

South Australia

# Advance Care Directives Regulations 2014

under the *Advance Care Directives Act 2013*

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### 1—Short title

These regulations may be cited as the *Advance Care Directives Regulations 2014*.

### 3—Interpretation

In these regulations—

*Act* means the *Advance Care Directives Act 2013*.

#### 4—Health practitioners

- (1) For the purposes of the definition of *health practitioner* in section 3(1) of the Act, the following professions and practices are declared to be included in the ambit of that definition:
  - (a) the provision of an ambulance service and medical treatment by a member of the staff of SAAS or other person or body authorised to provide ambulance services under the *Health Care Act 2008*;
  - (b) paramedic.
- (2) In this regulation—  
*ambulance service*, *medical treatment* and *SAAS* have the same meanings as in the *Health Care Act 2008*.

#### 5—Giving advance care directives

For the purposes of section 11(2)(c) of the Act, a person giving an advance care directive must certify, by completing and signing the relevant part of the advance care directive form, that he or she was given the advance care directive information statement referred to in regulation 7(2) and understood the information contained in the statement.

#### 6—Provisions that cannot be included in advance care directives

For the purposes of the definition of *mandatory medical treatment* in section 12(4) of the Act, medical treatment of the following kinds are prescribed:

- (a) medical treatment ordered by a court;
- (b) medical treatment of a kind contemplated by section 56 or 57 of the *Mental Health Act 2009*;
- (c) medical treatment that is the subject of a requirement or direction (however described) of the Chief Public Health Officer under the *South Australian Public Health Act 2011*.

#### 7—Witnessing advance care directives

- (1) For the purposes of section 15(1)(a) of the Act, an advance care directive will only be taken to be witnessed in accordance with these regulations if—
  - (a) in the case where 1 or more substitute decision-makers are appointed under the advance care directive—each substitute decision-maker has complied with regulation 8(1) before the advance care directive is witnessed; and
  - (b) in any case—the person giving the advance care directive signs the advance care directive form in the presence of the suitable witness who witnesses the advance care directive.
- (2) For the purposes of section 15(1)(b)(i) of the Act, a suitable witness must give to the person giving the advance care directive a copy of the advance care directive information statement (and compliance with this requirement will, for the purposes of section 15(1)(b)(ii) of the Act, be taken to constitute an explanation of the legal effects of giving an advance care directive of the kind proposed).

- (3) For the purposes of the definition of *suitable witness* in section 15(4) of the Act, a suitable witness must satisfy the following requirements:
  - (a) the suitable witness must be a competent adult;
  - (b) the suitable witness must be a person, or a person of a class, included on the list of suitable witnesses set out in Schedule 1.
- (4) To avoid doubt, nothing in subregulation (3) affects an advance care directive witnessed by a suitable witness who was competent at the time he or she witnessed the advance care directive, but who later lost competency.
- (5) In this regulation—

*advance care directive information statement* means the advance care directive information statement determined by the Minister from time to time for the purposes of this regulation and published in the Gazette.

## **8—Appointment of substitute decision-makers**

- (1) For the purposes of section 21(3) of the Act, it is a requirement that the substitute decision-maker must certify, by completing and signing the relevant part of the advance care directive form before the advance care directive is witnessed, that he or she—
  - (a) accepts the appointment as substitute decision-maker; and
  - (b) has read and understands the guidelines for substitute decision-makers.
- (2) In this regulation—

*guidelines for substitute decision-makers* means the guidelines determined by the Minister from time to time for the purposes of this regulation and published in the Gazette.

## **9—Copies of advance care directives**

- (1) For the purposes of section 24(2)(a) of the Act, a document may be certified as a true copy of a particular advance care directive by a person, or a person of a class, included on the list of suitable witnesses set out in Schedule 1 signing and certifying the document as a true copy of the advance care directive.
- (2) For the purposes of section 24(2)(b) of the Act, a scheme determined by the Minister from time to time in respect of making copies of advance care directives available electronically is prescribed.

## **10—Revoking advance care directives**

For the purposes of section 29(2) of the Act, a person who has given an advance care directive may revoke the advance care directive—

- (a) by giving another advance care directive; or
- (b) by giving, or causing to be given, a written indication that he or she has revoked the advance care directive.

## 11—Advising Tribunal of wish to revoke advance care directive

For the purposes of section 31(1) of the Act, a person must advise the Tribunal of a wish to revoke an advance care directive in such manner and form as is determined from time to time by the Tribunal.

## 12—Interstate advance care directives and corresponding laws

- (1) For the purposes of section 33(1) of the Act, instruments of the following classes are declared to be interstate advance care directives:
  - (a) an enduring power of attorney under the *Powers of Attorney Act 2006* of the Australian Capital Territory that is in force;
  - (b) a health direction under the *Medical Treatment (Health Directions) Act 2006* of the Australian Capital Territory that is in force;
  - (c) an instrument appointing an enduring guardian under the *Guardianship Act 1987* of New South Wales that is in force;
  - (d) an advance personal plan under the *Advance Personal Planning Act 2013* of the Northern Territory that is in force;
  - (e) an enduring power of attorney under the *Powers of Attorney Act 1998* of Queensland that is in force;
  - (f) an advance health directive under the *Powers of Attorney Act 1998* of Queensland that is in force;
  - (g) an instrument appointing an enduring guardian under the *Guardianship and Administration Act 2000* of Tasmania that is in force;
  - (h) an instrument appointing an enduring guardian under the *Guardianship and Administration Act 1986* of Victoria that is in force;
  - (i) a refusal of treatment certificate under the *Medical Treatment Act 1988* of Victoria that is in force;
  - (j) an enduring power of attorney (medical treatment) under the *Medical Treatment Act 1988* of Victoria that is in force;
  - (k) an advance health directive under the *Guardianship and Administration Act 1990* of Western Australia that is in force;
  - (l) an enduring power of guardianship under the *Guardianship and Administration Act 1990* of Western Australia that is in force;
  - (m) an instrument (however described) corresponding to an advance care directive that is binding under the common law and in force.

**Note—**

Such instruments are often referred to as a living will.

- (2) For the purposes of section 33(4) of the Act, the following Acts are declared to be corresponding laws:
  - (a) the *Powers of Attorney Act 2006* and the *Medical Treatment (Health Directions) Act 2006* of the Australian Capital Territory;
  - (b) the *Guardianship Act 1987* of New South Wales;

- (c) the *Advance Personal Planning Act 2013* of the Northern Territory;
- (d) the *Powers of Attorney Act 1998* and the *Guardianship and Administration Act 2000* of Queensland;
- (e) the *Guardianship and Administration Act 2000* of Tasmania;
- (f) the *Guardianship and Administration Act 1986* and the *Medical Treatment Act 1988* of Victoria;
- (g) the *Guardianship and Administration Act 1990* of Western Australia;
- (h) the common law.

### **13—Application of Part 7 of Act**

For the purposes of section 44 of the Act, a matter related to the residential and accommodation arrangements and personal affairs of a person who has given an advance care directive is specified.

### **14—Resolution of disputes by Public Advocate**

- (1) For the purposes of section 45 of the Act, and despite section 23 of the *Guardianship and Administration Act 1993*, the Public Advocate may only delegate a function or power under that section relating to mediation to a person if the Public Advocate is satisfied that the person has suitable qualifications and expertise in mediation.
- (2) A mediator to whom the Public Advocate has delegated a function or power under section 45 of the Act has, for the purposes of that section, the same privileges and immunities as a member of the Tribunal under the *South Australian Civil and Administrative Tribunal Act 2013*.

### **15—Referral of matters to Tribunal or Public Advocate**

- (1) If the Public Advocate decides to refer a matter to the Tribunal under section 46(1) of the Act, the following provisions apply:
  - (a) the referral must be made within 7 business days of the Public Advocate bringing a mediation to an end or refusing to determine an application, as the case may be;
  - (b) the Public Advocate must notify the Tribunal whether any or all parties have consented to the matter being referred to the Tribunal;
  - (c) the Public Advocate must provide the Tribunal with written reasons for its decision to refer the matter to the Tribunal;
  - (d) the Public Advocate must provide the Tribunal with a summary of the dispute between the parties, the contact details of the parties and all other information relevant to the matter that is in the possession of the Public Advocate when the referral is made;
  - (e) if the matter was the subject of mediation under section 45 of the Act and the mediator was a delegate of the Public Advocate—the Public Advocate must provide the Tribunal with the name of the mediator.

- (2) If the Tribunal decides to refer a matter to the Public Advocate under section 49(1) of the Act, the following provisions apply:
- (a) the referral must be made within 7 business days of the Tribunal making the decision to refer;
  - (b) the Tribunal must notify the Public Advocate whether any or all parties have consented to the matter being referred to the Public Advocate;
  - (c) the Tribunal must provide the Public Advocate with written reasons for its decision to refer the matter to the Public Advocate;
  - (d) the Tribunal must provide the Public Advocate with a summary of the dispute between the parties, the contact details of the parties and all other information relevant to the matter that is in the possession of the Tribunal when the referral is made.
- (3) For the purposes of section 49 of the Act, the Tribunal may not refer a matter to the Public Advocate if the matter has already been the subject of mediation under section 45 of the Act.

## 16—Fees

The fees payable for the purposes of the Act are as prescribed in Schedule 2.

## Schedule 1—List of suitable witnesses

The following persons, or classes of persons, are suitable witnesses:

- (a) agents of the Australian Postal Corporation in charge of an office supplying postal services to the public;
- (b) Australian Consular Officers or Australian Diplomatic Officers within the meaning of the *Consular Fees Act 1955* of the Commonwealth;
- (c) bailiffs;
- (d) bank officers with 5 or more continuous years of service;
- (e) building society officers with 5 or more years of continuous service;
- (f) chief executive officers of Commonwealth courts;
- (g) clerks of courts;
- (h) commissioners for taking affidavits;
- (i) commissioners for declarations;
- (j) credit union officers with 5 or more years of continuous service;
- (k) employees of the Australian Trade Commission who are—
  - (i) in a country or place outside Australia; and
  - (ii) authorised under paragraph 3(d) of the *Consular Fees Act 1955* of the Commonwealth; and
  - (iii) exercising his or her function in that place;
- (l) employees of the Commonwealth who are—
  - (i) in a country or place outside Australia; and

- (ii) authorised under paragraph 3(c) of the *Consular Fees Act 1955* of the Commonwealth; and
  - (iii) exercising his or her function in that place;
- (m) fellows of the National Tax and Accountants' Association;
- (n) health practitioners;
- (o) finance company officers with 5 or more years of continuous service;
- (p) holders of a statutory office not specified in another item in this list;
- (q) Judges of courts;
- (r) Justices of the Peace;
- (s) Magistrates;
- (t) marriage celebrants registered under Subdivision C of Division 1 of Part IV of the *Marriage Act 1961* of the Commonwealth;
- (u) Masters of court;
- (v) members of Governance Institute of Australia;
- (w) members of Engineers Australia, other than at the grade of student;
- (x) members of the Association of Taxation and Management Accountants;
- (y) members of the Australasian Institute of Mining and Metallurgy;
- (z) a member of the Australian Defence Force who is—
  - (i) an officer; or
  - (ii) a non-commissioned officer within the meaning of the *Defence Force Discipline Act 1982* of the Commonwealth with 5 or more years of continuous service; or
  - (iii) a warrant officer within the meaning of that Act;
- (za) members of the Institute of Chartered Accountants in Australia, CPA Australia (Certified Public Accountants) or the Institute of Public Accountants;
- (zb) Members of—
  - (i) the Parliament of the Commonwealth; or
  - (ii) the Parliament of a State; or
  - (iii) a Territory legislature; or
  - (iv) a local government authority of a State or Territory;
- (zc) ministers of religion registered under Subdivision A of Division 1 of Part IV of the *Marriage Act 1961* of the Commonwealth;
- (zd) notary public;
- (ze) patent attorneys or trade marks attorneys;
- (zf) permanent employees of the Australian Postal Corporation with 5 or more years of continuous service who are employed in an office supplying postal services to the public;

- (zg) permanent employees of—
  - (i) the Commonwealth or a Commonwealth authority; or
  - (ii) a State or Territory or a State or Territory authority; or
  - (iii) a local government authority,with 5 or more years of continuous service who are not specified in another item in this list;
- (zh) persons enrolled on the roll of the Supreme Court of a State or Territory, or the High Court of Australia, as a legal practitioner (however described);
- (zi) persons before whom a statutory declaration may be made under the law of the State or Territory in which the declaration is made;
- (zj) police officers;
- (zk) Registrars, or Deputy Registrars, of a court;
- (zl) Senior Executive Service employees of—
  - (i) the Commonwealth or a Commonwealth authority; or
  - (ii) a State or Territory or a State or Territory authority;
- (zm) sheriffs;
- (zn) sheriff's officers;
- (zo) teachers employed on a full-time basis at a school or tertiary education institution;
- (zp) veterinary surgeons.

## **Schedule 2—Fees**

<b>Description of fee</b>	<b>Fee</b>
Application under section 45 of the Act	nil

## **Schedule 3—Further transitional provisions**

### **1—Further transitional provisions relating to appointment of enduring guardians**

- (1) Except as provided by this clause, this clause is in addition to, and does not derogate from, the provisions of Parts 5 and 8 of Schedule 1 of the Act.
- (2) This clause applies to an instrument in writing that—
  - (a) was created before the commencement of Schedule 1 Part 5 of the Act; and
  - (b) complies with any requirements under section 25(2)(a) of the *Guardianship and Administration Act 1993* (as in force at the time the instrument was created); and
  - (c) purports to appoint an enduring guardian in accordance with that section; and

- (d) had not, at the time Schedule 1 Part 5 of the Act came into operation, been endorsed or witnessed (or both) as required under section 25(2)(b) and (c) of the *Guardianship and Administration Act 1993* (as in force immediately before the commencement of Schedule 1 Part 5 of the Act).
- (3) An instrument to which this clause applies will, despite the operation of Schedule 1 Part 5 of the Act—
- (a) be taken to have been in force from the time it was created; and
  - (b) be taken to continue in force until—
    - (i) it is endorsed and witnessed in accordance with section 25(2)(b) and (c) of the *Guardianship and Administration Act 1993* (as in force immediately before the commencement of Schedule 1 Part 5 of the Act); or
    - (ii) 31 December 2015,whichever is the sooner; and
  - (c) on being so endorsed and witnessed (whether before or after the commencement of this clause), will be taken to be an advance care directive given in accordance with the Act,

(but, to avoid doubt, nothing in this subclause operates to effect the appointment of an enduring guardian under the *Guardianship and Administration Act 1993*).

**Note—**

The provisions of the *Advance Care Directives Act 2013* will then apply to the instrument as if it were an advance care directive given under the Act rather than an appointment of an enduring guardian under the *Guardianship and Administration Act 1993*.

- (4) An advance care directive referred to in subclause (3) will be taken—
- (a) to have been given by the person who purported to appoint the enduring guardian; and
  - (b) to appoint as a substitute decision-maker each person who (by endorsement on the instrument to which this clause applies) has accepted his or her purported appointment as an enduring guardian; and
  - (c) to contain such provisions as may be necessary to enable each substitute decision-maker to make any decision he or she could have made as the person's enduring guardian (but no other provision).
- (5) Any condition or limitation contained in an instrument to which this clause applies will be taken to apply to the advance care directive contemplated by this clause.
- (6) A provision of an instrument to which this clause applies that is a provision of a kind contemplated by section 6 or 12(1) of the Act will be taken to be void and of no effect.
- (7) An instrument to which this clause applies will, for all purposes, be taken to be an advance care directive form.
- (8) A reference in any instrument or document to an enduring guardian (being an enduring guardian purportedly appointed by an instrument to which this clause applies) will be taken to be a reference to a substitute decision-maker appointed by this clause.

- (9) Clauses 36 and 37 of Schedule 1 of the Act apply in relation to the operation of this clause as if the advance care directive were an advance care directive contemplated by clause 35 of that Schedule.

## Legislative history

### Notes

- Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.
- Earlier versions of these regulations (historical versions) are listed at the end of the legislative history.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal regulations and variations

New entries appear in bold.

Year	No	Reference	Commencement
2014	77	<i>Gazette 12.6.2014 p2491</i>	1.7.2014: r 2
2015	15	<i>Gazette 5.3.2015 p884</i>	29.3.2015: r 2
2015	46	<i>Gazette 14.5.2015 p1762</i>	14.5.2015: r 2
<b>2015</b>	<b>50</b>	<b><i>Gazette 28.5.2015 p2297</i></b>	<b>28.5.2015: r 2</b>

### Provisions varied

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
<i>r 2</i>	<i>omitted by Legislation Revision and Publication Act 2002</i>	<i>29.3.2015</i>
<b>r 4</b>		
<b>r 4(1)</b>	<b>varied by 50/2015 r 4</b>	<b>28.5.2015</b>
<b>r 7</b>		
<b>r 7(1)</b>	<b>varied by 50/2015 r 5</b>	<b>28.5.2015</b>
<b>r 8</b>		
<b>r 8(1)</b>	<b>varied by 50/2015 r 6</b>	<b>28.5.2015</b>
r 11	substituted by 15/2015 r 4	29.3.2015
<b>r 12</b>		
<b>r 12(1)</b>	<b>varied by 50/2015 r 7(1)</b>	<b>28.5.2015</b>
<b>r 12(2)</b>	<b>varied by 50/2015 r 7(2)</b>	<b>28.5.2015</b>
r 14		
r 14(2)	varied by 15/2015 r 5	29.3.2015
r 15	substituted by 15/2015 r 6	29.3.2015
r 15(1)	varied by 46/2015 r 4	14.5.2015
<b>Sch 1</b>	<b>varied by 50/2015 r 8(1)—(3)</b>	<b>28.5.2015</b>
Sch 2	substituted by 15/2015 r 7	29.3.2015

**Sch 3**

**inserted by 50/2015 r 9**

**28.5.2015**

### **Historical versions**

29.3.2015

14.5.2015