Background

Currently, in South Australia, there are three types of advance directives for health, medical, residential and personal decision-making under two separate laws:

- The *Consent to Medical Treatment and Palliative Care Act 1995* (Consent Act), committed to the Minister for Health and Ageing, contains the:
  - Medical Power of Attorney which allows a person to appoint and instruct a Medical Agent to make medical treatment decisions on his or her behalf in the event of future impaired decision-making capacity
  - Anticipatory Direction which allows a person to list medical treatments they do or do not want in the event that they can no longer make their own decisions and are in the terminal phase of a terminal illness or a persistent vegetative state.

- The *Guardianship and Administration Act 1993* (the Guardianship Act), committed to the Attorney-General, allows a person to appoint and instruct an Enduring Guardian to make health, residential and personal decisions in the event of future impaired decision-making capacity.

The current forms of advance directives have different legal requirements, require multiple forms to be completed to ensure that all decision-making areas are covered and have different decision-making standards, witnessing provisions and appeal and dispute mechanisms. The forms are not simple to complete or apply and for the general public advance decision making is complex and confusing. This Bill seeks to simply advance decision making.

The Bill

The Advance Care Directives Bill 2012 will result in a single Advance Care Directive form for health, residential, accommodation and personal matters in which a competent adult can:

- write down their values, wishes, instructions and directions and/or
- appoint one or more substitute decision-makers to make decisions on their behalf

which will take effect if, or when, a person’s decision-making capacity becomes impaired in the future.

The Bill intends to preserve the right of individuals to direct in advance what quality of life means to them, how they wish to live and how they want decisions made for them, enabling Substitute Decision-Makers, health practitioners and others to make decisions
based on knowledge of an individual’s preferences and values. This approach supports a person-centred model of decision-making and a rights-based approach to substitute decision-making.

The Bill also makes related amendments to the Consent Act and the Guardianship Act to consolidate provisions about consent to medical treatment and health care within the one Act. The effect of these provisions is that, in the absence of an Advance Care Directive, families and/or those closest to a person can make health care decisions for a person who does not have decision-making capacity.

Guardians, appointed by the Guardianship Board, will only be required if a person does not, or cannot, complete an Advance Care Directive and does not have an appropriate person responsible to make decisions if their decision-making capacity is impaired.
The information below has been prepared to provide a lay explanation and should be read in conjunction with the Bill and second reading speech

The Advance Care Directives Bill 2012

Part 1 Preliminary

- This clause provides the definitions of key terms in the Bill. The definitions are pivotal to understanding how these terms apply in the clauses in the Bill.

- The Bill provides that a person cannot use an Advance Care Directive to demand that particular health care be provided. Instead, a request for health care in an Advance Care Directive is an indication of a person’s wishes (s6) which should be considered when decisions are being made.

Part 2 Objects and Principles

- The objects and principles of the Bill place the person completing the Advance Care Directive at the centre, and include protections for Substitute Decision-Makers, health practitioners and others who may have to comply with a person’s Advance Care Directive.

- The principles are to be applied in the administration, operation and enforcement of the Act, including when considering disputes.
Part 3 Advance Care Directives

Division 1 – Advance Care Directives

Division 1 relates to completing an Advance Care Directive.

- Like other legal documents, an adult must be competent to complete an Advance Care Directive. This means that the person must understand what an Advance Care Directive is and the consequences of completing one. It is presumed an adult is competent to complete an Advance Care Directive unless there is evidence to the contrary.

- A person can record their wishes and instructions or write down their values for future health care, residential, accommodation and personal matters in an Advance Care Directive. They can also appoint one or more substitute decision-makers to make such decisions on their behalf.

- Only an Advance Care Directive given on the approved Advance Care Directive form and witnessed by a suitable witness is considered valid under the Bill (s11). The Advance Care Directive form will be developed in consultation with stakeholders and focus tested to ensure it is easy to complete and apply.

- An Advance Care Directive does not permit (s12):
  - anything which is unlawful such as euthanasia or assisted suicide
  - a health practitioner or other person breaching a professional Code or Standard. The Code or Standard contemplated by this section does not include a hospital or facility code/standard but rather a Code/Standard set out by the relevant profession such as the Australian Medical Council's *Good Medical Practice: A code of conduct for doctors in Australia* or the Australian Nursing and Midwifery Council of Australia’s *Code of professional conduct for nurses in Australia*
  - the refusal of mandatory medical treatment, such as a community treatment order or an inpatient treatment order under the *Mental Health Act 2009*
  - any directions in relation to a person’s finances or legal affairs.

- The Bill contains provisions for people for whom English is a second language to be able to use an interpreter to assist them to complete the form. The Advance Care Directive form itself must however be completed in English (s14). An interpreter will be required to complete and sign a section on the form to certify a number of matters.

Witnessing Requirements

- To be valid, an Advance Care Directive must be witnessed by a suitable witness who must certify on the form that he or she:
  - Gave the person the information required by the regulations (for example, information on where to keep their Advance Care Directive, who to give copies to, etc.)
  - explained to the person the legal effects of completing an Advance Care Directive and which, in their opinion, the person appeared to understand
  - believes that the person was not being pressured or threatened to complete the directive and was completing it of their own free will.
• The categories of suitable witnesses will be set out in the Regulations and will be similar to those accepted in Commonwealth legislation for completing statutory declarations. Having a broad range of persons who can witness an Advance Care Directive will make finding a witness easier.

• If this Bill is passed, SA Health will develop comprehensive guidelines to support witnesses to understand their role and responsibilities, including advice about when not to witness an Advance Care Directive and where to report concerns such as coercion. It is intended that the Regulations will set out a list of questions the witness should ask. It is anticipated that this check list will be included in the guidelines accompanying the Advance Care Directive form.

• The witnessing provisions will be an added protection for both the person and those applying the Advance Care Directive to ensure that the person completing the Advance Care Directive understood the nature and effect of completing an Advance Care Directive and were doing so of their own free will, and give a greater level of assurance about the ability to rely on the contents of the Directive into the future.

• To prevent conflicts of interest or conflicts of duty the Bill does not allow certain persons to be a witness (15(2)).

**When an Advance Care Directive is in force (s16)**

• An Advance Care Directive is in force from the time the signing of it is witnessed. It remains in force until either:
  - the expiry date if one is specified, or
  - if no expiry date, until it is revoked, or
  - if the person who gave the Advance Care Directive dies,

  whichever comes first.

• The Regulations will contain details about the process for revocation. See Division 3 notes below.

**Binding and non-binding provision (s19)**

• A person can refuse particular health care, or health care in particular circumstances, and such refusals must be complied with if the person intended it to apply to the current circumstances. In this way, refusals of health care are considered binding. This is consistent with a well-established common law principle.

• All other instructions or directions which relate to health care, residential, accommodation or personal matters are non-binding, but must be taken into account or given effect if it is reasonable in the circumstances to do so.
Division 2 – Substitute decision-makers

- A competent adult can appoint one or more persons of their own choosing to make decisions on their behalf for their health care, accommodation, residential and personal matters in the event they are not capable of making their own decisions. Such persons are termed Substitute Decision-Makers.

- Appointed Substitute Decision-Makers must be competent and cannot be:
  - health practitioners responsible for the care of the person, or
  - paid carers (this does not include an unpaid carer or a carer in receipt of payments from Centrelink).

- Subject to the particularities of an Advance Care Directive, appointed Substitute Decision-Maker/s stand in the shoes of the person as if they were that person and can make all the decisions that the person could lawfully make if the person’s decision-making capacity was not impaired.

- The Bill also makes provisions for the production of an Advance Care Directive through electronic means so that Substitute Decision-Makers do not have to produce a certified hardcopy of the Advance Care Directive each and every time it might apply. The Regulations will set out the process for how this is to occur. This will be important in light of the new electronic patient record system being implemented across SA Health and the new national Personally Controlled Electronic Health Record scheme being implemented by the Australian Government. This will provide more reliable accessibility for these important documents.
Division 3 – Revoking Advance Care Directives

Subdivision 1 - Revoking an Advance Care Directive where person is competent

- A competent adult can revoke their Advance Care Directive at any time, and must do so in accordance with the Regulations. The Regulations are intended to include provisions which may require a person to sign, date and have witnessed, a section on the form to make it clear that they have revoked the Advance Care Directive.

- A person must, as soon as is reasonably practicable, notify others who may have a copy of the Advance Care Directive that the Advance Care Directives has been revoked. It will be in their interests to do so and this will be made clear in the guidelines accompanying the Advance Care Directive form.

- Any new Advance Care Directive completed will automatically revoke an earlier version, including previously completed Enduring Powers of Guardianship, Medical Powers of Attorney and Anticipatory Directions. This means that the most recently dated and witnessed Advance Care Directive will be the one in force and which can be relied on in good faith.

Subdivision 2 - Revoking an Advance Care Directive where person not competent

- This section sets out a process for the revocation of an Advance Care Directive by the Guardianship Board if a person is no longer competent and it is unclear whether the person understands the consequences of revoking their Advance Care Directive.

- An application must be made to the Guardianship Board and the Board must only revoke the Advance Care Directive if satisfied that it is the person’s genuine wish and that they understand the consequences of doing so and that the revocation is appropriate in all the circumstances.

- However, the Guardianship Board must not revoke the Advance Care Directive if the Advance Care Directive contains provisions to the contrary. For example, the person may have written in their Advance Care Directive that even if they say they want the Advance Care Directive revoked when their decision-making capacity is impaired, they do not want it to be revoked. This may particularly be the case for people with a mental illness or perhaps people with dementia who may anticipate a future time when they may have impaired decision-making capacity.

- The Bill contains provisions dealing with the situation of a revocation and subsequent appointment of a guardian under the Guardianship Act, requiring that a guardian must give effect to the provisions in the person’s Advance Care Directive if it is reasonably practicable to do so (Schedule 1, Clause 20). There may be provisions in the Advance Care Directive which describe the person, their values etc and which may still be relevant to guide decision-making.
Part 4 Recognition of Advance Care Directives from other jurisdictions

- This section sets out a process whereby the Governor can declare, by regulation, a class or classes of instruments completed in other jurisdictions, to be an "interstate advance care directive" completed under a corresponding law, which will be recognised as effective in South Australia.

- These provisions will give some certainty to those travelling to South Australia from interstate that their previously given wishes will be known and respected if they are unable to make their own decisions whilst in South Australia.

Part 5 – Giving effect to Advance Care Directives (ss34, 35, 36)

- The Bill sets out how Substitute Decision-Makers appointed under the Advance Care Directive must make decisions. It requires that a Substitute Decision-Maker must make a decision based on what they believe the person would have made in the current circumstances themselves. It also requires that a Substitute Decision-Maker must act in good faith and without negligence.

- If no Substitute Decision-Maker is appointed under the Advance Care Directive, and there is a relevant provision in the Advance Care Directive which applies to the current situation or decision, the Bill sets out the obligations of health practitioners in these circumstances.

- A health practitioner does not have to comply with a provision which requires or demands that certain health care be provided. A person cannot use an Advance Care Directive to demand that specific health care be provided if that is not considered clinically appropriate. If a person has specifically indicated in their Advance Care Directive that they consent to particular healthcare, this would be a guide to health practitioners but cannot be a demand. It would be up to the health practitioner to decide if the health care specified in the Advance Care Directive is relevant, would be of benefit to the person and should be offered.

- However, if a person wishes to decline particular healthcare which may be offered, this must be respected and the particular healthcare must not be provided. This applies to withholding or withdrawing of life sustaining measures. If a binding refusal is ignored and the particular health care is subsequently provided to the person in disregard of the refusal, this may amount to professional misconduct under the Health Practitioner Regulation National Law (South Australia) 2010. In these circumstances, the relevant professional Board would consider and decide the matter. It may also amount to a civil or criminal offence.

S37- Conscientious objection

- This section provides that if a health practitioner refuses, on conscientious grounds, to comply with a person’s binding refusal of health care in the Advance Care Directive or a Substitute Decision-Maker’s decision, then they must refer the person to another health practitioner who the first health practitioner believes will not refuse to comply.

S38- Consent taken to be that of the person who gave the Advance Care Directive

- This section provides that a relevant provision in an Advance Care Directive or a decision of a Substitute Decision-Maker is as effective as if given by the person.
• This applies to both a consent or refusal of particular health care.

**S39- Consent taken to be withdrawn in certain circumstance**

• This section allows a person who has previously consented to health care in an Advance Care Directive to withdraw their consent prior to the health care being provided. This is on the proviso that the Advance Care Directive does not contain a provision to the contrary. For example, the Advance Care Directive could state that “even if I say I do not want the health care at the time, provide it to me anyway”. This may be the case for some people with say a mental illness who have included provisions in their Advance Care Directive which they want to apply when they become unwell and suspect that they will not consent at that time.

• However, if health care was provided in good faith prior to communication of a withdrawal of consent and subsequently it was found that consent was withdrawn, consent will be taken to have been valid and always to have been valid.
Part 6 – Validity and limitation of liability

- Health practitioners, Substitute Decision-Makers, and others acting on a valid Advance Care Directive (or Substitute Decision-Maker decision) are:
  - entitled to presume an Advance Care Directive is valid and in force (provided it is on the approved Advance Care Directive form and witnessed) unless the person knew, or should have known, that it was not valid and in force (s40)
  - protected from criminal or civil liability for acting on a valid Advance Care Directive in good faith and without negligence (s41) even if it is subsequently found to have been revoked (s42).

Part 7 – Dispute resolution, reviews and appeals

Division 1 – Preliminary

- This part sets out a process whereby disputes in relation to the decisions under an Advance Care Directive can be resolved.

Division 2 – Resolution of disputes by Public Advocate

- The purpose of this section is to enable the Public Advocate to assist to resolve matters under an Advance Care Directive in an informal manner, without the need to resort to formal proceedings before the Guardianship Board.
- The Public Advocate must apply the principles contained in section 10 when considering matters.
- An application for assistance can be made to the Public Advocate and the Public Advocate (or delegate) can assist to resolve a matter in the first instance by giving advice or conducting mediation, and can give limited declarations in relation to the agreed outcome.
- If a person is not satisfied with the Public Advocate’s advice or declaration, or requires greater certainty about a matter, they can apply to the Guardianship Board for a review of a Public Advocate declaration.
- A person can also apply directly to the Guardianship Board for a declaration or a direction in relation to the matter. A Guardianship Board direction is binding.
- The option to appeal to the District Court against a decision of the Guardianship Board will remain.

Division 3 – Review by the Guardianship Board

- When reviewing or considering matters under the Advance Care Directives Bill, the Guardianship Board must apply the principles in the Bill.
- Upon application, the Guardianship Board can:
  - review a matter dealt with by the Public Advocate under section 45 and the Guardianship Board can confirm, cancel or revoke a decision or declaration of the Public Advocate
o refuse to hear a matter if the matter lacks substance, is unjustifiable, is frivolous or vexatious, not made in good faith or would be an abuse of the process

o give a declaration or direction in relation to a matter relating to an Advance Care Directive whether or not it is a matter considered by the Public Advocate. Penalties apply for failing to comply with a Guardianship Board direction

o refer a matter to the Public Advocate if it believes it should be resolved through mediation. This would not apply if the matter had already been considered by the Public Advocate.

S50- Orders of Guardianship Board in relation to Substitute Decision-Makers

• The Guardianship Board may revoke the appointment of a Substitute Decision-Maker under various circumstances.

• If more than one Substitute Decision-Maker has been appointed, the Advance Care Directive will remain in force and the remaining Substitute Decision-Maker/s can continue to act pursuant to it.

• If only one Substitute Decision-Maker has been appointed, and the person who gave the Advance Care Directive is no longer competent (meaning that they are unable to complete a new Advance Care Directive), the Guardianship Board can revoke the Advance Care Directive. However, the Board should not revoke an Advance Care Directive if it contains provisions which can be given effect such as the expression of a person’s wishes in relation to health care, accommodation and personal matters, values or specific refusals of health care which would still apply despite the removal of a Substitute Decision-Maker.

• If the Guardianship Board decides to make the person subject to a guardianship order (under the Guardianship Act), then the appointed guardian must give effect to the person’s Advance Care Directive.

Division 4 – Urgent review of decisions

• The Bill provides that in urgent circumstances, anyone with an interest in a decision made by a Substitute Decision-Maker, may apply to the Supreme Court of South Australia to determine if the decision is in accordance with the Advance Care Directive and the provisions of the legislation.

• However, a review cannot be undertaken if it relates to a decision about the withdrawal or withholding of health care and the person is in the advanced stage of illness and there is no prospect of recovery, that is the person is dying.

Division 5 – Miscellaneous

• Both the Public Advocate and the Guardianship Board can refer any question of law to the Supreme Court.
Part 8 – Offences

- The Bill contains a number of offences including:
  - for knowingly giving false or misleading statements in, or in relation to, or in an attempt to give, an Advance Care Directive. If the defendant is, or was at the time, a Substitute Decision-Maker the maximum penalty is $20,000 or 2 years imprisonment. In any other case it is $10,000.
  - inducing another person to make an Advance Care Directive by dishonesty or undue influence. The maximum penalty is 10 years imprisonment.
  - purporting to be a Substitute Decision-Maker when they know that they are not. The maximum penalty is 10 years imprisonment.

- If convicted or found guilty of an offence under this section, the offender forfeits any interest they may have had in the estate of the person who gave or revoked the Advance Care Directive.

- When sentencing an offender and if appropriate, the Court can:
  - revoke the Advance Care Directive
  - if the offender was an Substitute Decision-Maker, revoke the Substitute Decision-Maker’s appointment
  - declare that a forfeited interest in the person’s estate does not apply
  - make any other order it thinks appropriate in relation to the Advance Care Directive.
Part 9 – Miscellaneous

- This part sets out a number of miscellaneous provisions relating to:
  - the requirement to give notice to Substitute Decision-Makers. The kind of notice envisaged by this clause may be a notice of eviction for example (s56)
  - the prohibition of the publication of reports of proceedings, unless with the consent of all parties (s57)
  - service of documents (s58)
  - victimisation as a result of having an Advance Care Directive or being a Substitute Decision-Maker (s59)
  - confidentiality
  - review of Act five years after the Act's commencement (s61)
  - regulation making powers (s61).
Schedule 1 –Related amendments and transitional provisions

Schedule 1 of the Bill contains amendments to the Consent Act and the Guardianship Act to recognise the new Advance Care Directive, update terminology and to ensure consistency between the Acts.

In addition, provisions relating to consent that are currently contained within the Guardianship Act have been moved to the Consent Act. The amendments set out a similar dispute resolution process as contained in Part 7 the Advance Care Directives Bill.

Part 1 Preliminary

This Part means that changes to other Acts listed in this schedule will amend those Acts.

Part 2 – Amendment of the Consent to Medical Treatment and Palliative Care Act 1995

2—Amendment of section 3—Objects

- This section amends the Objects of the Consent Act to recognise that the Act no longer contains the Medical Power of Attorney or Anticipatory Direction (1).
- A new object of the Consent Act is inserted to capture the additional consent provisions for patients with impaired capacity transferred from the Guardianship Act.

3—Amendment of section 4—Interpretation

- This section deletes definitions which are no longer contained in the Consent Act as a result of the new Advance Care Directives Bill.
- The Bill inserts the same definition of health practitioner to that contained in the Advance Care Directives Bill.
- The definition of medical treatment is amended to include:
  - the examination and assessment of a patient and
  - the provision of medical treatment by health practitioners.
- The Bill sets out what is deemed impaired decision-making capacity in relation to a particular health care decision. This definition is the same as that contained in Clause 7 of the Advance Care Directives Bill.

4—Insertion of sections 4A and 4B

- Clause 4A provides that a reference in the Act to the administration of medical treatment also means the withdrawal or withholding of medical treatment, unless the contrary intention appears.
- Clause 4B means that nothing in the Act requires consent be given before medical treatment is withdrawn or withheld. This is consistent with common law and current practice. The Consent Act itself does not require consent, rather it sets out a series of provisions dealing with who can consent, and allowing medical practitioners to act without a person’s consent in certain circumstances (for example emergencies).
clause is to help clarify some confusion that has arisen in relation to the question of whether or not a person’s consent is required before a medical practitioner can withdraw or withhold treatment from the person. The amendment to Clause 4B does not alter when consent is or is not required. It is simply clarifying that there are no requirements under the Consent Act that operate to require consent for withholding or withdrawing treatment.

5—Repeal of section 5

Health and medical research is currently excluded from the Consent Act but not from the Guardianship Act. To ensure that certain conditions are met when a person (or a person responsible for the patient) consents to health and medical research, the exclusion has been removed. Note: consent for health and medical research is also regulated by the National Health and Medical Research Council National Statement on Ethical Conduct in Human Research.

6—Amendment of heading to Part 2

This clause changes the heading of Part 2 to: Consent to medical treatment generally.

7—Repeal of Part 2 Divisions 2 and 3

- This clause removes the provisions containing the Medical Power of Attorney and Anticipatory Direction which will no longer exist as a result of the new Advance Care Directives Bill.
- It is important to note that the Advance Care Directives Bill contains transitional provisions which will continue to legally recognise the Medical Powers of Attorney and Anticipatory Directions as if they were completed under the Advance Care Directives Act.

8—Amendment of section 13—Emergency medical treatment

- These provisions amend the section regarding the provision of emergency treatment to recognise the new Advance Care Directive and associated terms.
- As is currently the case:
  - emergency treatment must not be provided if the patient had previously refused the treatment, including in an Advance Care Directive
  - medical practitioners must make reasonable enquiries as to whether the patient had given an Advance Care Directive, provided it is reasonably practicable in the circumstances to do so
  - if the Advance Care Directive contains a relevant provision refusing treatment which applies to the emergency situation, treatment must not be provided
  - if there is an appointed Substitute Decision-Maker available who is willing to make the decision, emergency treatment must not be provided without the Substitute Decision-Maker’s consent.
- Similarly, if there is no Advance Care Directive and a person responsible is available and willing to make a decision, emergency treatment should not be provided without the consent of the person responsible for the patient.
9—Repeal of Part 2 Division 6
This clause is consequential to the new Advance Care Directive Bill and removes the provisions relating to the Register for Medical Powers of Attorney and Anticipatory Directions.

10—Insertion of Part 2A

Part 2A—Consent to medical treatment if person has impaired decision-making capacity
The new Part 2A sets out who (if there is no Advance Care Directive or the Advance Care Directive does not contain a relevant provision in relation to the proposed health care) can consent to particular medical treatment (including health care) on behalf of a patient who has impaired decision-making capacity. These provisions have been revised and moved from the Guardianship Act so that all consent provisions (in the absence of an Advance Care Directive) are contained in one Act.

14—Interpretation

• Section 14 defines the terms specifically used in this Part of the Act including health care, health practitioner, medical practitioner, person responsible and prescribed relative.

• Only under this Part of the Act does the provision of medical treatment include the provision of health care more broadly and could include the provision of physiotherapy for example. This means that the provisions in this part apply to who can consent or refuse health care such as medical treatment, podiatry or physiotherapy for example on behalf of a person with impaired decision-making capacity.

• The definition of person responsible sets out a hierarchy of persons who can consent to medical treatment (including health care) on behalf of a patient with impaired decision-making capacity. The position in the hierarchy is based on whether the person has a close and continuing relationship with the patient, and is available and willing to make a decision about what is being proposed by the health practitioner.

• In the absence of appointed Substitute Decision-Makers or relevant provisions contained in an Advance Care Directive, a person responsible for the patient, in the following order, can consent or refuse to consent to medical treatment (including health care) on the patient’s behalf:

1. Guardian (appointed by the Board)
2. Prescribed relative*
   ▪ Spouse/domestic partner
   ▪ Adult related by blood or marriage, or adoption
   ▪ Aboriginal or Torres Strait Islander kinship
3. Adult friend*
4. Adult charged with overseeing ongoing day-to-day care of the patient
5. Guardianship Board

*the person responsible must have a close and continuing relationship and be available and willing to make the decision.
14A—Application of this Part

- Because the following matters are dealt with elsewhere, Clause 14A clearly indicates that Part 14 (dealing with consent by a person responsible) does not apply to, or in relation to:
  - decisions involving children (this is governed by s12 of the Act)
  - persons who have given an Advance Care Directive including if there is an appointed Substitute Decision-Maker who can make health care decisions, or a relevant provision contained in the Advance Care Directive. This means that a person responsible can only consent if the person does not have a relevant Advance Care Directive.
  - prescribed treatment. These provisions are unchanged and will remain in the Guardianship Act. As is currently the case prescribed treatment for people with a mental incapacity, this can only be undertaken with the permission of the Guardianship Board.

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

- This clause provides that the consent (or refusal) to proposed health care by a person responsible for a patient with impaired decision-making capacity is as effective as if it was the consent of the patient.
- The consent by a person responsible is not affected:
  - merely because a health practitioner did not try and find a person responsible higher up in the hierarchy before the consent was given or
  - if the person held themselves out to be a person responsible but was not and the health practitioner did not know this was the case.

14C—Person responsible for patient to make substitute decision

- A person responsible for a patient must, as far as is reasonably practicable, make a decision which they believe reflects the decision the patient would have made in the circumstances had the patient’s decision-making capacity not been impaired.
- If the person has completed an Advance Care Directive but did not appoint a Substitute Decision-Maker, the person responsible should give effect to the wishes or instructions as set out in the Advance Care Directive.

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

- This section makes it an offence for a person to hold themselves out as a person responsible for a patient knowing that they are not: the maximum penalty is 2 years imprisonment.

11—Amendment of section 17—Care of the dying

- This section relates to the care of people who are dying and the obligations of medical practitioners and those under their supervision.
- The amendment to section 17(2) seeks to clarify a currently ambiguous clause and align the section with a well-accepted principle of common law: that a patient (or their representative) can consent to treatment which is offered, can refuse treatment which is offered, but cannot demand that treatment be provided which is considered futile or
of no or negligible benefit to the patient, including life-sustaining measures at the end of life.

- As is currently the case, a medical practitioner must withdraw life-sustaining measures if a patient or their representative so directs.

12—Insertion of Part 3A
This part sets out a dispute resolution process similar to that relating to disputes under an Advance Care Directive. Previously, the only means of resolving a dispute under the Consent Act was to appeal to the Supreme Court.

Part 3A—Dispute resolution

Division 1—Preliminary
- This part sets out a process whereby disputes in relation to health care decisions can be resolved.

Division 2 – Resolution of disputes by Public Advocate
- The purpose of this section is to enable the Public Advocate to assist to resolve health care disputes in a less formal manner, without the need to institute formal proceedings before the Guardianship Board.
- Under this section, the Public Advocate (or delegate) can assist to resolve a matter in the first instance by giving advice or conducting mediation.

Division 3 – Resolution of disputes by Guardianship Board
- If a person is not satisfied with the outcome of the mediation, a person can apply to the Guardianship Board for a review of a mediation outcome.
- An eligible person can apply directly to the Guardianship Board for a declaration or a direction in relation to the health care decision. A Guardianship Board direction is binding. However the Guardianship Board cannot compel a health practitioner to provide health care which is not considered good medical practice.
- The option to appeal to the District Court against a decision of the Guardianship Board will remain.

13—Substitution of section 19

19—Regulations
This section replaces the previous section with additional regulation making powers which reflect current legislative practice.

Part 8—Transitional provisions
This section gives legal recognition to previously completed Medical Powers of Attorney, Anticipatory Directions and Enduring Powers of Guardianship as if they were an Advance Care Directive completed under the Advance Care Directive legislation. The protections and dispute process set out under the Advance Care Directives legislation will apply to the former instruments.