

Legislative Council—No 113A

As reported with amendments, report adopted, Standing Orders suspended and passed remaining stages, 16 November 2023

South Australia

**Advance Care Directives (Review) Amendment
Bill 2022**

A BILL FOR

An Act to amend the *Advance Care Directives Act 2013*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Advance Care Directives (Review) Amendment Act 2022*.

5 2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

Part 2—Amendment of *Advance Care Directives Act 2013*

3—Insertion of section 5A

After section 5 insert:

5A—References to advance care directive to include certain digital copies

Except where the contrary intention appears, a reference in this Act to an advance care directive (being an advance care directive form that has been completed and witnessed in accordance with this Act and by which a person has given an advance care directive) will be taken to include an electronic copy of the advance care directive of a kind prescribed by, or prepared in accordance with, the regulations.

4—Insertion of section 8A

After section 8 insert:

8A—Interaction with other Acts and laws

- (1) This Act is in addition to, and does not derogate from, any other Act or law.
- (2) To avoid doubt, a direction (however described) given by a person under another Act or law is not an advance care directive for the purposes of this or any other Act.

5—Amendment of section 14—Giving advance care directives where English not first language

- (1) Section 14(1)(a)—delete "relation to a language in which the person is fluent (the *interpreter*)" and substitute:
accordance with this section
- (2) Section 14(1)(b)—delete "the interpreter" and substitute:
an interpreter in accordance with this section
- (3) Section 14(2)—delete subsection (2) and substitute:
 - (2) For the purposes of this Act, an interpreter who assists a person to give an advance care directive—
 - (a) must be 18 or more years of age; and
 - (b) must not have impaired decision-making capacity in relation to a decision that is reasonably likely to be made in the course of such interpretation; and
 - (c) must comply with any other requirements set out in the regulations for the purposes of this paragraph.

- (3) However, a person cannot be an interpreter in relation to a particular advance care directive if—
- (a) the person is appointed under the advance care directive as a substitute decision-maker; or
 - (b) the person has a direct or indirect interest in the estate of the person giving the advance care directive (whether as a beneficiary of the person's will or otherwise); or
 - (c) the person is a health practitioner who is responsible (whether solely or with others) for the health care of the person giving the advance care directive; or
 - (d) the person occupies a position of authority in a hospital, hospice, nursing home or other facility at which the person giving the advance care directive resides.
- (4) To avoid doubt, a person who is a suitable witness in relation to a particular advance care directive (being a person who is not prevented by subsection (2) or (3) from being an interpreter in relation to the advance care directive) may act as an interpreter under this section.
- (5) To avoid doubt, nothing in subsection (2) or (3) affects the validity of an advance care directive given before the commencement of those subsections.

5A—Amendment of section 15—Requirements for witnessing advance care directives

Section 15—after subsection (1) insert:

- (1a) Without otherwise limiting the requirements that may be set out in regulations made under this section relating to witnessing an advance care directive, the regulations—
- (a) cannot require an advance care directive to be signed or witnessed in a particular order; and
 - (b) cannot require a substitute decision-maker appointed under the advance care directive to have completed a part of an advance care directive form before the advance care directive can be witnessed.

6—Amendment of section 19—Binding and non-binding provisions

Section 19—after subsection (1) insert:

- (1a) Despite any other provision of this Act, a provision of an advance care directive that purports to be a refusal of health care arising out of, or directly related to, the attempted suicide or self-harm of the person who gave the advance care directive will be taken to be a non-binding provision.

7—Amendment of section 21—Requirements in relation to appointment of substitute decision-makers

- (1) Section 21(1)—delete "1 or more adults to be substitute decision-makers in respect of the advance care directive" and substitute:

5 such number of adults to be substitute decision-makers in respect of the advance care directive as the person thinks fit

- (2) Section 21—after subsection (3) insert:

- 10 (3a) Without otherwise limiting the requirements that may be set out in regulations made under this section relating to the appointment of substitute decision-makers, the regulations—
- (a) cannot require an advance care directive to be signed or witnessed in a particular order; and
- (b) cannot require a substitute decision-maker to complete a part of an advance care directive form before the advance care directive can be witnessed.
- 15

8—Substitution of section 22

Section 22—delete the section and substitute:

22—Substitute decision-makers empowered separately and together etc

- 20 (1) A person giving an advance care directive may, in relation to the appointment of substitute decision-makers in respect of the advance care directive, impose such conditions on the exercise of powers or making of decisions by the substitute decision-makers as the person thinks fit, including (without limiting this subsection) by—
- 25 (a) appointing the substitute decision-makers in order of precedence; or
- (b) limiting specified powers or decisions that may be exercised or made under the advance care directive to a specified substitute decision-maker or substitute decision-makers; or
- 30 (c) appointing substitute decision-makers as alternative substitute decision-makers and limiting their powers to where a specified substitute decision-maker or substitute decision-makers are not available.
- 35 (2) Subject to this Act and to any provision of an advance care directive to the contrary, if a person giving an advance care directive appoints more than 1 substitute decision-maker in respect of the advance care directive, the substitute decision-makers are empowered separately and together to make decisions under the advance care directive.

9—Amendment of section 24—Exercise of powers by substitute decision-maker

Section 24(2)—delete subsection (2) and substitute:

- 5 (2) For the purposes of this Act, a requirement that a substitute decision-maker produce an advance care directive will be taken to be satisfied if—
- (a) the substitute decision-maker produces a document that has been certified, in accordance with the regulations, as a true copy of the advance care directive; or
- 10 (b) the substitute decision-maker makes available a copy of the advance care directive in accordance with a scheme set out in the regulations in respect of electronic access to, or provision of, copies of advance care directives; or
- 15 (c) the health practitioner to whom the advance care directive is to be produced accesses an electronic copy of the advance care directive in accordance with any requirements set out in the regulations.

10—Amendment of section 36—Health practitioners to give effect to advance care directives

20 (1) Section 36—after subsection (1) insert:

- (1a) Subsection (1)(a) does not apply in relation to a binding provision of an advance care directive to the extent that—
- (a) the health practitioner reasonably suspects that the person has attempted suicide or self-harmed; and
- 25 (b) the health practitioner is of the opinion that the provision of health care is reasonably necessary to save the life of the person.
- (1b) A health practitioner who, pursuant to subsection (1a), provides health care in contravention of a binding provision of an advance care directive must, as soon as reasonably practicable after doing so—
- 30 (a) make a written record setting out the information required by the regulations in relation to the provision of the health care; and
- 35 (b) provide a report in relation to the provision of the health care in accordance with the requirements set out in the regulations.
- (1c) Subsection (1)(b) does not apply in relation to a non-binding provision of a kind referred to in section 19(1a).
- 40 (1d) Subsection (1)(c) and (d) do not apply in relation to a binding provision of a kind referred to in subsection (1a), a non-binding provision of a kind referred to in section 19(1a), or to health care of a kind referred to in subsection (1a)(b).

(1e) Without limiting subsections (1a), (1c) or (1d), but to avoid doubt, the effect of those subsections is as follows:

(a) a health practitioner may disregard a provision of a person's advance care directive that is a refusal of health care if—

- 5
- (i) the need for the health care arises out of the attempted suicide or self-harm of the person; and
 - (ii) the health care is reasonably necessary to save the life of the person;

(b) in such a case, the health practitioner—

- 10
- (i) may nevertheless decide to comply with the person's refusal of health care in their advance care directive and not provide such health care to the person; or

Note—

15 Such a decision would be subject to the health practitioner's usual professional standards.

- 20
- (ii) may, if authorised to do so under another Act or law, provide health care to the person despite the person's refusal of the health care in their advance care directive if, and only if, the health care arises out of the attempted suicide or self-harm and is reasonably necessary to save the life of the person;

Note—

25 Such Acts would include the *Consent to Medical Treatment and Palliative Care Act 1995* and the *Mental Health Act 2009*.

(c) nothing in those subsections operates to authorise the health practitioner to provide health care without being authorised to do so under the *Consent to Medical Treatment and Palliative Care Act 1995* or the *Mental Health Act 2009* or any other Act or law;

Note—

35 Those Acts operate to deem consent to have been given, or to dispense with the need for consent, in specified circumstances.

(d) the person's refusal of health care in their advance care directive (for example, in the case of a general "do not resuscitate" provision) would continue to apply in relation to any health care that does not arise out of the attempted suicide or self-harm, or that is not reasonably necessary to save the life of the person.

Example—

45 If the person were to need stitches for a non-life threatening laceration, the person's refusal of treatment would, even in the case of self-harm, continue to apply.

- (2) Section 36(5)—delete "subsection (1)" and substitute:
 this section

11—Amendment of section 45—Resolution of disputes by Public Advocate

- (1) Section 45(3)—after "may" insert:
 refuse to determine an application under this section, or
- (2) Section 45(5), (6) and (7)—delete subsections (5), (6) and (7)
- (3) Section 45(13)—delete "mediations under this section" and substitute:
 the operation of this section

Schedule 1—Statute law revision of *Advance Care Directives Act 2013*

Provision amended	How amended
section 7(1)(a)(iv)	delete "his or her" and substitute: their
section 7(1)(b)	delete "he or she" and substitute: the person
section 10	delete "his or her" wherever occurring and substitute in each case: their
section 10(b)	delete "for him or her"
section 10(f)	delete "he or she" and substitute: the person
section 11(1)	delete "he or she" and substitute: the person
section 11(3)	delete "he or she" and substitute: the person
section 11(5)(g)	delete "his or her" and substitute: their
section 14(1)	delete "his or her" wherever occurring and substitute in each case: their
section 15(1)(b)(i) and (ii)	delete "he or she" wherever occurring and substitute in each case: the suitable witness
section 15(1)(b)(iii) and (iv)	delete "his or her" wherever occurring and substitute in each case: their
section 15(1)(b)(iii)	delete "him or her" and substitute:

Provision amended	How amended
	them
section 15(2)	delete "he or she" wherever occurring and substitute in each case: the person
section 25	delete "he or she" and substitute: the substitute decision-maker
section 26	delete "he or she" and substitute: the substitute decision-maker
section 26	delete "his or her" wherever occurring and substitute in each case: their
section 27	delete "his or her" wherever occurring and substitute in each case: their
section 31(4)	delete "he or she" and substitute: the defendant
section 31(4)	delete "his or her" and substitute: their
section 31(5)(b)	delete "he or she" and substitute: the person
section 32(2)(a)	delete "his or her" and substitute: their
section 35(1)(b)	delete "he or she" and substitute: the substitute decision-maker
section 39(1)	delete "his or her" and substitute: their
section 40	delete "he or she" and substitute: the person
section 45	delete "his or her" wherever occurring and substitute in each case: their
section 45(11)	delete "he or she" and substitute: the Public Advocate
section 48(5)	delete "he or she" and substitute: the person
section 50(2)	delete "he or she" and substitute: the defendant
section 50(2)	delete "his or her" and substitute:

Provision amended	How amended
	their
section 51(1)(c)	delete "his or her" and substitute: their
section 53(b)(v)	delete "he or she has" and substitute: they have
section 53(c)	delete "he or she" and substitute: the person
section 53(f)	delete "he or she is" and substitute: they are
section 54A	delete "he or she has" and substitute: they have
section 56(2)	delete "he or she" and substitute: the person
section 57(2)	delete "he or she" and substitute: that substitute decision-maker
section 60(1)	delete "he or she" and substitute: the person
section 60(2)	delete "he or she" wherever occurring and substitute in each case: they
section 62(1)	delete "him or her" and substitute: the Minister
Schedule 1, clause 33(3)(c)	delete "he or she" and substitute: the substitute decision-maker
Schedule 1, clause 34(4)(d)	delete "he or she" and substitute: the substitute decision-maker
Schedule 1, clause 35(3)(c)	delete "he or she" and substitute: the substitute decision-maker