

NORTHERN TERRITORY OF AUSTRALIA

HEALTH CARE DECISION MAKING ACT 2023

As in force at 1 July 2024

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# NORTHERN TERRITORY OF AUSTRALIA

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As in force at 1 July 2024

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## HEALTH CARE DECISION MAKING ACT 2023

**An Act to govern the making of health care decisions for adults with impaired decision making capacity, for the provision of urgent health care without consent to both adults and children and for related purposes**

### **Part 1 Preliminary matters**

#### **1 Short title**

This Act may be cited as the *Health Care Decision Making Act 2023*.

#### **2 Commencement**

- (1) Subject to subsection (2), this Act commences on the day fixed by the Administrator by *Gazette* notice.
- (2) If a provision of this Act does not commence before 18 May 2025, it commences on that day.

#### **3 Purposes of Act**

The purposes of this Act are the following:

- (a) to provide authority to a hierarchy of persons to make decisions regarding the health care of an adult with impaired decision making capacity;
- (b) to include, within that hierarchy, persons with authority under the *Advance Personal Planning Act 2013* and the *Guardianship of Adults Act 2016*;
- (c) to establish the principles and rules for making health care decisions, while protecting an adult's freedom of decision and action;

- (d) to regulate the administration of certain types of health care and prohibit or restrict the making of certain health care decisions, in relation to an adult with impaired decision making capacity;
- (e) to provide for the administration of health care without consent to both adults and children in urgent circumstances.

#### 4 Definitions

In this Act:

**advance care statement**, see section 3 of the *Advance Personal Planning Act 2013*.

**advance consent decision** means a health care decision set out in an advance personal plan under the *Advance Personal Planning Act 2013*.

**health care**, see section 6.

**health care decision**, see section 7.

**health care decision maker** means a person determined under Part 2 with authority under this Act to make a health care decision.

**health care provider** means an individual who provides health care.

**impaired decision making capacity**, see section 8.

**Public Guardian** means the Public Guardian established under section 60 of the *Guardianship of Adults Act 2016*.

**Senior Practitioner** means the person appointed under section 9 of the *National Disability Insurance Scheme (Authorisations) Act 2019*.

**willing and able**, see section 9.

*Note for section 4*

*The Interpretation Act 1978 contains definitions and other provisions that may be relevant to this Act.*



## 5 Presumption of capacity to make health care decisions

An adult is presumed to have capacity to make a health care decision unless there is evidence to the contrary.

*Note for section 5*

*In the absence of other evidence, an adult who merely appears to have impaired decision making capacity is still presumed not to have impaired decision making capacity. A guardianship order could be evidence to the contrary.*

## 6 Meaning of health care

(1) **Health care** means any kind of health care, including the following services or anything provided as part of any of the following services:

- (a) services provided by a health practitioner under the Health Practitioner Regulation National Law;
- (b) hospital services;
- (c) mental health services;
- (d) pharmaceutical services;
- (e) ambulance services;
- (f) community health services;
- (g) health education services;
- (h) welfare services necessary to implement any services referred to in paragraphs (a) to (g);
- (i) services provided by dietitians, massage therapists, naturopaths, social workers, speech pathologists, audiologists or audiometrists;
- (j) pathology services;
- (k) the removal of tissue from an adult's body in accordance with Part 2 of the *Transplantation and Anatomy Act 1979*.

(2) An assessment conducted by a health care provider for the purpose of assessing current or future health care requirements is taken to be a form of health care.

*Example for subsection (2)*

*An aged care assessment made in relation to care under the Aged Care Act 1997 (Cth).*

**7        *Meaning of health care decision***

- (1) A ***health care decision*** is a decision whether to commence, continue, withdraw or withhold health care for an adult.
- (2) A health care decision to commence, continue, withdraw or withhold health care made by a health care decision maker is taken to be consent on behalf of the adult to the commencement, continuation, withdrawal or withholding of that health care.
- (3) A health care decision to not commence, not continue, not withdraw or not withhold health care made by a health care decision maker is taken to be refusal to consent on behalf of the adult to the commencement, continuation, withdrawal or withholding of that health care.

**8        *Meaning of impaired decision making capacity***

- (1) An adult has ***impaired decision making capacity*** in relation to a health care decision if the adult's capacity to make the health care decision is impaired.
- (2) An impairment in any of the following is relevant in determining whether an adult's capacity to make the health care decision is impaired:
  - (a) understanding and retaining information relevant to the health care decision;
  - (b) weighing information relevant to the health care decision in order to make the health care decision;
  - (c) communicating the health care decision in some way;
  - (d) understanding the effect of the health care decision.
- (3) For subsection (2)(a), an adult is taken to understand information relevant to a health care decision if the adult understands an explanation of the information given to the adult in a way that is appropriate to the adult's circumstances, whether by using modified language, visual aids or other means.
- (4) For subsection (2)(c), an adult is taken to communicate the health care decision if the adult communicates the decision in a way that is appropriate to the adult's circumstances, whether by using modified language, visual aids or other means.
- (5) An adult may have impaired decision making capacity in relation to some matters and not others.

- (6) The degree to which an adult has impaired decision making capacity may vary over time.
- (7) The cause of the impairment of the decision making capacity is immaterial.
- (8) An adult does not have impaired decision making capacity merely because the adult:
  - (a) has a disability, illness or other medical condition, whether physical or mental; or
  - (b) requires the use of practicable and appropriate support, including additional time for explanation, modified language, visual or technological aids or other means of communication; or
  - (c) engages in unconventional behaviour or another form of personal expression; or
  - (d) chooses a living environment or lifestyle with which other people do not agree; or
  - (e) makes decisions with which other people do not agree; or
  - (f) does not have a particular level of fluency in English; or
  - (g) does not have a particular level of literacy or education; or
  - (h) engages in particular cultural or religious practices; or
  - (i) does or does not express a particular religious, political or moral opinion; or
  - (j) is of a particular sexual orientation or gender identity or expresses particular sexual preferences; or
  - (k) takes or took, or is or was dependent on, alcohol or drugs, unless the alcohol or drugs are causing actual impairment in relation to the health care decision; or
  - (l) engages or engaged in illegal or immoral conduct.

*Examples for subsection (8)(b)*

- 1 *Using information or formats tailored to the particular needs of the adult.*
- 2 *Communicating or assisting a person to communicate the adult's decision.*
- 3 *Giving a person additional time and discussing the matter with the adult.*
- 4 *Using technology that alleviates the effects of an adult's disability.*

**9 Meaning of *willing and able***

A person is ***willing and able*** to make a health care decision for an adult with impaired decision making capacity if the person:

- (a) has capacity to make the decision; and
- (b) is reasonably available; and
- (c) is willing to make the decision; and
- (d) understands the obligation to act in accordance with the decision making principles; and
- (e) has the information reasonably needed to make a balanced decision; and
- (f) has adequate time to consider that information; and
- (g) understands the effect of making the decision; and
- (h) is able to make the decision voluntarily and without undue influence from any person.

*Example for paragraph (b)*

*The person is available by telephone or video call.*

**10 Application of Criminal Code**

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

*Note for section 10*

*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 Health care decision makers****11 Authority of health care decision maker**

- (1) A health care decision maker has authority to make a health care decision for an adult if:
  - (a) the adult has impaired decision making capacity in relation to the health care decision; and
  - (b) the adult has not made an advance consent decision in an advance personal plan in relation to the health care decision.

- (2) A health care decision maker has no authority under this Act regarding the following:
- (a) any treatment or care ordered by the Local Court under the *Disability Services Act 1993*;
  - (b) any treatment under the *Mental Health and Related Services Act 1998*:
    - (i) for complex cognitive impairment or mental illness; or
    - (ii) of a mentally disturbed person;
  - (c) any neurosurgery for mental illness.
- (3) In this section:

***complex cognitive impairment***, see section 6A of the *Mental Health and Related Services Act 1998*.

***mental illness***, see section 6 of the *Mental Health and Related Services Act 1998*.

***mentally disturbed***, see section 4 of the *Mental Health and Related Services Act 1998*.

## 12 Scope of health care decisions

- (1) A health care decision may be made in relation to health care to be provided:
- (a) in specified circumstances; or
  - (b) as a course of health care to be provided over a period of time.
- (2) Subsection (1) does not authorise a health care decision maker to avoid responsibility by delegating a health care decision to someone else.

*Example for subsection (2)*

*A health care decision maker cannot decide to have someone else make the health care decision in the future, but would allow consent to be given to a surgeon to make immediately required decisions during surgery.*

**13 Hierarchy of health care decision makers**

The following persons, listed in descending order of priority, are the potential health care decision makers for an adult with impaired decision making capacity:

- (a) a person with health care authority appointed by the adult in an advance personal plan under the *Advance Personal Planning Act 2013* or an equivalent document under a law of a State or another Territory;
- (b) a guardian of the adult with health care authority appointed under the *Guardianship of Adults Act 2016*;
- (c) a relative of the adult who is considered by Aboriginal or other customary law or tradition to be the appropriate person to be a health care decision maker;
- (d) a spouse or de facto partner of the adult who has a close and continuing relationship with the adult;
- (e) a person who is the carer of the adult and not providing that care as a service on a commercial basis;
- (f) a child of the adult who has a close and continuing relationship with the adult;
- (g) a parent of the adult who has a close and continuing relationship with the adult;
- (h) a sibling of the adult who has a close and continuing relationship with the adult;
- (i) a friend of the adult who has a close and continuing relationship with the adult.

*Notes for section 13*

- 1 *The persons specified in paragraphs (a) and (b) are appointed under other legislation and accordingly have statutory functions. The other persons in the section are persons with familial or other connections to the adult.*
- 2 *A friend or relative is not precluded from being a health care decision maker because they are receiving a carer payment from the Commonwealth to be a carer of the adult.*
- 3 *The Public Guardian may make guidelines on applying and interpreting this section. See section 55(a).*

**14 Appropriate health care decision maker**

- (1) If needed to make a health care decision for an adult with impaired decision making capacity, the appropriate health care decision maker is the person specified in section 13 who meets the following criteria:
  - (a) the person has the highest priority under that section;
  - (b) the person is an adult;
  - (c) the person is willing and able to make the decision.
- (2) If a guardian with health care authority is appointed for the adult under the *Guardianship of Adults Act 2016* after another person had authority as the adult's health care decision maker, the guardian becomes the health care decision maker instead of the other person.
- (3) If a person specified in section 13(a) or (b) exists but is not willing and able to make a health care decision, that person must apply to NTCAT for an order under section 41(1)(c), unless it is not reasonably practicable to do so.
- (4) The application under subsection (3) must be made as soon as practicable.
- (5) The Public Guardian is taken to be the health care decision maker for an adult if an application is required but not made in accordance with subsections (3) and (4).

**15 Multiple appointees**

- (1) This section applies if 2 or more persons referred to in section 13(a) or (b) are appointed.
- (2) All of the persons appointed are considered to be the health care decision maker and must exercise their authority in accordance with their appointment.

*Note for subsection (2)*

*They may be appointed to act jointly, severally or jointly and severally.*

- (3) If a person appointed is not willing and able to make the decision, the remaining person or persons have authority to make the health care decision, unless the persons are jointly appointed.
- (4) If 2 or more persons who are severally appointed agree on the health care decision, any one of them may make the decision.

- (5) If 2 or more persons who are jointly appointed do not agree on the health care decision, none of them may make the decision.

## **16 Relinquishing authority**

- (1) A health care decision maker, other than one specified in section 13(a) or (b), may relinquish authority under this Act at any time for any reason.
- (2) If a health care decision maker relinquishes authority, the next person who meets the criteria of section 14(1) is the appropriate health care decision maker.

## **17 Support to adult in making health care decision**

- (1) Before exercising authority under this Act, a health care decision maker must make a reasonable effort to use any practicable support appropriate to the circumstances to assist the adult in making the health care decision.
- (2) A health care decision maker may also consult other persons who may have relevant information before exercising authority under this Act.

## **18 Decision making principles**

- (1) This section governs the exercise of authority of a health care decision maker to make a health care decision in relation to an adult with impaired decision making authority.
- (2) Subject to sections 20(1) and 41(1)(e), the health care decision maker must give effect to any advance care statement, about the health care decision, made by the adult.
- (3) If no advance care statement was made about the health care decision, the health care decision maker must exercise authority under this Act in the way the health care decision maker believes on reasonable grounds the adult would in the circumstances.
- (4) In determining what the adult would do in the circumstances, the health care decision maker must take into account:
  - (a) the adult's current and previously stated decisions, views, wishes and objections about the matter; and



- (b) the health care decision maker's personal knowledge of the adult.

*Note for subsection (4)(a)*

*This would include the advance personal plan for a person with health care authority appointed under the Advance Personal Planning Act 2013.*

- (5) If a health care decision maker forms a belief on reasonable grounds regarding what the adult would do in the circumstances, the health care decision maker must exercise authority in that way, even if doing so may not be in the adult's best interests.

*Note for subsection (5)*

*Certain decisions, practices and health care are restricted or limited under sections 29 and 30.*

- (6) Subsection (5) does not require giving the adult addictive substances, without therapeutic benefit, that the adult would use if the adult had legal capacity.
- (7) If a health care decision maker is unable to form a belief on reasonable grounds regarding what the adult would do in the circumstances, the health care decision maker must exercise authority in the way that the decision maker believes on reasonable grounds is in the best interests of the adult.
- (8) For subsection (7), in determining what is in the best interests of the adult, the health care decision maker must:
  - (a) take into account all relevant considerations; and
  - (b) assess those considerations by giving each of them the weight the health care decision maker believes on reasonable grounds is appropriate in the circumstances.
- (9) Without limiting subsection (8)(a), relevant considerations regarding the adult include the following:
  - (a) protecting the adult from harm, neglect, abuse and exploitation;
  - (b) providing the adult with appropriate care;
  - (c) promoting the adult's happiness, enjoyment of life and wellbeing;
  - (d) protecting the adult's freedom of decision and action;
  - (e) enabling the adult to be as independent as practicable;

- (f) enabling the adult to achieve the adult's maximum physical, social, emotional and intellectual potential;
  - (g) enabling the adult to live in the general community and take part in community activities;
  - (h) maintaining the adult's right to be treated with dignity and respect;
  - (i) enabling the adult to maintain the adult's preferred living environment and lifestyle;
  - (j) maintaining or creating a positive support network for the adult;
  - (k) protecting the adult's property and financial resources from loss, damage and misuse;
  - (l) protecting the adult's right to keep the adult's information confidential.
- (10) In determining what is appropriate in the circumstances under subsection (8)(b), the health care decision maker must exercise authority in a way that:
- (a) is the least restrictive of the adult's freedom of decision and action as is practicable; and
  - (b) provides the adult with as much support as is practicable to make the adult's own health care decisions.

## **19 Advance consent decision**

Subject to section 41, an advance consent decision made by an adult has effect for all purposes as if it is a health care decision made by a fully informed adult with capacity to make the health care decision.

## **20 Exemptions**

- (1) A health care decision maker is not required to comply with section 18(2) if:
- (a) the adult made a subsequent written declaration stating that the adult does not want to give effect to the advance care statement, at a time when the adult did not have impaired decision making capacity to make a health care decision; or
  - (b) there is no reasonable possibility the adult would have intended the statement to apply in the circumstances.

- (2) A health care decision maker is not required to comply with section 18(2) or (3) if compliance would:
- (a) be impracticable; or
  - (b) be unlawful; or
  - (c) impose a burden on another person that is so unreasonably onerous that it is justifiable to override the adult's wishes; or
  - (d) be so unreasonable that it is justifiable to override the adult's wishes.
- (3) If a health care decision maker relies on subsection (1) or (2), the health care decision maker must keep a written record of the reasons for not complying with section 18(2) or (3), as the case may be.

## **21 Benefit to third party**

A health care decision maker may exercise authority under this Act in a way that benefits a person other than the adult with impaired decision making capacity if:

- (a) the benefit to the other person is of a kind that the adult with impaired decision making capacity:
  - (i) provided to the other person before their decision making capacity became impaired; or
  - (ii) might reasonably be expected to provide to the other person but for the impaired decision making capacity; and
- (b) providing the benefit to the other person:
  - (i) would be reasonable in the circumstances; and
  - (ii) would not have a significantly adverse effect on the best interests of the adult with impaired decision making capacity.

### *Example for section 21*

*A health care decision maker might consent to the adult with impaired decision making capacity donating bone marrow to treat a child of the adult with leukaemia, even though doing so may involve some risk to the adult.*

**22 Role of Public Guardian**

- (1) The Public Guardian has authority to make a health care decision for an adult if:
  - (a) the adult has impaired decision making capacity in relation to the health care decision; and
  - (b) the adult has not made an advance consent decision in an advance personal plan in relation to the health care decision; and
  - (c) no health care decision maker meets the criteria of section 14(1); and
  - (d) no application is made to NTCAT for an order under section 41(1)(c).
- (2) In addition to subsection (1), the Public Guardian has authority to make a health care decision for an adult if:
  - (a) appointed as the adult's guardian with health care authority under the *Guardianship of Adults Act 2016*; or
  - (b) appointed as a person with health care authority for the adult under the *Advance Personal Planning Act 2013*; or
  - (c) ordered to be the health care decision maker by NTCAT under section 41(1)(c)(i).
- (3) The following provisions of this Act apply to the making of a health care decision by the Public Guardian under subsections (1) and (2):
  - (a) section 15;
  - (b) sections 17 to 21;
  - (c) sections 27 to 30.

**Part 3 Administering health care****23 Initial responsibilities of health care provider**

- (1) Before administering health care to an adult with impaired decision making capacity, a health care provider must make reasonable efforts in the circumstances to ascertain if the adult made an advance consent decision in relation to the health care.

- (2) Subject to sections 33(2) and 41(2), a health care provider has authority to administer health care to an adult with impaired decision making capacity in accordance with the adult's advance consent decision in relation to the health care, without the consent of a health care decision maker.

*Note for subsection (2)*

*Section 19 provides for the effect of an advance care consent decision.*

- (3) If after reasonable efforts the health care provider is not aware of an advance consent decision, the health care provider must make reasonable efforts in the circumstances to contact the appropriate health care decision maker for the adult with impaired decision making capacity.
- (4) A health care provider must keep a written record of the provider's efforts to comply with subsections (1) and (3).
- (5) For this section, a health care provider must make reasonable efforts to follow any guidelines issued by the Public Guardian under section 55(b).

*Note for section 23*

*These responsibilities are subject to Part 4 regarding administration of health care in urgent circumstances.*

## **24 Determination of capacity**

- (1) Before a health care decision maker makes a health care decision for an adult with impaired decision making capacity, the health care provider who would administer the health care must first determine:
- (a) the extent of the adult's impairment in relation to the decision; and
  - (b) whether the impairment is likely to be temporary or permanent; and
  - (c) whether the health care decision maker needs to exercise authority to make the decision in the circumstances.
- (2) The determination under subsection (1) must be done in collaboration with the health care decision maker if reasonably practicable.
- (3) If the health care provider determines the adult's impairment to be temporary, any health care provided to the adult must be limited to what is necessary during the expected period of impairment.

- (4) For this section, a health care provider must make reasonable efforts to follow any guidelines issued by the Public Guardian under section 55(c).

## **25 Routine health care**

- (1) A health care provider may administer routine health care to an adult with impaired decision making capacity without the consent of a health care decision maker.
- (2) Subsection (1) authorises administering routine personal hygiene and grooming.
- (3) Subsections (1) and (2) do not authorise a health care provider to administer any health care that:
- (a) is objected to by the adult; or
  - (b) consists of an ongoing course of treatment; or
  - (c) causes a significant degree of intrusion into the body of the adult; or
  - (d) creates a significant risk of harm to the adult; or
  - (e) causes significant side-effects to the adult; or
  - (f) causes significant pain or distress to the adult.
- (4) For this section, a health care provider must make reasonable efforts to follow any guidelines issued by the Public Guardian under section 55(d).

## **26 Palliative care**

- (1) A health care provider may administer palliative care to an adult with impaired decision making capacity without the consent of, and despite an objection from, a health care decision maker, if the adult:
- (a) has an active, progressive and advanced disease; and
  - (b) has little or no prospect of cure and is expected to die.
- (2) The health care provider must consult with the health care decision maker before administering palliative care to an adult with impaired decision making capacity.

(3) In addition to the duty in section 23, a health care provider must have regard to any preferences and values of the adult with impaired decision making capacity known to the health care provider when making a decision to administer palliative care under subsection (1).

(4) In this section:

***palliative care*** means reasonable treatment for the relief of pain, suffering and distress provided to an adult:

- (a) with an active, progressive and advanced disease; and
- (b) who has little or no prospect of cure; and
- (c) who is expected to die; and
- (d) for whom the primary goal is to optimise the quality of life.

## **27 Relief from pain and distress**

- (1) A health care decision maker must exercise their authority to ensure that an adult with impaired decision making capacity does not needlessly suffer significant pain or distress.
- (2) A health care provider may administer health care that provides relief to an adult with impaired decision making capacity from significant pain or distress without the consent of, and despite an objection from, a health care decision maker.

## **28 Cosmetic surgery and other treatments**

A health care decision maker has authority to consent to the administration of cosmetic surgery, botulinum toxin injections or body piercing to an adult with impaired decision making capacity if:

- (a) the procedure is justified as health care; or
- (b) both of the following apply:
  - (i) the adult gave explicit directions to have the procedure before their decision making capacity became impaired;
  - (ii) the procedure carries a low risk of harm to the adult.

**29 Role of health care decision makers regarding "restrictive practices"**

- (1) A health care decision maker has no authority to consent to any practice or health care that has the effect of restricting the rights or freedom of movement of an adult with impaired decision making capacity in relation to that practice or health care, including, but not limited to, the following:
  - (a) seclusion of an adult in a room or place where voluntary exit is prevented or where it is implied that voluntary exit is not permitted;
  - (b) chemical restraint of an adult for the primary purpose of influencing the adult's behaviour;
  - (c) mechanical restraint of an adult to prevent, restrict or subdue the adult's movement for the primary purpose of influencing the adult's behaviour;
  - (d) physical restraint of an adult by physical force to prevent, restrict or subdue movement of the adult's body, or part of their body, for the primary purpose of influencing their behaviour;
  - (e) environmental restraint of an adult preventing free access to their preferred activities or to all parts of their environment, including their personal belongings or other items.
- (2) Despite subsection (1), a health care decision maker has authority to consent to the following practices or health care being administered by a health care provider:
  - (a) the use of drugs or chemicals if:
    - (i) they are used for the treatment of, or to enable the treatment of, a diagnosed illness, injury or other organic malfunction; and
    - (ii) they are the least restrictive method of treatment in the circumstances;
  - (b) the use of a hands-on technique to restrain an adult if:
    - (i) used to prevent potential injury or harm to the adult or others; and
    - (ii) used in a manner consistent with reasonable care of the adult; and



- (iii) it is the least restrictive method of prevention in the circumstances;
  - (c) seclusion as mentioned in subsection (1)(a) if:
    - (i) it is reasonably required to assist in the management of the adult; and
    - (ii) used in a manner consistent with reasonable care of the adult; and
    - (iii) it is the least restrictive method of prevention in the circumstances;
  - (d) a practice expressly approved by, or allowed by a directive issued by, the Senior Practitioner under section 54;
  - (e) a practice or health care expressly approved in relation to a particular adult by:
    - (i) if the adult is receiving health care at a public hospital – the medical practitioner who is director of medical services for the hospital; or
    - (ii) if the adult is receiving health care at a private hospital – the medical practitioner who is the manager of the hospital under the *Private Hospitals Act 1981*;
  - (f) a practice or health care:
    - (i) otherwise permitted by section 25; or
    - (ii) authorised or required under another law of the Territory; or
    - (iii) prescribed by regulation.
- (3) An approval of a particular practice or health care in relation to a particular adult under subsection (2)(e):
- (a) has effect for a period of no longer than 72 hours, as specified in the approval; and
  - (b) cannot be reapproved.

- (4) In administering any practice or health care mentioned in this section, a health care provider must make reasonable efforts to follow any directives issued by the Senior Practitioner under section 54.

*Note for section 29*

*An advance consent decision may be made about a matter to which this section applies.*

### **30 Restricted health care**

- (1) Subject to subsections (2) and (3), a health care decision maker has no authority in relation to the following:
- (a) sterilisation;
  - (b) termination of a pregnancy;
  - (c) removal of non-regenerative tissue, as defined in section 4 of the *Transplantation and Anatomy Act 1979*, for transplantation into another person;
  - (d) special medical research or experimental health care that:
    - (i) relates to a condition the adult has or to which the adult has a significant risk of being exposed; or
    - (ii) is intended to gain knowledge for use in the diagnosis, maintenance or treatment of a condition the adult has or had;
  - (e) health care that is not yet accepted as evidence-based or best practice by a substantial number of health care providers specialising in the relevant area of health care;
  - (f) electroconvulsive therapy;
  - (g) any treatment that involves the use of an aversive stimulus, whether mechanical, chemical, physical or otherwise;
  - (h) any procedure prescribed by regulation.
- (2) A health care decision maker has authority to consent to the administration of a procedure referred to in subsection (1)(a) or (b) to an adult if:
- (a) the primary reason for the procedure is to treat an illness, injury or other organic malfunction; and
  - (b) serious or irreversible damage to the adult's health is likely unless the procedure is performed.

- (3) Subsection (1)(d) does not prohibit research (including psychological research), a clinical trial or the collection of information:
- (a) that is:
    - (i) approved by a Human Research Ethics Committee registered with the National Health and Medical Research Council; and
    - (ii) conducted in accordance with any human research guidelines made under section 10 of the *National Health and Medical Research Council Act 1992* (Cth); or
  - (b) that is prescribed by regulation.

*Note for section 30*

*An advance consent decision may be made about a matter to which this section applies.*

### **31 Reliance on health care decision makers and others**

- (1) A health care provider who administers health care to an adult is taken, for all purposes, to have the consent of the adult in relation to that health care, if the health care provider:
- (a) believes on reasonable grounds the adult has impaired decision making capacity in relation to making a health care decision; and
  - (b) relies on the consent to the health care or a health care decision given by:
    - (i) the adult in an advance consent decision; or
    - (ii) another person whom the health care provider believes on reasonable grounds to be the appropriate health care decision maker for the adult; or
    - (iii) the Public Guardian under section 22; or
    - (iv) NTCAT under section 41(1)(c) or (d).
- (2) For subsection (1)(b)(i), the health care provider may rely on an advance consent decision that NTCAT previously ordered to be disregarded if the health care provider does not know, and could not reasonably be expected to know, about the order.
- (3) Subsection (1) has effect even if administering the health care will hasten the death of the adult.

**32 Reliance on consent of adult with unknown impaired decision making capacity**

- (1) A health care provider who administers health care to an adult is taken, for all purposes, to have the consent of the adult in relation to that health care if:
  - (a) the health care provider relies in good faith on consent purportedly given by the adult; and
  - (b) the adult has impaired decision making capacity in relation to making a decision about the health care; 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 in relation to a decision about the health care.
- (2) Subsection (1) has effect even if administering the health care will hasten the death of the adult.

**33 Other responsibilities of health care provider**

- (1) Nothing in this Act affects any other duty of care owed by a health care provider to a person.
- (2) Nothing in this Act relieves a health care provider from the requirement to comply with any of the following in administering health care under this Act:
  - (a) another law of the Territory;
  - (b) any requirements applicable to the health care provider by any relevant professional organisation;
  - (c) any operational requirements for the administration of the health care.

**34 Unnecessary health care**

Nothing in this Act requires a health care provider to administer health care that is extraordinary, excessively burdensome, intrusive or futile.

**35 Deemed unprofessional conduct**

A health care provider's conduct constitutes unprofessional conduct for the Health Practitioner Regulation National Law and any other law prescribed by regulation if:

- (a) the health care provider believes on reasonable grounds that an adult has impaired decision making capacity to make a health care decision; and
- (b) administering the health care requires a health care decision made in accordance with this Act; and
- (c) the health care provider administers the health care to the adult without that health care decision.

**36 Other laws allowing health care without consent not affected**

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

*Example for section 36*

*Part 3 of the Mental Health and Related Services Act 1998.*

**37 Other rights preserved**

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

**Part 4 Urgent health care****38 Application**

- (1) This Part applies in relation to the administration of health care to both adults and children.
- (2) Parts 2 and 3 are subject to this Part and if a provision of those Parts is inconsistent with this Part, this Part prevails to the extent of the inconsistency.

**39 Urgent health care without consent**

- (1) A health care provider may administer health care to an individual without the consent of the individual or any other person if the health care provider believes on reasonable grounds that:
- (a) the health care is necessary, as a matter of urgency to:
    - (i) save the individual's life; or
    - (ii) prevent serious damage to the individual's health; or
    - (iii) prevent the individual suffering, or continuing to suffer, from significant pain or distress; and
  - (b) the individual has impaired decision making capacity in relation to the health care; and
  - (c) it is not practicable to delay the health care to obtain or attempt to obtain consent from:
    - (i) if the impaired decision making capacity is temporary – the individual; or
    - (ii) a health care decision maker; and
  - (d) the health care is limited to what is necessary, as a matter of urgency.
- (2) Subsection (1) does not authorise a health care provider to administer health care to an individual if the health care provider is aware the individual has refused that health care by way of:
- (a) an advance consent decision; or
  - (b) a previously informed refusal when the individual did not have impaired decision making capacity.

**Part 5 NTCAT****40 Application to NTCAT**

- (1) An application may be made to NTCAT for an order under section 41 by the following persons:
- (a) a health care provider who has the care of, or is administering health care to, an adult;
  - (b) the health care decision maker for an adult;

- (c) the Public Guardian;
  - (d) any other person who NTCAT is satisfied has a special interest in the affairs of the adult.
- (2) Subject to subsection (3), an application must be commenced as soon as practicable.
- (3) An application on the grounds that a health care decision maker made or is making a health care decision contrary to the wishes of an adult must be filed without delay after the applicant forms a reasonable belief of those grounds.

*Note for subsection (3)*

*The application should be filed within a day of forming the belief if possible.*

#### **41 Orders by NTCAT**

- (1) NTCAT may, by order, do one or more of the following:
- (a) limit or vary a health care decision or the authority of a health care decision maker to make a health care decision under this Act;
  - (b) decide who is the appropriate health care decision maker for an adult with impaired decision making capacity;
  - (c) if a person specified in section 13(a) or (b) is not willing or able to make a health care decision:
    - (i) determine who should be the health care decision maker; or
    - (ii) make the health care decision itself;
  - (d) approve or allow any practice or health care for which a health care decision maker has no authority under section 29 or 30;
  - (e) subject to subsection (2), disregard an advance consent decision;
  - (f) provide for any related matter it considers necessary.
- (2) NTCAT may order that an advance consent decision be disregarded only if 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) the advance consent decision was not an informed decision;  
or
- (c) giving effect to 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.
- (3) NTCAT may make an order under subsection (1) on application or on its own initiative.
- (4) The authority to make orders under this section comes within NTCAT's original jurisdiction.
- (5) NTCAT must act in accordance with the decision making principles in section 18 when making a health care decision.

## **42 Parties**

- (1) The following persons are parties to any proceeding before NTCAT under this Act:
  - (a) the adult to whom the health care is to be administered or for whom the health care decision is to be made;
  - (b) any person who commenced the proceeding;
  - (c) any health care decision maker who is the subject of the proceeding;
  - (d) any person whose selection as a health care decision maker is the subject of the proceeding.
- (2) The Public Guardian may intervene in any proceeding before NTCAT under this Act in which it is not a party.

## **43 Closed proceedings**

- (1) Despite section 60 of the *Northern Territory Civil and Administrative Tribunal Act 2014* but subject to subsection (2):
  - (a) a proceeding under this Part is not open to the public and must be heard in private; and
  - (b) information that identifies, or is likely to lead to the identification of, an adult who is the subject of the proceeding must not be published.



- (2) If satisfied that it is in the public interest, NTCAT may, by order:
  - (a) open to the public a proceeding under this Part; and
  - (b) authorise publication of information prohibited under subsection (1)(b).

#### **44 Oral reasons and findings of fact**

- (1) Despite section 105(2) of the *Northern Territory Civil and Administrative Tribunal Act 2014*, NTCAT may give the reasons for a decision and any relevant findings of fact in any proceeding orally to the parties to the proceeding.
- (2) If requested by a party, NTCAT must give the reasons in writing to the parties within 28 days after the day the request is made.
- (3) A request referred to in subsection (2) must be made within 28 days after the day the reasons are given orally.
- (4) The President of NTCAT may extend the time limits in subsections (2) and (3).

#### **45 No internal review**

Section 140(1) of the *Northern Territory Civil and Administrative Tribunal Act 2014* does not apply in relation to a decision of NTCAT under this Act.

## **Part 6 Offences**

### **46 Disclosure of identity information**

A person commits an offence if:

- (a) the person intentionally engages in conduct; and
- (b) the conduct results in the disclosure of information that identifies, or is likely to lead to the identification of, an adult who is the subject of a proceeding under Part 5; and
- (c) the disclosure is not:
  - (i) authorised by an order of NTCAT; or
  - (ii) for a purpose connected with the administration of this Act, including a legal proceeding arising out of the operation of this Act; or

- (iii) to a person who is otherwise entitled to the information;  
and
- (d) the person is reckless in relation to the result and circumstances referred to in paragraph (b) and (c).

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

*Note for section 46*

*In addition to the circumstances specified in this section, a person who discloses information specified in this section will not be criminally responsible for an offence if the disclosure is justified or excused by or under a law (see section 43BE of the Criminal Code).*

## **47 False representation**

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

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

- (2) A person commits an offence if:
  - (a) the person represents, by words or conduct, that the person or another person:
    - (i) is a health care decision maker; or
    - (ii) is a health care decision maker with authority for a particular matter; and
  - (b) the representation is false and the person has knowledge of that circumstance; and
  - (c) the person engages in the conduct mentioned in paragraph (a) with the intention of obtaining a benefit for the person or another person.

Maximum penalty: Imprisonment for 7 years.

- (3) Subsection (2)(c) is the fault element for the conduct in subsection (2)(a).

#### **48 Misleading information**

- (1) A person commits an offence if:
- (a) the person intentionally gives information to another person; and
  - (b) the other person is:
    - (i) the Public Guardian; or
    - (ii) the Senior Practitioner; or
    - (iii) a member of NTCAT; or
    - (iv) a health care provider; or
    - (v) a health care decision maker; or
    - (vi) a person acting under the authority of a person specified in subparagraph (i), (ii), (iii), (iv) or (v); and
  - (c) the information is misleading and the person has knowledge of that circumstance; and
  - (d) the other person is acting in an official capacity and the person has knowledge of that circumstance.

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

- (2) A person commits an offence if:
- (a) the person intentionally gives a document to another person; and
  - (b) the other person is:
    - (i) the Public Guardian; or
    - (ii) the Senior Practitioner; or
    - (iii) a member of NTCAT; or
    - (iv) a health care provider; or
    - (v) a health care decision maker; or

- 
- (vi) a person acting under the authority of a person specified in subparagraph (i), (ii), (iii), (iv) or (v); and
  - (c) the document contains misleading information and the person has knowledge of that circumstance; and
  - (d) the other person is acting in an official capacity and the person has knowledge of that circumstance.

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

- (3) Strict liability applies to subsections (1)(b) and (2)(b).
- (4) It is a defence to a prosecution for an offence against subsection (1) or (2) if the defendant, when giving the information or document:
  - (a) draws the misleading aspect of the information or document to the other person's attention; and
  - (b) to the extent to which the defendant can reasonably do so – gives the other person the information necessary to remedy the misleading aspect of the information or document.

*Note for subsection (4)*

*The defendant has an evidential burden in relation to the matters mentioned (see section 43BU of the Criminal Code).*

- (5) In this section:

***acting in an official capacity*** means exercising powers or performing functions under, or otherwise related to the administration of, this Act.

#### **49 Improper exercise of authority**

- (1) A person commits an offence if:
  - (a) the person intentionally engages in conduct; and
  - (b) the conduct purports to be the exercise of authority as a health care decision maker for an adult; and
  - (c) the adult does not have impaired decision making capacity for that health care decision and the person is reckless in relation to that circumstance.

Maximum penalty: 400 penalty units or imprisonment for 5 years.

- (2) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the conduct purports to be the exercise of authority as a health care decision maker for an adult; and
  - (c) the adult does not have impaired decision making capacity for that health care decision and the person is reckless in relation to that circumstance; and
  - (d) the person engages in the conduct mentioned in paragraph (a) with the intention obtaining a benefit for the person or another person.

Maximum penalty: 400 penalty units or imprisonment for 7 years.

- (3) Subsection (2)(d) is the fault element for the conduct in subsection (2)(a).
- (4) Strict liability applies to subsections (1)(b) and (2)(b).

## **50 Acting without authority**

- (1) A person commits an offence if:
- (a) the person intentionally makes a health care decision; and
  - (b) the health care decision is in relation to an adult with impaired decision making capacity; and
  - (c) the person is not a health care decision maker and the person is reckless in relation to that circumstance.

Maximum penalty: 400 penalty units or imprisonment for 5 years.

- (2) Strict liability applies to subsection (1)(b).

## **51 Contravention of decision making principles**

- (1) A person commits an offence if:
- (a) the person is a health care decision maker; and
  - (b) the person intentionally engages in conduct in the exercise of the decision maker's authority as a health care decision maker; and

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(c) the conduct results in a contravention of section 18 and the decision maker is reckless in relation to that result; and

(d) the conduct is not exempted by section 20.

Maximum penalty: 400 penalty units or imprisonment for 5 years.

(2) A person commits an offence if:

(a) the person is a health care decision maker; and

(b) the person engages in conduct in the exercise of the decision maker's authority as a decision maker; and

(c) the conduct results in a contravention of section 18 and the decision maker is reckless in relation to that result; and

(d) the person engages in the conduct mentioned in paragraph (a) with the intention obtaining a benefit for the person or another person; and

(e) the conduct is not exempted by section 20.

Maximum penalty: 400 penalty units or imprisonment for 7 years.

(3) Subsection (2)(d) is the fault element for the conduct in subsection (2)(b).

(4) Strict liability applies to subsections (1)(d) and (2)(e).

## **52 Inducing contravention of decision making principles**

(1) A person commits an offence if:

(a) the person intentionally engages in conduct; and

(b) the conduct induces a health care decision maker to contravene section 18 and the person has intention in relation to that result; and

(c) the result is not exempted by section 20.

Maximum penalty: 400 penalty units or imprisonment for 5 years.

(2) A person commits an offence if:

(a) the person engages in conduct; and

- (b) the conduct induces a health care decision maker to contravene section 18 and the person has intention in relation to that result; and
- (c) the person engages in the conduct mentioned in paragraph (a) with the intention of obtaining a benefit for the person or another person; and
- (d) the result is not exempted by section 20.

Maximum penalty: 400 penalty units or imprisonment for 7 years.

- (3) Subsection (2)(c) is the fault element for the conduct in subsection (2)(a).
- (4) Strict liability applies to subsections (1)(c) and (2)(d).

### **53 Limitation period for prosecutions**

- (1) Proceedings for an offence against this Act may not be brought later than 2 years after the day on which the offence was committed.
- (2) A proceeding for an offence may be brought after the end of the limitation period in subsection (1) if:
  - (a) fresh evidence relevant to the offence is discovered; and
  - (b) the court of competent jurisdiction is satisfied that the evidence could not reasonably have been discovered within the limitation period.
- (3) For subsection (1), if an offence is committed on more than 1 day, the period of time is to be counted from the last day.

## **Part 7 Administrative and other matters**

### **54 Senior Practitioner directives and approvals**

- (1) The Senior Practitioner may, in consultation with the Public Guardian, issue the following:
  - (a) general directives regarding the use of a practice referred to in section 29(1);
  - (b) directives expressly allowing the use of a practice for which a health care decision maker would otherwise have no authority to consent to under section 29.

- (2) The Senior Practitioner may approve the use, for a particular adult, of a practice to which a health care decision maker has no authority to consent under section 29, with or without conditions.

### **55 Public Guardian guidelines**

The Public Guardian may make guidelines for this Act in relation to the following:

- (a) how to apply and interpret section 13, including determining the appropriate health care decision maker when more than one person may be the appropriate health care decision maker;
- (b) satisfying the duty of a health care provider under section 23;
- (c) determining capacity under section 24;
- (d) administering routine health care under section 25;
- (e) making health care decisions generally under this Act.

### **56 Report to Public Guardian**

A health care provider must give written notice to the Public Guardian of any instance when:

- (a) the health care provider is aware of the health care decision maker refusing to consent to significant treatment for an adult with impaired decision making capacity; and
- (b) the health care provider believes on reasonable grounds that the health care decision maker does not know, and cannot infer, the wishes and views of the adult with impaired decision making capacity.

*Note for section 56*

*The Public Guardian has powers under the Guardianship of Adults Act 2016 to take action if appropriate in the circumstances.*

### **57 Liability of health care providers**

A health care provider who, in good faith and without negligence, administers or does not administer health care to a person in accordance with this Act and believes on reasonable grounds that the requirements of this Act have been complied with is not:

- (a) guilty of an offence; or
- (b) liable for unprofessional conduct or professional misconduct;  
or



- (c) liable in any civil proceeding; or
- (d) liable for contravention of any code of conduct.

## **58 Regulations**

- (1) The Administrator may make regulations under this Act.

*Note for subsection (1)*

*See section 65 of the Interpretation Act 1978.*

- (2) The Regulations may apply, adopt or incorporate, with or without changes, the whole or part of a document as in force or existing at a particular time or from time to time.

## **Part 8 Repeal**

### **59 Act repealed**

The *Emergency Medical Operations Act 1973* (Act No. 45, 1973) is repealed.

## **Part 9 Consequential amendments**

### **Division 1 Advance personal planning legislation**

#### **Subdivision 1 Advance Personal Planning Act 2013**

#### **60 Act amended**

This Subdivision amends the *Advance Personal Planning Act 2013*.

#### **61 Long title amended**

Long title

*omit*

**lose**

*insert*

**have impaired**

**62 Section 3 amended (definitions)**

- (1) Section 3, definitions ***health care***, ***health care provider***, ***impaired decision-making capacity*** and ***willing and able to make an informed consent decision***

*omit*

- (2) Section 3

*insert*

***health care***, see section 6 of the *Health Care Decision Making Act 2023*.

***health care provider***, see section 4 of the *Health Care Decision Making Act 2023*.

***impaired decision-making capacity***, see section 6A.

**63 Section 5 amended (Meaning of *reasonably believes*)**

Section 5(3)

*omit*

**64 Section 6 amended (Decision-making capacity and impaired decision-making capacity)**

- (1) Section 6, heading

*omit, insert*

**6 Meaning of *decision-making capacity***

- (2) Section 6(1)

*omit*

all words after "if"

*insert*

the adult does not have impaired decision-making capacity for the matter.

- (3) Section 6(3), (4) and (5)

*omit*

**65 Sections 6A and 6B inserted**

After section 6

*insert*

**6A Meaning of *impaired decision-making capacity***

- (1) An adult has ***impaired decision-making capacity*** in relation to a matter if the adult's capacity to make a decision in relation to the matter is impaired.
- (2) An impairment in any of the following is relevant in determining whether an adult's capacity to make a decision is impaired:
  - (a) understanding and retaining information relevant to the decision;
  - (b) weighing information relevant to the decision in order to make the decision;
  - (c) communicating the decision in some way;
  - (d) understanding the effect of the decision.
- (3) For subsection (2)(a), an adult is taken to understand information relevant to a decision if the adult understands an explanation of the information given to the adult in a way that is appropriate to the adult's circumstances, whether by using modified language, visual aids or other means.
- (4) For subsection (2)(c), an adult is taken to communicate a decision if the adult communicates the decision in a way that is appropriate to the adult's circumstances, whether by using modified language, visual aids or other means.
- (5) An adult may have impaired decision-making capacity in relation to some matters and not others.
- (6) The degree to which an adult has impaired decision-making capacity may vary over time.
- (7) The cause of the impairment of the decision-making capacity is immaterial.
- (8) An adult does not have impaired decision-making capacity merely because the adult:
  - (a) has a disability, illness or other medical condition, whether physical or mental; or

- (b) requires the use of practicable and appropriate support, including additional time for explanation, modified language, visual or technological aids or other means of communication; or
- (c) engages in unconventional behaviour or another form of personal expression; or
- (d) chooses a living environment or lifestyle with which other people do not agree; or
- (e) makes decisions with which other people do not agree; or
- (f) does not have a particular level of fluency in English; or
- (g) does not have a particular level of literacy or education; or
- (h) engages in particular cultural or religious practices; or
- (i) does or does not express a particular religious, political or moral opinion; or
- (j) is of a particular sexual orientation or gender identity or expresses particular sexual preferences; or
- (k) takes or took, or is or was dependent on, alcohol or drugs, unless the alcohol or drugs are causing actual impairment in relation to the decision; or
- (l) engages or engaged in illegal or immoral conduct.

*Examples for subsection (8)(b)*

- 1 *Using information or formats tailored to the particular needs of the adult.*
- 2 *Communicating or assisting a person to communicate the adult's decision.*
- 3 *Giving a person additional time and discussing the matter with the adult.*
- 4 *Using technology that alleviates the effects of the adult's disability.*

**6B Health Care Decision Making Act 2023**

This Act is subject to the *Health Care Decision Making Act 2023* and if a provision of this Act is inconsistent with that Act, that Act prevails to the extent of the inconsistency.

**66 Section 8 amended (Adult may make advance personal plan)**

- (1) Section 8(1)(b)

*omit*

he or she wants anyone to act if they make decisions for him or her

*insert*

the adult wants anyone to act if they make decisions for the adult

(2) Section 8(1)(c)

*omit*

he or she loses

*insert*

the adult has impaired

#### **67 Section 20 amended (Authority of decision maker)**

Section 20(3)

*omit, insert*

(3) The decision maker's authority is subject to:

(a) this Act; and

(b) the *Health Care Decision Making Act 2023*; and

(c) the terms of the advance personal plan by which the decision maker was appointed.

#### **68 Section 21 amended (Exercise of authority by decision maker)**

Section 21(1)(b)(iii), after "Act"

*insert*

and the *Health Care Decision Making Act 2023*

#### **69 Sections 22 and 23 replaced**

Sections 22 and 23

*repeal, insert*

#### **22 Decision making principles**

(1) This section governs the exercise of authority of a decision maker under this Act.

(2) Subject to section 23(2), the decision maker must give effect to any advance care statement made by the person.

- (3) If no advance care statement was made about the matter, the decision maker must exercise authority under this Act in the way that the decision maker believes on reasonable grounds the person would do in the circumstances.
- (4) In determining what the person would do in the circumstances, the decision maker must take into account:
  - (a) the person's current and previously stated decisions, views, wishes and objections about the matter; and
  - (b) the decision maker's personal knowledge of the person.
- (5) If a decision maker forms a belief on reasonable grounds regarding what the person would do in the circumstances, the decision maker must exercise authority in that way, even if doing so may not be in the person's best interests.
- (6) Subsection (5) does not require giving the person addictive substances, without therapeutic benefit, that the person would use if the person had legal capacity.
- (7) If a decision maker is unable to form a belief on reasonable grounds regarding what the person would do in the circumstances, the decision maker must exercise authority in the way that the decision maker believes on reasonable grounds is in the best interests of the person.
- (8) For subsection (7), in determining what is in the best interests of the person, the decision maker must:
  - (a) take into account all relevant considerations; and
  - (b) assess those considerations by giving each of them the weight the decision maker believes on reasonable grounds is appropriate in the circumstances.
- (9) Without limiting subsection (8)(a), relevant considerations regarding the person include the following:
  - (a) protecting the person from harm, neglect, abuse and exploitation;
  - (b) providing the person with appropriate care;
  - (c) promoting the person's happiness, enjoyment of life and wellbeing;
  - (d) protecting the person's freedom of decision and action;

- (e) enabling the person to be as independent as practicable;
  - (f) enabling the person to achieve the person's maximum physical, social, emotional and intellectual potential;
  - (g) enabling the person to live in the general community and take part in community activities;
  - (h) maintaining the person's right to be treated with dignity and respect;
  - (i) enabling the person to maintain the person's preferred living environment and lifestyle;
  - (j) maintaining or creating a positive support network for the person;
  - (k) protecting the person's property and financial resources from loss, damage and misuse;
  - (l) protecting the person's right to keep the person's information confidential.
- (10) In determining what is appropriate in the circumstances under subsection (8)(b), the decision maker must exercise authority in a way that:
- (a) is the least restrictive of the person's freedom of decision and action as is practicable; and
  - (b) provides the person with as much support as is practicable to make the person's own health care decisions.

## **23 Exemptions**

- (1) A decision maker is not required to comply with section 22(2) if:
- (a) the person made a subsequent written declaration stating that the person does not want to give effect to the advance care statement, at a time when the person did not have impaired decision making capacity to make a decision on the matter; or
  - (b) there is no reasonable possibility the person would have intended the statement to apply in the circumstances.
- (2) A decision maker is not required to comply with section 22(2) or (3) if compliance would:
- (a) be impracticable; or
  - (b) be unlawful; or

- (c) impose a burden on another person that is so unreasonably onerous that it is justifiable to override the person's wishes; or
  - (d) be so unreasonable that it is justifiable to override the person's wishes.
- (3) A decision maker must keep a written record of the reasons for not complying with section 22(2) or (3) if the decision maker relies on subsection (1) or (2).

**70 Section 25 repealed (Restricted health matters)**

Section 25

*repeal*

**71 Part 4, Division 1 heading omitted**

Part 4, Division 1, heading

*omit*

**72 Section 39A repealed (Guardian having authority prima facie evidence of adult's lack of capacity)**

Section 39A

*repeal*

**73 Part 4, Divisions 2, 3 and 4 repealed**

Part 4, Divisions 2, 3 and 4

*repeal*

**74 Sections 63 and 64 repealed**

Sections 63 and 64

*repeal*

**75 Part 8, Division 4 inserted**

After section 96

*insert*



## **Division 4 Transitional matters for Health Care Decision Making Act 2023**

### **97 Consent decision about health care**

- (1) An advance consent decision about health care action set out in an advance personal plan that is in effect immediately before the commencement of Part 2 of the *Health Care Decision Making Act 2023* continues to have effect in accordance with its terms after that commencement.
- (2) A consent decision, in relation to health care action, made by a decision maker or adult guardian under this Act that is in effect immediately before the commencement of Part 2 of the *Health Care Decision Making Act 2023* continues to have effect in accordance with its terms after that commencement.

## **Subdivision 2 Advance Personal Planning Regulations 2014**

### **76 Regulations amended**

This Subdivision amends the *Advance Personal Planning Regulations 2014*.

### **77 Regulation 4 repealed (Restricted health matters)**

Regulation 4

*repeal*

### **78 Regulation 9 amended (Exercise of rights and powers under recognised interstate documents)**

Regulation 9

*omit*

section 24 or 25 of the Act

*insert*

section 24 of the Act or section 30 of the *Health Care Decision Making Act 2023*

## Division 2 Guardianship of adults legislation

### Subdivision 1 Guardianship of Adults Act 2016

#### 79 Act amended

This Subdivision amends the *Guardianship of Adults Act 2016*.

#### 80 Section 3 amended (Definitions)

- (1) Section 3, definitions **health care**, **health care provider**, **impaired decision-making capacity** and **restricted health care**

*omit*

- (2) Section 3

*insert*

**health care**, see section 6 of the *Health Care Decision Making Act 2023*.

**health care decision**, see section 7 of the *Health Care Decision Making Act 2023*.

**health care provider**, see section 4 of the *Health Care Decision Making Act 2023*.

**impaired decision-making capacity**, see section 5A.

- (3) Section 3, definition **agent**, paragraph (d)

*omit, insert*

(d) a health care decision maker with authority under the *Health Care Decision Making Act 2023*.

#### 81 Section 4 amended (Guardianship principles)

- (1) After section 4(1)

*insert*

(1A) The guardianship principles in this section do not apply in relation to health care or consent decisions about health care action.

- (2) Section 4(7)(b)

*omit*

23(2)(a) to (e)

*insert*

23(1) or (2)

## **82 Section 5 amended**

(1) Section 5, heading

*omit*

**and impaired decision-making capacity**

(2) Section 5(1)

*omit, insert*

(1) An adult has **decision-making capacity** in relation to personal matters and financial matters if the adult does not have impaired decision-making capacity in relation to those matters.

(3) Section 5(3), (4), (5) and (6)

*omit*

## **83 Sections 5A and 5B inserted**

After section 5

*insert*

### **5A Meaning of *impaired decision-making capacity***

(1) An adult has **impaired decision-making capacity** in relation to a personal matter or financial matter if the adult's capacity to make a decision in relation to the matter is impaired.

(2) An impairment in any of the following is relevant in determining whether an adult's capacity to make a decision is impaired:

(a) understanding and retaining information relevant to the decision;

(b) weighing information relevant to the decision in order to make the decision;

(c) communicating the decision in some way;

(d) understanding the effect of the decision.

(3) For subsection (2)(a), an adult is taken to understand information relevant to a decision if the adult understands an explanation of the

information given to the adult in a way that is appropriate to the adult's circumstances, whether by using modified language, visual aids or other means.

- (4) For subsection (2)(c), an adult is taken to communicate a decision if the adult communicates the decision in a way that is appropriate to the adult's circumstances, whether by using modified language, visual aids or other means.
- (5) An adult may have impaired decision-making capacity in relation to some matters and not others.
- (6) The degree to which an adult has impaired decision-making capacity may vary over time.
- (7) The cause of the impairment of the decision-making capacity is immaterial.
- (8) An adult does not have impaired decision-making capacity merely because the adult:
  - (a) has a disability, illness or other medical condition, whether physical or mental; or
  - (b) requires the use of practicable and appropriate support, including additional time for explanation, modified language, visual or technological aids or other means of communication; or
  - (c) engages in unconventional behaviour or other form of personal expression; or
  - (d) chooses a living environment or lifestyle with which other people do not agree; or
  - (e) makes decisions with which other people do not agree; or
  - (f) does not have a particular level of fluency in English; or
  - (g) does not have a particular level of literacy or education; or
  - (h) engages in particular cultural or religious practices; or
  - (i) does or does not express a particular religious, political or moral opinion; or
  - (j) is of a particular sexual orientation, gender identity or expresses particular sexual preferences; or

- (k) takes or took, or is or was dependent on, alcohol or drugs, unless the alcohol or drugs are causing actual impairment in relation to the decision; or
- (l) engages or engaged in illegal or immoral conduct.

*Examples for subsection (8)(b)*

- 1 *Using information or formats tailored to the particular needs of the adult.*
- 2 *Communicating or assisting a person to communicate the adult's decision.*
- 3 *Giving a person additional time and discussing the matter with the adult.*
- 4 *Using technology that alleviates the effects of the adult's disability.*

## **5B Health Care Decision Making Act 2023**

This Act is subject to the *Health Care Decision Making Act 2023* and if a provision of this Act is inconsistent with that Act, that Act prevails to the extent of the inconsistency.

### **84 Section 8 repeal (Meaning of *restricted health care*)**

Section 8

*repeal*

### **85 Section 23 replaced**

Section 23

*repeal, insert*

## **23 Health care decisions**

- (1) A guardian has authority to make health care decisions for the represented adult if the guardian has authority under the guardianship order for the health care decision.
- (2) The authority of a guardian regarding a health care decision is subject to:
  - (a) the *Advance Personal Planning Act 2013*; and
  - (b) the *Health Care Decision Making Act 2023*.

**86 Part 8, Division 4 inserted**

After section 104D

*insert*

**Division 4 Transitional matters for Health Care Decision Making Act 2023**

**105 Consent decision about health care**

Despite the repeal of section 23 by the *Health Care Decision Making Act 2023*, a consent decision about health care action made by a guardian under this Act that is in effect immediately before the commencement of section 85 of the *Health Care Decision Making Act 2023* continues to have effect in accordance with its terms after that commencement.

**Subdivision 2 Guardianship of Adults Regulations 2016**

**87 Regulations amended**

This Subdivision amends the *Guardianship of Adults Regulations 2016*.

**88 Regulation 3 repealed (Restricted health care)**

Regulation 3

*repeal*

**Division 3 Mental Health and Related Services Act 1998**

**89 Act amended**

This Division amends the *Mental Health and Related Services Act 1998*.

**90 Section 4 amended (Definitions)**

(1) Section 4

*insert*

***health care decision maker***, for person who is an adult, means a person, other than an adult guardian, who has authority under the *Health Care Decision Making Act 2023* for health care decisions for the adult.

(2) Section 4, definition ***adult guardian***

*omit*

that is in the best interests of

*insert*

for

**91 Section 25 amended (Voluntary admission)**

Section 25(10)

*omit, insert*

(10) The following persons cannot make an application under this section for another person:

(a) an adult guardian of the other person;

(b) a decision maker or other health care decision maker for the other person.

**92 Section 54 amended (Treatment after voluntary admission)**

Section 54(1)

*omit, insert*

(1) A person who is admitted to an approved treatment facility as a voluntary patient may only be treated under this Act if the person gives informed consent to the treatment.

**93 Section 63 amended (Non-psychiatric treatment)**

(1) Section 63(3)(c)

*omit, insert*

(c) informed consent for the treatment is obtained in accordance with the *Health Care Decision Making Act 2023*.

(2) Section 63(6)

*omit, insert*

(6) A person who performs non-psychiatric treatment on a person without informed consent under subsection (3)(c) must report the fact as soon as possible after the treatment is performed to the person who should have given informed consent in accordance with

the *Health Care Decision Making Act 2023*.

**94 Section 64 amended (Major medical procedure)**

(1) Section 64(2)(b)

*omit, insert*

(b) informed consent for the major medical procedure is obtained in accordance with the *Health Care Decision Making Act 2023*.

(2) Section 64(4)

*omit, insert*

(4) No later than 1 day after authorising the performance of a major medical procedure under subsection (3), the authorised psychiatric practitioner must notify the person who should have given informed consent in accordance with the *Health Care Decision Making Act 2023*.

**95 Section 66 amended (Electroconvulsive therapy)**

Section 66(1)

*omit, insert*

(1) A person must not perform electroconvulsive therapy on another person unless the other person gives informed consent to the treatment.

**96 Section 80A amended (Voluntary admission of prisoner)**

Section 80A(1)(b)

*omit, insert*

(b) the prisoner has given informed consent to the admission.

**97 Section 91 amended (Disclosure of information)**

After section 91(2)(k)

*insert*

(ka) to a health care decision maker for a person if the information is reasonably required in connection with the performance of a duty or the exercise of a power by the health care decision maker under the *Health Care Decision Making Act 2023*;



**98 Section 92 amended (Access to records)**

After section 92(1)(ba)

*insert*

(bb) a health care decision maker for a person if the information is reasonably required in connection with the performance of a duty or the exercise of a power by the health care decision maker under the *Health Care Decision Making Act 2023*;

**99 Section 94 amended (Inclusion of written comments into records)**

Section 94, after "maker"

*insert*

, health care decision maker

**100 Section 99 amended (Withholding of certain correspondence)**

After section 99(2)(hb)

*insert*

(hc) a health care decision maker for the person;

**Division 4 Powers of Attorney Act 1980**

**101 Act amended**

This Division amends the *Powers of Attorney Act 1980*.

**102 Section 15A amended (Exercise of power)**

Section 15A(1)(b)

*omit*

23(2)(a) to (e)

*insert*

23(1) or (2)

## **Division 5 Transplantation and Anatomy Act 1979**

### **103 Act amended**

This Division amends the *Transplantation and Anatomy Act 1979*.

### **104 Section 8 amended (Consent by adult living donor to removal of tissue)**

(1) Section 8(1)

*omit*

his or her

*insert*

the person's

(2) Section 8, note 1

*omit*

*Part 4 of the Advance Personal Planning Act 2013*

*insert*

*the Health Care Decision Making Act 2023*

(3) Section 8, note 2

*omit, insert*

*2 If the donor does not have decision-making capacity, the Health Care Decision Making Act 2023 may permit consent to be given:*

*(a) in relation to regenerative tissue – by a health care decision maker; or*

*(b) in relation to any tissue – by NTCAT*

*This consent has effect as the consent of the donor.*

### **105 Section 10 amended (Certificate of medical practitioner)**

Section 10(1)

*omit*

section 42 of the *Advance Personal Planning Act 2013*

*insert*

*the Health Care Decision Making Act 2023*

**106 Section 11 amended (When consent authorises removal of tissue)**

(1) Section 11(1)(b)

*omit, insert*

(b) the consent was given by NTCAT as permitted by section 41 of the *Health Care Decision Making Act 2023*.

(2) Section 11(2)(b)

*omit*

the Local Court

*insert*

NTCAT

**107 Section 14 amended (Consent to removal of blood)**

(1) Section 14

*omit*

his or her

*insert*

the person's

(2) Section 14, note 1

*omit*

*his or her*

*insert*

*the donor's*

(3) Section 14, note 1

*omit*

*Part 4 of the Advance Personal Planning Act 2013*

*insert*

*the Health Care Decision Making Act 2023*

(4) Section 14, note 2

*omit, insert*

2 *If the donor is over 18 years of age and does not have decision-making capacity, the Health Care Decision Making Act 2023 may permit consent to be given by a health care decision maker or NTCAT. That consent has effect as the consent of the donor.*

**108 Section 16 amended (How consent is revoked)**

Section 16, note

*omit, insert*

*Note for section 16*

*If the donor is over 18 years of age and does not have decision-making capacity, the Health Care Decision Making Act 2023 may permit consent to be revoked by a health care decision maker or NTCAT.*

**109 Section 26 amended (Act does not prevent specified removals of tissue etc.)**

Section 26(a)(ii)

*omit, insert*

(ii) *in accordance with Part 4 of the Health Care Decision Making Act 2023; or*

**Division 6 Repeal of Part**

**110 Repeal of Part**

This Part is repealed on the day after it commences.

## ENDNOTES

### 1

### KEY

Key to abbreviations

amd = amended

app = appendix

bl = by-law

ch = Chapter

cl = clause

div = Division

exp = expires/expired

f = forms

*Gaz* = *Gazette*

hdg = heading

ins = inserted

lt = long title

nc = not commenced

od = order

om = omitted

pt = Part

r = regulation/rule

rem = remainder

renum = renumbered

rep = repealed

s = section

sch = Schedule

sdiv = Subdivision

SL = Subordinate Legislation

sub = substituted

### 2

### LIST OF LEGISLATION

***Health Care Decision Making Act 2023 (Act No. 19, 2023)***

Assent date 17 August 2023

Commenced 1 July 2024 (*Gaz* G13, 20 June 2024, p 2)