

South Australia

## **Advance Care Directives Act 2013**

An Act to enable a person to make decisions and give directions in relation to their future health care, residential and accommodation arrangements and personal affairs; to provide for the appointment of substitute decision-makers to make such decisions on behalf of the person; to ensure that health care is delivered to the person in a manner consistent with their wishes and instructions; to facilitate the resolution of disputes relating to advance care directives; to provide protections for health practitioners and other persons giving effect to an advance care directive; and for other purposes.

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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 Act 2013*.

### 3—Interpretation

- (1) In this Act, unless the contrary intention appears—

**advance care directive** means an advance care directive given under this Act that is in force (and includes, where the context requires, a reference to the advance care directive form in relation to a particular advance care directive);

**advance care directive form** means the form for giving advance care directives approved by the Minister from time to time and published in the Gazette;

**binding provision** of an advance care directive—see section 19;

**decision**, of the Tribunal, has the same meaning as in the *South Australian Civil and Administrative Tribunal Act 2013*;

**health care** means any care, service, procedure or treatment (including medical treatment) provided by, or under the supervision of, a health practitioner for the purpose of diagnosing, maintaining or treating a physical or mental condition of a person;

**Note—**

See also section 4.

**health practitioner** means a person who practises 1 or more of the following:

- (a) a health profession (within the meaning of the *Health Practitioner Regulation National Law (South Australia)*);
- (b) any other profession or practice declared by the regulations to be included in the ambit of this definition;

**impaired decision-making capacity**, in relation to a decision—see section 7;

**internal review** means a review under section 70 of the *South Australian Civil and Administrative Tribunal Act 2013*;

**life sustaining measures** has the same meaning as in the *Consent to Medical Treatment and Palliative Care Act 1995*;

**medical practitioner** means a person registered under the *Health Practitioner Regulation National Law* to practise in the medical profession (other than as a student);

**medical treatment** means the provision by a medical practitioner of physical, surgical or psychological therapy to a person (including the provision of such therapy for the purposes of preventing disease, restoring or replacing bodily function in the face of disease or injury or improving comfort and quality of life) and includes the prescription or supply of drugs;

**non-binding provision**, of an advance care directive—see section 19;

**Public Advocate** means the person holding or acting in the office of Public Advocate under the *Guardianship and Administration Act 1993*;

**substitute decision-maker**, under a particular advance care directive, means a substitute decision-maker appointed under Part 3 Division 2 or Part 7;

**Tribunal** means the South Australian Civil and Administrative Tribunal established under the *South Australian Civil and Administrative Tribunal Act 2013*.

- (2) For the purposes of this Act, a reference to an act will be taken to include a reference to an attempt to do the act, and a refusal or omission to act.
- (3) For the purposes of this Act, a reference to a decision made by a substitute decision-maker appointed under an advance care directive will be taken to include a reference to an exercise of a power by the substitute decision-maker under the advance care directive.
- (4) For the purposes of this Act, a reference to a provision of an advance care directive will be taken to include a reference to a condition, instruction or direction of an advance care directive.

#### **4—References to provision of health care to include withdrawal etc of health care**

Unless the contrary intention appears, a reference in this Act to the provision of health care to a person will be taken to include a reference to the withdrawal, or withholding, of health care to the person (including, to avoid doubt, the withdrawal or withholding of life sustaining measures).

#### **5—References to particular forms of health care in advance care directives**

Subject to any provision of the advance care directive to the contrary, a reference in an advance care directive to particular health care will be taken to include a reference to any other health care that is of substantially the same kind, or that is only distinguishable on technical grounds not likely to be understood or appreciated by the person who gave the advance care directive.

#### **6—Health practitioner cannot be compelled to provide particular health care**

- (1) Nothing in this Act authorises the making of—
  - (a) a provision of an advance care directive; or
  - (b) a decision by a substitute decision-maker under an advance care directive; or
  - (c) an order made under Part 7,

that purports to compel a health practitioner to provide a particular form of health care to a person.

**Note—**

Whilst a person can indicate his or her wishes in respect of the health care he or she wishes to receive, ultimately the question of what form of health care should be provided to a patient is a matter for the health practitioner to decide (however, a person is entitled to refuse health care of any kind, or to require it to be stopped, including health care that saves or prolongs his or her life).

- (2) Subsection (1) does not apply to health care comprising the withdrawal, or withholding, of health care to the person.
- (3) A provision of an advance care directive, a decision of a substitute decision-maker under an advance care directive or an order made under Part 7 is, to the extent that it contravenes subsection (1), void and of no effect.

## **7—Impaired decision-making capacity**

- (1) For the purposes of this Act, a person will be taken to have impaired decision-making capacity in respect of a particular decision if—
  - (a) the person is not capable of—
    - (i) understanding any information that may be relevant to the decision (including information relating to the consequences of making a particular decision); or
    - (ii) retaining such information; or
    - (iii) using such information in the course of making the decision; or
    - (iv) communicating his or her decision in any manner; or
  - (b) the person has satisfied any requirement in an advance care directive given by the person that sets out when he or she is to be considered to have impaired decision-making capacity (however described) in respect of a decision of the relevant kind.
- (2) For the purposes of this Act—
  - (a) a person will not be taken to be incapable of understanding information merely because the person is not able to understand matters of a technical or trivial nature; and
  - (b) a person will not be taken to be incapable of retaining information merely because the person can only retain the information for a limited time; and
  - (c) a person may fluctuate between having impaired decision-making capacity and full decision-making capacity; and
  - (d) a person's decision-making capacity will not be taken to be impaired merely because a decision made by the person results, or may result, in an adverse outcome for the person.

## **8—Application of Act**

This Act applies within the State, and outside of the State to the full extent of the extraterritorial power of the Parliament.

## **Part 2—Objects and principles**

### **9—Objects**

The objects of this Act include the following:

- (a) to enable competent adults to give directions about their future health care, residential and accommodation arrangements and personal affairs;
- (b) to enable competent adults to express their wishes and values in respect of health care, residential and accommodation arrangements and personal affairs, including by specifying outcomes or interventions that they wish to avoid;
- (c) to enable competent adults to allow decisions about their future health care, residential and accommodation arrangements and personal affairs to be made by another person on their behalf;

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- (d) to ensure, as far as is reasonably practicable and appropriate, that health care that is provided to a person who has given an advance care directive accords with the person's directions, wishes and values;
  - (e) to ensure that the directions, wishes and values of a person who has given an advance care directive are considered in dealing with the person's residential and accommodation arrangements and personal affairs;
  - (f) to protect health practitioners and others giving effect to the directions, wishes and values of a person who has given an advance care directive;
  - (g) to provide mechanisms for the resolution of disputes relating to decisions made on behalf of those who have given an advance care directive.

## 10—Principles

The following principles must be taken into account in connection with the administration, operation and enforcement of this Act (including, to avoid doubt, the resolution of disputes under Part 7):

- (a) an advance care directive enables a competent adult to make decisions about his or her future health care, residential and accommodation arrangements and personal affairs either by stating their own wishes and instructions or through 1 or more substitute decision-makers;
- (b) a competent adult can decide what constitutes quality of life for him or her and can express that in advance in an advance care directive;
- (c) a person is, in the absence of evidence or a law of the State to the contrary, to be presumed to have full decision-making capacity in respect of decisions about his or her health care, residential and accommodation arrangements and personal affairs;
- (d) a person must be allowed to make their own decisions about their health care, residential and accommodation arrangements and personal affairs to the extent that they are able, and be supported to enable them to make such decisions for as long as they can;
- (e) a person can exercise their autonomy by making self-determined decisions, delegating decision making to others, making collaborative decisions within a family or community, or a combination of any of these, according to a person's culture, background, history, spiritual or religious beliefs;
- (f) subject to this Act, an advance care directive, and each substitute decision-maker appointed under an advance care directive, has the same authority as the person who gave the advance care directive had when he or she had full decision-making capacity;
- (g) a decision made by a person on behalf of another in accordance with this Act—
  - (i) must, as far as is reasonably practicable, reflect the decision that the person would have made in the circumstances; and
  - (ii) must, in the absence of any specific instructions or expressed views of the person, be consistent with the proper care of the person and the protection of his or her interests; and

- (iii) must not, as far as is reasonably practicable, restrict the basic rights and freedoms of the person;
- (h) in the event of a dispute arising in relation to an advance care directive, the wishes (whether expressed or implied) of the person who gave the advance care directive are of paramount importance and should, insofar as is reasonably practicable, be given effect;
- (i) subject to this Act, in determining the wishes of a person who gave an advance care directive in relation to a particular matter, consideration may be given to—
  - (i) any past wishes expressed by the person in relation to the matter; and
  - (ii) the person's values as displayed or expressed during the whole or any part of his or her life; and
  - (iii) any other matter that is relevant in determining the wishes of the person in relation to the matter.

## Part 3—Advance care directives

### Division 1—Advance care directives

#### 11—Giving advance care directives

- (1) A competent adult may give an advance care directive if he or she—
  - (a) understands what an advance care directive is; and
  - (b) understands the consequences of giving an advance care directive.
- (2) Subject to this section, a person gives an advance care directive by—
  - (a) completing any relevant sections of an advance care directive form in accordance with this Act and any instructions contained on that form, or causing any relevant sections to be so completed; and
- (3) Subject to this Act, an advance care directive can make such provision relating to the future health care, residential and accommodation matters and personal affairs of the person giving the advance care directive as he or she thinks fit.
- (4) Nothing in this Act authorises a person to give an advance care directive for or on behalf of another person.

**Note—**

A parent, for example, cannot give an advance care directive on behalf of his or her child.

- (5) An advance care directive, or a provision of an advance care directive, is not invalid merely because—
- (a) the person giving the advance care directive did not complete a particular section of the advance care directive form (other than a section specified in an instruction on the form as being a section that must be completed); or
  - (b) the person giving the advance care directive did not appoint a substitute decision-maker; or
  - (c) the person giving the advance care directive was not fully informed in relation to each medical condition, or any other circumstance, to which the advance care directive relates; or
  - (d) the person giving the advance care directive did not seek legal or other professional advice in relation to the advance care directive; or
  - (e) the advance care directive contains a minor error (being an error that does not affect the ability to understand the wishes and instructions of the person who gave the advance care directive); or

**Note—**

The type of error contemplated by this paragraph includes a misspelling or obsolete reference.

- (f) instructions in the advance care directive are expressed in informal language rather than medical or technical terminology; or
- (g) the person giving the advance care directive expressed their wishes in general terms rather than specific instructions, or that his or her wishes in relation to a particular matter need to be inferred from the advance care directive; or
- (h) instructions in the advance care directive are based solely on religious, moral or social grounds.

**12—Provisions that cannot be included in advance care directives**

- (1) Subject to this Act, an advance care directive cannot make provisions of the following kinds:
- (a) a provision—
    - (i) that is unlawful; or
    - (ii) that would require an unlawful act to be performed; or
- Example—**
- An example of such a provision would be a request for euthanasia.
- (iii) that would, if given effect, cause a health practitioner or other person to contravene a professional standard or code of conduct (however described) applying to the health practitioner or person;
  - (b) a provision that comprises a refusal of mandatory medical treatment;
  - (c) any other provision of a kind declared by the regulations to be within the ambit of this section.

- (2) For the purposes of subsection (1), a reference to a professional standard or code of conduct does not include a reference to a standard or code of conduct prepared by or on behalf of a hospital, clinic, hospice, nursing home or any other place at which health care is provided to a person that regulates the provision of health care or other services at that place.
- (3) A provision of an advance care directive that contravenes subsection (1) is, to the extent of the contravention, void and of no effect.
- (4) In this section—

***mandatory medical treatment*** means—

  - (a) medical treatment ordered under a community treatment order or an inpatient treatment order under the *Mental Health Act 2009*; or
  - (b) any other medical treatment of a kind prescribed by regulations for the purposes of this definition.

### **13—Advance care directive not to give power of attorney**

- (1) Nothing in this Act authorises an advance care directive to have the effect of giving a power of attorney.

**Note—**

A power of attorney under the *Powers of Attorney and Agency Act 1984* is required if the substitute decision-maker is to deal with the financial and legal affairs of the person giving the advance care directive.

- (2) A provision of an advance care directive that purports to give a power of attorney is void and of no effect.

### **14—Giving advance care directives where English not first language**

- (1) The following provisions apply where a person for whom English is not his or her first language wishes to give an advance care directive:
  - (a) the advance care directive may be given with the assistance of an interpreter in relation to a language in which the person is fluent (the ***interpreter***);
  - (b) any information required under this Act to be given to the person in relation to the advance care directive must be given to the person through the interpreter;
  - (c) the advance care directive form must be completed in English;
  - (d) the interpreter must complete the relevant section of the advance care directive form certifying that—
    - (i) in his or her opinion, any information required under this Act to be given to the person giving the advance care directive was given to, and appeared to be understood by, the person; and
    - (ii) the information recorded in the advance care directive form accurately reproduces in English the original information and instructions of the person provided in the course of giving the advance care directive;

- (e) if an advance care directive form is completed in accordance with this section, the advance care directive will, for the purposes of this Act, be taken to have been given by the person.
- (2) Nothing in this section prevents a person who is a suitable witness in relation to a particular advance care directive from being an interpreter under this section.

### **15—Requirements for witnessing advance care directives**

- (1) An advance care directive will only be taken to have been witnessed in accordance with this Act if—
  - (a) the advance care directive form is witnessed by a suitable witness in accordance with the regulations; and
  - (b) the suitable witness completes the appropriate parts of the advance care directive form certifying that—
    - (i) he or she gave to the person giving the advance care directive any information required by the regulations for the purposes of this section; and
    - (ii) he or she explained to the person giving the advance care directive the legal effects of giving an advance care directive of the kind proposed; and
    - (iii) in his or her opinion, the person giving the advance care directive appeared to understand the information and explanation given to him or her by the suitable witness under this paragraph; and
    - (iv) in his or her opinion, the person giving the advance care directive did not appear to be acting under any form of duress or coercion; and
  - (c) any other requirements set out in the regulations in relation to the witnessing of advance care directives have been complied with.
- (2) However, a person cannot be a suitable witness in relation to a particular advance care directive—
  - (a) if he or she is appointed under the advance care directive as a substitute decision-maker; or
  - (b) if he or she 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) if he or she 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) if he or she occupies a position of authority in a hospital, hospice, nursing home or other facility at which the person giving the advance care directive resides; or
  - (e) in any other circumstances set out in the regulations in which a person cannot be a suitable witness in relation to a particular advance care directive.
- (3) For the purposes of this section, a reference to duress or coercion in relation to a person giving an advance care directive includes a reference to duress or coercion due solely to a perception or mistake on the part of the person.

- (4) In this section—

*suitable witness* means a person, or a class of persons, who satisfies any requirements prescribed by the regulations for the purposes of this definition.

## 16—When advance care directives are in force

- (1) An advance care directive will be taken to be in force from the time that the advance care directive is witnessed in accordance with this Act.
- (2) Subject to this Act, an advance care directive remains in force—
- (a) —
- (i) if an expiry date is specified in the advance care directive—until that day; or
- (ii) if no expiry date is specified in the advance care directive—until it is revoked in accordance with this Act; or
- (b) until the death of the person who gave the advance care directive, whichever occurs first.

## 17—Advance care directive revokes previous advance care directives

- (1) Subject to this Act, if a person gives an advance care directive, any previous advance care directives given by the person are revoked.
- (2) A revocation of a previous advance care directive will be taken to have occurred at the time the later advance care directive is taken to be in force.

## 18—No variation of advance care directive

Subject to this Act, an advance care directive cannot be varied.

### Note—

If a person wishes to vary the terms of his or her advance care directive, he or she must prepare a new one in accordance with this Act. However, only a competent adult can give an advance care directive—see section 11.

There is, however, capacity for the Tribunal to vary an advance care directive by appointing another substitute decision-maker in certain circumstances—see Part 7 Division 3.

## 19—Binding and non-binding provisions

- (1) Subject to this section, a provision of an advance care directive comprising a refusal of particular health care (whether express or implied) will, for the purposes of this Act, be taken to be a *binding provision*.

### Note—

Certain provisions of an advance care directive refusing some forms of mandatory medical treatment are void—see section 12(1)(b).

- (2) If a binding provision of an advance care directive is expressed to apply, or to be binding, only in specified circumstances, the provision will be taken to be a binding provision only in respect of those circumstances.
- (3) All other provisions of an advance care directive are *non-binding provisions*.

**20—Advance care directive has effect subject to its terms**

Subject to this Act, and to any other Act or law, an advance care directive has effect according to its terms.

**Division 2—Substitute decision-makers****21—Requirements in relation to appointment of substitute decision-makers**

- (1) Subject to this Act, a person giving an advance care directive may appoint 1 or more adults to be substitute decision-makers in respect of the advance care directive.

**Note—**

Nothing in this Act requires a substitute decision-maker to be appointed under an advance care directive—a person may choose simply to give instructions in his or her advance care directive.

- (2) However, the following persons cannot be appointed or act as a substitute decision-maker in relation to a particular advance care directive:
  - (a) a person who is not competent;
  - (b) a health practitioner who is responsible (whether solely or with others) for the health care of the person giving the advance care directive;
  - (c) a paid carer of the person giving the advance care directive;
  - (d) any other person of a class prescribed by the regulations for the purposes of this section.
- (3) An appointment of a substitute decision-maker must comply with any other requirements set out in the regulations for the purposes of this section.
- (4) An appointment in contravention of this section is void and of no effect.

**22—Substitute decision-makers jointly and severally empowered**

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 jointly and severally empowered to make decisions under the advance care directive.

**23—Powers of substitute decision-maker**

- (1) Subject to this Act and to any provision of the advance care directive, a substitute decision-maker appointed under an advance care directive may make any decision that the person who gave the advance care directive could have lawfully made in respect of the following areas:
  - (a) health care (other than a kind of health care declared by the regulations to be excluded from the ambit of this paragraph);
  - (b) residential and accommodation arrangements;
  - (c) personal affairs.

- (2) Nothing in subsection (1) authorises a substitute decision-maker to make a decision of a kind that requires the substitute decision-maker to have been given the person's power of attorney unless the required power of attorney has in fact been given to the substitute decision-maker.

**Note—**

A power of attorney cannot be given by an advance care directive—see section 13.

- (3) An advance care directive does not authorise a substitute decision-maker to perform functions that the person who gave the advance care directive has as a trustee or personal representative of another.
- (4) Despite any provision of an advance care directive to the contrary, an advance care directive does not authorise a substitute decision-maker to refuse the following:
- (a) the administration of drugs to relieve pain or distress;
  - (b) the natural provision of food and liquids by mouth.

## **24—Exercise of powers by substitute decision-maker**

- (1) Without limiting any other provision of this Act, a substitute decision-maker may only make a decision under an advance care directive if—
- (a) the substitute decision-maker produces the advance care directive at the request of a health practitioner who is to provide health care in accordance with the decision; and
  - (b) the substitute decision-maker is not prevented under this or any other Act or law from acting under the advance care directive; and
  - (c) the substitute decision-maker is competent at the time the decision is made.
- (2) A requirement under this section to 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
  - (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.

## **25—Substitute decision-maker to give notice of decisions**

If a substitute decision-maker makes a decision under the advance care directive, he or she must take reasonable steps to notify each other substitute decision-maker appointed under the advance care directive of the decision.

## **26—Substitute decision-maker may obtain advice**

- (1) Despite any other Act or law, a substitute decision-maker may obtain such advice (whether of a professional or technical nature or otherwise) as he or she reasonably requires in relation to the exercise of his or her powers, or discharge of his or her responsibilities, under an advance care directive.

- (2) However, a substitute decision-maker must have regard to, and seek to protect, the privacy of the person who gave the advance care directive when obtaining such advice.

### **27—Substitute decision-maker may renounce appointment**

- (1) Subject to this section, a substitute decision-maker appointed under an advance care directive may, by notice in writing given to the person who gave the advance care directive, renounce his or her appointment.
- (2) Subject to this Act and to any provision of the advance care directive to the contrary, the powers and responsibilities of another substitute decision-maker appointed under an advance care directive are not affected merely because a substitute decision-maker has renounced his or her appointment under subsection (1).
- (3) If the sole substitute decision-maker appointed under an advance care directive wishes to renounce his or her appointment during a period in which the person who gave the advance care directive is not competent, the appointment may only be renounced with the permission of the Tribunal.

**Note—**

See also section 32 (Revocation of advance care directives where person is not competent etc) and section 51 (Orders of Tribunal in relation to substitute decision-makers).

### **28—Death of substitute decision-maker does not affect validity of advance care directive**

The death of a substitute decision-maker appointed under an advance care directive does not, of itself, affect the validity of the advance care directive.

## **Division 3—Revoking advance care directives**

### **Subdivision 1—Revoking advance care directive where person competent**

#### **29—Revoking advance care directive where person competent**

- (1) A person who has given an advance care directive and who—
- (a) is competent; and
  - (b) understands the consequences of revoking the advance care directive, may revoke the advance care directive at any time.
- (2) An advance care directive may only be revoked in the manner prescribed by the regulations.
- (3) On revoking an advance care directive, the person must, as soon as is reasonably practicable—
- (a) advise each substitute decision-maker appointed under the advance care directive of the revocation; and
  - (b) take reasonable steps to notify each other person who has been given a copy of the advance care directive of the revocation.

**Example—**

Such persons might include family members, hospitals, accommodation providers and health practitioners.

**Subdivision 2—Revoking advance care directive where person not competent**

**30—Application of Subdivision**

This Subdivision applies to a person who has given an advance care directive but who—

- (a) is not competent; or
- (b) does not appear to understand the consequences of revoking an advance care directive.

**31—Tribunal to be advised of wish for revocation**

- (1) A person who becomes aware that a person to whom this Subdivision applies wishes, or may wish, to revoke an advance care directive must, as soon as is practicable and in accordance with any requirement set out in the regulations, advise the Tribunal of that fact.
- (2) The Tribunal, on being advised under this section, may give any directions to specified persons or bodies that the Tribunal thinks necessary or desirable in the circumstances of the case.
- (3) A person who, without reasonable excuse, refuses or fails to comply with a direction under subsection (2) is guilty of an offence.  
Maximum penalty: \$20 000 or imprisonment for 6 months.
- (4) It is a defence to a charge of an offence against subsection (3) if the defendant proves that he or she did not know, and could not reasonably have been expected to know, that his or her conduct amounted to a failure to comply with the direction.
- (5) A health practitioner or other person who advises the Tribunal that a person wishes, or may wish, to revoke an advance care directive—
  - (a) cannot, by virtue of doing so, be held to have breached any code of professional etiquette or ethics, or to have departed from any accepted form of professional conduct; and
  - (b) insofar as he or she has acted in good faith, incurs no civil or criminal liability in respect of the advice.
- (6) For the purposes of the *South Australian Civil and Administrative Tribunal Act 2013*, a review under this section will be taken to come within the Tribunal's original jurisdiction.

**32—Revoking advance care directives where person not competent**

- (1) An advance care directive of a person to whom this Subdivision applies may only be revoked by the Tribunal in accordance with this section.
- (2) Subject to subsection (3), the Tribunal must revoke an advance care directive if—
  - (a) —

- (i) the person who gave the advance care directive, or a person acting on his or her behalf, applies to the Tribunal for the revocation in a manner and form determined by the Tribunal; or
- (ii) the Tribunal is advised under section 31 of a person's wish to revoke an advance care directive; and
- (b) the Tribunal (having made such inquiries as it thinks fit) is satisfied that—
  - (i) the person who gave the advance care directive understands the nature and consequences of the revocation; and
  - (ii) the revocation genuinely reflects the wishes of the person; and
  - (iii) the revocation is, in all the circumstances, appropriate.
- (3) If an advance care directive expressly provides that the advance care directive is not to be revoked in the circumstances contemplated by this Subdivision, the Tribunal should not revoke the advance care directive unless satisfied that the current wishes of the person who gave the advance care directive indicate a conscious wish to override such a provision.
- (4) If the Tribunal revokes an advance care directive under this section, the Tribunal—
  - (a) must advise each substitute decision-maker appointed under the advance care directive of the revocation as soon as is reasonably practicable; and
  - (c) may give such advice and directions as the Tribunal considers necessary or desirable in the circumstances of the case.

## Part 4—Recognition of advance care directives from other jurisdictions

### 33—Advance care directives from other jurisdictions

- (1) The Governor may, by regulation, declare a class of instruments made under a corresponding law to be an *interstate advance care directive*.
- (2) Subject to this section—
  - (a) for the purposes of the laws of this State, an interstate advance care directive has effect as if it were an advance care directive given under this Act; and
  - (b) this Act (other than Part 3) applies to an interstate advance care directive as if it were an advance care directive given under this Act; and
  - (c) the powers and responsibilities of a substitute decision-maker under the interstate advance care directive will be determined in accordance with the corresponding law under which the interstate advance care directive was given.
- (3) For the purposes of this Act, a provision of an interstate advance care directive of a kind contemplated by section 6, 12(1) or 13 will be taken to be void and of no effect (whether or not the provision was able to be included in the interstate advance care directive in the jurisdiction in which it was made).

- (4) In this section—

*corresponding law* means a law of the Commonwealth, or of another State or Territory, that is declared by the regulations to be a corresponding law for the purposes of this section.

## Part 5—Giving effect to advance care directives

### 34—When things can happen under an advance care directive

- (1) A substitute decision-maker may only make a decision under an advance care directive if, at the relevant time, the person who gave the advance care directive has impaired decision-making capacity in respect of the decision.
- (2) A health practitioner may only provide health care pursuant to a consent granted under an advance care directive (whether by a substitute decision-maker or otherwise) if, at the relevant time, the person who gave the advance care directive has impaired decision-making capacity in respect of a decision relevant to the provision of the health care.

**Note—**

This includes the withdrawal, or withholding the provision of, health care—see section 4.

- (3) Nothing in this section prevents a provision of an advance care directive being taken into account when determining the wishes of the person who gave the advance care directive.

### 35—Substitute decision-maker to give effect to advance care directive

- (1) Subject to this Act, in making a decision under an advance care directive, a substitute decision-maker—
- (a) must, as far as is reasonably practicable—
    - (i) give effect to any instructions or directions expressed in the advance care directive; and
    - (ii) seek to avoid any outcome or intervention that the person who gave the advance care directive would wish to be avoided (whether such wish is expressed or implied); and
    - (iii) obtain, and have regard to, the wishes of the person who gave the advance care directive (whether such wishes are expressed or implied); and
    - (iv) endeavour to make the decision in a manner that is consistent with the principles set out in section 10; and
  - (b) must make the decision that he or she reasonably believes the person who gave the advance care directive would have made in the circumstances; and
  - (c) must act in good faith and with due diligence.
- (2) A failure to comply with this section does not, of itself, result in any civil or criminal liability on the part of the substitute decision-maker.

### 36—Health practitioners to give effect to advance care directives

- (1) Subject to this Act, a health practitioner who is providing, or is to provide, health care to a person who has given an advance care directive and who has impaired decision-making capacity in respect of a decision that is required in relation to the health care—
  - (a) must comply with a binding provision of the advance care directive that relates to health care of the relevant kind; and
  - (b) should, as far as is reasonably practicable, comply with a non-binding provision of the advance care directive that relates to health care of the relevant kind; and
  - (c) must, as far as is reasonably practicable, seek to avoid any outcome or intervention that the person who gave the advance care directive would wish to be avoided (whether such wish is expressed or implied); and
  - (d) must endeavour to provide the health care in a manner that is consistent with the principles set out in section 10.

**Note—**

This includes the provision of emergency medical treatment—see Division 5 of Part 2 of the *Consent to Medical Treatment and Palliative Care Act 1995*.

- (2) Despite subsection (1), a health practitioner may refuse to comply with a provision of an advance care directive if the health practitioner believes on reasonable grounds that—
  - (a) the person who gave the advance care directive did not intend the provision to apply in the particular circumstances; or
  - (b) the provision does not reflect the current wishes of the person who gave the advance care directive.

**Note—**

This subsection does not, however, authorise a health practitioner to provide health care. If health care is to be provided, consent must be given in accordance with the *Consent to Medical Treatment and Palliative Care Act 1995*—see, for example, Part 2A of that Act.

- (3) Despite subsection (1), a health practitioner may refuse to comply with a provision of an advance care directive that specifies the kind of health care that the person who gave the advance care directive wishes to receive if such health care—
  - (a) is not consistent with any relevant professional standards; or
  - (b) does not reflect current standards of health care in the State.
- (4) Subsection (3) does not apply—
  - (a) to, or in relation to, a binding provision of an advance care directive; or
  - (b) if the specified health care comprises the withdrawal, or withholding, of health care to a person (including, to avoid doubt, the withdrawal or withholding of life-sustaining measures).

**Example—**

An example would be a "do not resuscitate" instruction in an advance care directive.

- (5) For the purposes of the *Health Practitioner Regulation National Law (South Australia) Act 2010* and the *Health Practitioner National Law (South Australia)*, and for any other Act declared by the regulations to be included in the ambit of this subsection, a contravention of subsection (1) will be taken to amount to unprofessional conduct.

### **37—Conscientious objection**

Despite any other provision of this Act, a health practitioner may refuse to comply with a provision of an advance care directive on conscientious grounds.

### **38—Consent etc taken to be that of person who gave advance care directive**

For the purposes of the law of the State, a consent to particular health care given or refused pursuant to an advance care directive—

- (a) will be taken to be the consent or refusal of consent (as the case requires) of the person who gave the advance care directive; and
- (b) will be taken to have the same effect for all purposes as if the person were capable of giving such consent.

### **39—Consent taken to be withdrawn in certain circumstances**

- (1) If, at any time before particular health care is provided pursuant to a consent granted under an advance care directive (whether by a substitute decision-maker or otherwise), the person who gave the advance care directive expressly or implicitly withdraws his or her consent to the health care, the consent will, for the purposes of the law of the State, be taken to have been withdrawn.

**Note—**

The dispute resolution processes in Part 7 may also be available in such circumstances.

- (2) Subsection (1) does not apply in relation to particular health care, or health care of a particular kind—
- (a) if the advance care directive expressly excludes its operation; or
  - (b) in any other circumstances prescribed by the regulations.
- (3) Any act or omission done or made in good faith, without negligence and in accordance with an advance care directive before consent was withdrawn under this section will be taken to be valid, and always to have been valid.

## **Part 6—Validity and limitation of liability**

### **40—Presumption of validity**

A health practitioner, substitute decision-maker or other person is entitled to presume that an apparently genuine advance care directive is valid and in force unless he or she knew, or ought reasonably to have known, that the advance care directive was not valid or in force (as the case requires).

### **41—Protection from liability**

- (1) A health practitioner, substitute decision-maker or other person incurs no criminal or civil liability for an act or omission done or made in good faith, without negligence and in accordance with, or purportedly in accordance with, an advance care directive.

- (2) For the purposes of this section, a reference to the civil liability of a person includes a reference to liability arising under disciplinary proceedings or similar proceedings.

#### **42—Validity of acts etc under revoked or varied advance care directive**

Subject to this Act, the revocation or variation of an advance care directive under this Act does not affect the validity of any act done or decision made under the advance care directive before the revocation or variation.

### **Part 7—Dispute resolution, reviews and appeals**

#### **Division 1—Preliminary**

##### **43—Interpretation**

In this Part—

*eligible person*, in respect of an advance care directive, means—

- (a) the person who gave the advance care directive; and
- (b) a substitute decision-maker appointed under the advance care directive; and
- (c) a health practitioner providing, or proposing to provide, health care to the person who gave the advance care directive; and
- (d) any other person who satisfies the Public Advocate that he or she has a proper interest in a particular matter relating to the advance care directive,

and, for the purposes of section 48, includes each person who was a party to any mediation under Division 2 arising out of the matter.

##### **44—Application of Part**

This Part applies to the following matters:

- (a) the giving or revoking of an advance care directive;
- (b) a decision, or proposed decision, under an advance care directive;
- (c) the provision, or proposed provision, of health care to a person who has given an advance care directive;

**Note—**

This includes the withdrawal or withholding of health care—see section 4.

- (d) any other matter specified by the regulations for the purposes of this section.

#### **Division 2—Resolution of disputes by Public Advocate**

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

- (1) The Public Advocate may, on application by an eligible person in respect of an advance care directive or on his or her own initiative, provide preliminary assistance in resolving a matter to which this Part applies, including by—
- (a) ensuring that the parties to the matter are fully aware of their rights and obligations; and

- (b) identifying the issues (if any) that are in dispute between the parties; and
  - (c) canvassing options that may obviate the need for further proceedings; and
  - (d) where appropriate, facilitating full and open communication between the parties.
- (2) The Public Advocate may, on application by an eligible person in respect of an advance care directive, mediate a matter to which this Part applies.
- (3) The Public Advocate may bring a mediation to an end at any time—
  - (a) if, in the opinion of the Public Advocate, it is more appropriate that the matter be dealt with by the Tribunal; or
  - (b) at the request of a party to the mediation.
- (4) Evidence of anything said or done in the course of a mediation under this section is not admissible in subsequent proceedings except by consent of all parties to the proceedings.
- (5) The Public Advocate may, on application by an eligible person in respect of an advance care directive or on his or her own initiative, or in relation to a mediation under this section—
  - (a) make such of the following declarations in respect of a matter to which this Part applies as the Public Advocate thinks necessary or desirable in the circumstances of the case:
    - (i) a declaration as to the nature and scope of a person's powers or responsibilities under the advance care directive;
    - (ii) a declaration as to whether or not a particular act or omission is within the powers, or discharges the responsibilities, of a person under the advance care directive;
    - (iii) a declaration as to whether or not the person who gave the advance care directive has impaired decision-making capacity in relation to a specified decision;
    - (iv) any other declaration prescribed by the regulations; and
  - (b) give any advice that the Public Advocate considers necessary or desirable in the circumstances of the case.
- (6) The Public Advocate may vary or revoke a declaration under this section.
- (7) The Public Advocate may refuse to determine an application for a declaration or advice under this section if, in the opinion of the Public Advocate, it is more appropriate that the matter be dealt with by the Tribunal.
- (8) An application under this section—
  - (a) must be made in a manner and form determined by the Public Advocate; and
  - (b) must be accompanied by such information as the Public Advocate may reasonably require; and
  - (c) must be accompanied by the prescribed fee.
- (9) An application under this section may be determined by the Public Advocate despite the absence of any person who may be affected by the Public Advocate's decision.

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- (10) The Public Advocate has, for the purposes of this section, the same privileges and immunities as a member of the Tribunal under the *South Australian Civil and Administrative Tribunal Act 2013*.
  - (11) Subject to this Act, the Public Advocate may conduct proceedings under this section in such manner as he or she thinks fit.
  - (12) Despite section 23 of the *Guardianship and Administration Act 1993*, the Public Advocate cannot delegate a power or function conferred on the Public Advocate under subsection (5)(a) or (6).
  - (13) The regulations may make further provisions in relation to mediations under this section.

#### **46—Public Advocate may refer matter to Tribunal**

- (1) If the Public Advocate ends a mediation, or refuses to determine an application, under section 45 on the grounds that it is more appropriate that the matter be dealt with by the Tribunal, the Public Advocate may refer the matter to the Tribunal.
- (2) The regulations may make further provision in respect of referrals under this section.

#### **46A—Public Advocate may refer question of law to Supreme Court**

The Public Advocate may refer any question of law for the opinion of the Supreme Court.

### **Division 3—Resolution of disputes by Tribunal**

#### **47—Tribunal to give priority to wishes of person who gave advance care directive**

Without limiting Part 2, the Tribunal must, in performing a function or exercising a power under this Division—

- (a) seek, as far as is reasonably practicable, to give full effect to the wishes of the person who gave the relevant advance care directive.

#### **48—Resolution of disputes by Tribunal**

- (1) An eligible person in respect of an advance care directive may apply to the Tribunal for—
  - (a) a review of a matter dealt with by the Public Advocate under section 45; or
  - (b) a declaration or direction in relation to a matter to which this Part applies (including, to avoid doubt, a matter contemplated by section 45).
- (2) For the purposes of the *South Australian Civil and Administrative Tribunal Act 2013*—
  - (a) a review contemplated by subsection (1)(a) will be taken to come within the Tribunal's review jurisdiction; and
  - (b) a declaration or direction contemplated by subsection (1)(b) will be taken to come within the Tribunal's original jurisdiction.

- (3) The Tribunal may, on determining an application under this section—
- (a) in the case of a review of a matter dealt with by the Public Advocate under section 45—
    - (i) confirm, cancel or reverse a decision that is the subject of the review;
    - (ii) confirm, vary or revoke a declaration given under section 45; and
  - (b) in any case—
    - (i) make any declarations that the Tribunal thinks necessary or desirable in the circumstances of the case; and
    - (ii) give any directions that the Tribunal thinks necessary or desirable in the circumstances of the case (including a direction that the provision of particular health care to a person be withdrawn or withheld); and
- Note—**
- The Tribunal cannot compel a health practitioner to provide particular health care to a patient—see section 6.
- (iii) give any advice that the Tribunal considers necessary or desirable in the circumstances of the case.
- (4) The Tribunal may vary or revoke a declaration or direction under this section.
- (5) The person who gave the advance care directive to which proceedings under this section relate is (if he or she is not the applicant) a party to the proceedings.
- (6) Section 51 of the *South Australian Civil and Administrative Tribunal Act 2013* does not apply to, or in relation to, proceedings under this section.
- (8) The regulations may make further provisions in relation to proceedings under this section.

#### **49—Tribunal may refer matter to Public Advocate**

- (1) If the Tribunal is of the opinion that it is more appropriate that a particular application under section 48(1)(b) be dealt with by the Public Advocate, the Tribunal may refer the matter to the Public Advocate.
- (2) The regulations may make further provision in respect of referrals under this section.

#### **50—Failing to comply with direction of Tribunal**

- (1) Subject to this Act, a person who fails to comply with a direction of the Tribunal under section 48 is guilty of an offence.  
Maximum penalty: \$20 000 or imprisonment for 6 months.
- (2) It is a defence to a charge of an offence against subsection (1) if the defendant proves that he or she did not know, and could not reasonably have been expected to know, that his or her conduct amounted to a failure to comply with the relevant direction.

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## 51—Orders of Tribunal in relation to substitute decision-makers

- (1) If, on the application of an eligible person in respect of an advance care directive, the Tribunal is satisfied that a person appointed as a substitute decision-maker under the advance care directive—
  - (a) is a person who cannot be a substitute decision-maker pursuant to section 21(2); or
  - (b) is no longer willing to act as a substitute decision-maker under the advance care directive; or
  - (c) has been negligent in the exercise of his or her powers under the advance care directive,  
the Tribunal may—
    - (d) revoke the appointment of the substitute decision-maker; or
    - (e) if the person who gave the advance care directive is competent—with the consent of the person, make any variation to the advance care directive the Tribunal thinks appropriate (including by appointing another substitute decision-maker); or
    - (f) if the person who gave the advance care directive is not competent, and if no other substitute decision-maker was appointed under the advance care directive—revoke the advance care directive.
- (2) If, on the application of the Public Advocate, the Tribunal is satisfied that, because of a change in the personal circumstances of—
  - (a) the person who gave the advance care directive; or
  - (b) a substitute decision-maker under the advance care directive,  
it is no longer appropriate that a particular person be a substitute decision-maker under the advance care directive, the Tribunal may make any of the orders contemplated by subsection (1)(d), (e) or (f).
- (5) However, the Tribunal should not revoke an advance care directive under this section if there are provisions in the advance care directive that can continue to have effect despite the fact that there is no substitute decision-maker appointed under the advance care directive.

**Note—**

Such provisions include, for example, an expression of the wishes of the person who gave the advance care directive in respect of specified health care, or accommodation or personal matters.

In the circumstances contemplated by subsection (1)(f) of this section, the Tribunal may also make an order placing the person who gave the advance care directive under limited or full guardianship—see Part 4 Division 2 of the *Guardianship and Administration Act 1993*. If such an order is made, section 31A of that Act requires the guardian to seek to give effect to the instructions and wishes of the person as set out in the revoked advance care directive.

## Division 4—Urgent review by Supreme Court of substitute decision-maker's decision

### 52—Urgent review by Supreme Court

- (1) The Supreme Court may, on the application of—
  - (a) a health practitioner responsible (whether solely or with others) for the health care of a person who has given an advance care directive; or
  - (b) any person who has, in the opinion of the Court, a proper interest in the exercise of powers by the substitute decision-maker,review the decision of a substitute decision-maker appointed under an advance care directive.
- (2) A review under this section—
  - (a) is limited to ensuring that the substitute decision-maker's decision is in accordance with the advance care directive and this Act; and
  - (b) cannot be undertaken in respect of a decision to withdraw or withhold health care if the person who gave the advance care directive is in the advanced stages of an illness without any real prospect of recovery and the effect of the health care would be merely to prolong the person's life.
- (3) On completion of a review, the Supreme Court may—
  - (a) confirm, cancel or reverse the decision of the substitute decision-maker; and
  - (b) make such other orders, and give such advice and directions, as the Court thinks necessary or desirable in the circumstances of the case.
- (4) The Supreme Court must conduct a review under this section as expeditiously as possible.

## Division 5—Reviews and appeals

### 53—Reviews and appeals

The following provisions operate in connection with the application of Part 5 of the *South Australian Civil and Administrative Tribunal Act 2013* in relation to this Act:

- (a) a decision of the Tribunal not to authorise publication of a report of proceedings before the Tribunal may not be the subject of an application for internal review;
- (b) subject to paragraph (a), an application for internal review may be made by—
  - (i) the applicant in proceedings before the Tribunal in the exercise of its original jurisdiction (within the meaning of the *South Australian Civil and Administrative Tribunal Act 2013*) for the purposes of this Act; or
  - (ii) a person to whom the proceedings relate (if not the applicant under paragraph (a)); or
  - (iii) the Public Advocate; or

- (iv) any person who presented evidence or material before, or made submissions to, the Tribunal in the relevant proceedings; or
- (v) any other person who satisfies the Tribunal that he or she has a proper interest in the matter;
- (c) the person to whom an application for internal review relates (if he or she is not the applicant) will be a party to those proceedings;
- (d) the Tribunal may make an order for costs against a party to proceedings for internal review, but only if the Tribunal is satisfied that the institution of the proceedings, or the party's conduct in relation to the proceedings, was frivolous, vexatious or calculated to cause delay;
- (e) an appeal under section 71 of the *South Australian Civil and Administrative Tribunal Act 2013* must be instituted within 14 days—
  - (i) after the making of the decision to which the appeal relates; or
  - (ii) after being furnished with the reasons for that decision,
 whichever is the later (but the Supreme Court may, if it is satisfied that it is just and reasonable in the circumstances to do so, dispense with the requirement that the appeal should be instituted within that period (even if the time for instituting the appeal has expired));
- (f) no order for costs may be made against an applicant in an appeal under section 71 of the *South Australian Civil and Administrative Tribunal Act 2013* if he or she is the person to whom the decision appealed against relates.

## Part 7A—Special provisions relating to Tribunal

### 54—Tribunal must give notice of proceedings

- (1) Tribunal must give the following persons reasonable notice of the time and place of the hearings of proceedings before the Tribunal:
  - (a) the applicant;
  - (b) the person to whom the proceedings relate;
  - (c) the Public Advocate;
  - (d) such other persons as the Tribunal considers have a proper interest in the matter.
- (2) Despite subsection (1)—
  - (a) the Tribunal is not obliged to give notice of proceedings to a person if the person's whereabouts cannot, after reasonable enquiries, be ascertained; and
  - (b) the Tribunal may, if satisfied that urgent action is required in proceedings before the Tribunal, make an order (or any other decision) as a matter of urgency without complying with subsection (1), with effect as follows:
    - (i) in the case of an order under section 32(1)—for a period not exceeding 14 days as directed by the Tribunal;

- (ii) in any other case—for a period not exceeding 21 days as directed by the Tribunal.

#### **54A—Reasons for decisions**

The Tribunal must, on request by a person who has a right of internal review of a decision of the Tribunal or who satisfies the Tribunal that he or she has a proper interest in the matter, furnish the person with a written statement of the Tribunal's reasons for the decision, but not—

- (a) if the request is made after the period for the review has expired; or
- (b) if a review has been instituted—after the review has been decided.

#### **54B—Representation of person who is subject of proceedings**

- (1) A person who is the subject of proceedings before the Tribunal is entitled to appear before the Tribunal by—
  - (a) the Public Advocate; or
  - (b) except in the case of an internal review—by a recognised advocate.
- (2) Subsection (1) applies in addition to section 56(1) of the *South Australian Civil and Administrative Tribunal Act 2013*.
- (3) In this section—

*recognised advocate* means a person who is, by instrument in writing, recognised by the Tribunal as a person who is qualified to act as an advocate in proceedings before the Tribunal for the person to whom the proceedings relate.

### **Part 8—Offences**

#### **55—False or misleading statements**

- (1) A person who knowingly makes a false or misleading statement in, or in relation to, an advance care directive is guilty of an offence.

Maximum penalty:

- (a) if the defendant is a substitute decision-maker appointed under the advance care directive—\$20 000 or imprisonment for 2 years;
- (b) in any other case—\$10 000.

- (2) A person who knowingly makes a false or misleading statement in relation to an attempt to give an advance care directive is guilty of an offence.

Maximum penalty: \$10 000.

- (3) For the purposes of subsection (1), a reference to a substitute decision-maker includes a reference to a person who is not but who was, at the relevant time, a substitute decision-maker appointed under the advance care directive.

#### **56—Fraud, undue influence etc**

- (1) A person who, by dishonesty or undue influence, induces another to give an advance care directive is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (2) A person who purports to act as a substitute decision-maker appointed under an advance care directive knowing that—
- (a) the advance care directive has been revoked; or
  - (b) he or she is not a substitute decision-maker appointed under the advance care directive,
- is guilty of an offence.
- Maximum penalty: Imprisonment for 10 years.
- (3) If a person is convicted or found guilty of an offence against this section, the court sentencing the person may, if satisfied it is appropriate to do so in the circumstances—
- (a) revoke the relevant advance care directive; or
  - (b) if the person is a substitute decision-maker appointed under the relevant advance care directive—revoke the person's appointment as a substitute decision-maker; or
  - (c) make any other order the court thinks appropriate.

## **Part 9—Miscellaneous**

### **57—Giving notice to substitute decision-makers**

- (1) If a person or body is required under this or any other Act or law to give notice to a substitute decision-maker, that requirement will be taken to be satisfied if the person gives such notice to—
- (a) if a particular substitute decision-maker is specified in the advance care directive as being the person to whom such notice is to be given—that substitute decision-maker; or
  - (b) in any other case—the substitute decision-maker who is appointed first in the advance care directive.

**Note—**

This paragraph does not require a person to give notice to or otherwise contact a substitute decision-maker, rather it applies where a provision of this Act or another Act requires such notice to be given.

- (2) If the first-appointed substitute decision-maker is given notice in accordance with subsection (1)(b), he or she must give each other substitute decision-maker appointed under the advance care directive—
- (a) if the notice is a written notice—a copy of the notice; or
  - (b) in any other case—information setting out the effect of the notice.

### **58—Prohibition of publication of reports of proceedings**

- (1) Subject to this section, a person must not publish a report of any proceedings under this Act.
- Maximum penalty: \$10 000.
- (2) The body or court before which proceedings under this Act are heard may, on application by a person who it is satisfied has a proper interest in the matter, authorise the publication of a report of those proceedings.

- (3) A person who publishes a report pursuant to an authorisation given under subsection (2) must not disclose any information in the report that identifies, or could tend to identify, the person to whom the proceedings relate.

Maximum penalty: \$10 000.

- (4) This section does not apply if the person who gave the relevant advance care directive consents to the publication of the report or information.

## 59—Service of documents

A notice or document required or authorised to be given or sent to, or served on, a person for the purposes of this Act may—

- (a) be given to the person personally; or
- (b) be posted in an envelope addressed to the person—
  - (i) at the person's last known address; or
  - (ii) at the person's address for service; or
- (c) be left for the person at the address for service with someone apparently over the age of 16 years; or
- (d) be transmitted by fax or email to a fax number or email address provided by the person (in which case the notice or document will be taken to have been given or served at the time of transmission).

## 60—Victimisation

- (1) A person commits an act of victimisation against another person (the *victim*) if he or she causes detriment to the victim on the ground, or substantially on the ground, that the victim—
- (a) has made, or wishes to make an advance care directive; or
  - (b) is a substitute decision-maker appointed under an advance care directive; or
  - (c) is otherwise involved in relation to an advance care directive.

- (2) An act of victimisation under this Act may be dealt with—

- (a) as a tort; or
- (b) as if it were an act of victimisation under the *Equal Opportunity Act 1984*,

but, if the victim commences proceedings in a court seeking a remedy in tort, he or she cannot subsequently lodge a complaint under the *Equal Opportunity Act 1984* and, conversely, if the victim lodges a complaint under that Act, he or she cannot subsequently commence proceedings in a court seeking a remedy in tort.

- (3) If a complaint alleging an act of victimisation under this Act has been lodged with the Commissioner for Equal Opportunity and the Commissioner is of the opinion that the subject matter of the complaint has already been adequately dealt with by a competent authority, the Commissioner may decline to act on the complaint or to proceed further with action on the complaint.

(4) In this section—

*detriment* includes—

- (a) injury, damage or loss; or
- (b) intimidation or harassment; or
- (c) discrimination, disadvantage or adverse treatment in relation to the victim's employment or business; or
- (d) threats of reprisal.

## 61—Confidentiality

(1) A person engaged or formerly engaged in the administration of this Act must not divulge or communicate personal information obtained (whether by that person or otherwise) in the course of official duties except—

- (a) as required or authorised by or under this Act or any other Act or law; or
- (b) with the consent of the person to whom the information relates; or
- (c) in connection with the administration of this Act; or
- (d) as may be required to give effect to the provisions of an advance care directive to which the information relates; or
- (e) to an authority responsible under the law of a place outside this State, where the information is required for the proper administration of that law; or
- (f) to an agency or instrumentality of this State, the Commonwealth or another State or a Territory of the Commonwealth for the purposes of the proper performance of its functions.

Maximum penalty: \$10 000.

(2) Subsection (1) does not prevent disclosure of statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates.

(3) Information that has been disclosed under subsection (1) for a particular purpose must not be used for any other purpose by—

- (a) the person to whom the information was disclosed; or
- (b) any other person who gains access to the information (whether properly or improperly and whether directly or indirectly) as a result of that disclosure.

Maximum penalty: \$10 000.

## 62—Review of Act

(1) The Minister must cause a review of the operation of this Act to be conducted and a report on the results of the review to be submitted to him or her.

(2) The review and the report must be completed before the fifth anniversary of the commencement of this Act.

(3) The Minister must cause a copy of the report submitted under subsection (1) to be laid before both Houses of Parliament within 6 sitting days after receiving the report.

## 63—Regulations

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- (2) Without limiting subsection (1), the regulations may—
  - (a) exempt (conditionally or unconditionally) a specified person or class of persons from a specified provision or provisions of this Act; and
  - (b) prescribe fees in respect of any matter under this Act and their payment, recovery or waiver; and
  - (c) prescribe fines, not exceeding \$5 000, for offences against the regulations; and
  - (d) make provisions for the facilitation of proof of the commission of offences against the regulations; and
  - (e) make provisions of a saving or transitional nature.
- (3) The regulations may—
  - (a) be of general application or vary in their application according to prescribed factors; and
  - (b) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Minister or a specified person or body.

## Schedule 1—Transitional provisions

### Part 8—Transitional provisions

#### 32—Transitional provisions relating to anticipatory directions under *Consent to Medical Treatment and Palliative Care Act 1995*

- (1) A direction given by a person under section 7 of the *Consent to Medical Treatment and Palliative Care Act 1995* that is in force immediately before the commencement of clause 7 of this Schedule will, on the commencement of that clause, be taken to be an advance care directive given in accordance with this Act.

**Note—**

See also clause 36.

- (2) A provision of such a direction of a kind contemplated by section 6 or 12(1) of this Act will be taken to be void and of no effect.
- (3) An advance care directive contemplated by this clause—
  - (a) will be taken to have been given by the person who gave the direction; and
  - (b) will be taken to contain such provisions as may be necessary to give effect to the direction (but no other provision); and

- (c) will be taken to contain a provision limiting the circumstances in which the advance care directive has effect to the circumstances contemplated by section 7(1) of the *Consent to Medical Treatment and Palliative Care Act 1995* (as in force immediately before the commencement of clause 7 of this Schedule).

**Note—**

Those circumstances are limited to where the person is in the terminal phase of a terminal illness, or in a persistent vegetative state, and is incapable of making decisions about medical treatment when the question of administering the treatment arises.

- (4) Any relevant condition or limitation contained in the direction will be taken to apply to an advance care directive contemplated by this section.
- (5) The prescribed form by which the direction under section 7 of the *Consent to Medical Treatment and Palliative Care Act 1995* was given will, for all purposes, be taken to be an advance care directive form.
- (6) A reference in any instrument or document to a direction under section 7 of the *Consent to Medical Treatment and Palliative Care Act 1995* (however described) will be taken to be a reference to the advance care directive contemplated by this clause.

**33—Transitional provisions relating to medical agents under *Consent to Medical Treatment and Palliative Care Act 1995***

- (1) A medical power of attorney appointing an agent under section 8 of the *Consent to Medical Treatment and Palliative Care Act 1995* that is in force immediately before the commencement of clause 7 of this Schedule will, on the commencement of that clause, be taken to be an advance care directive given in accordance with this Act.

**Note—**

See also clause 36.

- (2) A provision of such a medical power of attorney of a kind contemplated by section 6 or 12(1) of this Act will be taken to be void and of no effect.
- (3) An advance care directive contemplated by this clause—
- (a) will be taken to have been given by the person who gave the medical power of attorney; and
- (b) will be taken to appoint each agent appointed by the medical power of attorney as a substitute decision-maker under the advance care directive; and
- (c) will be taken 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 agent (but no other provision).
- (4) Any relevant condition or limitation contained in the medical power of attorney will be taken to apply to an advance care directive contemplated by this section.
- (5) The prescribed form by which the medical power of attorney was given will, for all purposes, be taken to be an advance care directive form.

- (6) A reference in any instrument or document to a medical power of attorney or agent under section 8 of the *Consent to Medical Treatment and Palliative Care Act 1995* (however described) will be taken to be a reference to the advance care directive or substitute decision-maker contemplated by this clause (as the case requires).

**34—Transitional provisions relating to other instruments continued under  
*Consent to Medical Treatment and Palliative Care Act 1995***

- (1) A direction or enduring power of attorney continued in force pursuant to Schedule 3 of the *Consent to Medical Treatment and Palliative Care Act 1995* and that is in force immediately before the commencement of this clause will, on the commencement of Part 2 of this Schedule, be taken to be an advance care directive given in accordance with this Act.

**Note—**

See also clause 36.

- (2) A provision of such a direction or enduring power of attorney of a kind contemplated by section 6 or 12(1) of this Act will be taken to be void and of no effect.
- (3) An advance care directive contemplated by this clause—
- (a) will be taken to have been given by the person who gave the direction or enduring power of attorney (as the case requires); and
  - (b) in the case of an advance care directive related to a direction—will be taken to contain such provisions as may be necessary to give effect to the direction (but no other provision); and
  - (c) in the case of an advance care directive related to an enduring power of attorney—will be taken to appoint each agent appointed by the enduring power of attorney as a substitute decision-maker under the advance care directive; and
  - (d) will be taken 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 agent under the enduring power of attorney (but no other provision).
- (4) Any condition or limitation contained in the direction or enduring power of attorney (as the case requires) will be taken to apply to an advance care directive contemplated by this section.
- (5) Any instrument by which the direction or enduring power of attorney was given will, for all purposes, be taken to be an advance care directive form.
- (6) A reference in any instrument or document to a direction or enduring power of attorney to which this clause relates (however described) will be taken to be a reference to the advance care directive contemplated by this clause.

### **35—Transitional provisions relating to enduring guardians under *Guardianship and Administration Act 1993***

- (1) An instrument appointing an enduring guardian under section 25 of the *Guardianship and Administration Act 1993* that is in force immediately before the commencement of clause 18 of this Schedule will, on the commencement of that clause, be taken to be an advance care directive given in accordance with this Act.

**Note—**

See also clause 36.

- (2) A provision of such an instrument appointing an enduring guardian of a kind contemplated by section 6 or 12(1) of this Act will be taken to be void and of no effect.
- (3) An advance care directive contemplated by this clause—
- (a) will be taken to have been given by the person who appointed the enduring guardian; and
  - (b) will be taken to appoint each enduring guardian appointed by the instrument as a substitute decision-maker under the advance care directive; and
  - (c) will be taken 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).
- (4) Any condition or limitation contained in the instrument appointing the enduring guardian will be taken to apply to an advance care directive contemplated by this section.
- (5) The instrument by which the enduring guardian was appointed will, for all purposes, be taken to be an advance care directive form.
- (6) A reference in any instrument or document to an enduring guardian appointed under section 25 of the *Guardianship and Administration Act 1993* (however described) will be taken to be a reference to the advance care directive contemplated by this clause.

### **36—Only 1 advance care directive to be created**

- (1) If 2 or more of clauses 32, 33, 34 or 35 apply in respect of a particular person, the person will, for the purposes of this or any other Act, be taken to have given 1 advance care directive containing, or subject to, the relevant provisions (in addition to any other applicable provisions under this Act).

- (2) In this clause—

*relevant provisions* means—

- (a) if clause 32 applies in respect of the person—clause 32(2), (3) and (4); and
- (b) if clause 33 applies in respect of the person—clause 33(2), (3) and (4); and
- (c) if clause 34 applies in respect of the person—clause 34(2), (3) and (4); and
- (d) if clause 35 applies in respect of the person—clause 35(2), (3) and (4).

### **37—Disputes**

A dispute arising out of the operation of this Schedule will be taken to be a matter to which Part 7 of this Act applies.

## Legislative history

### Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- 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).

### Legislation amended by principal Act

The *Advance Care Directives Act 2013* amended the following:

*Consent to Medical Treatment and Palliative Care Act 1995*

*Coroners Act 2003*

*Fair Work Act 1994*

*Guardianship and Administration Act 1993*

*Health and Community Services Complaints Act 2004*

*Wills Act 1936*

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
2013	12	<i>Advance Care Directives Act 2013</i>	18.4.2013	1.7.2014 ( <i>Gazette</i> 6.2.2014 p546)
<b>2014</b>	<b>26</b>	<b><i>Statutes Amendment (SACAT) Act 2014</i></b>	<b>11.12.2014</b>	<b>Pt 2 (ss 4—20)—29.3.2015 (<i>Gazette</i> 5.3.2015 p883)</b>
2016	34	<i>Mental Health (Review) Amendment Act 2016</i>	14.7.2016	Sch 1 (cl 1)—5.6.2017 ( <i>Gazette</i> 30.5.2017 p1982)

### Provisions amended

New entries appear in bold.

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

Provision	How varied	Commencement
Long title	amended under <i>Legislation Revision and Publication Act 2002</i>	29.3.2015
Pt 1		
s 2	<i>omitted under Legislation Revision and Publication Act 2002</i>	29.3.2015
s 3		
s 3(1)		
decision	inserted by 26/2014 s 4(1)	29.3.2015
<i>Guardianship Board</i>	<i>deleted by 26/2014 s 4(2)</i>	29.3.2015
internal review	inserted by 26/2014 s 4(3)	29.3.2015

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Tribunal	inserted by 26/2014 s 4(4)	29.3.2015
Pt 3		
s 27		
s 27(3)	amended by 26/2014 s 5	29.3.2015
s 31		
s 31(1), (2) and (5)	amended by 26/2014 s 6(1)	29.3.2015
s 31(6)	inserted by 26/2014 s 6(2)	29.3.2015
s 32		
s 32(1)—(3)	amended by 26/2014 s 7(1)	29.3.2015
s 32(4)	amended by 26/2014 s 7(1)	29.3.2015
	(b) deleted by 26/2014 s 7(2)	29.3.2015
Pt 7		
Pt 7 Div 2		
s 45		
s 45(3) and (7)	amended by 26/2014 s 8(1)	29.3.2015
s 45(10)	amended by 26/2014 s 8(1), (2)	29.3.2015
s 46		
s 46(1)	amended by 26/2014 s 9	29.3.2015
s 46A	inserted by 26/2014 s 10	29.3.2015
Pt 7 Div 3		
heading	substituted by 26/2014 s 11	29.3.2015
s 47	amended by 26/2014 s 12(1)	29.3.2015
	(b) deleted by 26/2014 s 12(2)	29.3.2015
s 48		
s 48(1)	amended by 26/2014 s 13(1)	29.3.2015
s 48(2)	substituted by 26/2014 s 13(2)	29.3.2015
s 48(3) and (4)	amended by 26/2014 s 13(1)	29.3.2015
s 48(6)	substituted by 26/2014 s 13(3)	29.3.2015
s 48(7)	<i>deleted by 26/2014 s 13(3)</i>	29.3.2015
s 48(9)	<i>deleted by 26/2014 s 13(4)</i>	29.3.2015
s 49		
s 49(1)	amended by 26/2014 s 14	29.3.2015
s 50		
s 50(1)	amended by 26/2014 s 15	29.3.2015
s 51		
s 51(1) and (2)	amended by 26/2014 s 16(1)	29.3.2015
s 51(3) and (4)	<i>deleted by 26/2014 s 16(2)</i>	29.3.2015
s 51(5)	amended by 26/2014 s 16(1)	29.3.2015
Pt 7 Div 4		
heading	substituted by 26/2014 s 17	29.3.2015
Pt 7 Div 5	substituted by 26/2014 s 18	29.3.2015
Pt 7A	inserted by 26/2014 s 19	29.3.2015
Sch 1		

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Pts 1—7

omitted under Legislation Revision and  
Publication Act 2002

29.3.2015

## Transitional etc provisions associated with Act or amendments

### *Statutes Amendment (SACAT) Act 2014*

#### 20—Transitional provisions

- (1) In this section—

**Guardianship Board** means the Guardianship Board established under the *Guardianship and Administration Act 1993*;

**principal Act** means the *Advance Care Directives Act 2013*;

**relevant day** means the day on which this Part comes into operation;

**Tribunal** means the South Australian Civil and Administrative Tribunal.

- (2) A right to make any application or referral, or to seek a review, under the principal Act with respect to any matter in existence before the relevant day, with the effect that the relevant proceedings would have been commenced before the Guardianship Board, will be exercised as if this Part had been in operation before the right arose, so that the relevant proceedings may be commenced instead before the Tribunal.
- (3) Any proceedings before the Guardianship Board under the principal Act immediately before the relevant day will, subject to such directions as the President of the Tribunal thinks fit, be transferred to the Tribunal where they may proceed as if they had been commenced before the Tribunal.
- (4) The Tribunal may—
- receive in evidence any transcript of evidence in proceedings before the Guardianship Board, and draw any conclusions of fact from that evidence that appear proper; and
  - adopt any findings or determinations of the Guardianship Board that may be relevant to proceedings before the Tribunal; and
  - adopt or make any decision (including a decision in the nature of a permission), direction or order in relation to proceedings before the Guardianship Board before the relevant day (including so as to make a decision or give a permission, direction or order, in relation to proceedings fully heard before the relevant day); and
  - take other steps to promote or ensure the smoothest possible transition from 1 jurisdiction to another in connection with the operation of this section.
- (5) Nothing in this section affects a right to appeal to the Administrative and Disciplinary Division of the District Court against a decision, direction or order of the Guardianship Board made or given before the relevant day.