

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; to make related amendments to the *Consent to Medical Treatment and Palliative Care Act 1995*, the *Coroners Act 2003*, the *Fair Work Act 1994*, the *Guardianship and Administration Act 1993*, the *Health and Community Services Complaints Act 2004* and the *Wills Act 1936*; 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*.

#### 2—Commencement

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

#### 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;

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

***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;

*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.

- (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;
- (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

**Note—**

An advance care directive form must be the approved form—see the definition of *advance care directive form* in section 3(1).

- (b) having the completed advance care directive form witnessed in accordance with this Act; and
  - (c) complying with any other requirements set out in the regulations in relation to giving advance care directives.
- (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 Guardianship Board 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 Guardianship Board.

**Note—**

See also section 32 (Revocation of advance care directives where person is not competent etc) and section 51 (Orders of Guardianship Board 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—Guardianship Board 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 Guardianship Board of that fact.
- (2) The Guardianship Board, on being advised under this section, may give any directions to specified persons or bodies that the Guardianship Board 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 Guardianship Board 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.

### **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 Guardianship Board in accordance with this section.
- (2) Subject to subsection (3), the Guardianship Board 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 Guardianship Board for the revocation in a manner and form determined by the Guardianship Board; or
    - (ii) the Guardianship Board is advised under section 31 of a person's wish to revoke an advance care directive; and
  - (b) the Guardianship Board (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 Guardianship Board 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 Guardianship Board revokes an advance care directive under this section, the Guardianship Board—
  - (a) must advise each substitute decision-maker appointed under the advance care directive of the revocation as soon as is reasonably practicable; and
  - (b) must take reasonable steps to notify each other person who has been given a copy of the advance care directive of the revocation; and

**Example—**

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

- (c) may give such advice and directions as the Guardianship Board 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 Guardianship Board; 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 Guardianship Board.
- (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.
- (10) The Public Advocate has, for the purposes of this section, the same privileges and immunities as a member of the Guardianship Board under the *Guardianship and Administration Act 1993*.
- (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 Guardianship Board**

- (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 Guardianship Board, the Public Advocate may refer the matter to the Guardianship Board.
- (2) The regulations may make further provision in respect of referrals under this section.



### **Division 3—Resolution of disputes by Guardianship Board**

**Note—**

Certain persons who are dissatisfied with a decision, direction or order of the Guardianship Board under this Division may, with the permission of the Guardianship Board or the Administrative and Disciplinary Division of the District Court, appeal to that court against the decision, direction or order—see section 67 of the *Guardianship and Administration Act 1993*.

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

Without limiting Part 2, the Guardianship Board 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; and
- (b) without limiting paragraph (a), to limit the intervention of the Guardianship Board as far as is reasonably practicable in the circumstances.

#### **48—Resolution of disputes by Guardianship Board**

- (1) An eligible person in respect of an advance care directive may apply to the Guardianship Board 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) The Guardianship Board may refuse to hear an application under this section if the Guardianship Board is of the opinion—
  - (a) that the matter to which the application relates lacks substance, is unnecessary or unjustifiable, or is frivolous, vexatious or not made in good faith; or
  - (b) that to conduct a review would be an abuse of the processes under this Part; or
  - (c) that the matter should be determined by way of legal proceedings.
- (3) The Guardianship Board 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 Guardianship Board thinks necessary or desirable in the circumstances of the case; and
    - (ii) give any directions that the Guardianship Board 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 Guardianship Board cannot compel a health practitioner to provide particular health care to a patient—see section 6.

- (iii) give any advice that the Guardianship Board considers necessary or desirable in the circumstances of the case.
- (4) The Guardianship Board 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) Sections 15 and 15A of the *Guardianship and Administration Act 1993* do not apply to, or in relation to, proceedings under this section.
- (7) An application under this section—
  - (a) must be made in a manner and form determined by the Guardianship Board; and
  - (b) must be accompanied by such information as the Guardianship Board may reasonably require; and
  - (c) must be accompanied by the prescribed fee.
- (8) The regulations may make further provisions in relation to proceedings under this section.
- (9) Subject to this Act and the *Guardianship and Administration Act 1993*, the Guardianship Board may conduct a review under this section in such manner as it thinks fit.

**Note—**

Section 14 of the *Guardianship and Administration Act 1993* sets out the powers and procedures of the Guardianship Board in respect of proceedings before the Guardianship Board.

#### **49—Guardianship Board may refer matter to Public Advocate**

- (1) If the Guardianship Board 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 Guardianship Board 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 Guardianship Board**

- (1) Subject to this Act, a person who fails to comply with a direction of the Guardianship Board under this Division 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.

## **51—Orders of Guardianship Board in relation to substitute decision-makers**

- (1) If, on the application of an eligible person in respect of an advance care directive, the Guardianship Board 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 Guardianship Board 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 Guardianship Board 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 Guardianship Board 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 Guardianship Board may make any of the orders contemplated by subsection (1)(d), (e) or (f).
- (3) The Guardianship Board may refuse to hear an application under this section if the Guardianship Board is of the opinion—
  - (a) that the matter to which the application relates lacks substance, is unnecessary or unjustifiable, or is frivolous, vexatious or not made in good faith; or
  - (b) that the matter should be determined by way of legal proceedings.
- (4) An application—
  - (a) must be made in a manner and form determined by the Guardianship Board; and
  - (b) must be accompanied by the prescribed fee.

- (5) However, the Guardianship Board 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 Guardianship Board 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 of decisions**

### **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—Miscellaneous**

### **53—Question of law may be referred to Supreme Court**

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

## **54—Operation of orders pending appeal**

- (1) Subject to subsection (2), a decision, direction or order of the Guardianship Board or a court against which a right of appeal lies (whether under this Act or any other Act or law) continues to operate despite that right of appeal or the institution of an appeal.
- (2) The operation of a decision, direction or order against which an appeal has been instituted may, on the application of the appellant, be suspended by the body that made it or by the appellate court pending determination of the appeal, if the body or court thinks special reason exists for doing so.

## **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—Related amendments and transitional provisions**

### **Part 1—Preliminary**

#### **1—Amendment provisions**

In this Schedule, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

### **Part 2—Amendment of *Consent to Medical Treatment and Palliative Care Act 1995***

#### **2—Amendment of section 3—Objects**

- (1) Section 3(a)(ii)—delete subparagraph (ii)
- (2) Section 3(b)—delete paragraph (b) and substitute:
- (b) to provide for the medical treatment of people who have impaired decision-making capacity; and

#### **3—Amendment of section 4—Interpretation**

- (1) Section 4, definition of *anticipatory direction*—delete the definition and substitute:
- advance care directive* means an advance care directive under the *Advance Care Directives Act 2013* that is in force;
- (2) Section 4, definition of *authorised witness*—delete the definition
- (3) Section 4, definition of *available*—delete the definition
- (4) Section 4—after the definition of *guardian* insert:
- Guardianship Board* means the Guardianship Board established under the *Guardianship and Administration Act 1993*;
- impaired decision-making capacity*, in respect of a particular decision—see subsection (2);
- (5) Section 4, definition of *medical agent*—delete the definition
- (6) Section 4, definition of *medical treatment*—delete the definition and substitute:
- 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;

**Note—**

See also section 14, which extends this definition for the purposes of Part 2A to include other forms of health care.

- (7) Section 4, definition of *parent*—delete the definition and substitute:

*parent*, of a child, includes—

- (a) a step-parent; and
- (b) an adult who acts *in loco parentis* in relation to the child;

*persistent vegetative state* includes post-coma unresponsiveness and a minimally responsive state;

*Public Advocate* means the Public Advocate appointed under the *Guardianship and Administration Act 1993*;

- (8) Section 4, definition of *representative*—delete the definition and substitute:

*representative*, of a patient, means a person authorised under this or any other Act or law to make decisions about the administration of medical treatment of the relevant kind to the patient;

*substitute decision-maker* has the same meaning as in the *Advance Care Directives Act 2013*;

- (9) Section 4—after its present contents (now to be designated as subsection (1)) insert:

- (2) 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 is, by reason of being comatose or otherwise unconscious, unable to make a particular decision about his or her medical treatment.

- (3) 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;
- (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;
- (c) a person may fluctuate between having impaired decision-making capacity and full decision-making capacity;

- (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.
- (4) For the purposes of this Act, a medical practitioner is entitled to presume that a person who purports to be in a close and continuing relationship with another person is in such a relationship unless the medical practitioner knew, or ought reasonably to have known, that the 2 persons were not in such a relationship.
- (5) For the purposes of this Act, a medical practitioner is entitled to presume that a person who purports to have a particular relationship to another person (whether the relationship is based on affinity or consanguinity or otherwise) does have such a relationship unless the medical practitioner knew, or ought reasonably to have known, that the person did not have such a relationship to the other person.

#### **4—Insertion of sections 4A and 4B**

After section 4 insert:

##### **4A—References to provision of medical treatment etc to include withdrawal etc of medical treatment**

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

##### **4B—Consent not required for withdrawal etc of medical treatment**

Nothing in this Act operates to require the consent of a person to be given before medical treatment (including, to avoid doubt, life sustaining measures) can be withdrawn or withheld.

#### **5—Repeal of section 5**

Section 5—delete the section

#### **6—Amendment of heading to Part 2**

Heading to Part 2—after "treatment" insert:  
generally

#### **7—Repeal of Part 2 Divisions 2 and 3**

Part 2 Divisions 2 and 3—delete Divisions 2 and 3

#### **8—Amendment of section 13—Emergency medical treatment**

- (1) Section 13(1)—delete "subsection (3)" and substitute:  
this section

- (2) Section 13(1)(a)—after "consenting" insert:  
(whether or not the person has impaired decision-making capacity in respect of a particular decision)
- (3) Section 13(1)—after paragraph (c) insert:  
and  
(d) the medical practitioner proposing to administer the treatment has made, or has caused to be made, reasonable inquiries to ascertain whether the patient (if the patient is 18 or more years of age) has given an advance care directive.
- (4) Section 13—after subsection (1) insert:  
(1a) Subject to this section, a medical practitioner may lawfully administer medical treatment to a person (the *patient*) despite a provision of an advance care directive given by the patient comprising a refusal of medical treatment if—  
(a) the patient is incapable of consenting (whether or not the patient has impaired decision-making capacity in respect of a particular decision); and  
(b) the medical practitioner who administers the treatment is of the opinion that the treatment is necessary to meet an imminent risk to life or health and that opinion is supported by the written opinion of another medical practitioner who has personally examined the patient; and  
(c) the medical practitioner who administers the treatment reasonably believes that the provision of the advance care directive is not intended to apply—  
(i) to treatment of the kind proposed; or  
(ii) in the circumstances in which the proposed medical treatment is to be administered; and  
(d) it is not reasonably practicable in the circumstances of the case to have the matter dealt with under Part 7 of the *Advance Care Directives Act 2013*.
- (5) Section 13(2)—delete "subsection (1)" and substitute:  
subsection (1)(b) or (1a)(b)
- (6) Section 13—after subsection (2) insert:  
(2a) Inquiries under subsection (1)(d) need not be made if in the circumstances of the case it is not reasonably practicable to do so.
- (7) Section 13(3)—delete subsection (3) and substitute:  
(3) If—  
(a) the patient has given an advance care directive; and

- (b) the medical practitioner proposing to administer the treatment is aware of that fact (whether on the basis of inquiries made under this section or otherwise); and
- (c) a substitute decision-maker appointed under the advance care directive is empowered or authorised to make decisions relating to the administration of such treatment and is reasonably available to make such a decision,

the medical treatment must not be administered without the consent of the substitute decision-maker.

**Note—**

This provision simply requires the substitute decision-maker to be given the opportunity to make the decision about consent if he or she is available—there may also be other provisions of the advance care directive in relation to the treatment that are relevant, and need to be complied with, in the circumstances.

- (8) Section 13(4)—delete "medical agent" insert:

substitute decision-maker

- (9) Section 13—after subsection (4) insert:

- (4a) If neither a substitute decision-maker nor a guardian of the patient is available, but a person responsible for the patient (within the meaning of Part 2A) is reasonably available and willing to consent to the administration of the medical treatment, the medical treatment may not be administered without the consent of the person responsible for the patient (given in accordance with Part 2A).

## 9—Repeal of Part 2 Division 6

Part 2 Division 6—delete Division 6

## 10—Insertion of Part 2A

After Part 2 insert:

### **Part 2A—Consent to medical treatment if person has impaired decision-making capacity**

#### **14—Interpretation**

- (1) In this Part—

*health care* means any care, service, procedure or 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;

*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;

**medical practitioner**, in respect of particular health care, includes a health practitioner practising in the relevant profession or practice;

**medical treatment** includes health care;

**patient** means a person to whom medical treatment is, or is proposed to be, administered pursuant to this Part;

**person responsible** for a patient means—

- (a) if a guardian has been appointed in respect of the patient, and his or her powers as guardian have not been limited so as to exclude the giving of a consent contemplated by this Part and he or she is available and willing to make a decision as to such consent—that guardian; or
- (b) if paragraph (a) does not apply, but a prescribed relative of the patient who has a close and continuing relationship with the patient is available and willing to make a decision as to a consent contemplated by this part—that prescribed relative; or
- (c) if paragraphs (a) or (b) do not apply, but an adult friend of the patient who has a close and continuing relationship with the patient is available and willing to make a decision as to a consent contemplated by this part—that friend; or
- (d) if paragraphs (a), (b) or (c) do not apply, but an adult who is charged with overseeing the ongoing day-to-day supervision, care and well-being of the patient is available and willing to make a decision as to a consent contemplated by this part—that person; or
- (e) if none of the preceding paragraphs apply, or otherwise with the permission of the Guardianship Board—the Guardianship Board on the application of—
- (i) a prescribed relative of the patient; or
  - (ii) the medical practitioner proposing to give the treatment; or
  - (iii) any other person who the Board is satisfied has a proper interest in the matter;

**prescribed relative**—the following persons are prescribed relatives of a patient:

- (a) a person who is legally married to the patient;
- (b) an adult domestic partner of the patient (within the meaning of the *Family Relationships Act 1975* and whether declared as such under that Act or not);
- (c) an adult related to the patient by blood or marriage;
- (d) an adult related to the patient by reason of adoption;

- (e) an adult of Aboriginal or Torres Strait Islander descent who is related to the patient according to Aboriginal kinship rules or Torres Strait Islander kinship rules (as the case requires).
- (2) If a man and woman are married according to Aboriginal tradition, they will be regarded as legally married for the purposes of this Part.

#### **14A—Application of Part**

- (1) This Part does not apply to, or in relation to, a child.

**Note—**

Section 12 sets out who can consent to the administration of medical treatment (other than prescribed treatment) to a child.

- (2) This Part does not apply to, or in relation to, a person who has given an advance care directive to the extent that—
  - (a) a substitute decision-maker has been appointed under the advance care directive who is authorised to make decisions relating to the administration of medical treatment of the relevant kind to the patient; or
  - (b) the advance care directive makes specific provision in respect of the administration of medical treatment of the relevant kind to the patient.
- (3) This Part does not apply to, or in relation to, prescribed treatment (within the meaning of the *Guardianship and Administration Act 1993*).

**Note—**

Under the *Guardianship and Administration Act 1993*, prescribed treatments include terminations of pregnancy and sterilisations.

- (4) Nothing in this Part limits the operation of section 13.

#### **14B—Consent of person responsible for patient effective in certain circumstances**

- (1) Where it is proposed to administer medical treatment to a patient with impaired decision-making capacity in respect of a decision that is required in relation to the medical treatment, a consent given by a person responsible for the patient to the administration of the proposed medical treatment—
  - (a) will be taken to be a consent given by the patient; and
  - (b) will be taken to have the same effect for all purposes as if the patient gave the consent.
- (2) The regulations may make further provision in relation to the giving of consent by a person responsible for a patient for the purposes of this Act (including by limiting the kinds of medical treatment to which a specified class of person responsible can consent).

- (3) The effectiveness of a consent given by a person responsible for a patient is not affected merely because insufficient inquiries were made to locate a person with higher responsibility for the patient before the consent was given (as contemplated by the hierarchy in the definition of *person responsible* in section 14).
- (4) Consent to the administration of particular medical treatment will, for all purposes, be taken to have been given by the patient if—
  - (a) the medical treatment was administered with the purported consent of a person who represented to the medical practitioner that he or she was a person responsible for the patient; and
  - (b) the medical practitioner did not know and could not reasonably be expected to have known that the person was not, in fact, a person responsible for the patient.

#### **14C—Person responsible for patient to make substituted decision**

A decision of a person responsible for a patient to give, or to refuse to give, consent under this Part must, as far as is reasonably practicable, reflect the decision that the patient would have made in the circumstances had his or her decision-making capacity not been impaired.

**Note—**

In cases where the patient has given an advance care directive under which no substitute decision-maker is appointed, but the patient's wishes or instructions in relation to treatment of the relevant kind is recorded, it may nevertheless be necessary to give effect to those wishes or instructions—see Part 5 of the *Advance Care Directives Act 2013*.

#### **14D—Person must not give consent unless authorised to do so**

A person who is not a person responsible for a particular patient is guilty of an offence if he or she, knowing that he or she is not a person responsible for the patient or being recklessly indifferent as to whether or not he or she is a person responsible for the patient—

- (a) purports to give a consent under this Part in respect of the patient; or
- (b) represents to a medical practitioner that he or she is a person responsible for the patient.

Maximum penalty: Imprisonment for 2 years.



## 11—Amendment of section 17—The care of people who are dying

Section 17(2)—delete subsection (2) and substitute:

- (2) A medical practitioner responsible for the treatment or care of a patient in the terminal phase of a terminal illness, or a person participating in the treatment or care of the patient under the medical practitioner's supervision—
  - (a) is under no duty to use, or to continue to use, life sustaining measures in treating the patient if the effect of doing so would be merely to prolong life in a moribund state without any real prospect of recovery or in a persistent vegetative state (whether or not the patient or the patient's representative has requested that such measures be used or continued); and
  - (b) must, if the patient or the patient's representative so directs, withdraw life sustaining measures from the patient.

## 12—Insertion of Part 3A

After Part 3 insert:

### **Part 3A—Dispute resolution**

#### **Division 1—Preliminary**

##### **18A—Interpretation**

In this Part—

*eligible person*, in relation to a matter, means—

- (a) if the matter relates to a child—a parent or guardian of the child; and
- (b) if the matter relates to a patient with impaired decision-making capacity in respect of a particular decision—a person responsible for the patient; and
- (c) a medical practitioner who is providing, or is to provide, the medical treatment to which the matter relates; and
- (d) any other person who satisfies the Public Advocate that he or she has a proper interest in the matter;

*medical practitioner* and *medical treatment*, in relation to the administration, or proposed administration, of medical treatment to a patient pursuant to Part 2A, have the same meanings as in that Part;

*patient* means a patient within the meaning of Part 2A;

*person responsible* for a patient has the same meaning as in Part 2A.

## **18B—Application of Part**

This Part applies to the following matters:

- (a) a decision of a parent or guardian of a child to consent, or to refuse to consent, to the administration of medical treatment to the child;
- (b) a decision of a medical practitioner to administer, or not administer, medical treatment to a patient pursuant to Part 2A;
- (c) a decision of a person responsible for a patient to consent, or to refuse to consent, to the administration of medical treatment to the person pursuant to Part 2A;
- (d) any other matter prescribed by the regulations for the purposes of this section.

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

### **18C—Resolution of disputes by Public Advocate**

- (1) The Public Advocate may, on application by an eligible person in relation to a matter to which this Part applies or on his or her own initiative, provide preliminary assistance in resolving the matter, 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 mediate a matter to which this Part applies on application by an eligible person in relation to the matter.
- (3) 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.

- (4) Before undertaking a mediation, the Public Advocate may, if he or she thinks it appropriate to do so, require an applicant for mediation who is not a medical practitioner to first obtain a written report from an independent medical practitioner (made after examining the relevant person) setting out—
- (a) the potential advantages and disadvantages of—
    - (i) the medical treatment that a medical practitioner proposes to administer to the relevant person; and
    - (ii) any medical treatment that the eligible person, or some other person, has requested be administered to the relevant person; and

**Note—**

This includes where the medical treatment comprises the withdrawal or withholding of medical treatment—see section 4A.

- (b) whether, in the independent medical practitioner's opinion, the requested treatment is in the best interest of the relevant person's health and well-being; and
  - (c) any other information required by the regulations for the purposes of this subsection.
- (5) 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 Guardianship Board; or
  - (b) at the request of a party to the mediation.
- (6) Evidence of anything said or done in the course of a mediation is not admissible in subsequent proceedings except by consent of all parties to the proceedings.
- (7) Without limiting any other ways in which the Public Advocate may inform himself or herself for the purposes of a mediation, the Public Advocate may seek advice from such persons as the Public Advocate thinks fit in relation to protecting the interests of a child who is a party to, or is otherwise affected by, the matter the subject of the mediation.
- (8) The Public Advocate has, for the purposes of this section, the same privileges and immunities as a member of the Guardianship Board under the *Guardianship and Administration Act 1993*.
- (9) Subject to this Act, the Public Advocate may conduct a mediation in such manner as he or she thinks fit.
- (10) The regulations may make further provisions in relation to mediations under this section.

### **18D—Public Advocate may refer matter to Guardianship Board**

- (1) If the Public Advocate ends a mediation under section 18C on the grounds that it is more appropriate that the matter be dealt with by the Guardianship Board, the Public Advocate may refer the matter to the Guardianship Board.
- (2) The regulations may make further provision in respect of referrals under this section.

### **Division 3—Resolution of disputes by Guardianship Board**

#### **Note—**

Certain persons who are dissatisfied with a decision, direction or order of the Guardianship Board in proceedings under this Division may, with the permission of the Guardianship Board or the Administrative and Disciplinary Division of the District Court, appeal to that court against the decision, direction or order—see section 67 of the *Guardianship and Administration Act 1993*.

### **18E—Resolution of disputes by Guardianship Board**

- (1) An eligible person in relation to a matter to which this Part applies may apply to the Guardianship Board for—
  - (a) a review of a matter mediated by the Public Advocate under section 18C; or
  - (b) a declaration or direction in relation to the matter (including, to avoid doubt, a matter contemplated by section 18C).
- (2) An application under this section—
  - (a) must be made in a manner and form determined by the Guardianship Board; and
  - (b) must be accompanied by such information as the Guardianship Board may reasonably require; and
  - (c) must be accompanied by the prescribed fee.
- (3) The Guardianship Board may refuse to hear an application under this section if the Guardianship Board is of the opinion—
  - (a) that the matter to which the application relates lacks substance, is unnecessary or unjustifiable, or is frivolous, vexatious or not made in good faith; or
  - (b) that to conduct a review would be an abuse of the processes under this Part; or
  - (c) that the matter should be determined by way of legal proceedings.

- (4) The Guardianship Board may, on determining an application under this section—
  - (a) in the case of a review of a matter mediated by the Public Advocate under section 18C—confirm, cancel or reverse a decision that is the subject of the review; and
  - (b) in any case—
    - (i) make any declarations that the Guardianship Board thinks necessary or desirable in the circumstances of the case; and
    - (ii) give any directions that the Guardianship Board thinks necessary or desirable in the circumstances of the case (including a direction that the administration of particular medical treatment to a person be withdrawn or withheld); and
    - (iii) give any advice that the Guardianship Board considers necessary or desirable in the circumstances of the case.
- (5) The Guardianship Board may vary or revoke a declaration or direction under this section.
- (6) The person to whom the medical treatment is to be provided or not provided (as the case requires) is (if he or she is not the applicant) a party to the proceedings.
- (7) Sections 15 and 15A of the *Guardianship and Administration Act 1993* do not apply to, or in relation to, proceedings under this section.
- (8) Without limiting any other ways in which the Guardianship Board may inform itself for the purposes of this section, the Guardianship Board may seek advice from such persons or bodies as the Guardianship Board thinks fit in relation to protecting the interests of a child who is a party to, or is otherwise affected by, an application.
- (9) The regulations may make further provisions in relation to proceedings under this section.
- (10) Subject to this Act and the *Guardianship and Administration Act 1993*, the Guardianship Board may conduct a review under this section in such manner as it thinks fit.

**Note—**

Section 14 of the *Guardianship and Administration Act 1993* sets out the powers and procedures of the Guardianship Board in respect of proceedings before the Guardianship Board.

### **18F—Guardianship Board may refer matter to Public Advocate**

- (1) If the Guardianship Board is of the opinion that it is more appropriate that a particular application under section 18E be dealt with by the Public Advocate, the Guardianship Board may refer the matter to the Public Advocate.

- (2) The regulations may make further provision in respect of referrals under this section.

### **18G—Contravention of direction**

- (1) Subject to this Act, a person who fails to comply with a direction of the Guardianship Board under this Division 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.

## **Division 4—Miscellaneous**

### **18H—Question of law may be referred to Supreme Court**

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

### **18I—Operation of orders pending appeal**

- (1) Subject to subsection (2), a decision, direction or order of the Guardianship Board or a court against which a right of appeal lies (whether under this Act or any other Act or law) continues to operate despite that right of appeal or the institution of an appeal.
- (2) The operation of a decision, direction or order against which an appeal has been instituted may, on the application of the appellant, be suspended by the body that made it or by the appellate court pending determination of the appeal, if the body or court thinks special reason exists for doing so.

## **13—Substitution of section 19**

Section 19—delete the section and substitute:

### **19—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 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;
  - (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.

## Part 3—Amendment of *Coroners Act 2003*

### 14—Amendment of section 3—Interpretation

Section 3(1), definition of *reportable death*, (g)—after "*Guardianship and Administration Act 1993*" insert:

or Part 2A of the *Consent to Medical Treatment and Palliative Care Act 1995*

## Part 4—Amendment of *Fair Work Act 1994*

### 15—Amendment of section 76—Negotiation of enterprise agreement

Section 76(5a)(a)(iii)—delete subparagraph (iii) and substitute:

- (iii) a substitute decision-maker under an advance care directive (within the meaning of the *Advance Care Directives Act 2013*) given by the employee (being a substitute decision-maker who is authorised to make decisions relating to the employee's employment); or

## Part 5—Amendment of *Guardianship and Administration Act 1993*

### 16—Amendment of section 3—Interpretation

- (1) Section 3(1)—after the definition of *administrator* insert:

*advance care directive* means an advance care directive given under the *Advance Care Directives Act 2013* that is in force;

- (2) Section 3(1), definition of *authorised witness*—delete the definition
- (3) Section 3(1), definition of *enduring guardian*—delete the definition
- (4) Section 3(1), definition of *guardian appointed under this Act*—delete the definition
- (5) Section 3(1), definition of *medical agent*—delete the definition
- (6) Section 3(1), definition of *medical practitioner*—delete the definition and substitute:

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

- (7) Section 3(1), definition of *medical treatment*—delete the definition and substitute:

*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;

- (8) Section 3(1)—after the definition of *mentally incapacitated* insert:

*person responsible* for another person, means—

- (a) any of the following persons if he or she has a close and continuing relationship with the other person:
  - (i) a prescribed relative of the other person;

- (ii) a parent of the other person (including an adoptive parent and a step-parent);
  - (iii) if the other person is under 18 years of age—an adult who acts *in loco parentis* in relation to the other person;
  - (iv) an adult friend of the other person; or
- (b) an adult who is charged with overseeing the ongoing day-to-day supervision, care and well-being of the other person;

**Example—**

The director of nursing in an aged care facility would be such a person.

- (9) Section 3(1)—after the definition of *person to whom the proceedings relate* insert:

**prescribed relative**—the following persons are prescribed relatives of a person:

- (a) a person who is legally married to the person;
- (b) an adult domestic partner of the person (within the meaning of the *Family Relationships Act 1975* and whether declared as such under that Act or not);
- (c) an adult related to the person by blood or marriage;
- (d) an adult related to the person by reason of adoption;
- (e) an adult of Aboriginal or Torres Strait Islander descent who is related to the person according to Aboriginal kinship rules or Torres Strait Islander kinship rules (as the case requires).

- (10) Section 3(1), definition of *relative*—delete the definition

- (11) Section 3(1)—after the definition of *sterilisation* insert:

**substitute decision-maker**, in respect of a person, means a substitute decision-maker appointed under an advance care directive given by the person under the *Advance Care Directives Act 2013* that is in force;

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

- (3) For the purposes of this Act, the Board is entitled to presume that a person who purports to be in a close and continuing relationship with another person is in such a relationship unless the Board knew, or ought reasonably to have known, that the 2 persons were not in such a relationship.
- (4) For the purposes of this Act, the Board is entitled to presume that a person who purports to have a particular relationship to another person (whether the relationship is based on affinity or consanguinity or otherwise) does have such a relationship unless the Board knew, or ought reasonably to have known, that the person did not have such a relationship to the other person.
- (5) If a man and woman are married according to Aboriginal tradition, they will be regarded as legally married for the purposes of this Act.



### **17—Amendment of section 5—Principles to be observed**

Section 5—delete "appointed under this Act"

### **18—Repeal of Part 3**

Part 3—delete the Part

### **19—Amendment of section 28—Investigations by Public Advocate**

Section 28(1)—delete "directs after an application has been lodged with the Board for an order under this Part, investigate the affairs of the person the subject of the application" and substitute:

directs for the purposes of this Part, investigate the affairs of a person—

- (a) who is the subject of application for an order under this Part; or
- (b) who has had an advance care directive revoked by the Board under the *Advance Care Directives Act 2013*.

### **20—Amendment of section 29—Guardianship orders**

- (1) Section 29(1)—delete ", on an application made under this Division" and substitute:

(whether on an application made under this Division or on its own motion after revoking an advance care directive under the *Advance Care Directives Act 2013*)

- (2) Section 29(1)(b)—delete paragraph (b)

- (3) Section 29—after subsection (6) insert:

- (7) A condition or limitation imposed under subsection (6) should, as far as is reasonably practicable, be consistent with the terms of any advance care directive that the protected person has given.

### **21—Insertion of section 31A**

After section 31 insert:

#### **31A—Guardian to give effect to advance care directive**

- (1) A person appointed as a guardian under this Part—
- (a) must take reasonable steps to ascertain whether the protected person has given an advance care directive; and
  - (b) if the protected person has given an advance care directive—must, as far as may be reasonably practicable—
    - (i) give effect to any provision in the advance care directive; and
    - (ii) seek to avoid any outcome or intervention that the protected person would wish to be avoided (whether such wish is expressed or implied in the advance care directive).

- (2) For the purposes of subsection (1), a reference to an advance care directive includes an advance care directive that was revoked by the Board under the *Advance Care Directives Act 2013* in proceedings that gave rise to the making of an order under this Division.
- (3) For the purposes of this section, a reference to a provision of an advance care directive includes a reference to a condition, instruction or direction of an advance care directive.

## **22—Amendment of section 32—Special powers to place and detain certain persons**

- (1) Section 32—before subsection (1) insert:
  - (a1) This section applies to the following persons:
    - (a) a protected person;
    - (b) a person who has given an advance care directive under which at least 1 substitute decision-maker has been appointed.
- (2) Section 32(1)—delete "the guardian of a protected person" and substitute:

an appropriate authority in respect of a person to whom this section applies
- (3) Section 32(1)(a)—delete "protected"
- (4) Section 32(1)(a)(ii)—delete "guardian" and substitute:

appropriate authority
- (5) Section 32(1)(b)—delete "protected"
- (6) Section 32(1)(c)—delete "protected"
- (7) Section 32(2)—delete "protected"
- (8) Section 32(3)—delete "protected"
- (9) Section 32(4)—delete "protected" wherever occurring
- (10) Section 32(4)(a)—delete "guardian" wherever occurring and substitute in each case:

appropriate authority
- (11) Section 32—after subsection (7) insert:
  - (8) In this section—

***appropriate authority***, in respect of a person, means—
    - (a) if the person is a protected person—the guardian of the person; or
    - (b) if the person is a person who has given an advance care directive under which a substitute decision-maker has been appointed—each substitute decision-maker appointed under the advance care directive.

**23—Amendment of section 33—Applications under this Division**

- (1) Section 33(1)(c)—delete "relative, guardian or medical agent of" and substitute:  
guardian of, or substitute decision-maker for,
- (2) Section 33(1)—after paragraph (c) insert:  
(ca) a person responsible for the person; or

**24—Amendment of section 37—Applications under this Division**

- (1) Section 37(1)(c)—delete "relative, guardian appointed under this Act or medical agent of" and substitute:  
guardian of, or substitute decision-maker for,
- (2) Section 37(1)—after paragraph (c) insert:  
(ca) a person responsible for the person; or

**25—Amendment of heading to Part 5**

Heading to Part 5—delete "medical and dental treatment" and substitute:  
prescribed medical treatment

**26—Repeal of sections 58, 59 and 60**

Sections 58, 59 and 60—delete the sections

**27—Amendment of section 61—Prescribed treatment not to be carried out without Board's consent**

- (1) Section 61(1)—delete "to whom this Part applies" and substitute:  
who, by reason of his or her mental incapacity, is incapable of giving effective consent (whether or not he or she is a protected person)
- (2) Section 61(5)—delete "in relation to a person to whom this Part applies"

**28—Repeal of section 79**

Section 79—delete the section

**29—Repeal of Schedule**

Schedule—delete the Schedule

**Part 6—Amendment of *Health and Community Services Complaints Act 2004***

**30—Amendment of section 24—Who may complain**

- (1) Section 24(d)—delete "or an enduring guardian of the health or community service user"
- (2) Section 24—after paragraph (d) insert:  
or

- (da) a substitute decision-maker appointed under an advance care directive (within the meaning of the *Advance Care Directives Act 2013*) given by the health or community service user; or

## **Part 7—Amendment of *Wills Act 1936***

### **31—Amendment of section 7—Will of person lacking testamentary capacity pursuant to permission of court**

Section 7(7)(e)—delete "or enduring guardian"

## **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.