as to their medical treatment, which directions will continue after they, themselves, have ceased to have the power to give them.

The obvious solution is an enduring power of attorney tailored, not to business or contractual matters, but to decisions about the patient's health care placed in the hands of an agent authorised by the patient to take such decisions if the patient became legally incapable. This is known as a MEPA. Such a document, to be legally effective, should be legally recognised. It is not presently recognised in the NT.

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<sup>6</sup> The passage is from British Columbia Law Reform Commission Report No.22 on "Powers of Attorney and Mental Incapacity" and is quoted in the HK Report at p.3  
See, for instance, HK Report pp.3-4.

<sup>7</sup> See, for instance, HK Report pp.3-4.



Recourse to some form of authority for end of life decisions becomes increasingly necessary as medical science continuously succeeds in prolonging life even where the life prolonged may prove a serious and unwanted disability. As one commentator puts it : -

"Until relatively recently, an ill person died in the natural progression of his or her illness. But developments in medical technology have enabled that same person to live past the natural progression. Modern medicine can keep a person alive where there is no therapeutic benefit, and continuation of treatment merely prolongs the dying process<sup>8</sup>."

Other reasons for making provision for advance directives and MEPA's put forward by committee members include:

- Modern systems of medical planning, exemplified by palliative care plans utilised in the Territory, rely on a person's known wishes;
- People live less in nuclear and extended families where it might be expected that family members are clear about their wishes;
- The Territory is comprised of peoples from many cultures and religions and cultural and religious beliefs impact on views about some medical procedures; and
- Medical practitioners need certainty where patients are not able to give consent in a variety of situations.
- The issue of informed consent has growing ramifications in an increasingly litigious society – both for patients and medical practitioners.

#### Legal Recognition of Advance Directives and Medical Enduring Powers of Attorney

As previously mentioned, there is a variegated conglomeration of legislation in the various States and Territories; some dealing directly with MEPAs, and others, as it were, hovering on the brink.

A sensible and practical Constitution has, since 1901, given Australians the privilege of unrestricted travel within the Commonwealth; and, every day, thousands of our fellow citizens avail themselves of this privilege, which carries with it the obligation to conform to the laws of whatever jurisdiction they may find themselves in. Usually this creates little difficulty because of a broad similarity of legislation. Nevertheless some situations call for specific recognition by one jurisdiction of a particular law of another. An instance of this, within the present context, is s. 6A of the NT *Powers of Attorney Act*, which recognises, within the NT, Powers of Attorney executed according to the laws of another State or Territory. If all or most States and Territories ultimately pass laws relating to MEPAs, (and it appears that matters are tending in that direction), some provision similar to s. 6A would need to be included recognising MEPAs created in other

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<sup>8</sup> "Gardner re BWV — Resolved and Unresolved Issues at End of Life" by Alan Rothschild 11 JLM 292 (2004)

jurisdictions. The difficulty is already apparent, that a citizen of a jurisdiction which has provision for the recognition of MEPAs may become seriously or fatally ill in a jurisdiction which does not; and the citizen's intention and wishes may not be carried out.

Differing legislation has, at least, the advantage that it can be considered and compared to decide whether the same terms could usefully be employed in projected NT legislation.

Following this line, this Committee has considered the terms of the SA *Consent to Medical Treatment and Palliative Care Act* (the SA Act) as an appropriate pattern for NT legislation because it has provisions for legal recognition of MEPAs, (in the SA Act called "medical powers of attorney") and, in other respects, closely corresponds to the NT *Natural Death Act* and the NT *Emergency Medical Operations Act*.

### Comparison Between South Australian and Northern Territory Legislation

It will therefore be useful to compare the SA Act with the present Territory legislation to observe omissions and similarities.

One of the objects of the SA Act is stated in s.3 is,

"(b) to provide for medical powers of attorney under which those who desire to do so may appoint agents to make decisions about their medical treatment when they are unable to make such decisions for themselves."

The SA Act proceeds, in Division 3 of Part 2, to deal with the creation and operation of medical powers of attorney. These provisions do not appear in any NT legislation, but may be the model for NT legislation on the subject.

(Since it is now intended to review the SA Act in detail, and in the order in which the sections appear, the above subject will be further considered when reached in proper order).

The opening sections 1 — 4 would no doubt be somewhat different in any NT legislation, as they relate basically to the naming of the Act and the definition of various terms, some of which might have local significance. Section 5 removes from the operation of the Act medical research procedures. Such a provision does not appear in the NT legislation.

Part 2 of the SA Act is headed "Consent to medical treatment". It comprises ss.6 — 14.

Division 1 of Part 2 is headed "Consent generally" and contains s.6.

S.6 allows a person over 16 to make decisions about his or her own medical treatment. In the NT the appropriate age is 18. (See s. 4(1) of the NT *Natural Death Act*, and s. 2(1) of the NT *Emergency Medical Operations Act*.)

Division 2 of Part 2 of the SA Act, is headed "Anticipatory grant or refusal of consent", and contains s. 7. Though not precisely in the same terms, s.7 of the SA Act is similar to the NT *Natural Death Act*, (in particular s. 4 of that Act) and has the same effect. Both sections give a person "of sound mind" (c.f. SA Act

"while of sound mind"), the power to make directions as to medical treatment; in particular not to be subjected to "extraordinary measures". The emphasis on "sound mind" carries with it the obvious implication that a patient who becomes incompetent can no longer give directions (but note the alternative interpretation of the NT *Natural Death Act* appearing under "Legislative Labyrinth" paragraph A 2 (ii) pp. 18-19).

This is as far as the NT legislation goes. But many patients, quite clearly, would want their directions to extend beyond the time they became incompetent; and, indeed would consider a direction so limited to be totally unsatisfactory, inasmuch as it defeated the patient's expressed and continued intent not to be subject to "heroic measures" at any time.

The SA Act takes the next step, which follows logically and inevitably from the earlier legislation.

Division 3 of Part 2 of the SA Act is headed "Medical powers of attorney", and contains s.8 — 11. The expression "medical powers of attorney" carries the same meaning and effect as the expression "MEPAs" used in this Report.

Section 8(1) of the SA Act provides that, "A person of or over 18 years of age may, while of sound mind, by medical power of attorney, appoint an agent with power to make decisions on his or her behalf about medical treatment."

Various conditions as to form and exercise of the power follow in s.8, sub-sections (2) — (6), 7(b) and (8) — (10).  
Section 8(7) provides that "A medical power of attorney —

"(a) authorises the agent, subject to any conditions and directions contained in the power of attorney, to make decisions about the medical treatment of the person who granted the power if that person is incapable of making decisions on his or her own behalf". (Emphasis added).

Various cautionary provisions are added in ss. 9 and 10, including the right of a medical practitioner or a person with a "proper interest" to apply to the Supreme Court to review the decision of the agent.

Section 11 provides penalties for unlawfully inducing a person to execute a medical power of attorney.

These sections of the SA Act (i.e. ss. 8 — 11) create medical enduring powers of attorney. The NT has no equivalent legislation.

Division 4 of Part 2 of the SA Act (s.12), deals with medical treatment of children, with consent of parent, guardian or, in appropriate cases, the child.

Division 5 of Part 2 of the SA Act (s. 13) deals with emergency medical treatment of children or adults without consent. But if an adult has appointed an agent under a MEPA, or has a guardian, the treatment cannot be administered without the consent of the agent or guardian. In the case of a child, the consent of the parent or guardian must be sought, but the treatment may still be administered without their consent, if in the best interests of the child's health.

Much of this is similar to the NT *Emergency Medical Operations Act*. The NT *Emergency Medical Operations Act* is in somewhat more detail, (e.g. mention of blood transfusion), but the emphasis in both Acts is on the necessity of action in an emergency. An important difference is that, under the NT Act, if the medical practitioner is satisfied that there is an emergency situation, he may perform the operation "without the consent of the patient or any other person" (s.3(1)), whereas, in the SA Act the operation cannot be performed on an adult if the agent appointed under an MEPA or the guardian of the adult refuses consent.

Section 14 of the SA Act provides for a registry of directions under s.7 or of MEPAs.

Such a provision does not appear in the NT legislation.

Section 15 of the SA Act deals with the duties of medical practitioners to explain to a patient, or patient's representative, the nature and consequences of proposed medical treatment.

A similar provision appears in s. 4(4) of the NT *Natural Death Act*, though expressed in the negative, ("does not derogate from any duty of a medical practitioner to inform...etc)

Section 16 of the SA Act absolves a medical practitioner from civil or criminal liability if acting in accordance with the Act and without negligence.

This is somewhat differently worded in the NT *Emergency Medical Operations Act* ss.3(6) and s.4, where an operation performed in accordance with s. 3 (performance of operation without consent) is "deemed to have been performed with the consent of the person having authority in law to consent to the performance of the operation". Section 4 provides that the medical practitioner is not absolved from common law liability,

Though the immunity of medical practitioners, other than for negligence, is recognised in both statutes, it may be that the greater detail set out in the SA Act would be more acceptable to medical practitioners, particularly when that statute adds to the details contained in s15 (duty to explain), the further details set out in s17, under the heading "The care of people who are dying".

The NT legislation does not contain a provision similar to s.17 of the SA Act.

Finally, s. 18 of the SA Act, s.3(6) of the NT *Emergency Medical Operations Act* and s.6(1) of the NT *Natural Death Act*, though all somewhat differently expressed, distinguish the medical procedures permitted under these statutes from euthanasia, on the basis that the permitted procedures are not performed with the intent to end life but to alleviate suffering.

## APPROPRIATE LEGISLATION

The above analysis establishes the similarity between the SA Act and present NT legislation. The SA Act already contains in one Act the basic terms of the two Acts of the Territory, namely the NT *Emergency Medical Operations Act* and the NT *Natural Death Act*, and already has, in the same Act, made provision for MEPAs. There seems therefore a strong case for a single NT Act constituted by combining the provisions of the NT *Emergency Medical Operations Act* and the NT *Natural Death Act*, and which also contains legislative recognition of MEPAs. The compelling case for this course is that the topics to be included in the proposed single Act (advance directions, emergency operations and MEPAs), are clearly interconnected; as is already recognised by the SA Act.

There are two other arguments for this course: -

1. If legislation for MEPAs is to be enacted in all or most of the States and Territories, uniformity, as far as possible is desirable. No doubt every jurisdiction may wish to include variations based on some particular local mode or attribute, but this should not affect a basic pattern familiar in every jurisdiction.
2. If legislation is similar in SA and the NT, statutory interpretation from the courts proceeds from a common base, and assists both jurisdictions.

(To this, one might respectfully suggest that the example of at least two of the States and Territories enacting basically similar legislation may inspire the splendid Voltairean maxim "*pour encourager les autres*").

The appropriate steps to be taken for a single NT Act encompassing advance directions, emergency operations and MEPAs would be as follows: -

1. Repeal NT *Emergency Medical Operations Act* and NT *Natural Death Act*.
2. Include the provisions of these Acts into a single Act called the "Advance Directives Act".
3. The new Act to follow the SA Act as far as practicable, and, in particular, to include ss. 8 -11 of the SA Act recognising MEPAs, and thus introducing the concept into the NT.
4. Section 17 of the SA Act to be introduced into the NT Act but with the omission of the words "in the absence of an express direction by the patient or the patient's representative to the contrary", in s. 17(2). (An article in the Adelaide Law Review 2004 p. 161 by Loane Skene points out the ambiguity of that phrase in the context of the statute; and although the learned author proposes an ingenious interpretation to negate the apparently clear words of the sub-section, it is not clear that such an interpretation would necessarily be adopted, and the safest course would be to omit)<sup>9</sup>.
5. On this basis there would be no need to amend the NT *Powers of Attorney Act* which should remain confined to business and commercial interests of the donor.

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<sup>9</sup> See Appendix F "Table of Comparison with South Australian Consent to Medical Treatment Act and Proposed NT Legislation"

For children and incompetent adults there is presently a statutory regime of court appointed guardianship in the NT, as in all other States and Territories, although in various forms. At least one writer has lamented that : -

"there are eight different guardianship regimes which all differ in their approach as to how decisions should be made<sup>10</sup>."

The guardianship process will continue to be needed (e.g. for children or incompetent adults who do not subscribe to a form of MEPA, if one is ultimately introduced). But there seems no reason why, instead of a public authority determining what should be done, a patient may not, by means of an MEPA, direct that that process should be carried out according to his wishes, expressed in an MEPA in clear and unambiguous terms.

### Enduring Powers of Guardianship

The current situation in the Northern Territory has caused frustration to competent adults wishing to make provision for their future. All states have legislation to allow for some form of Enduring Power of Guardianship ("EPG"). The Northern Territory does not.

Generally, people are living longer and this is leading to an increase in numbers of people with dementia and other forms of intellectual incapacity.

More aged people are moving to the Territory to link up with families and more Territorians are ageing. Adults moving to the Territory who have made provisions for their future in other states are bewildered and annoyed to learn that their change of residency has rendered those provisions invalid and no similar action is available to them here.

The current Adult Guardianship process in the NT *Adult Guardianship Act* is already under strain yet the only current recourse requires that process leading to action by the court to ensure substitute decision makers become available to those who have already lost capacity. This process can be avoided and reduce unnecessary stress on family members where the person has made appropriate provision for the eventuality.

It must be emphasised that a guardian appointed under the NT *Adult Guardianship Act* has far wider powers than merely making provision for health care. These powers extend to the classical view of a guardian who can act for and govern almost every aspect of the daily life of the represented person.

It is proposed that s. 25 of the SA *Guardianship and Administration Act* be inserted in its present form to our proposed Advanced Directives Act with appropriate consequential provisions. Section 25 of the SA *Guardianship and Administration Act* reads as follows:-

#### "25 Appointment of enduring guardian

- (1) A person of or over 18 years of age may, by instrument in writing, appoint a person as his or her enduring guardian.

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<sup>10</sup> Cameron Stewart "Managing Death and the Law" Article in "Precedent" May/June 2008 p. 9

- (2) An instrument is not effective to appoint an enduring guardian unless—
  - (a) it is in the form set out in the Schedule or in a form to similar effect; and
  - (b) it has endorsed on it an acceptance in the form or to the effect of the acceptance set out in the Schedule signed by the person appointed as the enduring guardian; and
  - (c) it is witnessed by an authorised witness who completes a certificate in the form or to the effect of the certificate set out in the Schedule.
- (3) A person is not eligible to be appointed as an enduring guardian unless he or she is of or over 18 years of age.
- (4) A person is not eligible to be appointed an enduring guardian if he or she is, in a professional or administrative capacity, directly or indirectly responsible for or involved in the medical care or treatment of the appointor and, if a person who is validly appointed as an enduring guardian becomes so responsible or involved, the appointment lapses.
- (5) Subject to this Act and the conditions, limitations or exclusions (if any) stated in the instrument, an instrument appointing an enduring guardian authorises the appointee or, if there is more than one appointee, the appointees jointly or severally (as the case may be)—
  - (a) to exercise the powers at law or in equity of a guardian if the person who makes the appointment subsequently becomes mentally incapacitated; and
  - (b) in that event, to consent or refuse consent to the medical or dental treatment of the person, except where the person has a medical agent available and willing to act in the matter.
- (6) The powers conferred by an instrument appointing an enduring guardian must, unless the Board approves otherwise, be exercised in accordance with any lawful directions contained in the instrument”.

This proposal will enable individuals to make enforceable directives about matters other than financial issues, and appoint substitute decision makers to carry out their wishes when they are no longer intellectually competent.

We propose that the legislation is drafted to ensure primacy for MEPA over enduring guardianship in medical matters so no conflict occurs if both mechanisms have been utilised.

With our mobile population the need to establish reciprocal arrangements with the States should also be considered. In recommending adoption of the SA system it is anticipated that reciprocal arrangements with SA at least can be established with some ease.

#### The Control of the Courts.

The Courts have always had ultimate jurisdiction over guardianship matters, and, indeed, over any decisions where the welfare of the individual as to medical treatment or care is concerned. This is the "parens patriae" (literally, "parent of the nation") jurisdiction which has been resorted to in many areas where modern medical techniques create situations previously unknown,

causing vast debate about the ethics, morality and legality of the process.

Since there must be an ultimate arbiter in these often unexpected fields it is vital that the Court's jurisdiction be maintained. No doubt, as the unexpected becomes the familiar, legislation will create more detailed rules to cover the field (c.f. the development of legislation in the area of human artificial insemination); but the Courts must maintain the primary control of the unexpected.

One Victorian judge has doubted whether the "parens patriae" jurisdiction can be of much effect where parliament has provided comprehensive laws in such matters<sup>11</sup>. That may well be so where Parliament has finally stepped in, but it leaves the Courts as still the first line of defence for the unforeseen encroachment; and there will always be room for argument as to what is "comprehensive".

As a recent example of the parens patriae jurisdiction, Mildren J of the NT Supreme Court applied it in a case where he refused to order a further medical opinion in the case of a severely injured patient with no recovery likely, and the medical opinion was that further treatment would be futile<sup>12</sup>.

Nevertheless, although final judgment must always remain with the Courts, there is no reason not to explore procedures of which the Courts may approve, to the extent that any application to them may result in instant dismissal if accepted and tried procedure has been adopted and all proper inquiries have been made.

Applications to the Courts involve expense, and although this expense is often borne by public authorities, that remains an expense to the State and, ultimately, the taxpayer. Furthermore, in many cases the costs are borne out of the estate, which seems unfair if there is a better way to arrive at the same position. Courts have always acted with all appropriate speed in these cases, but delays are inevitable when various interests seek to be represented; and there is always the possibility of appeal. (c.f. s.24 of the *Adult Guardian Act*). To that end it would be desirable that there be a jurisdictional basis for an application to the Court which should be confined to those who can show a direct and personal interest in the application, and excluding parties wishing to promote some broad general philosophy unconnected to the particular facts save by that philosophy.

Thus if a MEPA or EPG, with proper safeguards and clearly evincing the donor's intention, is given legislative authority, it is likely that Courts will not interfere, and may decline applications to change or contradict the plain meaning of such applications, save in exceptional circumstances.

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<sup>11</sup> Rothschild 11 JLM 303, referring to the decision of Morris J. in "Gardner re BMW.

<sup>12</sup> Mildren J, in *Melo v Supt of Royal Darwin Hospital* (unrep) 19/12/07



## Other matters

Inquiries in SA indicate, that, although the SA Act has been in force for more than a decade, few have availed themselves of the provisions relating to medical powers of attorney. (Services SA have advised that whereas they have sold around 600 EPA and EPG packs this financial year, only a handful of MEPA forms have been requested) Yet the consensus is that the provisions of the Act are not opposed and are generally accepted. This committee has examined a document put out by the SA Department of Health and freely available for circulation. The document is headed "A Guide for those completing a Medical Power of Attorney", and clearly sets out the reasons and the procedure for executing such a document. This Committee does not know how far the public were informed of such a document, or whether solicitors had available the document, or discussed the subject with their clients at the time of drawing wills or discussing testamentary intentions.

In some other parts of the world it appears that the concept is more generally accepted. The remarks appearing in 78 ALJ (2004) are of interest.

"It is common in most of North America and Scotland for a health power of attorney to be executed at the same time as a will. This empowers the donee to make health decisions in the twilight years of the donor's life. A health power of attorney is enabled by statute but there is some scope for them under the general law".

If the concept of MEPAs is introduced into the NT, consideration should be given to informing the public about the existence of the right to execute an MEPA and EPG, and the Law Society should ensure that all practitioners remind their clients of the legislation in appropriate cases.

The packages available through agencies in SA cover, will making, EPA, EPG and MEPA and are most informative.

## **SOUTH AUSTRALIAN DEVELOPMENTS**

If accepted, the recommendations of this Committee would lead to a system in the NT mirroring that which has been operating in SA for many years.

On a recent visit to SA Mrs Bradley noted that interest was growing towards revising that current system of advance directives with its multiple legislation, differing signing requirements and differing ministerial responsibility with a view to encompassing all advance directives in one piece of legislation. Since this Committee's basic recommendation is that legislation similar to the SA Act be introduced into the NT, it would appear that co-operation between NT and SA could result in uniform legislation to the advantage of both. Furthermore, such legislation might encourage other States and Territories to bring their own legislation into line for the mutual advantage of all Australia citizens. To this end we would respectfully suggest that the NT and SA legislatures, which appear to be moving in the same direction, consult together through their respective Attorneys-General or their representatives.

Mrs Bradley also advised that the issue of organ donation had been raised in the advance directive debate in SA. Although that topic is not within this Committee's Terms of Reference, it does point out the desirability of uniform legislation on the matters covered in this Report and related matters.

## **LEGISLATIVE LABYRINTH**

To summarise what has gone before, there are, in the NT, and in other States and Territories, various and varied legislative provisions by which advance directions can be given or directed concerning an individual's medical, social, financial or general welfare.

Subject to the provisions of the particular statute involved, such advance directions can be given:

- a) by the individual;
- b) by that same individual to another person; or
- c) by a person appointed by a Court.

### **A. The Legislative Provisions Presently in the Northern Territory**

The legislative provisions presently in the NT are as follows:-

#### **1. Power of Attorney.**

- (i) A power of attorney is an appointment by an individual of another person to act as his/her attorney in business or financial matters pursuant to the NT *Powers of Attorney Act*.
- (ii) A general power of attorney is revoked upon the happening of any of the events set out in s.16 of the Act, which includes the "legal incapacity" of the donor.
- (iii) An enduring power of attorney is not revoked upon the donor's "legal incapacity". s. 17(2)(a).
- (iv) Section 6A of the Act allows for recognition of similar legislation under interstate laws.
- (v) Note again that a power of attorney under this Act is restricted to business or financial matters.

#### **2. Direction under the NT *Natural Death Act*.**

- (i) A person "of sound mind who has attained the age of 18 years" may give a direction that he or she does not desire to be subject to 'extraordinary measures' in the event of his or her suffering from a "terminal illness" (s. 4).
- (ii) Since the direction can only be given by a person "of sound mind", it ceases to have effect if that person subsequently becomes incompetent. This defeats the intention that many persons would have of continuing those directions, through the agency of a third party if they become incompetent. Such persons cannot give an agent any greater authority than they have themselves. This interpretation is based on the assumption that a person while "of sound mind" may vary or revoke at any time the direction he has given under s. 4. He ceases to have the power so to vary or revoke if he becomes incompetent (i.e. not "of sound mind"). Since it cannot be assumed that he may not have varied or revoked the direction at some future time had he not become incompetent, the medical practitioner cannot rely upon the direction if the patient is now incompetent. However, some members of this Committee

take the contrary view that the terms of s.4 should be interpreted as varying any common law principle or statutory interpretation that would negate the direction if the person giving it subsequently becomes incompetent, and the direction therefore stands, and the medical practitioner could and should rely upon it. Those preferring this reading refer to the provisions of the Act generally, and to subsections 4(3) and (4) in particular.

If Parliament had intended this interpretation, the matter could have been put beyond doubt by adding after words, "even if the person is no longer of sound mind". Meanwhile the possible ambiguity remains. So far as this Committee is aware, there has been no judicial ruling on the question.

- (iii) There is, presently, no provision for a MEPA similar to that permitted by the NT *Powers of Attorney Act* in business or financial matters.
- (iv) The NT *Emergency Medical Operations Act*, (whereby a medical practitioner can act without authority in emergencies), therefore presently applies:-
  - a) to an adult who has given a directive under the NT *Natural Death Act*, but who has become incompetent (subject to the aforesaid contrary view),
  - b) to any other adult or child.
- (v) Note again that the NT *Natural Death Act* applies only to medical circumstances.

### 3. Court Appointment Guardians.

- (i) Under the provisions of the NT *Adult Guardianship Act*, the Local Court may appoint a guardian for an adult person who is suffering from an "intellectual disability"
- (ii) It is important to note that, in this Act a guardian, once appointed, has very wide powers, including, but not restricted to, decisions as to medical procedures. Section 17(1) bestows on the guardian, "all the powers and duties which the guardian would have if he or she were a parent and the represented person his or her infant child". To emphasise the breadth of these powers the section proceeds, "without limiting subsection (1)", to confer on the guardian such powers as, determining residency, manner of work, (if appropriate), and health care. s.17 (2).

### B. The South Australian Provisions

- (i) SA legislation, in respect to the matters set out above, covers those matters, but goes further.
- (ii) The SA *Consent to Medical Treatment and Palliative Care Act* allows a person 18 or over, and of sound mind, to give directions personally as to medical treatment (C.F. NT *Natural Death Act*), but further, allows such person to execute a "medical power of attorney" whereby the attorney or agents may continue to give directions, "if that person is incapable of making decisions on his or her own behalf" (s. 8).
- (iii) Section 25 of the SA *Guardianship and Administration Act* allows a person 18 or over to appoint an "enduring guardian" with all the

powers of guardian, which powers continue if that person becomes mentally incapacitated.

- (iv) Note that, as in the NT Legislation, the powers of a guardian cover a wide field and are not restricted to medical matters.

### **C. General Recommendation**

Leaving aside incidental matters, the general view of this Committee is that the NT legislation should include the more extensive powers covered in this field by the SA legislation. For the reasons set out in paragraph "E" supra this Committee considers that the general aim might be best achieved in co-operation with SA research.

### **D. Statutory Procedures**

- (i) To achieve that aim, certain statutory steps need to be taken.
- (ii) Proposed legislation should recognise that there is a clear distinction in procedure and practice between a personally appointed guardian (or attorney or agent), and a court appointed guardian; the distinction being that a court appointed guardian has such powers as the court or the statute directs; whereas a personally appointed guardian (or attorney or agent) has such powers, (within the statutory scope), as the appointer may choose to give, i.e. individual freedom of choice.
- (iii) It would therefore seem rational to gather up into one statute all cases of freedom of choice ("advance directives") to achieve internal unity of purpose and external utility of reference. Some members of the Committee prefer the name "Advance Directives".
- (iv) This may be achieved by a statute (Advanced Directives Act), encompassing the present NT *Natural Death Act* and the NT *Emergency Medical Operations Act*, and including also the present SA provisions relating to the power to execute a MEPA, (SA *Consent to Medical Treatment and Palliative Care Act* s.8) and the provisions of s.25 of the SA *Guardianship and Administration Act*, allowing a person to appoint an "enduring guardian". In the case of an appointment of both an attorney under the medically enduring power of attorney, and an enduring guardian". In the case of an appointment of both an attorney under the medically enduring power of attorney, and enduring guardian, the appointment under the former to take precedence in medical matters.
- (v) Necessarily, the NT *Natural Death Act* and the NT *Emergency Medical Operations Act* be repealed.
- (vi) No amendment necessary to the NT *Powers of Attorney Act*, which will continue to be confined to the business and financial matters for which it was originally designed.
- (vii) No amendment necessary to the NT *Adult Guardianship Act*. This will continue to apply to court-appointed guardians.
- (viii) One small but important amendment, (not otherwise affecting the policy set out in (vi), above), should be recognised as soon as possible.

Mrs Bradley has drawn our attention to a case where the donee of an enduring power of attorney has refused or neglected to exercise the power in a way that would be to the advantage of the donor. (see Appendix H). The only way in which the situation can be ameliorated is by application to the Supreme Court under s.15 of the NT *Powers of Attorney Act*. (see particularly s.15 (2) (c). This can cause unnecessary expense and difficulty. Applications under the NT

*Adult Guardianship Act* are made to the Local Court. (see definition of "Court" in s. 3 of that Act). It would seem appropriate and less expensive if applications under the NT *Powers of Attorney Act* were likewise to the Local Court.

Our recommendation is, therefore that, in s.15 of the NT *Powers of Attorney Act*, the expression of "Local Court" be substituted for the expression "Supreme Court", wherever appearing.

Whether ultimately the provisions of s.15 should appear in a proposed Advance Directives Act should be reserved for later consideration.

#### **E. Co-operation with South Australia**

- (i) This Committee is aware of the SA initiative to review, inter alia, all legislation relating to advance directives.
- (ii) Since this Committee has recommended consistency with SA legislation, it would be important to be kept informed of the progress of this review. Representatives of the NT Justice Department and the NT Department of Health should request information or participation in such review. This committee understands that any such request would be kindly received.
- (iii) Although this may delay the Territory legislation until the completion of the SA review, the advantage of uniformity between SA and NT legislation would be considerable.

#### **F. National Guidelines**

- (i) A Committee of the Australian Health Ministers Advisory Council ("AHMAC") has been asked by AHMAC to develop nationally consistent guidelines for Advanced Care Directives and related matters pertaining to end of life medical decisions by health professionals.
- (ii) For this purpose the National Advance Care Planning Working Group ("NACPWG") has been established. This working group has representatives from every State and Territory, and two representatives from the Australian Government Department of Health and Ageing.
- (iii) The NACPWG considers it necessary for related matters considered during the project to be placed within the broader context of advance care planning rather than limited to end of life decisions by health professionals.
- (iv) Once guidelines, (with a set of principles), have been drawn up by the NACPWG and approved by AHMAC, all jurisdictions are asked to implement these principles into their medical advance directives and advance care planning.
- (v) The NT representative on NACPWG is Liz Kasteel, Senior Policy Adviser, Acute Care Policy & Services Development of the NT Department of Health and Families. She has agreed, subject to permission from the NACPWG, to advise and inform this Committee. This Committee appreciates the importance of such co-operation and records its thanks to Liz Kasteel.
- (vi) Since the AHMAC is concerned with guidelines rather than drafting legislation, the recommendations of this Committee as to such legislation need not be delayed, save that, from time to time some necessary amendments may be needed to conform with AHMAC guidelines as and when they appear.

## RECOMMENDATIONS

1. That, for the reasons set out in this Report, and for the better attainment of uniform legislation between the NT and SA regarding MEPAs and related matters, the Attorneys-General of the NT and SA, or their representatives and the NT and SA Departments of Health or their representatives, consult together to this end, and for the ultimate aim of promoting such uniform legislation for acceptance by other States and Territories for the welfare of all Australian citizens.
2. That the NT *Natural Death Act* and the NT *Emergency Medical Operations Act* be repealed and the provisions of both Acts be contained in one comprehensive Statute, the "Advance Directives Act" which follows, basically the provisions of the SA *Consent to Medical Treatment and Palliative Care Act*, and therefore includes also provisions relating to MEPAs. (Subject however, to a revision of s. 17 of the SA Act to exclude the words "in the absence of an express direction by the patient or the patient's representative to the contrary", - for the reasons set out in this Report).
3. That s. 25 of the SA *Guardianship and Administration Act* be inserted in its present form into the proposed "Advance Directives Act", with appropriate consequential amendments, ensuring, inter alia, primacy for MEPAs over Enduring Guardianship in medical matters, so that no conflict occurs if both mechanisms have been utilised.
4. That the legislation contemplated in Recommendations 2 and 3, be given appropriate regulatory power to provide Forms, Guides and Directions suitable for use and application by members of the public, and that such documents be freely made available.
5. That the legislation contemplated in Recommendation 2 and 3 involve one overall government body and authority.
6. That meanwhile, and as an immediate measure, s.15 of the NT *Powers of Attorney Act* be amended by substituting the expression "Local Court" for the expression "Supreme Court" wherever appearing.



MINISTER FOR JUSTICE AND ATTORNEY GENERAL

Parliament House  
State Square  
Darwin NT 0800  
[minister.burns@nt.gov.au](mailto:minister.burns@nt.gov.au)

GPO Box 3146  
Darwin NT 0801  
Telephone: 08 8901 4162  
Facsimile: 08 8901 4165

The Hon Austin Asche AC QC  
President and Chair  
Northern Territory Law Reform Committee  
PO Box 1535  
DARWIN NT 0801

03 MAR 2008

Dear Mr Asche

As you may be aware, the Northern Territory does not have legislation which allows a person to make a medical enduring power of attorney. A person can make a power of attorney, which allows a person to "donate" certain legal powers to another person. The "donor" appoints a person (who becomes known as the "attorney" or "donee") by way of a formal instrument. The instrument provides that the attorney can act as the donor's representative in respect to legal, financial or business matters. The power granted can be general, or for specific purposes. Further, whilst still competent, a person may make an enduring power of attorney pursuant to the *Powers of Attorney Act*. This allows a person to appoint a substitute decision-maker in the event that they later become incompetent to make decisions. In the Northern Territory, enduring powers of attorney are limited to financial and property matters. Issues of health and welfare decisions cannot be directed in this way and must be dealt with by appointment of a Guardian under the *Adult Guardianship Act*.

Additionally, you may be aware that issues relating to oaths and affirmations were also considered by the Northern Territory Law Reform Committee ("NTLRC") in 1983, Report 10 entitled "*Report on the Oaths Act and amendment thereof in connection with Oaths and Affirmations by witnesses in Court Proceedings*" ("the Oaths Act Report"). The issue of the language used for the taking of oaths and affirmations in courts and whether there is a need to simplify the language used by the Courts in seeking to ensure that witnesses understand that they should tell the truth, has recently been brought to my attention.

I would like to have the NTLRC examine and report on two issues:

- the need for and whether it is considered appropriate to amend the *Powers of Attorney Act* to accommodate and provide for Medical Enduring Powers of Attorney; and

- investigate the implementation of the proposal of the NTLRC *Oaths Act* Report of 1983, namely that the oath requirements be abolished and replaced by a simpler form of affirmation.

Please prepare reports on possible amendment to the *Powers of Attorney Act* and the language used for the taking of oaths and affirmations in courts by October 2008.

A hard copy of the *Oaths Act* Report will be provided by the Department of Justice.

Yours sincerely

CHRIS BURNS



## Appendix B

	ENDURING POWERS	LEGISLATION	SCOPE OF DECISION MAKING POWER
<b>NSW</b>	Enduring Guardian	<i>Guardianship Act 1987</i>	<p>Enduring Guardian (s6E) can be given powers in the following areas:</p> <ul style="list-style-type: none"> <li>(a) place (such as a specific nursing home or appointer's own home) where the appointer will live;</li> <li>(b) health care;</li> <li>(c) other kinds of personal services (for example house cleaning, shopping, social and recreational services);</li> <li>(d) giving consent under Part 5 to medical or dental treatment*;</li> <li>(e) any other function specified in the instrument.</li> </ul> <p>*Can only consent to medical or dental treatment that will promote health and well being (s.46B).</p> <p>The enduring guardian cannot give consent if the patient objects to the treatment. The consent will only override the patients objection if the Tribunal has given authority (s46A).</p> <p>Enduring guardian cannot consent to a treatment defined as special medical treatment:</p> <ul style="list-style-type: none"> <li>(a) any treatment intended or likely to lead to infertility</li> <li>(b) any new treatment not yet gained the support of a substantial number of medical practitioners or dentists practising in that area,</li> <li>(c) any other treatment determined by the regulations.</li> </ul> <p>An enduring guardian has to agree with the advance directive (Fact sheet using advance care directives). Advance directives not in legislation.</p>
	Enduring Power of Attorney	<i>Powers of Attorney Act 2003</i>	<p>Enduring Power of Attorney is restricted to property and financial affairs. Broad and general powers which include selling property, making investments, accessing cash and buying or selling shares (from fact sheet by Guardianship Tribunal).</p>
<b>VIC</b>	Enduring Power of Attorney (Medical Treatment)	<i>Medical Treatment Act 1988</i>	<p>Enduring Power of Attorney (Medical Treatment):            Attorney can agree to or refuse medical treatment including involvement in medical research. They can only refuse medical treatment if under (s.5(b)(2)).</p>

			<p>(a) the treatment would cause you unreasonable distress, or</p> <p>(b) the agent reasonably believes that you would consider the treatment unwarranted.</p> <p>An agent's decision takes precedence over those of an enduring guardian you may have appointed who has healthcare powers.</p> <p>An enduring power of attorney (medical treatment) cannot be used to make financial, legal or guardianship decisions.</p> <p>An agent cannot agree (consent) to the following medical procedures:</p> <ul style="list-style-type: none"> <li>• those likely to lead to infertility</li> <li>• termination of a pregnancy</li> <li>• removal of tissue for transplant.</li> </ul> <p>The agent cannot refuse medical treatment to alleviate pain or suffering when a person is dying (palliative care)(fact sheet).</p>
Enduring Power of Attorney (Financial)		<i>Instruments Act 1958</i>	An enduring power of attorney (financial) can make any financial and legal decisions. On the form you can limit or place conditions upon how you want your attorney(s) to carry out their responsibilities. An enduring power of attorney (financial) cannot be used to make medical treatment or lifestyle decisions.
Enduring Power of Guardianship		<i>Guardianship and Administration Act 1986</i>	<p>Enduring Power of Guardianship (Part 4 Division 5A) can cover the following areas (s.24):</p> <ul style="list-style-type: none"> <li>(a) to decide where represented person will live permanently or temporarily,</li> <li>(b) who represented person will live with;</li> <li>(c) whether they should be permitted to work, and if so the nature or type of work, for whom will work and related matters;</li> <li>(d) except as otherwise provided in part 4A, consent to any health care that is in the best interests*;</li> <li>(e) restrict visitors to such extent as in best interests or if guardian reasonably believes they would have an adverse effect.</li> </ul> <p>* If the guardian has the power to make healthcare decisions, they can agree to medical treatment but cannot refuse medical treatment. They can decide whether the represented person can participate in a medical research</p>

	Advance Directives		<p>procedure. If someone is also appointed with enduring power of attorney (medical treatment), this will take precedence over the guardian for all medical treatment decisions.</p> <p>A guardian cannot consent to the following medical procedures:</p> <ul style="list-style-type: none"> <li>• those likely to lead to infertility</li> <li>• termination of a pregnancy</li> <li>• removal of tissue for transplant.</li> </ul> <p>Under the <i>Medical Treatment Act</i>, there is a Refusal of Treatment Certificate. Only invoked for a current condition.</p>
<b>QLD</b>	Enduring Power of Attorney	<i>Power of Attorney Act 1987</i>	<p>In QLD, you can appoint separate enduring power of attorneys (i.e. one for financial and one for personal/health care matters) or you can appoint one attorney to look after both matters.</p> <p>Under the <i>Guardianship and Administration Act 2000</i> a health care matter is defined as (1) care or treatment of, or a service or a procedure:</p> <ol style="list-style-type: none"> <li>(a) to diagnose, maintain, or treat the adult's physical or mental condition; and</li> <li>(b) carried out by, or under the direction or supervision of, a health provider.</li> </ol> <p>(2) Health care includes withholding or withdrawal of a life-sustaining measure for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.</p> <p>(3) Health care, of an adult, does not include—</p> <ol style="list-style-type: none"> <li>(a) first aid treatment; or</li> <li>(b) a non-intrusive examination made for diagnostic purposes; or</li> <li>(c) the administration of a pharmaceutical drug if— <ol style="list-style-type: none"> <li>(i) a prescription is not needed to obtain the drug; and</li> <li>(ii) the drug is normally self-administered; and</li> <li>(iii) the administration is for a recommended purpose and at a recommended dosage level.</li> </ol> </li> </ol> <p>If the treatment involves "special health care" there is an order of priority in</p>

			<p>dealing with the matter, which places <b>advance health directives first</b>, then tribunal appointed guardians, then the enduring power of attorney and then a statutory health attorney. A special health care matter includes removing tissue, sterilisation, abortion, special medical research, electroconvulsive therapy and prescribed special health care for the child.</p>
Statutory Health Attorney			<p>A statutory health attorney is a person (usually a spouse or primary carer) who is legally able to make health care decisions on behalf of another adult.</p> <p>They only act if the person:</p> <ul style="list-style-type: none"> <li>• is not capable of making a particular health care decision</li> <li>• does not have anyone else to make health care decisions for them (in other words, has not appointed either a guardian for health matters or an attorney for personal or health matters to act on their behalf).</li> </ul> <p>In considering health care matters, the guardian or health attorney should exercise the health care principle (s12).</p> <p>In the Powers of Attorney Act under s35(1) a person can make an advance health directive and this takes priority over the health powers of an enduring guardian.</p>
<b>SA</b>	Enduring Power of Attorney	<i>Powers of Attorney and Agency Act 1984 (s.6)</i>	Under section 6 of the Act. For legal and financial matters only.
	Enduring Power of Guardianship (for medical treatment and general welfare)	<i>Guardianship and Administration Act 1993</i>	<p>An enduring power of guardianship for medical treatment and general welfare. (from the SA Legal Services Commission Fact sheet) (Division 3 Part 3 of the Act):</p> <p>Can consent to medical treatment (s59) which is defined in the Act as: treatment or procedures administered or carried out by a medical practitioner or other health professional in the course of professional practice and includes</p>

			the prescription or supply of drugs. Cannot consent to prescribed treatment (s59) which is termination of pregnancy, sterilisation and any other medical treatment prescribed by regulations.
	Medical Power of Attorney (only for medical treatment)  Anticipatory Direction	<i>Consent to Medical Treatment and Palliative Care Act 1995</i>	<u>Where a person has appointed an enduring guardian, and also appoints a medical agent (under the <i>Consent to Medical Treatment and Palliative Care Act 1995</i> see Part 2 Divisions 2 &amp; 3 ), both have the power to make decisions concerning medical treatment. It is not necessary to have both. The enduring guardian cannot act in relation to medical treatment if the medical agent is available and willing to act - <i>Guardianship and Administration Act 1993</i> s 25(5)(b). In addition, the person may also have completed an anticipatory direction and the enduring guardian cannot act inconsistently with this direction.  Under s.7 of the Act, an anticipatory grant is available to refuse consent to medical treatment. Only for those in the final stages of a terminal illness or vegetative state. A terminal illness is defined in s4 as an illness or condition likely to result in death, and terminal state is defined as "the phase of the illness reached where no real prospect of recovery or remission of symptoms".</u>
<b>WA</b>	Enduring Power of Attorney	<i>Guardianship and Administration Act 1990</i>	Made under part 9 of the Act. The enduring power of attorney is confined to making decisions about financial affairs and property.  Contact with the Public Advocate indicated that legislation concerned with advance health directives and enduring guardianship was introduced in late 2005. The process is still ongoing and at present the only legal guardianship concerns financial and property affairs.
<b>TAS</b>	Enduring power of attorney	<i>Powers of Attorney Act 2000</i>	Under Part 4 of the Act. Limited to financial and property decisions.
	Enduring guardianship	<i>Guardianship and Administration Act 1995</i>	Under Part 5 of the Act. For personal, lifestyle and medical decisions. Medical and dental treatment can be consented to if it is not special.

**"medical or dental treatment" or "treatment" means –**

- (a)** medical treatment (including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care) normally carried out by, or under, the supervision of a medical practitioner; or
  - (b)** dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a dentist; or
  - (c)** any other act declared by the regulations to be medical or dental treatment for the purposes of this Act –  
but does not include –
  - (d)** any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears); or
  - (e)** first-aid medical or dental treatment; or
  - (f)** the administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in the manufacturer's instructions (if the drug is one for which a prescription is not required and which is normally self-administered); or
  - (g)** any other kind of treatment that is declared by the regulations not to be medical or dental treatment for the purposes of this Act;
- Special medical or dental treatment means –
- (a)** any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out; or
  - (b)** termination of pregnancy; or
  - (c)** any removal of non-regenerative tissue for the purposes of transplantation;  
or
  - (d)** any other medical or dental treatment that is declared by the regulations to be special treatment for the purposes of Part 6.
- Advance directives not in the legislation. Informally may be supported by health care professionals, assist in enduring guardianship.

ACT	Enduring Power of Attorney	Powers of Attorney Act 2006	<p>Under Part 3.1 of the Act. Power of financial, property, lifestyle and health matters. Health care matter is defined in the Act as a matter, other than a special health care matter, relating to the principal's health care.</p> <p>Examples in the Act of health care matters a power of attorney may deal with</p> <ul style="list-style-type: none"> <li>(a) consenting to lawful medical treatment necessary for the principal's wellbeing</li> <li>(b) donations (other than donations of non-regenerative tissue) under the <i>Transplantation and Anatomy Act 1978</i> by the principal to someone else</li> <li>(c) withholding or withdrawal of medical treatment for the principal</li> <li>(d) legal matters relating to the principal's health care</li> </ul> <p>Cannot consent to a special health care matter.</p> <p>A special health care matter is defined as (s.37):</p> <ul style="list-style-type: none"> <li>(a) removal of non-regenerative tissue from the principal while alive for donation to someone else;</li> <li>(b) sterilisation of the principal if the principal is, or is reasonably likely to be, fertile;</li> <li>(c) termination of the principal's pregnancy;</li> <li>(d) participation in medical research or experimental health care;</li> <li>(e) treatment for mental illness;</li> <li>(f) electroconvulsive therapy or psychiatric surgery;</li> <li>(g) health care prescribed by regulation.</li> </ul> <p>There is also a condition on the exercise of the power in relation to medical treatment (s.46):</p> <ul style="list-style-type: none"> <li>(1) This section applies in relation to an enduring power of attorney if the principal has impaired decision-making capacity.</li> <li>(2) An attorney under the enduring power of attorney must not ask for medical treatment to be withheld or withdrawn from the principal unless— <ul style="list-style-type: none"> <li>(a) the attorney has consulted a doctor about— <ul style="list-style-type: none"> <li>(i) the nature of the principal's illness; and</li> <li>(ii) any alternative forms of treatment available to the principal; and</li> <li>(iii) the consequences to the principal of remaining untreated; and</li> </ul> </li> <li>(b) the attorney believes, on reasonable grounds, that the principal would ask for the medical treatment to be withheld or withdrawn if the principal— <ul style="list-style-type: none"> <li>(i) could make a rational judgment; and</li> <li>(ii) were to give serious consideration to the principal's own health and wellbeing.</li> </ul> </li> </ul> </li> </ul>
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	Advance directives	<i>Medical Treatment (Health Directions) Act 2006</i>	s.19 appointment of enduring power of attorney after advance health directive revokes it.
<b>NT</b>	Enduring power of attorney	<i>Powers of Attorney Act</i>	For financial and legal decisions only
	Power to make a direction	<i>Natural Death Act 1988</i>	Person can make an advance direction in relation to the suffering of a terminal illness (s.4).
	Emergency Medical Operations	<i>Emergency Medical Operations Act</i>	Circumstances of when doctor can perform operation without consent (s.3).



## **BACKGROUND/DISCUSSION PAPER**

### **END OF LIFE DECISION MAKING**

### **ADVANCE DIRECTIVE**

**July 2008**

## Disclaimer

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## 1. BACKGROUND

During February 2006 to 2007, the Department of Health and Community Services participated in trialling a national program on *Respecting Patient Choice* (RPC). The aim of the Program was to provide information that everyone has a say in his/her health care, now and in the future. Planning for future health care is about communicating to appropriate people and makes decisions about health care and medical treatment. The Program also to encourage participants to put together the result of the communications in a document known as an *Advance Care Planning* for the end of life in the event that a person become too unwell to communicate their wishes due to illness or injury.<sup>1</sup>

RPC encompasses professional training, consumer education and the change in culture and practice within service providers to improve end of life care. One of the aspects of RPC is the appointment of an Enduring Power of Attorney (medical). In the NT, RPC project was required to work within the current NT legislative framework, *the Natural Death Act 1989*. The concept of appointing an enduring power of attorney is not supported under NT legislation.

The Program Report recommends for the NT to review its existing legislation, the *Natural Death Act 1989*, and to provide individual with a legal framework when appointing a Medical Enduring Power of Attorney.

As part of implementing the Report's recommendations, the Acute Care Division of the Department of Health and Community Services is undertaking a project to submit a proposal for a new piece of legislation that will provide the Northern Territory community with a power:

- to record their instructions in advance about what medical care they would and would not want if they were unable to consent to or refuse treatment in the future; and
- to appoint a Medical Power of Attorney (an agent) to stand in for a person who no longer can make their own decisions and provide the agent with a legal written instructions an Advance Directive.

In order to canvas possible issues pertaining to the development of a submission for the proposed new legislation, the Department is planning to establish a Steering Committee. The Group will comprise people representing government and non-government organisations who either provide services to people in need of an advance directive and/or have expertise and experience in this field and/or caring for people with a condition or disease that may diminish the capacity to communicate or the ability to make decisions.

## 2. PURPOSE OF THIS PAPER

The purpose of this paper is to provide:

- brief explanation on end of life decision-making and advance directives, in particular the medical advance directive; and
- the basis for discussion among the NT Steering Committee members in order to develop a submission for a new legislation on "End of Life Decision-Making and Advance Directive".

This project does not address the subject on Euthanasia. It is a separate issue and will not be considered under this project.

## 3. INTRODUCTION

Prior to 1970, the health care ethics were based on professional authority and beneficence where physicians made all patient care decisions with the focus to maximise life preservation. The physician's decision regarding reasonable benefits of life-sustaining treatment for incompetent patient are determined on the basis of "best interests".<sup>2</sup>

The concept of "best interest" has its origins in Hippocratic medicine. In the clinical setting, the patient's best interests will be determined by such objective criteria as the therapeutic efficacy of the proposed treatment, relief from suffering, the degree of bodily invasion required by the procedure, and the chances of preservation or restoration of mental competence.

The characteristic feature of the "best interest principle", common to both law and medicine, is that it focuses exclusively on the incompetent patient and his/her best interest. In this instance, other interests including those of the family, community, and socioeconomic concerns are subordinate to those of the incompetent patient/person.

The medical model of health care has moved in the direction of respecting a competent patient's right to control medical interventions. The ethical concept of best interest has been interpreted in some countries in terms of personal autonomy that may or may not be in harmony with medical practitioners, religion, and the legal system that governs them.<sup>3</sup>

Many countries including Australia, have introduced advance directive legislation in recent years. The concept of advance directives arose as a response to rapid developments in life-extending medicine. Individualism and individual rights began to emerge as a dominant force in countries such as the USA and Australia. More and more people became increasingly concerned about the number of incurably patients, in particular the aged, who were kept alive for prolonged periods with medical technology. Many of these patients may have refused treatment if they had been competent or if there had been a legal framework for either themselves or their relatives to claim their right to refuse treatment.

### 3.1 Advance Directives

An **advance directive** is a legal document; it is not a term commonly used by the public. Across Australia the term 'advance directive' is used differently depending on the law of a jurisdiction. For the purpose of this document, an advance directive is a decision-making instrument that can be used by a competent individual before a serious illness or condition occurs which will result in the inability to make decisions.

An advance directive is either in the form of a written document, which expresses one's wishes in writing (also called a 'living will' or 'instructional directive') or it involves appointing another person/s to make the decisions (proxy, agent or power of attorney) if an individual is no longer able to do so. It may also be a combination of the two. The purpose of an advance directive can be for medical, health and lifestyle, or finance.<sup>i</sup> In most States and Territories, the right to make an advance directive is regulated by law, and it can also be sourced under common law – the fundamental right of self-determination.<sup>4, 5</sup>

Under the NT Adult Guardianship Act 2006 the Courts may appoint a person to be an alternate decision maker/proxy for matters including property, health care,<sup>ii</sup> lifestyle and finance when a person is no longer capable of doing so or never had the capacity (ie intellectually impaired).

An advance directive can be used by different people in different situations; this to include:

- a healthy person with a capacity to make future medical plan;
- a person who is chronically ill and anticipates deterioration in his/her condition; or
- a person who is terminally ill and faces more immediate treatment choices.

When an advance directive involves the appointment of a proxy or agent, usually there are stipulations, which determine the suitability of an agent; this usually involves a minimum age and the relationship between the principal<sup>iii</sup> and the agent. At the same time the principal is required to be of sound mind at the time he/she makes the directive and there must not be undue influence from anybody in the decision making process.

Advance directive is particularly relevant for the increasing number of older people who may be able to confront their death with less anxiety if they feel assured that technology intervention will not protract the dying process unnecessarily.

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<sup>i</sup> In all jurisdictions these advance directives usually come under separate legislations. However, SA is currently reviewing all legislations that have provision for the making of an advance directive with the intent to have all advance directives under one piece of legislation.

<sup>ii</sup> Section 21(1) of the NT Adult Guardianship Act 2006 defines health care that does not include major medical or dental procedure. Health professionals must obtain the Court's consent to carry out these procedures on a represented person.

<sup>iii</sup> The "principal" in this document means the person who is writing the advance directive.

In the NT, more and more health professionals in particular those providing palliative care are encouraging the making of medical advance directive. The existence of an advance directive will reduce doubt and conflict among family members and friends about the medical treatment to be provided to a person who is incapable in making his/her own decision due to illness or injury. However, research studies in Australia and overseas indicate that although patients and health care providers supportive of the concept of advance directives, they seldom use the forms due to lack of awareness. This is particularly true for the Northern Territory.<sup>6</sup>

The underpinning principles of an advance directive are on value of respect, dignity and autonomy. This allows individuals to determine and provide input into their future plan when they can no longer make their own decisions. It also enables clear legal arrangements to be put in place before their capacity is lost. These arrangements/decisions must be respected and protected by all parties concerned.<sup>7</sup>

### 3.2 Advance Care Planning

There is a growing societal expectation that a person's wishes for medical treatment will be respected at the end of life when progressive disease has taken away decision-making capacity. Parallel to this is a need of a structured process whereby the prior wishes of this person can be made known and considered at the time that critical treatment decisions need to be made.<sup>8</sup>

A research study indicates that a high proportion of health professionals and community strongly agreed that most patients would welcome the opportunity to discuss issues regarding end-of-life and prefer if the patients initiated such discussion. At the same time, there appears to be significant variation in the way health professionals approach situations where the use of life-sustaining treatment is being considered.<sup>9</sup> There are concerns that such treatments are being used in terminally ill patients resulting in over-zealous treatment or, less frequently, inappropriate under-treatment. Advance care planning may allow the use of life-sustaining treatments in ways that are more consistent with the individual's choice and priorities at end-of-life.

**Advance care plans**, unlike the advance directive, are informal documents. Advance care planning describes a structured process of future health care planning that can be supplemented by legislated advance directives. Advance care planning is an important element of quality end-of-life; it is a process of communicating among patients, their health care providers, their families, and important others regarding the kind of care that will be considered appropriate when the patient cannot make decisions. Advance care planning may, and generally does, include written advance directives forms.

## 4. LEGISLATIONS ACROSS ALL JURISDICTIONS

In Australia, the law and practice on end-of-life decision-making are changing. The current legal position in all Australian jurisdictions is that competent adults have a common law right to consent to, or refuse, medical treatment, including life-sustaining treatment.

As mentioned above, advance directives can be used not only for medical but also for financial affairs and lifestyle. In SA, there are four types of advance directives and they are operated under three separate legislations. All four of SA advance directives are currently under review to assess how well the current advance directives are working, how to make them work more effective and coherent and provide recommendations for the SA Government to consider.<sup>10</sup>

Queensland and ACT have combined financial, lifestyle, health and medical advance directives under a single Act. All jurisdictions with the exception of WA and the NT allow for an agent to make lifestyle and health care decisions.<sup>iv</sup> Victoria, Queensland, NT and NSW have legislated instructional medical (in the NT it is a "Direction" under the Natural Death Act 1988) advance directives, however they are varied in forms.

The inconsistencies within the Australian context in legislation and the different interpretation of the term 'advance directive' have contributed to people's confusion of the meaning of the terminology itself and may also be the barrier for people, in particular older people, wanting to use the system.

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<sup>iv</sup> In the NT, under the Respecting Patient Choice Program, individuals can appoint a Medical Power of Attorney, however, the NT statute law does not recognise such appointment.



A summary of the laws across Australia that legislate for advance directives<sup>11</sup>

	Financial	Personal	Health
ACT	EPA <i>Powers of Attorney Act 2006</i>	EPA <i>Powers of Attorney Act 2006</i>	EPA <i>Powers of Attorney Act 2006</i>  Direction <i>Medical Treatment (Health Directions) Act 2006</i>
NSW	EPA <i>Powers of Attorney Act 2003</i>	EPG <i>Guardianship Act 1987</i>	EPG <i>Guardianship Act 1987</i>
NT	EPA <i>Powers of Attorney Act 2000</i>	Adult Guardianship Act 2006	Direction <i>Natural Death Act 1988</i>
QLD	EPA <i>Powers of Attorney Act 1998</i>	EPA (personal) <i>Powers of Attorney Act 1998</i>	EPA (health) and Advance Health Directive (includes a personal attorney) <i>Powers of Attorney Act 1998</i>
SA	EPA <i>Powers of Attorney and Agency Act 1984</i>	EPG <i>Guardianship and Administration Act 1983</i>	EPG <i>Guardianship and Administration Act 1983</i>  MPA and Anticipatory Direction <i>Consent to Medical Treatment and Palliative Care Act 1995</i>
TAS	EPA <i>Powers of Attorney Act 2000</i>	EPG <i>Guardianship and Administration Act 1995</i>	EPG <i>Guardianship and Administration Act 1995</i>
VIC	EPA (financial) <i>Instruments Act 1958</i>	EPG <i>Guardianship and Administration Act 1986</i>	EPA (Med Treatment) and Refusal of Treatment Certificate <i>Medical Treatment Act 1988</i>
WA	EPA <i>Guardianship and Administration Act 1990</i>	none	none

EPA – Enduring Power of Attorney

EPG – Enduring Power of Guardianship

## **5. THE LIMITATION OF THE CURRENT LEGISLATION AND CONSIDERATIONS FOR THE PROPOSED NEW LEGISLATION**

### **5.1 Current Legislation Limitation**

In the NT, direction under *the Natural Death Act 1989* gives legal status to an individual who wishes to execute an advance directive. The Act provides for, and gives legal effect to, directions against the artificially prolongation of the dying process. The prescribe form of the Act allows a person to give instructions around refusing extraordinary measures in the case of a terminal illness.<sup>y</sup>

Under this Act there is no provision to appoint proxy decision-maker/s in advance to communicate individual's wishes about the preferred medical treatment/s in the event of injury or illness, which will result in the person being incapable to communicate his/her wishes.

The report on the Northern Territory study undertaken by the University of Queensland and the then Northern Territory University in 1998 indicates strong support by both health professionals and community members to increase patient self-determination in terminal care.

The report also highlighted the lack of knowledge by both the professionals and community members of the existence of the law pertaining to end-of-life decision making, lack of understanding of the Natural Death Act 1989 for those who were aware of its existence, and other legal issues surrounding end-of-life for example, that the NT enduring power of attorney does not allow the appointed person to make medical decisions for another person.

Following the completion of the Respecting Patient Choices (RPC) Program there may be an increase in the professionals and community member's awareness and knowledge of legal issues pertaining to end-of-life decision-making. Although the project was required to work within the NT legislative framework, one of the outcomes of the NT RPC is the development of a Statement of Choices that allows a person to appoint an agent or agents as the Medical Enduring Power of Attorney; this process, however, is not supported by any NT legislation.

### **5.2 Considerations for the New Legislation**

A number of social, legal and practical aspects need to be considered and discussed to ensure the proposal for the new legislation on end-of-life decision-making will address issues such as:

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<sup>y</sup> The definition of 'Terminal Illness' in the *NT Natural Death Act 1989* means any illness, injury or degeneration of mental or physical faculties: a) such that death would, if extraordinary measures were not undertaken, be imminent; and b) from which there is no reasonable of temporary or permanent recovery, even if extraordinary measures were undertaken.

**5.2.1. Assessing competency and capacity** - When completing an advance directive, often there is no formal requirement for a medical or psychological assessment of a person's competence. There are growing concerns within health professionals for recognition in a legislation to better recognise temporary, partial and fluctuating mental capacity. This is becoming increasingly evident with the rising incidence of dementia to the extent that decisions should be taken by an agent.

- For new legislation, how do we address competency and capacity?

**5.2.2. How to write the "instruction"** – In any jurisdiction, currently there is no requirement for a person to liaise with his/her doctor prior to completing a medical advance directive. The Direction under the NT Natural Death Act 1989, gives options to a person to chose between listing what medical intervention he/she wishes to have or not have OR to simply put "extraordinary measure generally", which include all medical or surgical measures that prolong life, or are intended to prolong life.

- Should the instruction be broad or detailed?
- Should the direction be used as a guide only or must it be followed exactly?

**5.2.3. The appointing agent or agents** – The criteria of the appointing agent should be made clear to include the age requirement, the relationship with the person giving the power. Legislations in other jurisdictions allow for the appointment of more than one agent.

- Should a person appoint more than one agent, and if so should they be listed in order or preference?

**5.2.4. Witnessing requirement** – Across Australia, witnessing requirements are varied among existing Acts. Some require witnesses to complete certificate certifying the person's capacity to make the instrument, some required to confirm the person's identity; others prescribe authorised persons to act as witnesses.

- What should be the criteria for the person or persons who witness the signing of a medical advance directive?

**5.2.5. Registration of and access to medical advance directive** – In some jurisdictions, registration of an advance directive is subject to a fee. It is of benefit to advise as many people (relatives, personal doctors, and hospital) of the completed advance directive.

- Should a medical advance directive be registered somewhere?
- Should there be a fee?

**5.2.6. Revoking and review procedure** – A person may wish to change or cancel the completed medical advance directive for a number of reasons. An agent or the person who has been granted the authority cannot amend or revoke the advance directive.

- Can anyone apply to the Court for the advance directive to be reviewed?

**5.2.7. Protection of medical practitioners** – There are occasions when a person's wishes at end of life do not agree with medical best practice. Medical practitioners have a duty to inform and explain the nature, consequences and risks of taking or not taking a proposed treatment.

- How can medical practitioners be protected?
- What to do if there is disagreement between medical practitioner's decision and that of the family?

**5.2.8. Cultural perspective** – Culture is central to how most people view individual. The NT community is a diverse population with many different cultures. Many people from non-English background still uphold their cultural values and beliefs. In some cultures it is recognised that a certain person within the family can make all sort of decisions including health. Among Aboriginal and Torres Strait people, there are differences in values and beliefs. Beliefs about death and dying vary among Aboriginal people; it is a sensitive topic and often can only be discussed by certain people in the community. Seeking decisions about treatment at the end of life with the wrong people or in the wrong place can cause problems for Aboriginal families. It is important to learn and respect the Aboriginal culture when raising issues about this matter. Cultural and social behaviours influence people's decisions about when and why they seek help.

- How to incorporate cultural matters into new legislation?

## 6. THE WAY FORWARD

The Acute Care Division of the Department of Health and Community Services, under the guidance of the Steering Committee members will:

- Explore legislation on end-of-life, medical enduring power of attorney, and advance directive in other jurisdictions.
- Identify legislation from a jurisdiction that can be used as the basis to develop NT legislation on end-of-life decision-making and advance directive.
- Revisit the NT Natural Death Act 1989 in relation to the development of new legislation on End-of-Life Decision Making – Advance Directive.
- Draft Cabinet Submission on End-of-Life Decision Making – Advance Directive and submit to Cabinet for decision.

Please refer the Project Brief for project details.

## 7. REFERENCES

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- <sup>1</sup> Austin Health. *Respecting Patient Choices, an Advance Care Planning Program*. <http://www.respectingpatientchoices.org.au/> accessed January 2008
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- <sup>3</sup> Mendelson D., Ashby M., *Arbitrating “end-of-life” decisions: Issues, processes, and the role of the law*. In *Disputes and Dilemmas in Health Law*, Federation Press, Sydney, 2006
- <sup>4</sup> Brown M., ‘*The Law and Practice Associated with Advance Directives in Canada and Australia: Similarities, Differences and Debates*’ in *Journal of Law & Medicine*, 2003 11(1)
- <sup>5</sup> Rogers L., *Planning Ahead by Appointing an Enduring Guardian*. *Elder Law Review* 2002: 1
- <sup>6</sup> Cartwright C et al, *End-of-life Decision Making: Perspectives of Northern Territory Doctors, Nurses and Community Members*. Report (University of Queensland and Northern Territory University, Brisbane, 1998.
- <sup>7</sup> Stewart C., ‘*Advance Directives: Disputes and Dilemmas*’, in *Freckleton, I. and Peterson, K. (eds)*. In *Disputes and Dilemmas in Health Law*, Federation Press, Sydney, 2006
- <sup>8</sup> Taylor D., Cameron P., *Advance Care Planning in Australia: Overdue for Improvement*. *Internal Medicine Journal* 2002: 32
- <sup>9</sup> Cartwright C et al, *End-of-life Decision Making: Perspectives of Northern Territory Doctors, Nurses and Community Members*. Report (University of Queensland and Northern Territory University, Brisbane, 1998.
- <sup>10</sup> Government of South Australia, ‘*South Australian Advance Directives Review: Background Paper, 2007*’
- <sup>11</sup> Government of South Australia, *Ibid*.



### Northern Territory Law Reform Commission Sub-committee – Enduring Medical Powers of Attorney

The Department of Health and Families (DHF) is in favour of the general notion that Enduring Medical Powers of Attorney should be introduced legislatively in the Northern Territory. The basis of such an introduction from the perspective of DHF should be because of the following:

- Nearly all other jurisdictions have some form of legislative framework in place for Enduring Medical Powers of Attorney;
- Potentially provides to medical practitioners far more certainty where decisions can be made for patients who can not provide legal consent for medical treatment for whatever reason(s);
- Allows individuals to have greater autonomy over whom they wish to make medical decisions for them if they are no longer competent;
- It also gives the individual the ability to convey an intention as to how they wish to be treated in certain medical situations;
- There might also be incorporated the ability to make advance directives or conditions to the power such as to operate as advance directives;
- Should be introduced contingent on a public awareness campaign and a culturally appropriate education package so that the indigenous and general population are aware of the implications and benefits of entering into such arrangements; and
- Such an introduction would fill a gap that currently exists. However there are others that are perhaps just as important and need filling. Those include a Public Advocate/Default decision maker and appointment of guardians in non-controversial situations without court involvement.

GPO Box 2301  
Darwin 0801  
6 March 2007

The Hon Syd Stirling MLA  
Attorney-General  
Parliament House  
Darwin NT 0800

Dear Attorney,

### **LEGISLATION TO ALLOW OPERATION OF ENDURING POWERS OF GUARDIANSHIP IN THE NORTHERN TERRITORY**

We believe as a matter of urgency you should sponsor legislation to enable competent adults to make provision for future life issues. At the present time adults can make enforceable directions about property and financial matters under the Power of Attorney Act and limited directions under the Natural Death Act. There is no legislative capacity to make directives about future life issues in anticipation of future incapacity.

This situation causes frustration to competent adults wishing to make provision for their future. It also puts unnecessary strain and cost on the processes defined under the Adult Guardianship Act which require action by the court to ensure protective services are available to those who have already lost capacity. This is not an intelligent use of public funds.

From our research it appears that all states except WA have some provision to allow advance orders. See Attachment 1 (Overview of other States). The legislation giving effect to the power does not have to be convoluted. See Attachment 2 (S25 of SA Guardianship and Administration Act). The formal documentation can also be very simple and straightforward. See Attachment 3 (SA forms)

With an ageing population and increasing numbers of older parents moving to the NT to live with their children the need for this legislation is pressing. In the overall context the need to establish reciprocal arrangement with the states should also be considered.

Whilst some states do not require registration of advance directives for them to be enforceable we believe it would be in the interests of a large sector of the population for the legislation to enable registration with the Registrar General without requiring it.

The signatories to this letter would like to meet with you and the head of your department with a view to advancing this issue as a matter of urgency. We are happy to offer our insights and skills to achieve a timely outcome.

We are approaching you in the first instance as this issue deals with the delegation of legal rights. Amendments to the Power of Attorney Act with minimal consequential amendments to other legislation may achieve our objectives.

Yours sincerely

(Community Members of Adult Guardianship Panels)

Ken Conway



Robyne Burridge



Sue Bradley

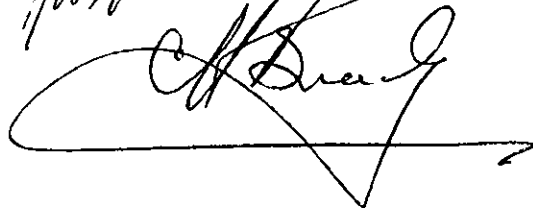


(Interested Persons)

John Flynn



Hugh Bradley



Cc: Mr Greg Shanahan



## Statutory provisions for the interstate recognition of Enduring Powers of Guardianship (EPG).

### Status report of October 2005.

#### ACT

There is no potential for EPGs in the ACT. The Power of Attorney Act 1956 is currently under review in connection with the governments elder abuse strategic plan. The current EPA arrangements allow for a person to elect for their attorney to make personal, medical and financial decisions from a designated point in time, either immediately or when capacity is lost. The Medical Treatment Act allows a person to give an advanced directive that certain medical treatment is refused.

#### NSW

An instrument appointing an interstate Enduring Guardian has effect in NSW as if it were an instrument appointing an Enduring Guardian in NSW, but only to the extent that the functions conferred in it could be conferred in a NSW appointment.

It would be wise to annex to any interstate appointment of Enduring Guardian, a document signed by a legal practitioner with a current practicing certificate in the state in which that appointment was made, stating that it was made in accordance with that State (or Territory) (s 60 *Guardianship Act 1987* (NSW)).

An "Interstate Enduring Guardian" means a person appointed as a guardian by an instrument prescribed in section 5B of the Guardianship Regulation 2000. The instruments in the regulation are from the ACT, Queensland, South Australia, Victoria and Tasmania.

#### NT

Not applicable as no Enduring Powers of Guardianship in NT, but legislation is being considered.

#### QUEENSLAND

If an EPG is made in another State and it complies with the law of that State, then to the extent that the powers it gives are possible to confer under the *Powers of Attorney Act 1998*, then the EPA must be treated as made under and in compliance with the POA Act.

#### SOUTH AUSTRALIA

Attorney General has accepted proposal made by Public Advocate to prepare legislation that will create combined financial, medical and guardianship powers. Policy proposals being prepared within government.

#### TASMANIA

No action currently proposed. Attorney is aware of the issue and will consider in the context of a range of proposed amendments to G&A Act. These will most probably be presented to Parliament in early 2004.

#### VICTORIA

No action currently proposed. OPA has asked Attorney to include provision next time *Guardianship and Administration Act 1986* is amended.

#### WESTERN AUSTRALIA

At this stage there is no immediate plan to amend the *Guardianship and Administration Act* 1990 in line with the AGAC recommendations. The Attorney General has advised that he will consider amendments in the context of more substantial amendments to the Act.

**South Australian Consolidated Acts**

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**GUARDIANSHIP AND ADMINISTRATION ACT 1993 - SECT 25****25—Appointment of enduring guardian**

(1) A person of or over 18 years of age may, by instrument in writing, appoint a person as his or her enduring guardian.

(2) An instrument is not effective to appoint an enduring guardian unless—

(a) it is in the form set out in the Schedule or in a form to similar effect; and

(b) it has endorsed on it an acceptance in the form or to the effect of the acceptance set out in the Schedule signed by the person appointed as the enduring guardian; and

(c) it is witnessed by an authorised witness who completes a certificate in the form or to the effect of the certificate set out in the Schedule.

(3) A person is not eligible to be appointed as an enduring guardian unless he or she is of or over 18 years of age.

(4) A person is not eligible to be appointed an enduring guardian if he or she is, in a professional or administrative capacity, directly or indirectly responsible for or involved in the medical care or treatment of the appointor and, if a person who is validly appointed as an enduring guardian becomes so responsible or involved, the appointment lapses.

(5) Subject to this Act and the conditions, limitations or exclusions (if any) stated in the instrument, an instrument appointing an enduring guardian authorises the appointee or, if there is more than one appointee, the appointees jointly or severally (as the case may be)—

(a) to exercise the powers at law or in equity of a guardian if the person who makes the appointment subsequently becomes mentally incapacitated; and

(b) in that event, to consent or refuse consent to the medical or dental treatment of the person, except where the person has a medical agent available and willing to act in the matter.

(6) The powers conferred by an instrument appointing an enduring guardian must, unless the Board approves otherwise, be exercised in accordance with any lawful directions contained in the instrument.

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# ENDURING POWER OF GUARDIANSHIP

(pursuant to section 25 of the *Guardianship and Administration Act 1993*)

## Instrument Appointing an Enduring Guardian

1. I, Name .....

Address .....

Occupation .....

Revoke all other Enduring Powers of Guardianship previously given by me.

**I APPOINT** Name .....

Address .....

Occupation .....

and Name .....

Address .....

Occupation .....

and Name .....

Address .....

Occupation .....

jointly or jointly and severally to be my guardian(s). → PLEASE READ CAREFULLY

(\*Where more than one person is named, delete the inapplicable)

'Jointly' means that the 2 or more nominated people have to agree and must act together to make decisions on behalf of the person for whom they are guardians.

'Jointly and severally' means that persons nominated can agree and act together, or, that one of the named persons may make decisions on his or her own.

2. I AUTHORISE my guardian(s), in the event that I become mentally incapacitated:

(a) to exercise the powers at law or in equity of a guardian; and

(b) to consent or refuse to consent to my medical and dental treatment (unless I have a medical agent who is reasonably available and willing to make a decision in the matter), subject to the *Guardianship and Administration Act 1993* and to clause 3 of this instrument.

**Giving of directions**

3. The authority of my enduring guardian(s) is subject to the following conditions, limitations or exclusions (see examples of directions at the back of this form): (if none, write 'Not Applicable')

.....

.....

.....

.....

.....

CONTINUE OVER PAGE

Lined area for notes or additional information.

4. This is an appointment of an enduring guardian made under the *Guardianship and Administration Act 1993*.

Dated this ..... day of ..... in the year.....

.....(signature)  
(to be signed by the person appointing the enduring guardian(s))

**Witness's certificate**

I, Name .....  
Address .....

Qualification to act as an authorised witness\*

.....  
(\*Under the *Guardianship and Administration Act 1993*, an authorised witness includes a Justice of the Peace of any State or Territory, a commissioner for taking affidavits in the Supreme Court of South Australia, or any notary public)

**CERTIFY**

(a) that the person appointing the enduring guardian(s) signed this instrument freely and voluntarily in my presence;  
and  
(b) appeared to understand its effect. \*\*

.....(signature)  
(authorised witness)

(\*\* The Office of the Public Advocate has guidelines to assist in determining a person's competence to execute legal documents.)

**Acceptance of appointment**

I, Name .....  
Address .....  
Occupation .....

accept appointment as a guardian under this instrument and undertake to exercise the powers conferred by it honestly and in accordance with the instrument and the principles set out in the *Guardianship and Administration Act 1993* (see principles overleaf).

Date of signing ..... (signature of nominated guardian)

**Witness's certificate**

I, Name .....  
Address .....  
Qualification to act as an authorised witness .....

**CERTIFY**

(a) that the above guardian signed this instrument freely and voluntarily in my presence; and  
(b) appeared to understand its effect.

.....(signature)  
(authorised witness)

**Acceptance of appointment (more than one guardian)**

I, Name .....  
Address .....  
Occupation .....

accept appointment as a guardian under this instrument and undertake to exercise the powers conferred by it honestly and in accordance with the instrument and the principles set out in the *Guardianship and Administration Act 1993* (see principles overleaf).

Date of signing ..... (signature of nominated guardian)

**Witness's certificate**

I, Name .....  
Address .....  
Qualification to act as an authorised witness .....

**CERTIFY**

(a) that the above guardian signed this instrument freely and voluntarily in my presence; and  
(b) appeared to understand its effect.

.....(signature)  
(authorised witness)

**Acceptance of appointment (more than two guardians)**

I, Name .....  
Address .....  
Occupation .....

accept appointment as a guardian under this instrument and undertake to exercise the powers conferred by it honestly and in accordance with the instrument and the principles set out in the *Guardianship and Administration Act 1993* (see principles overleaf).

Date of signing ..... (signature of nominated guardian)

**Witness's certificate**

I, Name .....  
Address .....  
Qualification to act as an authorised witness .....

**CERTIFY**

(a) that the above guardian signed this instrument freely and voluntarily in my presence; and  
(b) appeared to understand its effect.

.....(signature)  
(authorised witness)

## ENDURING POWER OF GUARDIANSHIP

(pursuant to section 25 of the *Guardianship and Administration Act 1993*)

### IMPORTANT ADDITIONAL INFORMATION

#### ① Relevant Principles to be observed by an Enduring Guardian

(Section 5)

Where an Enduring Guardian appointed under this Act, makes any decision or order in relation to a person pursuant to this Act or pursuant to powers conferred by or under the Act-

- (a) consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion; and
- (b) the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes; and
- (c) the decision or order made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and attention.

#### ② Example of the Directions that may be included in Part 3 of this Form

- (1) I wish my guardian to consult with my close friend (name) where possible, when making a decision about my welfare.
- (2) Because of my religious beliefs I do not wish to receive a blood transfusion, even if it is judged medically necessary to save my life. I accept the risks associated with this decision.
- (3) I do not give my guardian permission to consent to lifesaving medical intervention when the expected outcome is poor.
- (4) Should I require supported accommodation, I would prefer to live close to my sister (give details).

#### ③ Practical Considerations

- (1) A copy of this document should be made and placed in safe keeping (eg. with your Will)
- (2) Other copies should be distributed to significant key people (such as your doctor, family members and/or care providers), in case of an accident or illness, so there is knowledge of the existence of this document.
- (3) Ensure your Enduring Guardian has a certified copy. Your copy can be certified by a Justice of the Peace.
- (4) Carry on your person a small card (or other means) to alert people (eg. in the event of an accident or other situation where you cannot speak for yourself), of your appointment of an Enduring Guardian and how to contact him or her.

**It is strongly recommended that you purchase the Enduring Power of Guardianship 'Do It Yourself' Kit or obtain legal advice for help in filling out this form.**

Information regarding Enduring Power of Guardianship can be obtained from lawyers, some financial advisers, aged care services, community legal centres and the Legal Services Commission of SA. Contact the Office of the Public Advocate (OPA) for further advice: phone: (08) 8269 7575 toll free (country callers): 1800 066 969 fax: (08) 8269 7490. Many of the OPA resources are available at their web site: [www.opa.sa.gov.au](http://www.opa.sa.gov.au)

Additional forms and kits may be purchased from: Service SA Government Information Centre. Ground Floor 77 Grenfell Street, Adelaide SA 5000  
Telephone 13 23 24 (cost of local call) TTY (hearing impaired) 8204 1923 Fax 8204 1909 [www.info.sa.gov.au](http://www.info.sa.gov.au)  
Service SA Regional Outlets Please phone 13 23 24 for details of your nearest Service SA location [www.service.sa.gov.au](http://www.service.sa.gov.au)

WHERE WE MIGHT  
BE WITH ACTION.

AN INITIATIVE OF THE JUSTICE PORTFOLIO (SA)



## Making a Will, Power of Attorney or Enduring Power of Guardianship

Many people know Public Trustee for its Will making, estate and trust administration. Public Trustee was established in 1881 by the Government of South Australia to provide these important services.

### What is a will?

- Your Will is a legal document, which will take effect after your death. It should clearly define who handles your estate and how you wish your assets to be distributed.
- A Will must be in writing – handwritten, typed or a combination of both. It must be signed by the person making the Will and two preferably independent witnesses.
- Everyone should understand how essential it is to have a Will that accurately reflects his or her wishes, one that is current, legally sound and won't lead to confusion and delays which can create bitterness and distrust within a family. A poorly prepared Will can be as bad as having no Will at all, and can lead to legal challenges, long delays and the possibility that the person's assets will be distributed in ways he or she had not intended. It is strongly recommended that you get professional assistance when making a Will to avoid the many legal pitfalls that can occur.

Public Trustee provides a professional Will-making service throughout the State.

### What is a Power of Attorney?

- When accidents, sudden illness, planned or unexpected absences occur you may need someone to manage your financial affairs. A Power of Attorney is a legal document which gives the person you choose the power to manage your assets and financial affairs while you are alive. There are four basic types of Power of Attorney. Public Trustee can help you decide which one is right for you.
- Many people don't realise how important it is to have an attorney – until they need one. It makes good sense to plan ahead to choose the person you would want as your attorney rather than have a person chosen for you at a later date.
- The person you choose should:
  - have business and management skills and enough time to manage your affairs properly;
  - be available when needed;
  - be impartial and keep accurate financial records.

The person also needs to be trustworthy because as your attorney he or she has no legal obligation to report to any other person about the management of your affairs.

It makes good sense to choose the same person or organisation that you have appointed as executor in your Will. Public Trustee provides a professional, impartial and independent service.



### What is an enduring guardian?

An enduring guardian is a person you appoint to make lifestyle decisions for you should you become mentally incapacitated. He or she is appointed by preparing a legal document called an Enduring Power of Guardianship.

*"Why do I need an Enduring Power of Guardianship when I already have a Power of Attorney?"*

The two are quite different. A Power of Attorney refers only to your legal and financial matters. An Enduring Power of Guardianship enables lifestyle, accommodation and medical decisions to be made for you by the person you have chosen as your guardian when you are unable to make them yourself. For example:

- Which doctor should I have?
- What kind of medical treatment or medication?
- Who is to give consent for me to enter a group home, hostel or nursing home?

These and other decisions affecting your lifestyle can be readily made by your guardian. Given their sensitivity and personal nature, it is best to appoint a family member or close friend. For this reason Public Trustee does not accept this appointment, but is able to prepare the documentation for you.

### Who'll help you in more ways than you expect?

We will. Public Trustee provides an extensive range of services.

- Will making and advice.
- Estate administration.
- Administration of trusts.
- Power of Attorney.
- Enduring Power of Guardianship.
- Personal estate management.
- Taxation services.
- Document safe custody.
- Investment services.
- Funeral bonds.
- Genealogical services.

These services are detailed in brochures which are available from Public Trustee. Alternatively, contact Public Trustee for information on how these services can be provided to you or visit our website on [www.publictrustee.sa.on.net](http://www.publictrustee.sa.on.net)

Public Trustee Building  
25 Franklin Street, Adelaide South Australia.  
Telephone: (08) 8226 9200 Facsimile: (08) 8226 9233.

*The information provided on this sheet is of a general nature only and should not be regarded as a substitute for professional advice and/or reference to the appropriate legislation.*



Government  
of South Australia



## MINISTER FOR JUSTICE &amp; ATTORNEY-GENERAL

Parliament House  
State Square  
Darwin NT 0800  
minister.stirling@nt.gov.au

GPO Box 3146  
Darwin NT 0801  
Telephone: 08 8901 4053  
Facsimile: 08 8901 4060

Mr Ken Conway  
Ms Robyne Burrige  
Ms Sue Bradley  
Mr John Flynn  
Mr Hugh Bradley  
GPO Box 2301  
DARWIN NT 0801

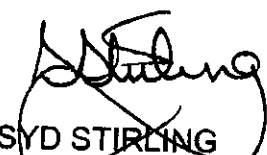
Dear Mr Conway, Ms Burrige, Ms Bradley, Mr Flynn and Mr Bradley

Thank you for your letter dated 6 March 2007 requesting my support for legislation relating to the operation of enduring powers of guardianship. I understand your concerns in wanting to provide for directives on future life issues where incapacitation may occur.

You note that most other jurisdictions have appropriate legislation to deal with this issue.

This matter will be considered by the Department of Justice, and you will be notified in due course of the proposed action to be taken.

Yours sincerely

 24th April 07  
SYD STIRLING

## Appendix G

SA Act	Proposed NT Act
Section 1 - Title	Will be required in NT Act
Section 2 - Transitional Provisions	Will be required in NT Act
Section 3 - Objects	NT Act should have the equivalent of section 3
Section 4 - Interpretation	Similar in NT Act with local variation including section 3 of <i>Natural Death Act</i>
Section 5 - Application of Act	Include in NT Act
Section 6 - Legal Compliance	Similar save insert age 18 for age 16 See <i>Emergency Medical Operations Act</i> ("EMO Act") section 2(1) and <i>Natural Death Act</i> section 4 (1) similar to NT <i>Natural Death Act</i>
Section 7 - Anticipatory Grants	Import provisions of NT <i>Natural Death Act</i> 4-7 into proposed NT Act
Section 8 - Medical Powers of Attorney	Take into the proposed NT Act sections 8 - 11 of SA Act
Section 12 - Medical Treatment of Children	Adapt in NT legislation but in NT Legislation child will be under 18
Section 13 - Emergency Medical Treatment	Similar to NT EMO Act and should be included in NT Legislation
Section 14 - Register	Should be in NT Legislation
Section 15 - Medical Practitioners Duty to explain	Does not appear in any NT legislation although may be covered by the common law. Should be included in NT legislation. SA terminology preferable to section 4(4) of <i>Natural Death Act</i>
Section 16 – Protection for Medical Practitioners	Somewhat similar provision in section 3(6) of EMO Act to note Section 6 of <i>Natural Death Act</i> . But South Australia terminology more desired and preferable
Section 17 - Care of people who are dying	Does not appear in NT legislation and SA section should be adopted
Section 18 - Saving Provision	Similar provisions in NT <i>Natural Death Act</i> ss 6 and 7(2) should be retained
19 - Regulations	Should be included in NT Legislation section 7 of Northern Territory <i>Natural Death Act</i> should be retained

## Appendix H

### **The Proposal:**

- 1) The capacity to make Enduring Power of Attorney be moved from Power of Attorney Act to proposed Advance Directives Act.
- 2) Applications for review of any Advance Directives should be to the Local Court in the first instance.

### **The Reason:**

EPA can only be revoked via an application to the Supreme Court and this can lead to continuing abuse of power.

### **An actual case in illustration:**

Ageing mother gives son her EPA. Her home is sold and Mum moves to a nursing home where an initial bond is paid. After two years of regularly paying weekly fees to the home, EPA stops payment of any fees. Son leaves Australia and resides overseas and does not respond to any enquiries from home or other relatives. EPA has always put off applying for aged pension for mum although she is entitled to one. After years of no payment nursing home contacts older brother down South who tries to apply for pension- with privacy laws he can gain no info and Centrelink only wants to deal with EPA- they need statements of income and assets which only EPA can provide. Older brother continues to try to investigate and does find out that after the sale of the family home EPA has purchased a home in Sydney in his own name. He can gain no other information.

Family suspect that EPA will not apply for pension for Mum (which will cover her nursing home fees) because the statements Centrelink require will expose that several hundred thousand dollars are missing from her assets.

However – the family cannot get evidence because of privacy provisions (so any complaint to police seems unrealistic); financial guardianship cannot be awarded by the Local Court to anyone else because the EPA is in place and prevails; neither the Adult Guardianship Office, the Public Trustee or the family have the resources to seek revocation of the EPA from the Supreme Court - so the situation prevails!!

Sue Bradley 25/03/09