**ADVANCE PERSONAL PLANNING BILL 2013**

ISSUES PAPER

JUNE 2013

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1. INTRODUCTION

The Advance Personal Planning Bill 2013 enables an adult to make decisions and give directions in relation to their future health care and appoint decision makers to make such decisions on behalf of the adult, as well as wider decisions about their life, such as in relation to accommodation and financial matters.

This Issues Paper has been prepared to seek contributions from the community on the proposed Bill.

## Purpose of issues paper

The purpose of this paper is to give a direction to discussion about some issues identified by the Department of Attorney-General and Justice and to elicit public comment on these issues and generally.

The issues raised are not intended to be exhaustive, and commentators are invited to identify other issues in their submissions.

## Process

Policy options and recommendations for change may be further developed by the Department of the Attorney-General and Justice from the submissions received. It is intended to provide a report to Government on those issues and that this report be published.

Further consultation (either broad or targeted) may be necessary, depending on the level of complexity or the scope of any proposed changes to the Act.

## How to make a submission

Anyone can make a submission. It can be as short and informal as a letter or email, or it can be a more substantial document. A submission does not have to address all of the issues identified in the paper, and it does not have to be confined to the issues identified in the paper. Electronic copies of submissions should also be sent whenever possible.

**Submissions should be sent to:**

Director Legal Policy

Department of the Attorney-General and Justice

GPO Box 1722

DARWIN NT 0801

Or by email to Policy.AGD@nt.gov.au

**Closing date for submissions is 15 July 2013.**

Any submission, feedback or comment received by the   
Department of the Attorney-General and Justice will be treated as a public document unless clearly marked as ‘confidential’. In the absence of a clear indication that a submission, feedback or comment is intended to be confidential, the Department of the Attorney-General and Justice will treat the submission, feedback or comment as non‑confidential.

Non‑confidential submissions, feedback or comments will be made publicly available and published on the Department of the Attorney-General and Justice website. The Department of the Attorney-General and Justice may draw upon the contents of such and quote from them or refer to them in reports, which may be made publicly available.

Any requests made to the Department of the Attorney-General and Justice for access to a confidential submission, feedback or comment will be determined in accordance with the *Information Act* (NT).

Note: Although every care has been taken in the preparation of the Issues Paper to ensure accuracy, it has been produced for the general guidance only of persons wishing to make submissions to the review. The contents of the paper do not constitute legal advice or legal information and they do not constitute Government policy documents.

1. BACKGROUND

## Northern Territory

The Northern Territory does not presently have legislation allowing a person to appoint a medical attorney. The *Powers of Attorney Act* is limited to financial and property matters. Issues of health and welfare decisions can only be dealt with by appointment of a guardian under the *Adult Guardianship Act*, which does not allow for competent individuals to appoint substitute decision makers of their own choice if needed in the future.

Additionally, except for the limited provisions of the *Natural Death Act* (which relates to directions around the artificial prolonging of death) there is currently no legislative capacity for individuals to make advance health directives which have binding power on others in the future.

To address these gaps, attempts have previously been made to legislate in this area, but have not progressed.

The previous Government introduced the Adult Decision Making Bill 2012 which intended to replace the *Adult Guardianship Act* with an Act that covered all aspects of adult substituted decision making, including:

* substituted decision making for adults incapable of appointing an attorney or making advanced health directives ie a guardianship scheme for adults under an intellectual disability;
* enduring powers of attorney (financial);
* medical powers of attorney;
* advanced health directives;
* appointment of a Commissioner for Adult Decision Making and Advocacy; and
* establishment of a special Adult Decision Making Tribunal.

The Powers of Attorney Amendment Bill 2012 was introduced as a private member’s Bill and was more targeted at filling the existing gaps in NT legislation. It proposed amendments to the *Powers of Attorney Act* to:

* expand enduring powers of attorney to also extend to health matters (ie appointment of a ‘health guardian’); and
* introduce a new separate Instrument known as an ‘Advance Health Directive’ which operates as a direction to the world at large about how to manage the person’s health care if they become ‘not legally capable’.

This Government’s immediate focus is that of filling a gap in the Territory’s statute book regarding advanced medical directives and appointment of future decision makers, as well as related matters. The Bill is drafted in a manner consistent with a wider scheme that could apply to all matters relating to adult substitute decision making, as reflected in the Adult Decision Making Bill 2013, if this approach is determined in the future. Under the discussion Bill, the role of the Adult Decision Making Tribunal has been transferred to the Local Court.

1. overview of the advance personal planning bill 2013

## Advance Personal Plans

An adult who has decision making capacity may make an **advance personal plan**. As part of an advance personal plan the adult may do any or all of the following:

* Make a consent decision for future health care action (an **advance consent decision**);
* A statement of the adult’s views, wishes and beliefs (an **advance care statement**);
* Appointment of one or more persons to make decisions for the person (appointment of a **decision maker**).

The Bill sets out the general nature and process of advance personal plans in Part 2. An advance personal plan must be in an approved form and must be signed by the person making the plan in the presence of an authorised witness. Any persons appointed as a decision maker must sign the plan to indicate they consent to the appointment. This must also be witnessed in the presence of an authorised witness.

Part 3 of the Bill provides for the appointment and role of decision makers. Part 4 deals with consent decisions and liability protection for health professionals. Part 5 sets out the Local Court’s jurisdiction and compliance provisions are provided for in Part 6.

The consequential amendments are to be set out in Part 9 of the Bill but are yet to be drafted. The views of stakeholders and the public are being sought as to the nature of the consequential provisions, particularly for the *Adult Guardianship Act*, the *Powers of Attorney Act* and the *Aged and Infirmed Persons Property Act* (see discussion at Chapter 4 of this paper).

## Advance Consent Decisions

Part 4 deals with consent decisions and liability protection for health professionals.

An advance personal plan that contains a direction about a future health care action will constitute an advance consent decision. Health care action means any type of health care, such as basic health services, emergency treatment and palliative care. Advance consent decision can be made about commencing, continuing, withholding or withdrawing health care for the adult.

If an adult has made an advance consent decision about a health care action, that decision has effect and no-one can make decisions contrary to the advance consent decision. However the Court may allow the advance consent decisions to be disregarded in certain limited circumstances (see clause 40).

Clauses 44-48 (inclusive) provide protection to medical professionals relying on advance care directions to provide medical treatment.

## Advance Care Statements

An advance care statement is a statement setting out an adult’s views, wishes and beliefs as the basis on which he or she wants anyone to act if they make decisions for him or her. For example, a person may want decisions about their care to be made in accordance with their religious beliefs, or the fact that they value quality of life more than longevity.

When exercising their decision making authority, a decision maker is required to give effect to any advance care statement, even if doing so is not in the best interests of the adult they are authorised to make decisions for

However, there are exceptions to when the statement needs to be complied with (see clause 23).

If an adult has not appointed a decision-maker, an advance care statement will still assist other people, such as family members and carers, to know how the adult wants to be cared for after they are no longer able to care for themselves.

A statement in an advance personal plan about a health care action can be either an advance consent decision or an advance care statement. If the statement is an express statement of the adult’s consent (or refusal of consent) for a health care action; or can reasonably be interpreted as a clear statement of a health action being taken or not taken, then the statement will be an advance consent decision. In all other cases, such a statement would be an advance care statement.

For further clarification on the difference between an advance consent decision and an advance care statement see clause 38.

## Decision makers

Part 3 of the Bill provides for the appointment and role of decision makers.

Under the Bill, decision makers can be appointed to make decisions on a wide range of matters, including matters dealing with an adult’s property and financial affairs. In this regard it covers the area already covered by enduring powers of attorney under the *Powers of Attorney Act*.

Examples of matters that an adult can appoint a decision maker for are set out in clause 16 and cover accommodation, diet, intimate relationships, banking, employment, education and health care.

If an appointment of a decision maker does not specify what matters the appointment covers, it will be taken to cover all matters. An adult may appoint more than one decision maker for matters eg an adult may want to appoint an accountant to deal with their financial matters but a close family member for their health care matters. Alternatively, an adult could appoint more 2 or more decision makers dealing with the same matters (for example, an adult may want to appoint all their children in case one is not available). Clause 41 deals with these situations, including where the decision makers are unable to agree.

There are however a number of ‘excluded matters’ ie matters in relation to which a decision maker is not able to exercise authority for an adult. This includes exercising the adult’s right to vote, making a will and consenting to a marriage or divorce (clause 24).

## Local Court Jurisdiction and Appeals

Applications can be made to the Local Court for a determination on a range of matters (clause 56) including as to whether an adult has impaired decision making capacity, whether an advance personal plan is valid and the scope of a decision maker’s authority.

Appeals against a decision of the Local Court are to the Supreme Court which can consider fresh evidence and/or evidence in addition to evidence before the Local Court.

## Transitional Matters and Consequential Amendments

Please see discussions below in Chapter 4 of this paper.

## Interaction with the Adult Guardianship Act

The draft Advance Personal Planning Bill 2013 aims to put in place modern legislation that, amongst other things, establishes decision making principles to ensure that decision makers make decisions that are based on a set of paramount considerations regarding the adult’s best interests (see clause 22).

There is potential for this to create inconsistencies between adults who have guardians appointed under the *Adult Guardianship Act* (persons with a pre-existing intellectual disability or who did not prepare a valid advance personal plan while they still had decision making capacity) and adults who have valid plans under the Advance Personal Planning Bill 2013.

The draft Advance Personal Planning Bill 2013 has been drafted to allow for future expansion to cover all areas relating to adult decision making.

## Mutual recognition of interstate documents

Due to the movement of people across jurisdictions, it is important that the Bill recognise advance health care documents entered into under the legislation of other jurisdictions. For example, if an ill or elderly relative moves from Sydney to Alice Springs to be cared for by family and lose their decision making capacity before arriving in the Northern Territory, it makes sense that any such valid document they prepared in New South Wales should be able to be relied upon in determining their long term treatment and day-to-day care in the Northern Territory.

Clause 85 of the Bill provides for the recognition of similar documents entered into in other jurisdictions and is further discussed below. This clause will recognise documents made under prescribed corresponding laws of the Commonwealth or another State or Territory. See discussions below at Chapter 4 of this paper.

1. LEGISLATIVE ISSUES

## Policy Issues for Consideration in the Advance Personal Planning Bill

Generally, the Department of the Attorney-General and Justice is seeking comments on any aspect of the draft Advance Personal Planning Bill 2013. If you have any general comments, observations or suggestions in addition to the queries and issues discussed below, they should also be included in your submission.

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| 1. Are there any general issues or concerns that should be addressed in relation to the Advance Personal Planning Bill 2013? |

### Signing and witnessing requirements for decision makers

An advance personal plan must be signed by the adult in the presence of an authorised witness who is authorised under the *Oaths, Affidavits and Declarations Act* to administer an oath. A Commissioner for Oaths and Justice of the Peace are authorised witnesses.

A decision maker appointed in an advance personal plan must accept the appointment by signing the plan, and this must also be done in the presence of an authorised witness. The decision maker must sign their acceptance to ensure the person is appointing a person who is willing and available to take on the role as decision maker.

The concern is that these requirements may be too onerous and deter people from making advance personal plans. There is also the concern that they may lead to defects and unnecessary litigation around the validity of the plans. On the other hand these are important documents that can impact on all aspects of people’s lives and wellbeing and it is acknowledged that a robust and careful process is required.

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| 1. Is the requirement for the decision maker to sign the plan and have it witnessed too onerous? |

### Decision maker to consent to appointment

The Bill requires a decision maker to consent to the appointment in writing (see clauses 11(3) and 15(2)). This provision is necessary and convenient for the appointments of licensed trustee companies, the Public Trustee or Public Guardian so those bodies can ensure they have the necessary capacity and funding to carry out decision maker functions on behalf of a person. Acceptance by an ordinary person would be desirable to ensure that the person accepting the appointment is eligible and willing to be appointed.

On the other hand, this may regarded as unnecessary red tape for members of the general public as they will always have to opportunity to resign their appointment once it becomes effective.

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| 1. Should a decision maker have to consent to their appointment as a decision maker? |

### Decision making relating to major medical procedures

The draft Advance Personal Planning Bill 2013 proposes that a decision maker could be given power to make consent decisions about any health care action and this would include power to make decisions about major medical procedures and end of life decisions.

Section 21 of the *Adult Guardianship Act* currently limits the scope of health care decisions that a guardian can make by expressly excluding "major medical procedures" unless consent of the Court has been obtained. Section 21(4) of the *Adult Guardianship Act* defines ‘major medical procedure’ as a medical or dental procedure (that does not remove an immediate threat to a person's health) but is generally accepted by the medical profession or dental profession as being of a major nature. It also includes a medical procedure relating to contraception or the termination of a pregnancy.

Consistent with the policy underlying the Bill (that is, to give an adult the ability to decide how decisions are to be made for them), the discussion Bill proposes to allow a person to give full decision-making power to another person to make decisions about any kind of health or other care. If a person wants to limit the matters a decision maker can make decisions about, he or she can do so in their advance personal plan.

However, there is some concern that the definition of health care action under the discussion Bill is too wide and provides decision makers almost automatically (where they are given authority in relation to health care) with an unnecessary amount of control over an adult, including to make decisions about invasive and potentially painful and risky procedures that are not immediately necessary. As is the case the *Adult Guardianship Act*, it may be considered more appropriate that a Court make decisions in this regard.

On the other hand, the position for guardians can be viewed differently as they are appointed by the Court, not the individual adult. Accordingly, the guardian may not be in a position to know what the adult would have wanted. In that context, it may well be more appropriate for the Court to be making decisions about major medical procedures.

The alternative may be to provide that a decision maker can only have authority in relation to certain medical decisions if that authority is specifically set out in the appointment contained in an advance personal plan.

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| 1. Should decision makers be able to make decisions relating to major medical procedures on behalf of a person? |

### Mutual Recognition of Interstate Plans

Clause 86 of the Bill provides for the recognition of similar documents entered into in other jurisdictions. This clause will recognise documents made under prescribed corresponding laws of the Commonwealth or other states or Territories.

If an interstate document is prescribed under clause 85 of the Bill, the document and the appointments and/or directions contained in it will be valid in the Territory. However, the effect will also be that decision maker or any other person acting under the authority of the interstate document must comply with the law of the jurisdiction that is was made in, not in accordance with the Advance Personal Planning Bill 2013 or its decision-making principles. Due to the diverse nature of the schemes across the jurisdictions and the different rights and powers that are contained in the various pieces of legislation, this approach appears appropriate to ensure that decision makers have clarity as to their role.

However, to ensure that there is an element of control and vetting of the types of documents that can be relied upon in the Northern Territory, the law under which the document is established must be prescribed in the Northern Territory by Regulation.

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| 1. Is the proposed provision purporting to recognise interstate plans appropriate? |

### Administrative Responsibility

It is proposed that the Attorney-General and Minister for Justice will have administrative responsibility for the Bill, once enacted, under the Administrative Arrangements Order.

In relation to the day-to-day operations under the Bill, the Minister has a limited role and the Chief Executive Officer of the Department of the Attorney-General and Justice has responsibility. As currently drafted, the Bill provides the Chief Executive Officer with a range of statutory roles and responsibilities including:

* Powers of investigation to ensure the provisions of the Act are being complied with and to seek evidence of suspected officers against the Act;
* Power to commence proceedings for an offence against the Act (along with other persons approved by the Minister);
* Approval of forms; and
* The establishment and maintenance of a register,

The Chief Executive Officer obviously will have power to delegate his powers and is expected that this will occur in certain circumstances. For example, it may be appropriate for the Chief Executive to delegate his powers in relation to the register, to the Public Trustee or Registrar-General.

Consideration should be given to whether the roles and responsibilities set out in the Bill are appropriate, including whether the Minister should have a greater role and/or whether specific statutory officers should be given specific roles.

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| 1. Are the roles and responsibilities set out in the Bill appropriate? |

## Consequential amendments to the Powers of Attorney Act

As mentioned above, under the draft Advance Personal Planning Bill 2013, adults will be able to make a plan that does all the same things as an enduring power of attorney ie they can appoint a decision maker in relation to financial matters as well as health and lifestyle matters.

The question is whether the existing enduring powers of attorney provisions in the *Power of Attorney Act* should be continued or repealed by the proposed legislation. Alternatively, the existing provisions could be continued and operate side by side. The concern of this approach is that it may lead to inconsistencies and the appointment of two different decisions makers having authority over the same matters.

If the existing enduring powers of attorney provisions of the *Powers of Attorney Act* were closed of to new appointments, transitional and savings provisions would be required to preserve existing and enduring powers of attorney. Consideration would also need to be given to how and if existing enduring powers of attorney appointments could be amended. However, any new enduring powers of attorney would be made via an advance personal plan.

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| 1. Should the existing enduring powers of attorney provisions in the *Powers of Attorney Act* be repealed or closed off to new appointments? If so, what approach should be taken to the treatment of existing enduring power of attorney appointments? |

## Consequential amendments to the Adult Guardianship Act

It has been suggested that there should be scope for an adult, who is already under a guardianship order under the *Adult Guardianship Act*, to make an advance personal plan. In most cases, this would seem inappropriate as adults subject to these orders are deemed to be unable to make reasonable judgments or informed decisions relevant to daily living. They will generally therefore lack the capacity to make an advance personal plan. Additionally, if they have already have one, they will not be able to change it.

However, there could be circumstances where an adult has partial capacity so that they could make a plan in relation to a particular aspect of their life. Should provision be made for these circumstances and, if so, what should happen in these circumstances?

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| 1. In what circumstances, if any, could an adult, subject to an order under the *Adult Guardianship Act*, be able to make an advance personal plan? |

Another issue for consideration is whether the Court, in relation to an adult who already has appointed a decision maker under the Advance Personal Planning Bill 2013, should also be able to appoint either an Adult Guardian under the *Adult Guardianship Act* or manager under the *Aged and Infirm Persons’ Property Act*.

It is likely that there will be circumstances where decision makers have only been appointed in relation to limited matters for the particular adult. It seems appropriate that the Court should be able to appoint a guardian or manager to deal with the matters that are outside the scope of the decision maker’s authority.

Although the discussion Bill is yet to include consequential amendments to other legislation, the following is proposed to address these issues:

* If an adult already has an advance personal plan and an application is made to the Court for a guardianship order, it is proposed that the Court must take the existence and terms of the plan (including any appointment of a decision maker) into account in deciding whether the person needs a guardian and, if so, who to appoint as guardian and the terms of the guardianship order.
* If a guardian is appointed for a person who has made an advance care statement, the guardian must endeavour to give effect to them in much the same way as a decision maker

Consideration also needs to be given to whether and how the Court, in such circumstances, should limit the powers of the guardian or manager so as not to overlap with the authority of the decision makers. To address this issue it is proposed that a consequential amendment to the *Adult Guardianship Act* be included. This would involve inserting new section into the *Adult Guardianship Act* to allow the Court, when making or varying a guardianship order for someone who has a appointed a decision maker under the Bill, to impose conditions under s17, 18 or 19 of the *Adult Guardianship Act* on the powers of the guardian, or give directions to the decision maker about the exercise of his or her authority. The Court would need to be satisfied that the conditions or directions ensured "an appropriate division of decision making authority between the guardian and decision maker".

These issue about the appointment for adult guardians also arise in relation to the appointment of managers under the *Aged and Infirm Persons’ Property Act*.

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| 1. Should a guardian or manager be able to be appointed under the *Adult Guardianship Act* or *Aged and Infirm Persons’ Property Act* where a decision maker is also appointed under the Advance Personal Planning Bill? If so, how should inconsistencies be managed? |

## Consequential amendments to the Aged and Infirm Persons’ Property Act

### Local Court Jurisdiction

One significant issue arising in relation to the *Aged and Infirm Persons’ Property Act* is that the Supreme Court has jurisdiction for the issuing of protection orders while, the Local Court has jurisdictions under the *Adult Guardianship Act* and the draft Advance Personal Planning Bill 2013.

Consideration is being given to amending the *Aged and Infirm Persons’ Property Act* to transfer jurisdiction under that Act to the Local Court.

Such an amendment would require consideration of the relevant transitional provisions, including whether it would be appropriate for existing orders made by the Supreme Court to be amended or revoked by the Local Court, noting that the jurisdictions is currently exercisable by the Master of the Supreme Court in chambers.

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| 1. Should the jurisdiction for the making of property orders etc be changed from the Supreme Court to the Local Court to avoid the need for persons to make applications in separate courts that may relate to the same matter? |

## Consequential amendments to other legislation

It is likely that consequential amendments will be required to other legislation in the NT statute book including the *Emergency Medical Operations Act,* the *Transplantation and Anatomy Act* and the *Mental Health and Related Services Act* to ensure they operate consistently.

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| 1. Are there consequential amendments to other legislation that should be made to reduce inconsistencies and ensure the draft Advance Personal Planning Bill 2013 operates effectively? |

## Attachment A