

South Australia



**CONSENT TO MEDICAL TREATMENT AND PALLIATIVE CARE
ACT 1995**

No. 26 of 1995

SUMMARY OF PROVISIONS

**PART 1
PRELIMINARY**

1. Short title
2. Commencement
3. Objects
4. Interpretation
5. Application of Act

**PART 2
CONSENT TO MEDICAL TREATMENT**

DIVISION 1—CONSENT GENERALLY

6. Legal competence to consent to medical treatment

DIVISION 2—ANTICIPATORY GRANT OR REFUSAL OF CONSENT

7. Anticipatory grant or refusal of consent to medical treatment

DIVISION 3—MEDICAL POWERS OF ATTORNEY

8. Appointment of agent to consent to medical treatment
9. Exercise of powers under medical power of attorney
10. Review of medical agent's decision
11. Penalty for fraud, undue influence, etc.

DIVISION 4—MEDICAL TREATMENT OF CHILDREN

12. Administration of medical treatment to a child

DIVISION 5—EMERGENCY MEDICAL TREATMENT

13. Emergency medical treatment

DIVISION 6—REGISTER

14. Register

**PART 3
PROVISIONS GOVERNING MEDICAL PRACTICE**

DIVISION 1—MEDICAL PRACTICE GENERALLY

15. Medical practitioner's duty to explain
16. Protection for medical practitioners, etc.

DIVISION 2—THE CARE OF PEOPLE WHO ARE DYING

17. The care of people who are dying
18. Saving provision

**PART 4
REGULATIONS**

19. Regulations

SCHEDULE 1
Medical Power of Attorney

SCHEDULE 2
*Direction under section 7 of the Consent to Medical Treatment
and Palliative Care Act 1995*

SCHEDULE 3
Repeal and Transitional Provisions and Consequential Amendments



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ELIZABETHAE II REGINAE

A.D. 1995

No. 26 of 1995

An Act to deal with consent to medical treatment; to regulate medical practice so far as it affects the care of people who are dying; to repeal the Natural Death Act 1983 and the Consent to Medical and Dental Treatment Act 1985; to amend the Guardianship and Administration Act 1993 and the Mental Health Act 1993; and for other purposes.

[Assented to 27 April 1995]

The Parliament of South Australia enacts as follows:

**PART 1
PRELIMINARY**

Short title

1. This Act may be cited as the *Consent to Medical Treatment and Palliative Care Act 1995*.

Commencement

2. (1) This Act will come into operation on a day to be fixed by proclamation.

(2) All provisions of this Act, other than section 14, must be brought into operation simultaneously.

(3) Section 14 may be brought into operation after the other provisions of this Act except that if it has not been brought into operation sooner, it will, by force of this provision, come into operation six months after the commencement of this Act.

Objects

3. The objects of this Act are—

(a) to make certain reforms to the law relating to consent to medical treatment—

(i) to allow persons of or over the age of 16 years to decide freely for themselves on an informed basis whether or not to undergo medical treatment; and

(ii) to allow persons of or over the age of 18 years to make anticipatory decisions about medical treatment; and

- (iii) to provide for the administration of emergency medical treatment in certain circumstances without consent; and
- (b) to provide for medical powers of attorney under which those who desire to do so may appoint agents to make decisions about their medical treatment when they are unable to make such decisions for themselves; and
- (c) to allow for the provision of palliative care, in accordance with proper standards, to people who are dying and to protect them from medical treatment that is intrusive, burdensome and futile.

Interpretation

4. In this Act, unless the contrary intention appears—

"administration" of medical treatment includes the prescription or supply of drugs;

"anticipatory direction"—*See section 7;*

"authorised witness" means—

- (a) a justice of the peace;¹ or
- (b) a commissioner for taking affidavits in the Supreme Court; or
- (c) a member of the clergy; or
- (d) a registered pharmacist;

"available"—*For availability of medical agent to act under medical power of attorney, see section 9(2);*

"child" means a person under 16 years of age;

"dentist" means a person who is registered on the general register or specialist register under the *Dentists Act 1984*;

"guardian" means a person acting or appointed under any Act or law as the guardian of another;

"life sustaining measures" means medical treatment that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation, and includes assisted ventilation, artificial nutrition and hydration and cardiopulmonary resuscitation;

"medical agent" means a person empowered to consent or refuse consent to medical treatment under a medical power of attorney;

"medical practitioner" means a person who is registered on the general register under the *Medical Practitioners Act 1983* and includes a dentist;

"medical treatment" means treatment or procedures administered or carried out by a medical practitioner in the course of medical or surgical practice or by a dentist in the course of dental practice and includes the prescription or supply of drugs;

"palliative care" means measures directed at maintaining or improving the comfort of a patient who is, or would otherwise be, in pain or distress;

"parent" includes a person *in loco parentis*;

"representative" means a person who is empowered by medical power of attorney or some other lawful authority to make decisions about the medical treatment of another when the other is incapable of making decisions for her/himself;

"terminal illness" means an illness or condition that is likely to result in death;

"terminal phase" of a terminal illness means the phase of the illness reached when there is no real prospect of recovery or remission of symptoms (on either a permanent or temporary basis).

¹ Section 34 of the *Oaths Act 1936* provides that where provision is made by an Act for the attestation of an instrument by a justice, the provision is complied with if the witness is a justice, a proclaimed postmaster, a proclaimed bank manager, or a proclaimed member of the police force.

Application of Act

5. This Act does not apply to medical procedures conducted for the purposes of research rather than for the purpose of treating, or determining the appropriate treatment for, the patient subjected to those procedures.

PART 2
CONSENT TO MEDICAL TREATMENT
DIVISION 1—CONSENT GENERALLY

Legal competence to consent to medical treatment

6. A person of or over 16 years of age may make decisions about his or her own medical treatment as validly and effectively as an adult.

DIVISION 2—ANTICIPATORY GRANT OR REFUSAL OF CONSENT

Anticipatory grant or refusal of consent to medical treatment

7. (1) A person of or over 18 years of age may, while of sound mind, give a direction under this section about the medical treatment that the person wants, or does not want, if he or she is at some future time—

- (a) in the terminal phase of a terminal illness, or in a persistent vegetative state; and
- (b) incapable of making decisions about medical treatment when the question of administering the treatment arises.

(2) A direction under this section—

- (a) must be in the form prescribed by Schedule 2 or in a form prescribed by regulation; and
- (b) must be witnessed by an authorised witness who completes a certificate in the form prescribed by Schedule 2 or in a form prescribed by regulation.

(3) If—

- (a) a person by whom a direction has been given under this section—
 - (i) is in the terminal phase of a terminal illness or in a persistent vegetative state; and
 - (ii) is incapable of making decisions about his or her medical treatment; and
- (b) there is no reason to suppose that the person has revoked, or intended to revoke, the direction,

the person is to be taken to have consented to medical treatment that is in accordance with the wishes of the person as expressed in the direction and to have refused medical treatment that is contrary to those expressed wishes.

DIVISION 3—MEDICAL POWERS OF ATTORNEY

Appointment of agent to consent to medical treatment

8. (1) A person of or over 18 years of age may, while of sound mind, by medical power of attorney, appoint an agent with power to make decisions on his or her behalf about medical treatment.

(2) A medical power of attorney—

(a) must be in the form prescribed by Schedule 1 or in a form to similar effect; and

(b) must be witnessed by an authorised witness who completes a certificate in the form or to the effect of the certificate in Schedule 1.

(3) A person is not eligible to be appointed an agent under a medical power of attorney unless over 18 years of age.

(4) The fact that a person has an interest under the will, or in the estate, of the grantor of a medical power of attorney does not invalidate the appointment of that person as a medical agent, or the exercise of any power by that person under a medical power of attorney.

(5) A person is not eligible to be appointed an agent under a medical power of attorney if that person is, in a professional or administrative capacity, directly or indirectly responsible for or involved in the medical care or treatment of the person by whom the medical power of attorney is to be given and, if a person who is validly appointed as a medical agent becomes so responsible or involved, the person is disqualified from acting as a medical agent under the medical power of attorney.

(6) If a medical power of attorney appoints two or more agents, it must indicate the order of appointment and, in that case, if the person designated first in order of appointment is unavailable, the power is to be exercised by the person designated second in order of appointment, if the first and second are not available, by the person designated third in order of appointment, and so on, but a medical power of attorney may not provide for the joint exercise of the power.

(7) A medical power of attorney—

(a) authorises the agent, subject to any conditions and directions contained in the power of attorney, to make decisions about the medical treatment of the person who granted the power if that person is incapable of making decisions on his or her own behalf; but

(b) does not authorise the agent to refuse—

(i) the natural provision or natural administration of food and water; or

(ii) the administration of drugs to relieve pain or distress; or

(iii) medical treatment that would result in the grantor regaining the capacity to make decisions about his or her own medical treatment unless the grantor is in the terminal phase of a terminal illness.

(8) The powers conferred by a medical power of attorney must be exercised—

(a) in accordance with any lawful conditions and directions contained in the medical power of attorney; and

(b) if the grantor of the power has also given an anticipatory direction—consistently with the direction,

and subject to those requirements, in what the agent genuinely believes to be the best interests of the grantor.

(9) The grantor of a medical power of attorney may, by any form of representation that indicates an intention to withdraw or terminate the power, revoke the power of attorney.

(10) The grantor of a medical power of attorney may, on regaining capacity to make decisions about his or her medical treatment, vary or revoke any decision taken by the medical agent during the period of incapacity.

Exercise of powers under medical power of attorney

9. (1) A medical agent is only entitled to act under a medical power of attorney if—

- (a) the agent produces a copy of the medical power of attorney for inspection by the medical practitioner responsible for the treatment of the grantor of the power; and
- (b) the medical agent is not disqualified from acting under the medical power of attorney¹; and
- (c) the medical agent is of full legal capacity.

(2) A medical agent will only be regarded as available to act under a medical power of attorney if—

- (a) the medical practitioner responsible for the treatment of the grantor of the medical power of attorney is aware of the appointment; and
- (b) the medical agent is entitled to act under the medical power of attorney; and
- (c) it is reasonably practicable in the circumstances for the medical practitioner responsible for the grantor's treatment to obtain a decision from the medical agent.

¹. See section 8(5) which disqualifies certain medical agents from acting.

Review of medical agent's decision

10. (1) The Supreme Court may, on the application of—

- (a) the medical practitioner responsible for the treatment of the grantor of a medical power of attorney; or
- (b) any person who has in the opinion of the Court a proper interest in the exercise of powers conferred by a medical power of attorney,

review the decision of a medical agent.

(2) The Court may not review a decision by a medical agent to discontinue treatment if—

- (a) the grantor is in the terminal phase of a terminal illness; and
- (b) the effect of the treatment would be merely to prolong life in a moribund state without any real prospect of recovery.

(3) The purpose of the review is—

- (a) to ensure that the medical agent's decision is in accordance with lawful conditions and directions contained in the medical power of attorney and, if the grantor of the power has also given an anticipatory direction, is consistent with that direction; and
- (b) to ensure as far as possible that the medical agent's decision is in accordance with what the grantor would have wished if the grantor had been able to express his or her wishes.

(4) A decision of a medical agent that is not contrary to lawful conditions and directions given by the grantor will, in the absence of proof to the contrary, be presumed to be in accordance with what the grantor would have wished if the grantor had been able to express his or her wishes but this presumption does not apply if—

- (a) the grantor is not in the terminal phase of a terminal illness; and
- (b) the effect of the medical agent's decision would be to expose the grantor to risk of death or exacerbate the risk of death.

(5) The Court may—

- (a) confirm, cancel, vary or reverse the decision of the medical agent; and
- (b) give advice and directions that may be necessary or desirable in the circumstances of the case.

(6) The Court must conduct a review under this section as expeditiously as possible.

(7) A person must not publish by newspaper, radio or television a statement or representation—

- (a) by which the identity of a person who is, or has been, the subject of proceedings under this section (the "patient") is revealed; or
- (b) from which the identity of a person who is, or has been, the subject of proceedings under this section (the "patient") might be inferred.

Penalty: \$10 000.

(8) Subsection (7)—

- (a) ceases to apply if or when the patient recovers and then gives his or her consent to the publication of the information; or
- (b) ceases to apply after the death of the patient.

(9) In subsection (7)—

"newspaper" includes any journal, magazine or other publication that is published daily or at periodic intervals.

Penalty for fraud, undue influence, etc.

11. (1) A person who, by dishonesty or undue influence, induces another to execute a medical power of attorney is guilty of an offence.

Penalty: Imprisonment for 10 years.

(2) A person who purports to act as a medical agent under a medical power of attorney knowing that the power of attorney has been revoked is guilty of an offence.

Penalty: Imprisonment for 10 years.

(3) A person convicted or found guilty of an offence against this section forfeits any interest that that person might otherwise have had in the estate of the grantor of the power of attorney.

DIVISION 4—MEDICAL TREATMENT OF CHILDREN

Administration of medical treatment to a child

12. A medical practitioner may administer medical treatment to a child if—

- (a) the parent or guardian consents; or
- (b) the child consents and—
 - (i) the medical practitioner who is to administer the treatment is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interest of the child's health and well-being; and
 - (ii) that opinion is supported by the written opinion of at least one other medical practitioner who personally examines the child before the treatment is commenced.

DIVISION 5—EMERGENCY MEDICAL TREATMENT

Emergency medical treatment

13. (1) Subject to subsection (3), a medical practitioner may lawfully administer medical treatment to a person (the "patient") if—

- (a) the patient is incapable of consenting; 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 patient (if of or over 16 years of age) has not, to the best of the medical practitioner's knowledge, refused to consent to the treatment.

(2) A supporting opinion is not necessary under subsection (1) if in the circumstances of the case it is not practicable to obtain such an opinion.

(3) If—

- (a) the patient has appointed a medical agent; and
- (b) the medical practitioner proposing to administer the treatment is aware of the appointment and of the conditions and directions contained in the medical power of attorney; and
- (c) the medical agent is available to decide whether the medical treatment should be administered,

the medical treatment may not be administered without the agent's consent.

(4) If no such medical agent is available and a guardian of the patient is available, the medical treatment may not be administered without the guardian's consent.

(5) If the patient is a child, and a parent or guardian of the child is available to decide whether the medical treatment should be administered, the parent's or guardian's consent to the treatment must be sought but the child's health and well-being are paramount and if the parent or guardian refuses consent, the treatment may be administered despite the refusal if it is in the best interests of the child's health and well-being.

DIVISION 6—REGISTER

Register

14. (1) The Minister must establish a register of—

- (a) directions under section 7 of this Act ("treatment directions"); and
- (b) medical powers of attorney.

(2) The Minister must appoint a suitable person (referred to below as the "Registrar") to administer the register.

(3) A person who has given a treatment direction, or granted a medical power of attorney, may, on application to the Registrar, have the direction or power of attorney registered in the register.

(4) An application under subsection (3) must be accompanied by—

- (a) a copy of the direction or power of attorney (to be held by the Registrar for the purposes of this section); and
- (b) a fee prescribed by regulation.

(5) The Registrar must, at the request of a medical practitioner responsible for the treatment of a person by whom a registered direction or power of attorney was given, or any other person with a proper interest in a registered direction or power of attorney, produce the direction or power of attorney for inspection by that medical practitioner or other person.

(6) The Registrar must, on application by a person who gave a registered treatment direction or granted a registered power of attorney, register the revocation of the direction or power of attorney and remove it from the register.

**PART 3
PROVISIONS GOVERNING MEDICAL PRACTICE**

DIVISION 1—MEDICAL PRACTICE GENERALLY

Medical practitioner's duty to explain

15. A medical practitioner has a duty to explain to a patient (or the patient's representative), so far as may be practicable and reasonable in the circumstances—

- (a) the nature, consequences and risks of proposed medical treatment; and
- (b) the likely consequences of not undertaking the treatment; and
- (c) any alternative treatment or courses of action that might be reasonably considered in the circumstances of the particular case.

Protection for medical practitioners, etc.

16. A medical practitioner responsible for the treatment or care of a patient, or a person participating in the treatment or care of the patient under the medical practitioner's supervision, incurs no civil or criminal liability for an act or omission done or made—

- (a) with the consent of the patient or the patient's representative or without consent but in accordance with an authority conferred by this Act or any other Act; and
- (b) in good faith and without negligence; and
- (c) in accordance with proper professional standards of medical practice; and
- (d) in order to preserve or improve the quality of life.

DIVISION 2—THE CARE OF PEOPLE WHO ARE DYING

The care of people who are dying

17. (1) 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, incurs no civil or criminal liability by administering medical treatment with the intention of relieving pain or distress—

- (a) with the consent of the patient or the patient's representative; and
- (b) in good faith and without negligence; and
- (c) in accordance with proper professional standards of palliative care,

even though an incidental effect of the treatment is to hasten the death of the patient.

(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, is, in the absence of an express direction by the patient or the patient's representative to the contrary, 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.

- (3) For the purposes of the law of the State—
- (a) the administration of medical treatment for the relief of pain or distress in accordance with subsection (1) does not constitute an intervening cause¹ of death; and
 - (b) the non-application or discontinuance of life sustaining measures in accordance with subsection (2) does not constitute an intervening cause¹ of death.

¹ A *novus actus interveniens* i.e. a cause that breaks a pre-existing chain of causation.

Saving provision

18. (1) This Act does not authorise the administration of medical treatment for the purpose of causing the death of the person to whom the treatment is administered.

- (2) This Act does not authorise a person to assist the suicide of another.

**PART 4
REGULATIONS**

Regulations

19. The Governor may, by regulation, prescribe forms for the purposes of this Act.

SCHEDULE 3

*Repeal and Transitional Provisions and Consequential Amendments***Repeal**

1. The following Acts are repealed:

(a) the *Natural Death Act 1983*;

(b) the *Consent to Medical and Dental Treatment Act 1985*.

Transitional provisions

2. (1) Despite the repeal of the *Natural Death Act 1983*, a direction made under that Act remains effective, subject to revocation or amendment by the person who made it, as a statement of that person's desire not to be subjected to extraordinary measures as defined in that Act to prolong life if suffering from a terminal illness.

(2) If before the commencement of this Act a person granted an enduring power of attorney and purported to confer on the agent power to decide questions about the medical treatment of the grantor of the power in the event of the grantor's incapacity to do so, that power of attorney is as valid and effective as if it had been made under this Act.

Amendment of Guardianship and Administration Act 1993

3. The *Guardianship and Administration Act 1993* is amended—

(a) by inserting in section 3(1) after the definition of "the Health Commission" the following definition:

"medical agent" means a person appointed under a medical power of attorney under the *Consent to Medical Treatment and Palliative Care Act 1995* to be the medical agent of another;;

(b) by striking out section 58 and substituting the following section:

Application of this Part

58. This Part applies in relation to a person—

(a) 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; and

(b) who does not have a medical agent who is reasonably available and willing to make a decision as to the giving of consent to the medical or dental treatment of the person.;

(c) by striking out from section 61(1) "prescribed circumstances exist for the purposes of section 62" and substituting "circumstances exist for the giving of emergency medical treatment under the *Consent to Medical Treatment and Palliative Care Act 1995*, but otherwise notwithstanding that Act";

(d) by striking out section 62.

Amendment of Mental Health Act 1993

4. The *Mental Health Act 1993* is amended—

(a) by inserting in section 3 after the definition of "director" the following definition:

"medical agent" means a person appointed under a medical power of attorney under the *Consent to Medical Treatment and Palliative Care Act 1995* to be the medical agent of another;;

(b) by inserting in section 13(4)(e) "or medical agent" after "a guardian";

**Consent to Medical Treatment and Palliative
Care Act 1995**

No. 26 of 1995

SCHEDULE 3

- (c) by striking out from section 20(2) "or relative" and substituting ", relative or medical agent";
- (d) by striking out from section 21(2)(d) "relative or guardian" and substituting "guardian, relative or medical agent";
- (e) by striking out subparagraph (C) from section 22(1)(b)(ii) and substituting the following subparagraph:
- (C) where the patient is incapable of giving effective consent and is of or over 16 years of age—
 - if the patient (being of or over 18 years of age) has a medical agent who is reasonably available and is willing to make a decision as to consent—of the medical agent;
 - in any other case—of the Board,;
- (f) by inserting in section 26(1) after paragraph (b) the following paragraph:
- (ba) a guardian, relative or medical agent of the patient;;
- (g) by striking out clause 5 from Division 2 of the Schedule.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

ROMA MITCHELL Governor