

Section 59 – informal arrangements**Consent of certain persons is effective**

- 59.** (1) Where it is proposed to give medical or dental treatment (not being prescribed treatment) to a person to whom this Part applies, the consent of the appropriate authority to the treatment will be taken to be a consent given by the person and to have the same effect for all purposes as if the person were capable of giving effective consent.
- (2) For the purposes of subsection (1), the appropriate authority is-
- (a) if a guardian has been appointed in respect of the person under any Act or law, his or her powers as guardian have not been limited so as to exclude the giving of such consent and he or she is available and is willing to make a decision as to consent-the guardian;
 - (b) in any other case-
 - (i) a relative of the person; or
 - (ii) the Board, on application by-
 - (A) a relative of the person; or
 - (B) the medical practitioner, dentist or other health professional proposing to give the treatment; or
 - (C) any other person who the Board is satisfied has a proper interest in the matter.
- (3) Where medical or dental treatment (not being prescribed treatment) is given to a person to whom this Part applies in the following circumstances it will be taken that an effective consent was given to the treatment:
- (a) treatment given with the purported consent of the person, if the medical practitioner, dentist or other health professional did not know and could not reasonably be expected to have known that the person was incapable of giving effective consent;
 - (b) treatment given with the purported consent of a person who represented to the medical practitioner, dentist or other health professional that he or she was the appropriate authority for the purposes of giving consent, if the medical practitioner, dentist or other health professional did not know and could not reasonably be expected to have known that the person was not the appropriate authority for giving consent.

Relevant extracts of the *Consent to Medical Treatment and Palliative Care Act 1995*

Section 3—Objects

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.

Section 7—Anticipatory grant or refusal of consent to medical treatment

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

Section 8—Appointment of agent to consent to medical treatment

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

Section 9—Exercise of powers under medical power of attorney

- (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 attorney; 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.

Section 10—Review of medical agent's decision

- (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.

Section 11—Penalty for fraud, undue influence etc

- (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.
- (3) 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.

Section 13—Emergency medical treatment

- (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.

Section 16—Protection for medical practitioners etc

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.

Section 17—The care of people who are dying

- (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 cause of death; and
 - (b) the non-application or discontinuance of life sustaining measures in accordance with subsection (2) does not constitute an intervening cause of death.

Section 18—Saving provision

- (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.

Advance care planning programs in South Australia

Respecting Patient Choices Program

A snapshot survey in 2003 of patients attending The Queen Elizabeth Hospital showed advance care plans and advance directives to be almost non-existent. At this time, the Respecting Patient Choices Program, which was originally developed at the Gunderson-Lutheran Medical Foundation in Wisconsin, USA, was being piloted in Victoria.

The Queen Elizabeth Hospital was selected in 2004 as the first Australian interstate hospital to introduce the Respecting Patient Choices Program (RPCP) under the National Palliative Care Program. The RPCP is managed by a Steering Committee and Reference Group and training and support staff, including a full-time project officer and a part-time Senior Medical Officer.

Health professionals, including medical, nursing and social work staff, are educated about the relevant laws and advance care planning processes. They learn how to talk with patients about what quality of life means to them in the context of their goals, values and health status. Patients are invited, encouraged and assisted to document their wishes in a non-crisis situation. End-of-life medical treatment preferences may be recorded in a Statement of Choices or a statutory advance directive, usually a Medical Power of Attorney or Anticipatory Direction. A green-sleeve in the front of their health care record ensures patients' plans are available, so that in the event of the patient being unable to communicate, their treatment choices are known and honoured. The RPCP guides changes in the health-care system to ensure wishes are followed.

The RPCP has repeatedly shown to improve the utilisation of advance directives, patients' perceptions of care and staff communication and satisfaction, and to relieve the decision-making burden on families. The RPCP does not support euthanasia or suicide, nor is the aim to reduce health care expenditure.

The Respecting Patient Choices Program is now being rolled out to community health agencies, GP clinics and aged care facilities within the locality of The Queen Elizabeth Hospital.

Good Palliative Care Plans

Good Palliative Care Plans (GPCP) were developed by the Palliative Care Council of SA (PCC) in the 1990s to enable terminally ill patients to be involved in decisions about their end-of-life care. They record a collaborative decision by the patient, treating team, family and close friends that curative treatment is no longer appropriate and palliative care only will be provided in the period leading up to death. GPCPs included in the medical record, if signed by both patient and physician, count as evidence of the patient's wishes and their concurrence with the treatment plan.

If the patient is unable to play a meaningful role in the discussion, GPCPs can be completed by the family with the treating team. They are more common in aged care facilities, where capacity is often diminished prior to admission, than statutory advance directives