

# NORTHERN TERRITORY OF AUSTRALIA

## ADVANCE PERSONAL PLANNING ACT

As in force at 13 November 2014

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# NORTHERN TERRITORY OF AUSTRALIA

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As in force at 13 November 2014

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## ADVANCE PERSONAL PLANNING ACT

An Act to enable people to make plans about how decisions are to be made for them if they lose decision-making capacity, and for related purposes

### Part 1 Preliminary matters

#### 1 Short title

This Act may be cited as the *Advance Personal Planning Act*.

#### 2 Commencement

This Act commences on the day fixed by the Administrator by *Gazette* notice.

#### 3 Definitions

In this Act:

**adult guardian** means a guardian under the *Adult Guardianship Act*.

**advance care statement** means a statement set out in an advance personal plan as mentioned in section 8(1)(b).

**advance consent decision** means a consent decision about health care action set out in an advance personal plan as mentioned in section 8(1)(a).

**advance personal plan**, see section 8.

**Advance Personal Planning (Part 4A) Register**, see section 55B.

**affected adult** means:

- (a) if the proceeding relates to an advance personal plan – the adult who made the plan; or
- (b) if the proceeding relates to a represented adult – the represented adult; or

- (c) if the proceeding relates to a consent decision about health care action for an adult – that adult; or
- (d) for other proceeding – the adult to whom the proceeding relates.

**agent**, for an adult, means a decision maker, adult guardian, AIPPA manager or enduring attorney for the adult or other person who has lawful authority to manage the adult's affairs.

**AIPPA manager** means a manager under the *Aged and Infirm Persons' Property Act*.

**available consenter**, see section 42(1)(b).

**best interests**, for an adult, see section 22(6A) and (7).

**consent decision**, about health care action, means a decision to give or refuse consent for the taking of the health care action.

**Court** means the Local Court.

**decision maker** means a person appointed by an adult in an advance personal plan as mentioned in section 8(1)(c).

**decision-making capacity**, see section 6(1).

**decision-making principles**, see section 22(1).

**enduring attorney** means the donee of an enduring power of attorney under Part III of the *Powers of Attorney Act*.

**financial management power**, for a decision maker, means authority to make decisions in relation to the management of all or part of the represented adult's property and financial affairs.

**health care** means health care of any kind, including:

- (a) anything that is part of a health service, as defined in section 5 of the Health Practitioner Regulation National Law; and
- (b) the removal of tissue from a person's body in accordance with Part 2 of the *Transplantation and Anatomy Act*.

**health care action**, for an adult, means commencing, continuing, withholding or withdrawing health care for the adult.

**health care provider** means a person who provides health care.

**impaired decision-making capacity**, see section 6(3).

**interested person**, for an adult, means one of the following:

- (a) a decision maker for the adult;
- (b) an adult guardian for the adult;
- (c) an AIPPA manager for the adult;
- (d) enduring attorney for the adult;
- (e) a health care provider for the adult;
- (f) the Chief Executive Officer;
- (g) the Public Guardian;
- (h) the Public Trustee;
- (i) another person who has a genuine and sufficient interest in protecting the adult's best interests.

**original decision**, see section 71(1).

**planning capacity**, see section 4.

**Public Guardian**, see section 3(1) of the *Adult Guardianship Act*.

**Public Trustee**, see section 5 of the *Public Trustee Act*.

**reasonably believes**, see section 5(1).

**registered**, for Part 4A, means registered in the Advance Personal Planning (Part 4A) Register.

**represented adult** means an adult who has made an advance personal plan that is in force and appoints a decision maker.

**willing and able to make an informed consent decision**, see section 43.

#### **4 Meaning of *planning capacity***

An adult has **planning capacity** if her or she:

- (a) has decision-making capacity for making an advance personal plan; and
- (b) does not have an adult guardian or AIPPA manager.



**5        Meaning of *reasonably believes***

- (1) A person ***reasonably believes*** something at a particular time if the person personally has grounds at the time for believing that thing and those grounds, when judged objectively, are reasonable.
- (2) The reasonableness of the belief is not affected by the grounds subsequently being found to be false or non-existent.
- (3) A belief held by a health care provider in relation to health care action is not reasonable unless it is consistent with the generally accepted standards of good professional practice of members of the health care provider's profession.

**6        Decision-making capacity and impaired decision-making capacity**

- (1) An adult has ***decision-making capacity*** for a matter if he or she has the capacity to:
  - (a) understand and retain information about the matter; and
  - (b) weigh the information in order to make a decision about the matter; and
  - (c) communicate that decision in some way.
- (2) An adult is presumed to have decision-making capacity for a matter until the contrary is shown.
- (3) An adult has ***impaired decision-making capacity*** for a matter if his or her decision-making capacity for the matter is impaired.
- (4) The cause of the impairment is immaterial.
- (5) An adult does not have impaired decision-making capacity for a matter only because he or she:
  - (a) has a disability, illness or other medical condition (whether physical or mental); or
  - (b) engages in unconventional behaviour or other form of personal expression; or
  - (c) chooses a living environment or lifestyle with which other people do not agree; or
  - (d) makes decisions with which other people do not agree; or
  - (e) does not speak English to a particular standard or at all; or

- (f) does not have a particular level of literacy or education; or
- (g) engages in particular cultural or religious practices; or
- (h) does or does not express a particular religious, political or moral opinion; or
- (i) is of a particular sexual orientation or identity or expresses particular sexual preferences; or
- (j) takes or has taken, or is or has been dependent on, alcohol or drugs (but the effect of alcohol or drugs may be taken into account in determining whether the adult has impaired decision-making capacity for the matter); or
- (k) engages or has engaged in illegal or immoral conduct.

## 7 Application of Criminal Code

Part IIAA of the Criminal Code applies to an offence against this Act.

*Note for section 7*

*Part IIAA of the Criminal Code states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences.*

## Part 2 Advance personal plans

### 8 Adult may make advance personal plan

- (1) An adult who has planning capacity may, by making an **advance personal plan**, do one or more of the following:
  - (a) make consent decisions about future health care action for the adult (**advance consent decisions**);
  - (b) set out the adult's views, wishes and beliefs as the basis on which he or she wants anyone to act if they make decisions for him or her (**advance care statements**);
  - (c) appoint one or more persons to make decisions for the adult if he or she loses decision-making capacity (**decision makers**).
- (2) The decisions mentioned in subsection (1)(b) and (c) may be about all or any aspect of the adult's care and welfare (including health care) and property and financial affairs.

**9 Form of advance personal plan**

- (1) An advance personal plan must be made in the form approved under section 86(1) if:
  - (a) the plan includes the appointment of a decision maker who is to have any financial management powers; or
  - (b) use of the approved form is required by regulation.
- (2) Any other advance personal plan must be made:
  - (a) in the form approved under section 86(1); or
  - (b) in writing and in accordance with any requirements prescribed by regulation.

**10 Advance personal plan to be signed and witnessed**

- (1) An advance personal plan must be signed:
  - (a) by the adult making it; or
  - (b) if the adult is unable to sign – by a person (a **representative**) acting on the direction, and in the presence of, the adult.
- (2) The plan must be signed in the presence of an authorised witness.
- (3) The witness must certify in the advance personal plan that:
  - (a) the witness reasonably believes that the adult making the plan:
    - (i) is who he or she purports to be; and
    - (ii) is at least 18 years of age; and
  - (b) it appears to the witness that:
    - (i) the adult understands the nature and effect of the advance personal plan; and
    - (ii) in making the plan the adult is acting voluntarily without coercion or other undue influence; and
  - (c) the plan was signed:
    - (i) by the adult making it or a representative in accordance with subsection (1); and
    - (ii) in the presence of the witness.

- (4) A person acting as a representative:
  - (a) must be is at least 18 years of age; and
  - (b) must not be, or be being appointed by the plan as, a decision maker for the adult.
- (5) In this section:

**authorised witness** means:

- (a) a person who is authorised under the *Oaths, Affidavits and Declarations Act* to administer an oath; or
- (b) a person prescribed by regulation to be an authorised witness.

## **11 Duration of advance personal plan**

An advance personal plan:

- (a) comes into force when it is made; and
- (b) remains in force until one of the following occurs:
  - (i) if the advance personal plan is expressed to be for a limited period – that period ends;
  - (ii) the advance personal plan is revoked by the adult who made it or the Court;
  - (iii) if the advance personal plan appoints a decision maker but does not include any advance consent decisions or advance care statements – the person appointed as decision maker, or if 2 or more persons are appointed the last of them, ceases to be a decision maker under section 19;
  - (iv) the adult who made the advance personal plan dies.

## **12 Amendment or revocation by adult**

- (1) An adult who has made an advance personal plan may amend or revoke it at any time if he or she has planning capacity.
- (2) An amendment must be made in accordance with sections 9 and 10 as if it were an advance personal plan.

*Note for section 12*

*The Court has power to amend or revoke an advance personal plan in some circumstances (see section 61).*

**13 Non-compliance with formal requirements**

- (1) This section applies if an adult attempts to make or amend an advance personal plan but the plan or amendment is not made in accordance with sections 9 and 10.
- (2) The attempt:
  - (a) does not have effect to make or amend an advance personal plan; but
  - (b) may constitute a statement of the adult's views and wishes that may be taken into account by an agent or other person acting for the adult.
- (3) However, if the Court is satisfied that the adult's intention to make or amend an advance personal plan is sufficiently clear, it may declare the attempt to be effective to create a valid advance personal plan or amendment despite the non-compliance with those sections.

*Note for section 13*

*This section does not affect section 68 of the Interpretation Act, which provides that substantial compliance with an approved form is sufficient.*

**14 Multiple advance personal plans**

- (1) An adult may make as many advance personal plans as he or she wishes.
- (2) If an adult has made 2 advance personal plans that are inconsistent, the most recently made plan prevails to the extent of the inconsistency.
- (3) The fact that an adult, by making 2 advance personal plans, appoints 2 decision makers for the same matter does not, by itself, constitute an inconsistency between the plans.

*Note for section 14*

*If there is an inconsistency within a plan, or between 2 plans made at the same time, the Court may make a declaration about the effect or meaning of the plan or plans under section 58(g) or an order under section 59 if the inconsistency relates to decision makers.*

## **Part 3            Decision makers**

### **Division 1        Appointments**

#### **15            Who can be appointed as a decision maker**

- (1) An adult making an advance personal plan may appoint as a decision maker:
  - (a) an individual who is at least 18 years of age; or
  - (b) a licensed trustee company (as defined in section 601RAA of the Corporations Act 2001); or
  - (c) the Public Trustee; or
  - (d) the Public Guardian.
- (2) Despite subsection (1)(a), the adult may appoint an individual who is under 18 years of age to become a decision maker when the individual turns 18.
- (3) The appointment of individual who is under 18 years of age, has no effect until the individual turns 18.

#### **16            Appointment of decision maker for matters**

- (1) An adult may appoint a decision maker for one or more, or all, matters relating to the adult's:
  - (a) care or welfare (including health care); or
  - (b) property or financial affairs.
- (2) If an adult appoints a decision maker but does not identify the matter or matters for which the decision maker is appointed, the decision maker is appointed for all matters.

*Examples for section 16*

*The following are examples of matters for which a decision maker may be appointed:*

- (a) accommodation;
- (b) day-to-day living matters, such as diet and dress;
- (c) health care;
- (d) the provision of care services to the adult;
- (e) relationships with other people, including intimate or sexual relationships;

- (f) *the carrying out of a forensic procedure (such as those mentioned in the definition of that term in section 4 of Police Administration Act) in relation to an adult;*
- (g) *employment;*
- (h) *education and training;*
- (i) *banking;*
- (j) *receipt and payment of money;*
- (k) *property (including real estate) ownership;*
- (l) *management of assets;*
- (m) *carrying on a trade or business;*
- (n) *holding a licence or permit;*
- (o) *insurance for an adult or his or her property;*
- (p) *legal matters (other than as mentioned in section 24(1)(e)).*

## **17            Appointment options for decision makers**

- (1) An adult may appoint a decision maker to act:

- (a) at all times; or
- (b) only in stated circumstances; or
- (c) at all times except in stated circumstances.

*Examples for subsection (1)(b) and (c)*

- 1     *An adult may appoint his wife while she is alive and then his son while he is alive and then his 2 grandchildren jointly.*
  - 2     *An adult who lives part of the time with her son and part of the time with her daughter might appoint her son for times she is living with him and her daughter for times when she is living with her.*
  - 3     *An adult who has a son who travels in remote areas and is sometimes out of contact might appoint her son as a primary decision maker and her friend as a secondary decision maker for the times when the son cannot be contacted.*
- (2) An adult may appoint one decision maker, or 2 or more decision makers, for a matter or matters.
- (3) If the adult appoints 2 or more decision makers for a matter, they may be appointed to exercise their authority jointly, severally or jointly and severally.

## **18            Restrictions, requirements and directions**

An adult appointing a decision maker may, in the advance personal plan, do one or more of the following:

- (a) impose restrictions on the decision maker's authority;

- (b) impose requirements to be complied with by the decision maker in relation to the exercise of the decision maker's authority;
- (c) give directions to the decision maker about the exercise by the decision maker of the decision maker's authority.

## **19            When appointment of decision maker ceases**

- (1) A person (**person A**) ceases to be a decision maker when one of the following occurs:
  - (a) person A, being an individual, dies;
  - (b) person A resigns by giving written notice to:
    - (i) if the represented adult has planning capacity – the represented adult; or
    - (ii) if the represented adult does not have planning capacity but has appointed another person (**person B**) who, on person A's resignation, would be a decision maker for the adult with authority for all matters for which person A has authority – person B; or
    - (iii) otherwise – the Public Guardian;
  - (c) if person A's appointment as a decision maker is expressed to be for a limited period – that period ends;
  - (d) the advance personal plan by which person A was appointed:
    - (i) ceases to be in force; or
    - (ii) is amended so as to terminate person A's appointment.
- (2) If a person resigns under subsection (1)(b) the person must give a copy of the resignation notice to each other agent for the adult of whom the person is aware.
- (3) A notice for subsection (1)(b)(iii) must be accompanied by:
  - (a) a copy of the advance personal plan by which the person was appointed; and
  - (b) any information prescribed by regulation.



## **Division 2            Authority of decision makers**

### **20            Authority of decision maker**

- (1) A decision maker for a matter has authority to do anything in relation to the matter that the represented adult could lawfully do if he or she had full legal capacity.
- (2) However, the decision maker may exercise that authority only when the represented adult has impaired decision-making capacity for the matter.
- (3) The decision maker's authority is subject to this Act and the terms of the advance personal plan by which the decision maker was appointed.

### **21            Exercise of authority by decision maker**

- (1) In exercising the decision maker's authority, the decision maker must:
  - (a) act in accordance with the decision-making principles; and
  - (b) comply with:
    - (i) any restrictions, requirements or directions of the kind mentioned in section 18 that are in the advance personal plan by which the decision maker was appointed; and
    - (ii) any order made by the Court under section 59; and
    - (iii) this Act; and
  - (c) cooperate with any other agents for the represented adult to enable them all to properly exercise their authority; and
  - (d) act honestly and with care, skill and diligence.
- (2) If 2 or more decision makers are appointed to exercise their authority for a matter jointly, they must exercise their authority unanimously.

*Note for subsection (2)*

*If the decision makers are unable to reach a unanimous decision, they may seek an order from the Court under section 59(2)(b).*

## 22            **Decision-making principles**

- (1) The ***decision-making principles*** are that when a decision maker for a matter for an adult exercises authority under this Act, the decision maker must decide how to exercise that authority in accordance with this section.
- (2) If the adult has made an advance care statement about the matter, the decision maker must exercise the decision maker's authority so as to give effect to the statement, unless:
  - (a) the adult, having decision-making capacity to do so, states that he or she does not want effect to be given to the statement; or
  - (b) the decision maker is excused from doing so under section 23.
- (3) For subsection (2), in determining how to give effect to the advance care statement the decision maker must exercise the decision maker's authority in the way the decision maker reasonably believes the adult would have done in the circumstances.
- (4) If the adult has not made an advance care statement about the matter the decision maker must exercise the decision maker's authority in the way the decision maker reasonably believes the adult would have done in the circumstances, unless the decision maker is excused from doing so under section 23.
- (5) For subsections (3) and (4), in determining what the adult would have done in the circumstances the decision maker:
  - (a) must, as far as is practicable, seek the adult's current views and wishes about the matter; and
  - (b) must take into account:
    - (i) the adult's current and previously stated views and wishes about the matter; and
    - (ii) the decision maker's personal knowledge of the adult and his or her views and wishes about the particular matter and matters generally; and
  - (c) may, but is not required to, consult other persons who the decision maker believes may have information relevant to determining what the adult would have done in the circumstances.

- (5A) If subsection (3) or (4) requires the decision maker to exercise the decision maker's authority in the way the decision maker reasonably believes the adult would have done in the circumstances, the decision maker must exercise the authority in that way even if doing so may not be in the adult's best interests.

*Note for subsection (5A)*

*However, the decision maker does not have authority to do anything that would be unlawful (see s20(1) and 23(2)(b)).*

- (6) If the decision maker:
- (a) is unable to form a reasonable belief about what the adult would have done in the circumstances; or
  - (b) is excused from exercising substituted judgment under section 23;

the decision maker must exercise the decision maker's authority in the way that the decision maker reasonably believes is in the adult's best interests.

- (6A) For subsection (6), in determining what is in the adult's best interests, the decision maker must:
- (a) take into account all relevant considerations; and
  - (b) weigh up those considerations, giving each of them the weight that the decision maker reasonably believes is appropriate in the circumstances.
- (7) For subsection (6A), the relevant considerations include, but are not limited to, the following:
- (a) protection of the adult from harm, neglect, abuse and exploitation;
  - (b) the provision to the adult of appropriate care, including the taking of appropriate health care action;
  - (ba) promotion of the adult's happiness, enjoyment of life and wellbeing;
  - (c) protection of the adult's freedom of decision and action;
  - (d) the ability of the adult to be as independent as is practicable;
  - (e) the ability of the adult to achieve his or her maximum physical, social, emotional and intellectual potential;

- (f) the ability of the adult to live in the general community and take part in community activities;
  - (g) maintenance of the adult's right to be treated with dignity and respect;
  - (h) the ability of the adult to maintain his or her preferred living environment and lifestyle;
  - (i) maintenance or creation of a positive support network for the adult;
  - (j) protection of the adult's property and financial resources from loss, damage or misuse;
  - (k) protection of the adult's right to confidentiality of information about him or her.
- (8) Subsections (6) to (7) do not prevent a decision maker exercising the decision maker's authority in a way that may be beneficial to another person if:
- (a) the benefit to the other person is of a kind that the adult:
    - (i) provided when he or she had decision-making capacity for the matter; or
    - (ii) might reasonably be expected to provide; and
  - (b) providing the benefit to the other person:
    - (i) would be reasonable in the circumstances; and
    - (ii) would not significantly adversely affect the adult's best interests.

*Examples for subsection (8)*

- 1 *It may be appropriate for a decision maker to make provision out of the adult's money for educational expenses for the adult's children, even though that is not directly for the benefit of the adult and will mean that the money is not available to pay for the adult's own expenses.*
- 2 *It may be appropriate for a decision maker to consent to the adult donating bone marrow to treat the adult's child who has leukaemia, even though doing so may involve some risk to the adult.*

**23            When decision maker is excused from exercising substituted judgment**

- (1) To ***exercise substituted judgment*** means:
- (a) to give effect to an advance care statement, as mentioned in section 22(2); or
  - (b) to exercise a decision maker's authority in the way the decision maker reasonably believes the represented adult would have done, as mentioned in section 22(4).
- (2) A decision maker is excused from exercising substituted judgment if the decision maker reasonably believes that one or more of the following applies:
- (a) exercising substituted judgment is impracticable;
  - (b) exercising substituted judgment would be unlawful;
  - (c) exercising substituted judgment would impose a burden on another person that is so unreasonably onerous that it is justifiable to override the adult's wishes;
  - (d) in the case of giving effect to an advance care statement – there is no reasonable possibility the adult would have intended the statement to apply in the circumstances;
  - (e) exercising substituted judgment would be so unreasonable that it is justifiable to override the adult's wishes.
- (3) If, in reliance on this section, a decision maker does not exercise substituted judgment, the decision maker must keep a written record of having done so and the grounds on which the decision maker formed the reasonable belief mentioned in subsection (2).

**24            Excluded matters**

- (1) Despite section 20, a decision maker is not authorised to do any of the following for the represented adult:
- (a) exercise the adult's right to vote in a Commonwealth, Territory or local government election or referendum;
  - (b) consent to the adoption of a child of the adult;
  - (c) consent to the marriage, or dissolution of the marriage, of the adult;

- (d) make, vary or revoke the following for the adult:
    - (i) a will;
    - (ii) a power of attorney;
    - (iii) an advance personal plan, or anything (by whatever name) having a similar effect in another jurisdiction;
  - (e) exercise the adult's rights as an accused person in relation to a criminal investigation or criminal proceedings, including under Part 10 of the *Mental Health and Related Services Act*.
- (2) This section applies despite anything else in this Act and regardless of the terms of the advance personal plan by which the decision maker was appointed.

## 25        **Restricted health matters**

- (1) Despite section 20, a decision maker cannot make a consent decision about restricted health care action for the represented adult.
- (2) Each of the following is ***restricted health care action*** for an adult:
- (a) sterilisation of the adult, unless it occurs as an effect of health care action that is taken primarily to treat an illness or injury of the adult;
  - (b) termination of a pregnancy of the adult, unless it occurs as an effect of health care action that is taken primarily to treat an illness or injury of the adult;
  - (c) removal from the adult of non-regenerative tissue (as defined in section 4 of the *Transplantation and Anatomy Act*) for transplantation to another person;
  - (d) health care action prescribed by regulation to be restricted health care action.
- (3) For subsection (2)(a) and (b), health care action is taken ***primarily to treat an illness or injury*** of an adult if the primary reason for taking the action is to treat an illness, injury or other organic malfunction that is likely to cause serious or irreversible damage to the adult's health unless the health care action is taken.

**26            Effect of exercise of authority by decision maker**

An act done or omission made by a decision maker in the exercise of the decision maker's authority has effect as if it were done or made by the represented adult and he or she had full legal capacity.

**27            Decision maker unaware of entitlement to act or not**

(1) If:

- (a) a decision maker purports to exercise authority for a matter in good faith and reasonably believing that circumstances exist that entitle the decision maker to do so; and
- (b) those circumstances do not in fact exist;

anything done by the decision maker in the purported exercise of the authority has effect, and the decision maker is liable to the same extent, as if the circumstances had existed.

(2) If:

- (a) a decision maker has authority for a matter; and
- (b) circumstances exist in which the decision maker is entitled to exercise that authority; and
- (c) the decision maker is unaware, and could not reasonably have been expected to be aware, of the existence of those circumstances;

the decision maker is not liable for a failure to exercise the authority.

*Example for section 27*

*A circumstance that would affect the decision maker's entitlement to exercise authority is whether or not the represented adult had impaired decision-making capacity for the matter.*

**Division 3            Specific powers and duties of decision makers**

**28            Right to documents and information**

(1) A decision maker for a matter:

- (a) has the same right to documents and information relevant to the exercise of the decision maker's authority in relation to that matter as the represented adult would have if he or she had full legal capacity; and

- (b) has a right to documents and information of the represented adult that are relevant to the exercise of the decision maker's authority in relation to that matter.
- (2) A person who has custody or control of a document or information that is relevant to the exercise of a decision maker's authority (an **information holder**) must give it to the decision maker if requested by the decision maker to do so, unless the information holder has a reasonable excuse not to do so.
- (3) If the information holder does not comply with the request, the Court may order the information holder to give the documents or information to the decision maker.
- (4) A person commits an offence if:
  - (a) the person is given an order under subsection (3); and
  - (b) the person engages in conduct that results in a contravention of the order.

Maximum penalty:        200 penalty units.

- (5) An information holder who gives information under this section in good faith is not civilly or criminally liable, or in breach of a professional code of conduct, for doing so.

## **29        Information and things may be given to decision maker**

- (1) This section applies if:
  - (a) a person is required by a law of the Territory (the **other law**) to give information or a thing to a represented adult; and
  - (b) the information or thing relates to a matter for which the adult has impaired decision-making capacity; and
  - (c) a decision maker has authority for the matter.
- (2) The person required to give the information or thing may give it to the decision maker instead of giving it to the represented adult.
- (3) A person who gives information or a thing to the decision maker under this section in good faith:
  - (a) is taken to have complied with the requirement in the other law to give it to the represented adult; and
  - (b) is not civilly or criminally liable, or in breach of a professional code of conduct, for giving it to the decision maker.



- (4) This section does not apply in relation to a document that the other law requires to be personally served on the represented adult.

### **30                      Record keeping and reporting requirements**

- (1) A decision maker must:
- (a) keep the records in relation to the exercise of the decision maker's authority that it would be reasonable in the circumstances to keep; and
  - (b) comply with any record keeping and reporting requirements prescribed by regulation.
- (2) Without limiting what may be provided for in regulations, a regulation may provide for one or more of the following:
- (a) keeping of records;
  - (b) preparation of annual or other reports;
  - (c) auditing or other verification of records and reports;
  - (d) the form of records or reports;
  - (e) who must or may be given copies of, or access to, records or reports.

### **31                      Property to be managed as if trust property**

- (1) A decision maker who has financial management powers:
- (a) must deal with the represented adult's property as if it were trust property held by the decision maker on trust for the represented adult; and
  - (b) in dealing with the property, is subject to the duties, obligations and limitations that apply under a law of the Territory to a trustee dealing with trust property.

*Note for subsection (1)*

*The decision maker's power to deal with the property stems from section 20(1). This section limits that power by requiring the decision maker to deal with the property as if it were trust property. However, this section does not constitute a trust nor cause the property to vest in the decision maker.*

- (2) However, the decision maker may deal with property other than in accordance with subsection (1) if:
- (a) permitted to do so by a provision of this Act; or

- (b) authorised to do so:
  - (i) by the represented adult in the advance personal plan by which the decision maker was appointed; or
  - (ii) by the Court by order under section 59(2)(c).
- (3) Subsection (1) does not prevent the continuation of joint ownership of property by the represented adult and the decision maker (whether as joint tenants or tenants in common) if the joint ownership commenced:
  - (a) before the decision maker was appointed; or
  - (b) after the appointment but while the represented adult had decision-making capacity for the matter.
- (4) Despite subsection (1)(b), section 24A of the *Trustees Act* does not apply in relation to property that is being dealt with under this section as if it were trust property.

## **32        Gifts**

- (1) A decision maker who has financial management powers may make a gift from the represented adult's property if:
  - (a) the gift is of a kind the represented adult:
    - (i) made when he or she had decision-making capacity for the matter; or
    - (ii) might reasonably be expected to make; and
  - (b) the value of the gift is reasonable in the circumstances.
- (2) However, the represented adult may, in the advance personal plan that appoints the decision maker:
  - (a) restrict the decision maker's authority to make gifts; or
  - (b) authorise the decision maker to make a gift not otherwise permitted by this section.
- (3) Further, the Court may, by order under section 59(2)(c), authorise the decision maker to make a gift not otherwise permitted by this section.
- (4) Despite subsection (1), the decision maker must not make a gift from the represented adult's property to the decision maker unless specifically authorised to do so under subsection (2)(b) or (3).

### **33            Maintenance of dependants**

- (1) A decision maker who has financial management powers may provide from the represented adult's property for the needs of a dependant of the represented adult if:
  - (a) the provision is of a kind the represented adult:
    - (i) made when he or she had decision-making capacity for the matter; or
    - (ii) might reasonably be expected to make; and
  - (b) the value of the provision is reasonable in the circumstances.
- (2) However, the represented adult may, in the advance personal plan that appoints the decision maker:
  - (a) restrict the decision maker's authority to provide for the needs of dependants; or
  - (b) authorise the decision maker to make provision for the needs of a dependant that is not otherwise permitted by subsection (1).
- (3) Further, the Court may, by order under section 59(2)(c), authorise the decision maker to make provision for the needs of a dependant that is not otherwise permitted by subsection (1).
- (4) Despite subsection (1), if the decision maker is a dependant of the represented adult, the decision maker must not make provision from the represented adult's property for the decision maker's own needs unless specifically authorised to do so under subsection (2)(b) or (3).

### **34            Transfer when person ceases to be decision maker**

A person who ceases to be a decision maker for an adult must take all reasonable steps to provide for:

- (a) if the represented adult is still alive – the orderly transfer of decision-making authority from the person to the represented adult or to another agent for the adult (as appropriate); or
- (b) if the represented adult has died – the orderly transfer of the adult's estate to the executor or administrator of the estate.

## **Division 4            Reimbursement and remuneration**

### **35            Reimbursement of expenses**

- (1) A decision maker is entitled to reimbursement from the represented adult for reasonable costs incurred in acting as decision maker:
  - (a) as authorised in the advance personal plan by which the decision maker was appointed; or
  - (b) as approved by the Court by order under section 59(2)(d).
- (2) The Court's approval may be given for a particular expense, for expenses up to a specified amount, for expenses generally, or otherwise as the Court considers appropriate.
- (3) However, the Court must not approve reimbursement of expenses contrary to an express provision in the advance personal plan.

*Note for section 35*

*This section applies only to costs incurred by the decision maker in the person's capacity as decision maker. For reimbursement of expenses incurred in providing other services, see section 37.*

### **36            Remuneration for professional decision maker**

- (1) A professional decision maker is entitled to reasonable remuneration from the represented adult:
  - (a) as authorised in the advance personal plan by which the decision maker was appointed; or
  - (b) as approved by the Court by order under section 59(2)(d).
- (2) However, the Court must not approve payment of remuneration contrary to an express provision in the advance personal plan.
- (3) This section does not affect any right of the Public Trustee or a trustee company to remuneration or commission under another Act or the Corporations Act 2001.
- (4) In this section:

***professional decision maker*** means one of the following:

- (a) the Public Trustee;
- (b) the Public Guardian;
- (c) a licensed trustee company (as defined in section 601RAA of the Corporations Act 2001);

- (d) another person who carries on the business of, or including, providing services as a decision maker.

*Note for section 36*

*This section applies only to remuneration for services provided by the decision maker in the person's capacity as decision maker. For remuneration for providing other services, see section 37.*

### **37            Reimbursement and remuneration for other services provided by decision maker to represented adult**

- (1) This section applies if a person who is a decision maker also provides other services to the represented adult.
- (2) The person is not entitled to either of the following from the represented adult unless approved under subsection (3):
  - (a) reimbursement for costs incurred in providing the other services;
  - (b) remuneration for providing the other services.
- (3) Approval for reimbursement or remuneration may be given:
  - (a) by the represented adult in the advance personal plan by which the decision maker was appointed; or
  - (b) by the Court by order under section 59(2)(d).
- (4) The Court must not give approval unless satisfied that:
  - (a) it is reasonable in the circumstances for the person who is the decision maker to also provide the other services; and
  - (b) the amount to be paid is reasonable.
- (5) In this section:

***provide other services***, to a represented adult, includes to act as a carer for the represented adult.

## **Part 4                      Consent to health care action**

### **Division 1                Preliminary matters about consent to health care action**

#### **38                      Scope of consent decisions**

A consent decision about health care action:

- (a) may be made in relation to health care to be provided in a particular instance or a course of health care to be provided over a period of time; and
- (b) may be made about one or more particular health care actions or generally about all health care action; and
- (c) may be made so as to apply:
  - (i) in all circumstances; or
  - (ii) only in stated circumstances; or
  - (iii) in all circumstances except in stated circumstances.

#### **39                      When statement in advance personal plan constitutes advance consent decision**

- (1) A statement in an advance personal plan about health care action may be:
  - (a) an advance consent decision (as mentioned in section 8(1)(a)); or
  - (b) an advance care statement (as mentioned in section 8(1)(b)).
- (2) A statement constitutes an advance consent decision if:
  - (a) it is an express statement of the adult's consent or refusal of consent for the health care action; or
  - (b) it would be reasonable to conclude from the statement that the adult would or would not want the health care action to be taken in the circumstances that exist at the time it is proposed to take the health care action.

*Examples for subsection (2)*

- 1     *A statement that "I do not want to be given a blood transfusion in any circumstances" is a clear statement refusing consent for a blood transfusion.*

- 2        *A statement that "If I have a terminal illness and am going to die soon, I do not want to be given treatment just to keep me alive for a little bit longer – just keep me pain free" may constitute consent for a terminally ill person to be given pain relief and for other treatment to be discontinued.*

- (3) A statement that does not constitute an advance consent decision is an advance care statement.

*Example for subsection (3)*

*A statement that "I want all decisions that are made for me to be made strictly in accordance with my religious belief as a Catholic" would not be an advance consent decision, but would be an advance care statement.*

## **Division 2            Consent to health care action**

### **40            Application of Division**

This Division applies:

- (a) if a health care provider proposes to take health care action for an adult who has impaired decision-making capacity for making a consent decision about the health care action; and
- (b) for the purpose of ascertaining who can make a consent decision about the health care action.

### **41            Advance consent decision**

- (1) If the adult has made an advance consent decision about the health care action, that decision has effect for all purposes as if:
  - (a) the decision had been made by the adult at the time it is proposed to take the health care action; and
  - (b) at the time the decision was made, the adult:
    - (i) had full legal capacity; and
    - (ii) was fully informed about the health care action.
- (2) However, the Court may order that the advance consent decision be disregarded.
- (3) The Court may do so only if it is satisfied that:
  - (a) there is no reasonable possibility that the adult would have intended the advance consent decision to apply in the circumstances; or

- (b) taking health care action in reliance on the advance consent decision:
  - (i) would cause the adult unacceptable pain and suffering; or
  - (ii) would otherwise be so wholly unreasonable that it is justifiable to override the adult's wishes.

*Note for subsection (3)*

*If the Court orders that the advance consent decision be disregarded, a consent decision about the health care action may be made by a decision maker or adult guardian under section 42 or by the Court under section 44.*

- (4) Unless the Court orders that the adult's advance consent decision be disregarded, no-one else may make a consent decision about the health care action.

## **42            Consent decision by decision maker or adult guardian**

- (1) This section applies if:
  - (a) either:
    - (i) the adult has not made an advance consent decision about the health care action; or
    - (ii) the Court has made an order under section 41(2) that the adult's advance consent decision be disregarded; and
  - (b) there is a decision maker or adult guardian for the adult who is willing and able to make an informed consent decision about the health care action (an **available consenters**); and
  - (c) the Court has not made a consent decision about the health care action under section 44.
- (2) If there is only one available consenters, that person may make the consent decision.
- (3) If there are 2 or more available consenters who agree on how the consent decision is to be made, any one of them may make the decision.



- (4) If there are 2 or more available consenters who do not all agree on how the consent decision is to be made:
- (a) if the health care provider who proposes to take the health care action reasonably believes that:
    - (i) there is one available conserter who is reasonably able to make a consent decision in accordance with the decision-making principles; and
    - (ii) in all the circumstances it is appropriate for that person to make the consent decision;that available conserter may make the decision; or
  - (b) otherwise, none of the available consenters may make the decision.

*Note for subsection (4)(b)*

*If there is no available conserter who is willing and able to make a consent decision, the health care provider or another interested person may apply to the Court for the Court to make a decision under section 44.*

- (5) A consent decision made by an available conserter under this section has effect as if:
- (a) the decision had been made by the adult; and
  - (b) at the time the decision was made, the adult:
    - (i) had full legal capacity; and
    - (ii) was fully informed about the health care action.
- (6) If there are 2 or more decision makers for an adult who are appointed to exercise their authority jointly:
- (a) a reference in this section to a decision maker is a reference to both or all of them acting jointly; and
  - (b) a reference to the decision maker being willing and able to make an informed consent decision is a reference to each of them being willing and able to make an informed consent decision.

#### 43      **Willing and able to make informed consent decision**

A decision maker or adult guardian is **willing and able to make an informed consent decision** about health care action if the decision maker or adult guardian:

- (a) has authority to make a consent decision about the health care action; and
- (b) has unimpaired decision-making capacity for the health care action; and
- (c) is reasonably available; and
- (d) is willing to make the consent decision; and
- (e) understands:
  - (i) in the case of a decision maker – the decision maker's obligation to act in accordance with the decision-making principles; or
  - (ii) in the case of an adult guardian – the guardian's obligation to act in accordance with sections 4 and 20 of the *Adult Guardianship Act*; and
- (f) has all the information decision maker or adult guardian reasonably needs to make a balanced decision about the health care action; and
- (g) has had adequate time to consider that information; and
- (h) understands the effect of making the consent decision; and
- (i) is able to make the consent decision voluntarily and without undue influence from any person.

*Note for paragraph (a)*

*Whether an adult guardian has authority to make a consent decision about the health care action depends on the terms of his or her appointment by the Court and the Adult Guardianship Act, particularly sections 17 to 19 and 21.*

#### 44      **Consent decisions by Court**

- (1) This section applies if:
  - (a) either:
    - (i) the adult has not made an advance consent decision about the health care action; or

- (ii) the Court has made an order under section 41(2) that the adult's advance consent decision be disregarded; and
- (b) there is no available consentor who is willing and able to make a consent decision about the health care action under section 42.
- (2) The Court may make a consent decision about the health care action.
- (3) The Court's decision has effect as if:
  - (a) the decision had been made by the adult; and
  - (b) at the time the decision was made, the adult:
    - (i) had full legal capacity; and
    - (ii) was fully informed about the health care action.
- (4) If the Court makes a consent decision in relation to a course of action to be provided over a period of time, a later consent decision to withhold or withdraw the health care may be made only by:
  - (a) the Court; or
  - (b) a decision maker or adult guardian who is authorised by the Court to make that decision.

#### **44A Consent decisions by persons under other laws**

- (1) If a person has a right under another law of the Territory to make a consent decision about the health care action, the person may exercise that right only if:
  - (a) either:
    - (i) the adult has not made an advance consent decision about the health care action; or
    - (ii) the Court has made an order under section 41(2) that the adult's advance consent decision be disregarded; and
  - (b) there is no available consentor who is willing and able to make a consent decision about the health care action under section 42; and
  - (c) the Court has not made a consent decision about the health care action under section 44.

- (2) This section does not affect any power under another law of the Territory of a court, tribunal or statutory office holder to order that health care action be taken for an adult without the consent of the adult.

### **Division 3                      Health care providers**

#### **45                      Health care provider relying on advance consent decision**

- (1) This section applies if a health care provider takes health care action for an adult:
- (a) reasonably believing that the adult has impaired decision-making capacity for the health care action; and
  - (b) relying on consent the health care provider reasonably believes to have been given by the adult in an advance consent decision; and
  - (c) if the Court has ordered under section 41(2) that the advance consent decision be disregarded – without knowledge of that order.
- (2) The health care provider is taken, for all purposes, to have taken the health care action with the consent of the adult.

*Note for subsection (2)*

*Under section 41(1), that consent has effect as if, when it was given, the adult had full legal capacity and was fully informed about the decision.*

- (3) Subsection (2) applies even if an effect of taking the health care action is to hasten the death of the adult.

#### **46                      Health care provider relying on consent of decision maker or adult guardian**

- (1) This section applies if a health care provider takes health care action for an adult:
- (a) reasonably believing that the adult has impaired decision-making capacity for the health care action; and
  - (b) reasonably believing that section 42 applies in relation to the health care action; and
  - (c) relying on consent the health care provider reasonably believes to have been given by a decision maker or adult guardian for the adult under section 42; and

- (d) if the Court has made a consent decision about the health care action under section 44 – without knowledge of that decision.
- (2) The health care provider is taken, for all purposes, to have taken the health care action:
  - (a) if the consent decision was made by a decision maker – with the consent of the adult; or
  - (b) if the consent decision was made by an adult guardian – with the consent of a parent of the adult as if the adult were a child.

*Note for subsection (2)*

*Under section 42(5) that consent has effect as if it had been given by the adult and that, when it was given, the adult had full legal capacity and was fully informed about the decision.*

- (3) Subsection (2) applies even if an effect of taking the health care action is to hasten the death of the adult.

#### **47                      Health care provider relying on consent of Court**

- (1) This section applies if a health care provider takes health care action for an adult:
  - (a) reasonably believing that the adult has impaired decision-making capacity for the health care action; and
  - (b) relying on consent the health care provider reasonably believes to have been given by the Court under section 44.
- (2) The health care provider is taken, for all purposes, to have taken the health care action with the consent of the adult.

*Note for subsection (2)*

*Under section 44(3) that consent has effect as if it had been given by the adult and that, when it was given, the adult had full legal capacity and was fully informed about the decision.*

- (3) Subsection (2) applies even if an effect of taking the health care action is to hasten the death of the adult.

#### **48                      Health care provider relying on another provider to ascertain consent**

- (1) This section applies if:
  - (a) a health care provider (**provider A**) takes health care action for an adult; and

- (b) the adult has impaired decision-making capacity for making a consent decision about the health care action; and
  - (c) it is reasonable in the circumstances for provider A to rely on another health care provider having ascertained that consent has been given for taking the health care action; and
  - (d) provider A reasonably assumes that another health care provider has done so.
- (2) Provider A is taken, for all purposes, to have taken the health care action with the consent of the adult and as if the adult had full legal capacity and was fully informed about the health care action.
- (3) Subsection (2) applies even if an effect of taking the health care action is to hasten the death of the adult.

**49                      Health care provider acting with consent of adult when  
unaware of impaired capacity**

- (1) This section applies if:
- (a) a health care provider takes health care action for an adult relying in good faith on consent purportedly given by the adult; and
  - (b) the adult has impaired decision-making capacity for making a consent decision about the health care action; and
  - (c) the health care provider does not know, and could not reasonably be expected to know, that the adult has impaired decision-making capacity for making a consent decision about the health care action.
- (2) The health care provider is taken, for all purposes, to have taken the health care action with the consent of the adult and as if the adult had full legal capacity and was fully informed about the health care action.
- (3) Subsection (2) applies even if an effect of taking the health care action is to hasten the death of the adult.

**Division 4                      Miscellaneous matters**

**50                      No obligation to take health care action**

This Act does not require a health care provider to take health care action if the health care provider would not, in the absence of this Act, be required to do so.

**51                      Unlawful health care action not permitted**

- (1) This Act does not authorise a person to take health care action for an adult unless the person would, in the absence of this Act, be lawfully able to take the health care action for an adult who had full legal capacity and gave fully informed consent to the taking of the health care action.
- (2) A person cannot, under this Act, consent to health care action being taken if taking the action would be unlawful.
- (3) This Act does not permit the form of intentional killing of another called euthanasia or the assisting of a person to terminate his or her life.

**52                      Conduct amounting to unprofessional conduct**

- (1) This section applies if:
  - (a) a health care provider reasonably believes that an adult has impaired decision-making capacity for health care action; and
  - (b) takes health care action for the adult other than in reliance on consent given in accordance with Division 1.
- (2) If this section applies, the health care provider's conduct constitutes unprofessional conduct for the purposes of:
  - (a) the Health Practitioner Regulation National Law; and
  - (b) any other law prescribed by regulation.
- (3) However, this section does not apply if, under any other law of the Territory, the health care provider is permitted to take the health care action without the adult's consent.

**53                      Effect of decision refusing consent on provision of emergency treatment**

- (1) This section applies if:
  - (a) a health care provider reasonably believes that an adult has impaired decision-making capacity for health care action; and
  - (b) the health care provider knows that the adult has, in an advance consent decision, refused consent for the health care action; and

- (c) either:
  - (i) the Court has not made an order under section 41(2) that the advance consent decision be disregarded; or
  - (ii) if the Court has made such an order – the health care provider does not know of that order.
- (2) This section also applies if:
  - (a) a health care provider reasonably believes that an adult has impaired decision-making capacity for health care action; and
  - (b) the health care provider knows that a decision maker or adult guardian for the adult who has authority to do so has refused consent for the health care action under section 42; and
  - (c) either:
    - (i) the Court has not made a contrary consent decision under section 44; or
    - (ii) if the Court has made such a decision – the health care provider does not know of that decision.
- (3) This section also applies if:
  - (a) a health care provider reasonably believes that an adult has impaired decision-making capacity for health care action; and
  - (b) the health care provider knows that the Court has refused consent for the health care action under section 44.
- (4) If anything done in taking, or attempting to take, the health care action constitutes conduct of a kind mentioned in paragraph (a) or (b) of the definition **assault** in section 187 of the Criminal Code, paragraph (c) of that definition does not operate to exclude the conduct from that definition.
- (5) If the health care action is an operation, as defined in the *Emergency Medical Operations Act*, section 3(3A) of that Act applies.

#### **54                      Other laws allowing treatment without consent not affected**

This Act does not affect the operation of any other law of the Territory that allows a person to take health care action for another person without that other person's consent.



**55            Other rights preserved**

- (1) This Act does not affect any right an adult with decision-making capacity for health care action has to refuse the health care.
- (2) This Act does not affect the common law relating to the recognition of an adult's instructions about health care action for the adult that are given other than in an advance personal plan.

**Part 4A            Dealings in relation to land**

**Division 1            Dealings by decision makers**

**55A            Advance personal plan must be registered**

- (1) A dealing in relation to land purporting to take effect as a result of the exercise of authority by a decision maker is of no effect unless, at the time the authority was purportedly exercised, an advance personal plan conferring authority to enter into the dealing on the decision maker was registered.
- (2) However, if:
  - (a) at the time the authority was purportedly exercised, an advance personal plan conferring the authority on the decision maker was in force (although not registered); and
  - (b) an advance personal plan conferring that authority on the decision maker is subsequently registered;the dealing takes effect immediately after the plan is registered.
- (3) For the purpose of this section, if an advance personal plan has been registered:
  - (a) the terms of the plan at a particular time are taken to be the terms of the plan when it was first registered as amended by any amendments that have been registered before the time in question; and
  - (b) a person appointed by the plan as a decision maker is taken to continue to be a decision maker until a notice to the contrary is registered as mentioned in section 55C(1)(c); and
  - (c) the plan is taken to remain in force until a notice to the contrary is registered as mentioned in section 55C(1)(d).

- (4) Subsection (3) does not apply in relation to a person who, at any relevant time, knows that:
  - (a) the advance personal plan has been amended in a material way by an amendment that has not been registered; or
  - (b) a person's appointment as a decision maker under the plan has ceased under section 19(1); or
  - (c) the plan has ceased to be in force under section 11(b).
- (5) This section does not apply in relation to a dealing in relation to land that is a lease for a period not exceeding 1 year.

## **Division 2      Advance Personal Plans (Part 4A) Register**

### **55B      Advance Personal Planning (Part 4A) Register**

- (1) The Registrar-General must establish and maintain a register of advance personal plans under which a decision maker is authorised to enter into dealings in relation to land (the **Advance Personal Planning (Part 4A) Register**).
- (2) Subject to the regulations, the Registrar-General may keep the Advance Personal Planning (Part 4A) Register in any form the Registrar-General considers appropriate.
- (3) Registration of an advance personal plan in the Advance Personal Planning (Part 4A) Register is optional and non registration does not affect the validity or effect of the advance personal plan.

*Note for subsection (3)*

*While non registration does not affect the validity or effect of the plan, non registration does affect the effectiveness of any dealing in relation to land entered into by the decision maker (see section 55A).*

### **55C      Registration of advance personal plans**

- (1) The Registrar-General may register any of the following in the Advance Personal Planning (Part 4A) Register:
  - (a) an advance personal plan under which a decision maker is authorised to enter into a dealing in relation to land for the represented adult;
  - (b) an amendment to a registered advance personal plan;
  - (c) a notice that a person who was a decision maker under a registered advance personal plan has ceased to be a decision maker as mentioned in section 19(1);

- (d) a notice that a registered advance personal plan has ceased to be in force as mentioned in section 11(b);
  - (e) any other document relating to an advance personal plan:
    - (i) that is prescribed by the regulations; or
    - (ii) that the Registrar-General considers it is appropriate to record in the Advance Personal Planning (Part 4A) Register.
- (2) An application for registration must be:
- (a) made in accordance with the regulations; and
  - (b) accompanied by any fee prescribed as mentioned in section 55D.

#### **55D Fees**

Regulations under the *Registration Act* may prescribe fees payable in relation to the Advance Personal Planning (Part 4A) Register.

## **Part 5 Role of the Local Court**

### **Division 1 Jurisdiction of Local Court**

#### **56 Jurisdiction of Court**

The Court has jurisdiction to hear and determine all matters arising in relation to this Act, other than appeals under Division 3.

#### **57 Court to act in accordance with decision-making principles**

In proceedings coming before it under this Act, the Court must act in accordance with the decision-making principles as if it were a decision maker.

#### **58 Declarations as to validity, status, powers etc.**

The Court may make a declaration as to one or more of the following:

- (a) whether an adult has impaired decision-making capacity for a matter;
- (b) whether an advance personal plan is or is not valid;

- (c) whether a statement in an advance personal plan about health care action is an advance consent decision or an advance care statement;
- (d) whether an advance consent decision or advance care statement is or is not applicable in a particular circumstance;
- (e) whether or not a decision maker has authority for a matter;
- (f) the scope of the authority of a decision maker;
- (g) any other matter relating to the validity, effect or meaning of an advance personal plan (including an advance consent decision, advance care statement or appointment in the plan);
- (h) any other matter relating to the making of a consent decision about health care action for an adult who has impaired decision-making capacity for making the consent decision;
- (i) any other matter arising for determination under this Act.

## **59 Orders to decision makers**

- (1) The Court may make orders as to the exercise by a decision maker of the decision maker's authority.
- (2) Without limiting subsection (1), the Court may make orders as follows:
  - (a) as to how the decision maker may, must, or must not, exercise the decision maker's authority so as to comply with section 21(1);
  - (b) if 2 or more decision makers who are appointed to exercise their authority for a matter jointly are unable to reach a unanimous decision as required by section 21(2) – to facilitate the resolution of their differences;
  - (c) authorising the decision maker to act as mentioned in section 31(2)(b)(ii), 32(3) or 33(3);
  - (d) approving reimbursement or remuneration for the decision maker as mentioned in section 35(1)(b), 36(1)(b) or 37(3)(b);
  - (e) if the represented adult has 2 or more agents – to facilitate a reasonable and workable division of decision-making authority between the agents.

- (3) The Court must not make an order under subsection (1) requiring or permitting the decision maker to act contrary to an express provision of the advance personal plan by which the decision maker was appointed.
- (4) The Court may make an order about the exercise of the decision maker's authority generally or for a particular circumstance.

## **60 Orders to former decision maker**

- (1) This section applies if a person has ceased to be a decision maker for an adult.
- (2) The Court may make the orders the Court considers appropriate to provide for:
  - (a) if the represented adult is still alive – the orderly transfer of decision-making authority from the person to the represented adult or to another agent for the adult (as appropriate); or
  - (b) if the represented adult has died – the orderly transfer of the adult's estate to the executor or administrator of the estate.

## **61 Court may amend or revoke advance personal plan**

- (1) This section applies if a person who has made an advance personal plan no longer has planning capacity.
- (2) There are **grounds for amending** the advance personal plan if one or more of the following applies:
  - (a) giving effect to the plan is, for all practical purposes, impossible;
  - (b) giving effect to the plan is unlawful;
  - (c) giving effect to the statement would impose a burden on another person that is so unreasonably onerous that it is justifiable to override the adult's wishes;
  - (d) there is no reasonable possibility the adult would have intended the plan to have the effect that it has or will have;
  - (e) giving effect to the plan would be so unreasonable that it is justifiable to override the adult's wishes;
  - (f) when making the plan (or an amendment of it) the adult:
    - (i) was not acting voluntarily; or

- (ii) was adversely affected by the dishonesty or undue influence of another person;
- (g) a decision maker appointed by the plan has failed to comply with section 21(1);
- (h) there has been a major change in circumstances since the plan was made;
- (i) the adult has 2 or more agents and an amendment of the plan is necessary to facilitate a reasonable and workable division of decision-making authority between the agents.

*Example for subsection (2)(h)*

*Major changes in circumstances might include the following:*

- (a) *a person appointed as decision maker losing decision-making capacity;*
- (b) *the adult getting divorced or becoming estranged from other family members;*
- (c) *a decision maker being convicted of an offence that makes it unsuitable for him or her to continue to be a decision maker.*

- (3) The Court may amend the advance personal plan if satisfied that:
  - (a) there are grounds for amending the plan; and
  - (b) the amendment is reasonably necessary to address those grounds; and
  - (c) if the adult had planning capacity, he or she would agree to the amendment.
- (4) However, the Court may amend the advance personal plan so as to terminate the appointment of a person as a decision maker only if satisfied that doing so is the only practicable way to address the grounds for amendment.
- (5) The Court may revoke the advance personal plan if satisfied that:
  - (a) there are grounds for amending the plan; and
  - (b) revoking the plan is the only practicable way to address those grounds; and
  - (c) if the adult had planning capacity, he or she would agree to the revocation.

## **62 Court to endorse cessation of decision maker**

- (1) This section applies if:
- (a) a person ceases to be a decision maker but the advance personal plan remains in force; and
  - (b) the represented adult no longer has planning capacity.

*Note for subsection (1)*

*The advance personal plan may remain in force because it also appoints another person as a decision maker or because it also contains advance consent decisions or advance care statements.*

- (2) If a Registrar (as defined in section 3 of the *Local Court Act*) is satisfied that this section applies, the Registrar must endorse on the advance personal plan the fact that the person has ceased to be a decision maker.
- (3) An application for endorsement may be made by:
- (a) the represented adult; or
  - (b) the former decision maker; or
  - (c) an interested person for the represented adult.

## **63 Application for urgent consent decision**

- (1) This section applies if:
- (a) an application is made under section 44 by a medical practitioner in relation to health care action proposed to be taken in relation to an adult who is the practitioner's patient; and
  - (b) the medical practitioner states in the application that he or she reasonably believes that a consent decision about the health care action is urgently required.
- (2) Within 24 hours after the application is made the Court must:
- (a) make that decision; or
  - (b) if satisfied that the consent decision is not urgently required – adjourn the application to be dealt with as an ordinary application under section 44.

- (3) If an application is dealt with urgently under subsection (2)(a), the Court must not make a consent decision about a course of health care that is to be provided over a period exceeding 2 weeks.

*Note for subsection (3)*

*Subsection (3) does not prevent the Court subsequently making another consent decision to continue the health care for a further period.*

#### **64 Effect of application to Court on consent decision**

If an application is made for an order under section 41(2) that an advance consent decision be disregarded, the making of the application does not stay or otherwise affect the advance consent decision or decision maker's decision, unless the Court orders otherwise.

#### **65 Effect of appeal against Court's decision**

If an appeal to the Supreme Court is lodged under section 71 against a consent decision made by the Local Court, the lodging of the appeal does not stay or otherwise affect the Local Court's decision, unless the Supreme Court orders otherwise.

### **Division 2 Procedure for Local Court**

#### **66 How proceeding to be started**

- (1) A proceeding before the Court must be started by application.
- (2) An application may be made by:
  - (a) the affected adult; or
  - (b) an interested person for the affected adult.
- (3) An application for an order under section 60 may also be made by:
  - (a) the former decision maker; or
  - (b) if the represented adult has died – the executor or administrator of the adult's estate.
- (4) An application for an order under section 69(2) or 70(3) may also be made by another person whom the Court is satisfied has a proper interest in the proceedings.
- (5) An application must be made in accordance with the Court's rules of court.



**67 Parties to proceedings**

The parties to the proceedings are:

- (a) the applicant; and
- (b) if the applicant is not the affected adult – the affected adult; and
- (c) any other interested person for the affected adult who, on application, is permitted by the Court to join the proceedings; and
- (d) any other person joined as a party by the Court in accordance with the Court's rules of court.

**68 Court to act informally and expeditiously**

In proceedings coming before it under this Act, the Court must act with as little formality and technicality and with as much expedition as the requirements of this or any other Act and a proper consideration of the matter permits.

**69 Court proceedings to be private**

- (1) A proceeding before the Court is to be conducted in private and not open to the public.
- (2) However, the Court may order that proceedings be open to the public if it appears to the Court that justice will be best served by doing so.

**70 Reporting on proceedings relating to Part 4**

- (1) A person commits an offence if:
  - (a) the person engages in conduct that results in the publication of information about Part 4 proceedings; and
  - (b) the information identifies the adult who is the subject of the proceedings or enables the identity of the adult to be ascertained.

Maximum penalty: 200 penalty units or imprisonment for 2 years.

- (2) Subsection (1) does not apply if the Court has authorised the publication of the information.

- (3) The Court may, by order, authorise publication of information that is otherwise prohibited only if satisfied that publication:
  - (a) is consistent with the decision-making principles; and
  - (b) is in the public interest.
- (4) In this section:

***Part 4 proceedings*** means proceedings relating to a matter arising under Part 4.

***publish*** includes broadcast or disseminate.

### **Division 3                      Appeals to Supreme Court**

#### **71                      Appeal to Supreme Court**

- (1) An appeal to the Supreme Court against a decision of the Local Court under this Act (the ***original decision***) may be made:
  - (a) by a party to the proceeding; or
  - (b) with leave of the Supreme Court, by another interested person for the affected adult.
- (2) An appeal must be lodged with the Supreme Court within 28 days after the original decision was made, or a longer period allowed by the Supreme Court.
- (3) An appeal is to be made in accordance with the *Supreme Court Act*.

#### **72                      Stay of decision and other interim orders**

- (1) Pending determination of an appeal, the Supreme Court may do either or both of the following:
  - (a) stay the operation of the original decision;
  - (b) make any other interim order it considers appropriate.
- (2) A stay or other interim order may be made on any conditions specified by the Supreme Court.

#### **73                      Hearing of appeal**

At the hearing of an appeal, fresh evidence or evidence in addition to, or in substitution for, the evidence before the Local Court may be given.

**74            Power of Supreme Court**

- (1) After hearing an appeal, the Supreme Court must do one of the following:
  - (a) confirm the original decision;
  - (b) vary the original decision;
  - (c) set aside the original decision;
  - (d) set aside the original decision and replace it with the Supreme Court's own decision;
  - (e) set aside the original decision and refer the matter back to the Local Court for reconsideration.
- (2) In making its decision, the Supreme Court must act in accordance with the decision-making principles as if it were a decision maker.
- (3) The Supreme Court may make any ancillary order as to costs or other matters as it considers appropriate.
- (4) If it makes a decision as mentioned in subsection (1)(e), the Supreme Court may give directions to the Local Court as it considers appropriate.

**Part 6            Enforcement**

**Division 1        Investigations**

**75            Requirement to provide information, produce documents etc.**

- (1) The Chief Executive Officer may exercise the powers under this section for the purposes of:
  - (a) assessing whether or not the provisions of this Act are being complied with; or
  - (b) seeking evidence of a suspected offence against this Act.
- (2) The Chief Executive Officer may, by written notice, require a person who the Chief Executive Officer reasonably believes has information or a document or other thing that is relevant for those purposes to do one or more of the following:
  - (a) provide the information to the Chief Executive Officer;

- (b) produce the document or thing to the Chief Executive Officer for inspection;
  - (c) answer questions asked by the Chief Executive Officer.
- (3) The Chief Executive Officer may make copies of, or otherwise make a record of, a document or thing produced for inspection.
- (4) A person commits an offence if:
  - (a) the person has been given a notice under subsection (2); and
  - (b) engages in conduct that results in a contravention of the notice.

Maximum penalty:        200 penalty units.

- (5) It is a defence to a prosecution for an offence against subsection (4) if the defendant establishes a reasonable excuse.
- (6) Without limiting subsection (5), it is a reasonable excuse for an individual to fail to comply with the requirement if doing so might tend to incriminate the individual.

## **Division 2            Offences**

### **76            Falsely representing to be decision maker**

- (1) A person commits an offence if the person:
  - (a) represents, by words or conduct, that the person or another person:
    - (i) is a decision maker; or
    - (ii) is a decision maker with authority for a particular matter; and
  - (b) knows the representation is false.

Maximum penalty:        200 penalty units or imprisonment for 2 years.

- (2) A person commits an offence against this subsection if the person:
  - (a) commits an offence against subsection (1); and
  - (b) does so with intent to obtain a benefit for the person or another person.

Maximum penalty:        Imprisonment for 7 years.

**77            Improper inducement in relation to advance personal plan**

A person commits an offence if:

- (a) the person engages in conduct with intent to induce another person to make, amend or revoke an advance personal plan; and
- (b) the conduct involves dishonesty or undue influence.

Maximum penalty:        Imprisonment for 7 years.

**78            Improper exercise of authority by decision maker**

(1) A decision maker commits an offence if the decision maker:

- (a) engages in conduct in the exercise of the person's authority as a decision maker; and
- (b) in doing so contravenes section 21(1).

Maximum penalty:        Imprisonment for 5 years.

(1A) A decision maker commits an offence if the decision maker:

- (a) engages in conduct purportedly in the exercise of the person's authority as a decision maker for a matter; and
- (b) is reckless as to whether the represented adult does not have impaired decision-making capacity for the matter.

Maximum penalty:        Imprisonment for 5 years.

(2) A decision maker commits an offence if the decision maker:

- (a) commits an offence against subsection (1) or (1A); and
- (b) does so with intent to obtain a benefit for the person or another person.

Maximum penalty:        Imprisonment for 7 years.

**79            Inducing decision maker to exercise authority improperly**

(1) A person commits an offence if the person engages in conduct with intent to induce a decision maker to engage in conduct that contravenes section 21(1).

Maximum penalty:        Imprisonment for 5 years.

- (2) A person commits an offence against this subsection if the person:
- (a) commits an offence against subsection (1); and
  - (b) does so with intent to obtain a benefit for the person or another person.

Maximum penalty:        Imprisonment for 7 years.

## **80            Misleading information**

- (1) A person commits an offence if:
- (a) the person gives information to another person; and
  - (b) the other person is an Agency officer; and
  - (c) the person knows the information is misleading; and
  - (d) the person knows the Agency officer is acting in an official capacity.

Maximum penalty:        400 penalty units or imprisonment for 2 years.

- (2) A person commits an offence if:
- (a) the person gives a document to another person; and
  - (b) the other person is an Agency officer; and
  - (c) the person knows the document contains misleading information; and
  - (d) the person knows the Agency officer is acting in an official capacity.

Maximum penalty:        400 penalty units or imprisonment for 2 years.

- (3) Strict liability applies to subsections (1)(b) and (2)(b).
- (4) Subsection (2) does not apply if the person, when giving the document:
- (a) draws the misleading aspect of the document to the Agency officer's attention; and
  - (b) to the extent to which the person can reasonably do so – gives the Agency officer the information necessary to remedy the misleading aspect of the document.

(5) In this section:

***acting in an official capacity***, in relation to an Agency officer, means the officer is exercising authority under, or otherwise related to the administration of, this Act.

***Agency officer*** means the Chief Executive Officer, a delegate of the Chief Executive Officer or a public sector employee employed in the Agency.

***misleading information*** means information that is misleading in a material particular or because of the omission of a material particular.

## Division 3                      Criminal liability for offences

### 81                      Alternative verdicts

- (1) This section applies if, in a proceeding against a person charged with an offence against a provision mentioned in the following Table (the ***prosecuted offence***), the trier of fact:
  - (a) is not satisfied beyond reasonable doubt that the person committed the prosecuted offence; but
  - (b) is satisfied beyond reasonable doubt that the person committed the offence specified in the Table as the alternative offence for the prosecuted offence.
- (2) The trier of fact may find the person not guilty of the prosecuted offence but guilty of the alternative offence.

**Table                      Alternative verdicts**

<b>Prosecuted offence</b>	<b>Alternative offence</b>
section 76(2)	section 76(1)
section 78(2)	section 78(1)
section 79(2)	section 79(1)

## **Division 4                      Consequences of conviction**

### **82                      Termination of appointment as decision maker and disqualification**

- (1) A court convicting a person of an offence against this Act may, in addition to imposing a penalty on the person, do either or both of the following:
  - (a) if the person is a decision maker – terminate the person's appointment as decision maker;
  - (b) disqualify the person from being a decision maker for the period specified by the court.
- (2) A person who is disqualified under subsection (1)(b) cannot be appointed as, or exercise authority as, a decision maker during the period of the disqualification.

### **83                      Payment of compensation to represented adult**

- (1) This section applies if a person (the **offender**) is convicted of an offence against any of sections 76 to 79.
- (2) If the court convicting the offender is satisfied that the conduct of the offender in committing the offence caused loss to the represented adult, the court may order the offender to pay compensation to the represented adult for that loss.
- (3) If the represented adult is dead, a reference in subsection (2) to the represented adult includes a reference to the adult's estate.
- (4) The standard of proof for a matter under this section is the balance of probabilities.
- (5) This section does not affect any civil liability the offender may have in relation to the conduct constituting the offence, but any compensation paid under this section must be taken into account in assessing damages in a later civil action.
- (6) In this section:

**represented adult** includes:

- (a) for an offence against section 76 – a person for whom the offender represented that the offender was a decision maker; and



- (b) for an offence against section 77 – a person whom the offender sought to induce to make, amend or revoke an advance personal plan.

## **Division 5            Legal proceedings**

### **84            Commencement of prosecution**

Proceedings for an offence against this Act may be started only by:

- (a) the Chief Executive Officer; or
- (b) a person authorised by the Minister.

### **85            When prosecution to be started**

Proceedings for an offence against this Act that is a simple offence may be started within 2 years after the date on which the Chief Executive Officer first became aware of the commission of the offence.

## **Part 7                Miscellaneous matters**

### **86            Approved forms**

- (1) The Minister may approve forms for use as mentioned in section 9.
- (2) The Chief Executive Officer must ensure that an approved form:
  - (a) is published in the *Gazette* as soon as practicable after it is approved; and
  - (b) is available for members of the public to download or print from the Agency's website.

### **87            Advance Personal Plans (General) Register**

- (1) The Chief Executive Officer may establish a register of advance personal plans for the purpose of:
  - (a) providing a repository for the safe-keeping of advance personal plans; and

- 
- (b) making them available to persons who have a proper interest in knowing whether an adult has an advance personal plan, and if so the terms on the plan.

*Example for subsection (1)*

*A medical practitioner treating a person who has lost decision-making capacity would have a proper interest in finding out whether the person has an advance personal plan as it might contain an advance consent decision or appoint a decision maker.*

- (2) Registration of an advance personal plan in a register established under subsection (1) is optional and non-registration does not affect the validity or effect of the advance personal plan.

*Note for subsection (2)*

*Part 4A makes provision in relation to decision makers entering into dealings in relation to land, including requiring registration of the advance personal plan in the Advance Personal Planning (Part 4A) Register, which is a separate register established under that Part.*

## 88 Recognition of interstate documents

- (1) Subject to this section, a recognised interstate document has effect in the Territory as if it were an advance personal plan made under this Act.
- (2) This Act, other than Parts 2 and 3, applies to a recognised interstate document as if it were an advance personal plan made under this Act.
- (3) An amendment or revocation of a recognised interstate document by the maker must be made in accordance with the corresponding law under which it was made.
- (4) A person appointed by a recognised interstate document to make decisions for the maker of the document has, in the Territory, the same rights, powers and responsibilities as the person has under the corresponding law under which it was made.
- (5) However, the regulations may limit, or impose conditions on the exercise of, the rights and powers mentioned in subsection (4).
- (5A) This section applies regardless of when the recognised interstate document was made.
- (6) In this section:

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

***recognised interstate document*** means a document made under a corresponding law that is of a kind prescribed by regulation to be a recognised interstate document.

**89                      Other rights not affected**

This Act does not affect any other right an adult may have, otherwise than under this Act, in relation to the making of decisions about the adult's care or welfare (including health care) or property or financial affairs.

**90                      Regulations**

- (1) The Administrator may make regulations under this Act.
- (2) A regulation may prescribe fees payable under this Act.

**Part 8                      Repeals and transitional matters**

**Division 1                Repeals**

**91                      *Natural Death Act* repealed**

The *Natural Death Act 1988* (Act No. 51, 1988) is repealed.

**Division 2                Transitional matters for Advance Personal Planning Act 2013**

**92                      Continuation of directions under *Natural Death Act***

- (1) On the commencement of section 91, an existing direction becomes an advance personal plan that contains an advance consent decision in accordance with its terms.
- (2) The advance personal plan has effect as if it had been made in accordance with this Act.
- (3) In this section:

***existing direction*** means a direction made under section 4 of the *Natural Death Act* if:

- (a) it was made before the commencement of section 91; and
- (b) it had not been revoked before that commencement; and
- (c) the person who made it was alive as at that commencement.

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## ENDNOTES

### 1 KEY

Key to abbreviations

<b>amd</b> = amended	<b>od</b> = order
<b>app</b> = appendix	<b>om</b> = omitted
<b>bl</b> = by-law	<b>pt</b> = Part
<b>ch</b> = Chapter	<b>r</b> = regulation/rule
<b>cl</b> = clause	<b>rem</b> = remainder
<b>div</b> = Division	<b>renum</b> = renumbered
<b>exp</b> = expires/expired	<b>rep</b> = repealed
<b>f</b> = forms	<b>s</b> = section
<b>Gaz</b> = <i>Gazette</i>	<b>sch</b> = Schedule
<b>hdg</b> = heading	<b>sdiv</b> = Subdivision
<b>ins</b> = inserted	<b>SL</b> = Subordinate Legislation
<b>lt</b> = long title	<b>sub</b> = substituted
<b>nc</b> = not commenced	

### 2 LIST OF LEGISLATION

***Advance Personal Planning Act 2013 (Act No. 35, 2013)***

Assent date	19 December 2013
Commenced	17 March 2014 ( <i>Gaz S14</i> , 17 March 2014)

***Advance Personal Planning (Consequential Amendments) Act 2013 (Act No. 36, 2013)***

Assent date	19 December 2013
Commenced	pt 3: 5 February 2014 ( <i>Gaz G5</i> , 5 February 2014, p 2); rem: 17 March 2014 ( <i>Gaz S14</i> , 17 March 2014)

***Statute Law Revision Act 2014 (Act No. 38, 2014)***

Assent date	13 November 2014
Commenced	13 November 2014

### 3 LIST OF AMENDMENTS

s 3	amd No. 36, 2013, s 18
s 22	amd No. 36, 2013, s 19
s 42	amd No. 36, 2013, s 20
s 44A	ins No. 36, 2013, s 21
s 53	amd No. 36, 2013, s 22
pt 4A hdg	ins No. 36, 2013, s 23
pt 4A	
div 1 hdg	ins No. 36, 2013, s 23
s 55A	ins No. 36, 2013, s 23
pt 4A	
div 2 hdg	ins No. 36, 2013, s 23
ss 55B – 55D	ins No. 36, 2013, s 23
s 78	amd No. 36, 2013, s 24; No. 38, 2014, s 2
s 87	amd No. 36, 2013, s 25
s 88	amd No. 36, 2013, s 26