

South Australia

# **Consent to Medical Treatment and Palliative Care (Restrictive Practices) Amendment Bill 2020**

A BILL FOR

An Act to amend the *Consent to Medical Treatment and Palliative Care Act 1995* and to make related amendments to the *Advance Care Directives Act 2013* and the *Mental Health Act 2009*.

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**The Parliament of South Australia enacts as follows:**

## Part 1—Preliminary

### 1—Short title

- 5        This Act may be cited as the *Consent to Medical Treatment and Palliative Care (Restrictive Practices) Amendment Act 2020*.

### 2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

### 3—Amendment provisions

- 10        In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

## Part 2—Amendment of *Consent to Medical Treatment and Palliative Care Act 1995*

### 4—Insertion of Part 2 Division A1

Part 2—before Division 1 insert:

15        **Division A1—Preliminary**

#### 4C—Interpretation

In this Part—

*health practitioner* means a person who practises 1 or more of the following:

- 20        (a) a health profession (within the meaning of the *Health Practitioner Regulation National Law (South Australia)*);

- (b) any other profession or practice declared by the regulations to be included in the ambit of this definition;

*medical practitioner* includes a health practitioner declared by the regulations to be included in the ambit of this definition.

5 **5—Insertion of Part 2B**

After section 14D insert:

**Part 2B—Restrictive practices**

**Division 1—Preliminary**

**14E—Interpretation**

- 10 (1) In this Part, unless the contrary intention appears—
- authorised person* means a person authorised to use restrictive practices under section 14I;
- medical practitioner* does not include a dentist;
- restrictive practices*—see section 14F;
- 15 *restrictive practices guidelines* or *guidelines* means guidelines published under Division 3, as in force from time to time;
- risk of harm*—see subsection (2).
- (2) For the purposes of this Part, a reference to behaviour of a person that constitutes a *risk of harm* will be taken to be a reference to any of the following behaviours, or a combination of any of the following behaviours:
- 20 (a) the use of force against another person, or an express or implied threat that force will be used against another person;
- (b) self-harm, or an express or implied threat of self-harm;
- 25 (c) behaviour that substantially increases the likelihood that physical or mental harm will be caused to the person or to any other person (whether intentionally or unintentionally);
- (d) any other behaviour of a kind prescribed by the regulations.
- (3) For the purposes of this Part, a reference to the consent of a person will be taken to include, if applicable—
- 30 (a) the consent of a guardian, parent, substitute decision maker or other person who is lawfully able to give consent on behalf of the person; and
- (b) the consent of a person responsible for the person (within the meaning of Part 2A).
- 35 (4) For the purposes of this Part, a reference to the *use of restrictive practices* or to *use restrictive practices* means the use of restrictive practices in accordance with the requirements of this Part.

**14F—Restrictive practices**

(1) For the purposes of this Part, a reference to *restrictive practices* will be taken to be a reference to any of the following, or a combination of any of the following:

- (a) the use of physical or mechanical means to restrain a person;
- (b) the use of chemical means to restrain or sedate a person;
- (c) the confinement of a person in an area from which the person cannot leave of the person's own volition;
- (d) the seclusion of a person on their own in an area from which the person cannot leave of the person's own volition;
- (e) the transportation of a person from place to place (including a place or places within the same building or facility);
- (f) any other act or omission of a kind prescribed by the regulations,

in each case being an act or omission done without the consent of the person, or a person but does not include an act or omission of a kind that is declared by the regulations not to constitute restrictive practices for the purposes of this Part.

(2) Without limiting subsection (1), an authorised person may use reasonable force in the course of using restrictive practices (however, the use of force is to be a last resort and must be reasonably necessary to enable the use of restrictive practices in the circumstances).

(3) For the purposes of this section, a reference to the consent of a person will be taken to include, if applicable, a reference to—

- (a) the consent of a guardian, parent, substitute decision maker or other person who is lawfully able to give consent on behalf of the person; and
- (b) the consent of a person responsible for the person (within the meaning of Part 2A).

(4) For the purposes of this Part, the use of a restrictive practice will be taken not to constitute medical treatment (whether or not the use of the restrictive practice also has a therapeutic effect).

(5) Nothing in this Part authorises the use of restrictive practices—

- (a) as a punishment or for the convenience of others; or
- (b) to address inadequate levels of staffing, equipment or facilities.

**14G—Application of Part**

(1) This Part is in addition to, and does not derogate from, the *Mental Health Act 2009*, the *Guardianship and Administration Act 1993* or any other Act or law that authorises the use of restrictive practices.

- (2) Nothing in this Part limits the operation of the *Controlled Substances Act 1984* (and, in particular, a drug may only be administered in the course of a restrictive practice or administration of medical treatment by a person authorised to do so in accordance with that Act).

5                   **14H—Delegation**

- (1) The Minister may delegate a function or power under this Part to the Chief Executive of the administrative unit of the Public Service that is responsible for assisting a Minister in the administration of this Act.
- 10                   (2) A delegation under this section—
- (a) must be by instrument in writing; and
  - (b) may be absolute or conditional; and
  - (c) does not derogate from the ability of the Minister to act in any matter; and
  - 15                   (d) is revocable at will.

**Division 2—Authorisation**

**14I—Minister may authorise person to use restrictive practices**

- (1) The Minister may authorise a specified health practitioner, or specified class of health practitioners, to use restrictive practices.
- 20                   (2) An authorisation under subsection (1)—
- (a) must be by notice in the Gazette;
  - (b) may be conditional or unconditional;
  - (c) has effect for—
    - 25                   (i) if a period is specified in the notice—that period; or
    - (ii) if no such period is specified—until it is revoked under this section.
  - (3) The Minister may, by notice in the Gazette, vary or revoke an authorisation under subsection (1).
  - (4) In this section—
  - 30                   ***health practitioner*** means a person who practises 1 or more of the following:
    - (a) a health profession (within the meaning of the *Health Practitioner Regulation National Law (South Australia)*);
    - 35                   (b) any other profession or practice declared by the regulations to be included in the ambit of this definition.

### Division 3—Restrictive practices guidelines

#### 14J—Minister to publish restrictive practices guidelines

- (1) The Minister must, by notice in the Gazette, publish guidelines (the *restrictive practices guidelines*) for the purposes of this Part.
- (2) The Minister may, by subsequent notice in the Gazette, vary, substitute or revoke the restrictive practices guidelines published under subsection (1).
- (3) The Minister must cause the restrictive practices guidelines published under subsection (1) to be published on a website determined by the Minister.
- (4) The Minister, before publishing, varying or substituting the restrictive practices guidelines—
  - (a) must undertake such consultation as may be required by the regulations; and
  - (b) may undertake such other consultation as the Minister thinks fit.
- (5) The Minister must, within 6 sitting days after publishing the restrictive practices guidelines, lay a copy of the guidelines (or the guidelines as varied) before both Houses.

### Division 4—Use of restrictive practices

#### 14K—Use of restrictive practices authorised in certain circumstances

- (1) Subject to this Division, an authorised person may use restrictive practices that they are authorised to use in relation to a person (the *patient*) if the authorised person believes on reasonable grounds that—
  - (a) the patient is displaying behaviour that constitutes a risk of harm; and
  - (b) the patient has impaired decision-making capacity in respect of—
    - (i) a decision to submit to any medical assessment or examination that the authorised person considers reasonably necessary; or
    - (ii) a decision to consent to the administration of any medical treatment that may, in the opinion of the authorised person, be reasonably required as a consequence of, or that relates to, the behaviour that constitutes a risk of harm; and
  - (c) the use of restrictive practices is necessary—
    - (i) to minimise the risk of harm, or to prevent further harm from being caused; or

(ii) to enable a medical assessment or examination of the patient to be undertaken.

(2) An authorised person may only use restrictive practices if, in the opinion of the authorised person, there is no other way—

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(a) to minimise the risk of harm, or to prevent further harm from being caused; or

(b) to undertake a medical assessment or examination of the patient,

that is reasonably available in the circumstances.

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(3) An authorised person must, in using restrictive practices, comply with the restrictive practices guidelines.

(4) An authorised person may, in relation to the use of restrictive practices in relation to a patient, do 1 or more of the following:

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(a) enter and remain in a place where the authorised person reasonably suspects the patient may be found;

(b) search the patient's clothing or possessions and take possession of anything in the patient's possession that the patient may use to cause harm to themselves or others, or to damage property;

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(c) retain anything so taken from the possession of the patient for as long as is necessary for reasons of safety (and then return the thing to the patient or otherwise deal with the thing according to law).

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(5) A search referred to in subsection (4)(b) must be carried out expeditiously and in a manner that avoids, as far as reasonably practicable, causing the patient any humiliation or offence.

(6) Subject to section 14L(7), restrictive practices may be used in relation to a patient—

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(a) for as long as is reasonably necessary to enable or facilitate the medical assessment or examination of the patient; or

(b) for a period of—

(i) in the case of a patient who is a child—12 hours; or

(ii) in any other case—24 hours,

whichever is the lesser.

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(7) An authorised person who uses restrictive practices in relation to a patient must, in accordance with any requirement set out in the regulations, cause a written notice in respect of the use of restrictive practices to be given to—

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(a) in the case of a patient who is a child—a parent or guardian of the patient; or

(b) in the case of a patient who has a guardian, substitute decision maker—the guardian or substitute decision maker (as the case requires) and the patient; or

(c) in any other case—the patient.

5 (8) An authorised person may be assisted in the use of restrictive practices by such other persons as the authorised person thinks fit.

(9) To avoid doubt, restrictive practices may be used in relation to a patient—

(a) without the consent of the patient; or

10 (b) despite a refusal of the patient to consent to the use of restrictive practices.

(10) To avoid doubt, restrictive practices may be used in relation to a patient who is a child.

#### 15 **14L—Medical treatment may be provided without consent in certain circumstances**

(1) Despite any other provision of this Act, or any other Act or law, a medical practitioner may lawfully administer medical treatment (not being prescribed treatment) to a person (the *patient*) without consent if—

20 (a) restrictive practices are being used in relation to the patient; and

(b) either—

25 (i) the medical treatment is reasonably necessary to treat an injury or medical condition arising out of the behaviour constituting the risk of harm to which the use of restrictive practices relates; or

(ii) the medical practitioner believes on reasonable grounds that—

30 (A) the risk of harm to which the use of restrictive practices relates is wholly or partly caused by a particular medical condition or conditions; and

(B) the treatment of the medical condition or conditions is reasonably necessary to minimise the risk of harm, or to prevent further harm from being caused; and

35 (c) the patient is incapable of consenting to the medical treatment; and

40 (d) the patient (if of or over 16 years of age) has not, to the best of the medical practitioner's knowledge, refused to consent to such medical treatment; and

- (e) the medical practitioner has made, or has caused to be made, reasonable inquiries to ascertain whether the patient (if of or over 18 years of age) has given an advance care directive.
- 5 (2) Inquiries under subsection (1)(e) need not be made if in the circumstances of the case it is not reasonably practicable to do so.
- (3) If—
- (a) the patient has given an advance care directive; and
- (b) the medical practitioner proposing to administer the medical treatment is aware of that fact (whether on the basis of
- 10 inquiries made under this section or otherwise); and
- (c) a substitute decision-maker appointed under the advance care directive is empowered or authorised to make decisions relating to the administration of such medical treatment and is reasonably available to make such a decision,
- 15 the medical treatment must not be administered without the consent of the substitute decision-maker.
- (4) If no such substitute decision-maker is available and a guardian of the patient is available, the medical treatment may not be administered without the guardian's consent.
- 20 (5) If neither a substitute decision-maker nor a guardian of the patient is available, but a person responsible for the patient (within the meaning of Part 2A) is reasonably available and willing to consent to the administration of the medical treatment, the medical treatment may not be administered without the consent of the person
- 25 responsible for the patient (given in accordance with Part 2A).
- (6) If the patient is a child, and a parent or guardian of the child is available to decide whether the medical treatment should be administered, the parent's or guardian's consent to the treatment must be sought but the child's health and wellbeing are paramount and if
- 30 the parent or guardian refuses consent, the treatment may be administered despite the refusal if it is in the best interests of the child's health and wellbeing.
- (7) Restrictive practices may continue to be used in relation to the patient—
- 35 (a) for as long as is reasonably necessary to enable the medical treatment to be administered; or
- (b) for a period of—
- (i) in the case of a patient who is a child—12 hours; or
- (ii) in any other case—24 hours,
- 40 whichever is the lesser.

(8) A medical practitioner who administers medical treatment to a patient under this section must, in accordance with any requirement set out in the regulations, cause a written notice in respect of the medical treatment to be given to—

(a) in the case of a patient who is a child—a parent or guardian of the patient; or

(b) in the case of a patient who has a guardian, substitute decision maker—the guardian or substitute decision maker (as the case requires) and the patient; or

(c) in any other case—the patient.

(9) A notice under subsection (8) may be combined with a notice under section 14K(7).

(10) In this section—

*medical condition* includes intoxication by a drug or alcohol or both;

*prescribed psychiatric treatment* means—

(a) prescribed psychiatric treatment within the meaning of the *Mental Health Act 2009*; and

(b) any other treatment of a kind prescribed by the regulations;

*prescribed treatment* means—

(a) prescribed psychiatric treatment; or

(b) prescribed treatment within the meaning of the *Guardianship and Administration Act 1993*.

#### **14M—Use of restrictive practices in administering emergency medical treatment**

(1) Subject to this Division, an authorised person who may lawfully administer medical treatment to a person (the *patient*) under section 13 may use restrictive practices that they are authorised to use in relation to the patient if the use of restrictive practices is, in the opinion of the authorised person, necessary to enable the medical treatment to be administered.

(2) An authorised person must, in using restrictive practices, comply with the restrictive practices guidelines.

(3) An authorised person may, in relation to the use of restrictive practices in relation to a patient, do 1 or more of the following:

(a) enter and remain in a place where the authorised person reasonably suspects the patient may be found;

(b) search the patient's clothing or possessions and take possession of anything in the patient's possession that the patient may use to cause harm to themselves or others, or to damage property;

- (c) retain anything so taken from the possession of the patient for as long as is necessary for reasons of safety (and then return the thing to the patient or otherwise deal with the thing according to law).
- 5 (4) A search referred to in subsection (3)(b) must be carried out expeditiously and in a manner that avoids, as far as reasonably practicable, causing the patient any humiliation or offence.
- (5) Restrictive practices may be used in relation to a patient—
- 10 (a) for as long as is reasonably necessary to enable the medical treatment under section 13 to be administered; or
- (b) for a period of—
- (i) in the case of a patient who is a child—12 hours; or
- (ii) in any other case—24 hours,
- whichever is the lesser.
- 15 (6) An authorised person who uses restrictive practices in relation to a patient must, in accordance with the regulations, cause a written notice in respect of the use of restrictive practices to be given to—
- (a) in the case of a patient who is a child—a parent or guardian of the patient; or
- 20 (b) in any other case—the patient.
- (7) An authorised person may be assisted in the use of restrictive practices by such other persons as the medical practitioner thinks fit.
- (8) To avoid doubt, restrictive practices may be used in relation to a patient—
- 25 (a) without the consent of the patient; or
- (b) despite a refusal of the patient to consent to the use of restrictive practices.
- (9) To avoid doubt, restrictive practices may be used in relation to a patient who is a child.

## 30 **Division 5—Miscellaneous**

### **14N—Limitation of liability**

- 35 (1) An authorised person or a person assisting an authorised person, incurs no civil or criminal liability for an act or omission relating to the use of restrictive practices in accordance with this Part (being an act or omission done or made in good faith and without negligence).

- 5
- (2) A medical practitioner who administers medical treatment to a patient in accordance with section 14L, or a person participating in the treatment or care of the patient under the medical practitioner's supervision, incurs no civil or criminal liability for an act or omission done or made—
- (a) in accordance with this Part; and
- (b) in good faith and without negligence; and
- (c) in accordance with proper professional standards of medical practice.

10 **14O—Offence to hinder or obstruct authorised person**

A person who hinders or obstructs an authorised person in relation to the use of restrictive practices is guilty of an offence.

Maximum penalty: \$5 000.

15 **14P—Reporting**

- (1) An authorised person who uses restrictive practices in relation to a patient must make such records as may be required by the regulations.

Maximum penalty: \$5 000.

- 20 (2) An authorised person must keep the records referred to in subsection (1) in accordance with the requirements set out in the regulations.

Maximum penalty: \$5 000.

25 **14Q—Review of certain uses of restrictive practices etc**

- (1) The Minister must cause the following reviews to be conducted, and a report of the review prepared, in accordance with the regulations:

- 30 (a) a review of the circumstances involved if restrictive practices are used in relation to a particular patient more than twice in any 7 day period;
- (b) a review of the circumstances involved if medical treatment is administered to a particular patient under section 14L more than twice in any 7 day period;
- (c) any other review required under the regulations.

- 35 (2) A review under subsection (1)(a) or (b) must be conducted as soon as is reasonably practicable after the third use of restrictive practices, or the third administration of medical treatment (as the case requires).

- (3) Without limiting the matters that the regulations may make provision for, the regulations may—

- (a) confer jurisdiction on a person or body in relation to a review under this section; or

- (b) require or authorise the provision of documents or information to the Minister or other specified person or body; or
- (c) provide that a review need not be conducted under this section in specified circumstances.

**6—Insertion of Part 3 Division A1**

Part 3—before Division 1 insert:

**Division A1—Preliminary**

**14R—Interpretation**

In this Part—

*health practitioner* means a person who practises 1 or more of the following:

- (a) a health profession (within the meaning of the *Health Practitioner Regulation National Law (South Australia)*);
- (b) any other profession or practice declared by the regulations to be included in the ambit of this definition;

*medical practitioner* includes a health practitioner declared by the regulations to be included in the ambit of this definition.

**Schedule 1—Related amendments**

**Part 1—Amendment of *Advance Care Directives Act 2013***

**1—Amendment of section 12—Provisions that cannot be included in advance care directives**

Section 12(1)—after paragraph (b) insert:

- (ba) a provision that comprises a refusal of the use of a restrictive practice (however described) used in accordance with Part 2B of the *Consent to Medical Treatment and Palliative Care Act 1995*;

**Part 2—Amendment of *Mental Health Act 2009***

**2—Amendment of section 24—Treatment of patients to whom level 1 orders apply**

Section 24(1)—delete "for his or her mental illness, or for any other illness that may be causing or contributing to the mental illness, of a kind authorised by a medical practitioner who has examined the patient" and substitute:

of a kind authorised by a medical practitioner who has examined the patient for 1 or more of the following:

- (a) the patient's mental illness;
- (b) any other illness or medical condition that may be causing or contributing to the patient's mental illness;

- (c) an injury or other medical condition caused by or arising out of the patient's mental illness.

### **3—Amendment of section 28—Treatment of patients to whom level 2 orders apply**

5 Section 28(1)—delete "for his or her mental illness, or for any other illness that may be causing or contributing to the mental illness, of a kind authorised by a medical practitioner who has examined the patient" and substitute:

of a kind authorised by a medical practitioner who has examined the patient for 1 or more of the following:

- 10 (a) the patient's mental illness;
- (b) any other illness or medical condition that may be causing or contributing to the patient's mental illness;
- (c) an injury or other medical condition caused by or arising out of the patient's mental illness.

### **4—Amendment of section 31—Treatment of patients to whom level 3 orders apply**

15 Section 31(1)—delete "for his or her mental illness, or for any other illness that may be causing or contributing to the mental illness, of a kind authorised by a medical practitioner who has examined the patient" and substitute:

20 of a kind authorised by a medical practitioner who has examined the patient for 1 or more of the following:

- (a) the patient's mental illness;
- (b) any other illness or medical condition that may be causing or contributing to the patient's mental illness;
- 25 (c) an injury or other medical condition caused by or arising out of the patient's mental illness.

### **5—Amendment of section 56—Powers of authorised officers relating to persons who have or appear to have mental illness**

(1) Section 56(4)(c)(I)—delete subparagraph (I) and substitute:

30 (I) —

(A) if the person is in a treatment centre or other place where a medical examination is reasonably able to be undertaken—conduct or arrange for a medical examination of the person; or

35 (B) if the person is not in a treatment centre or other place where a medical examination is reasonably able to be undertaken—transport the person, or arrange for the person to be transported by some other authorised officer or by a police officer, to a treatment centre or other place for  
40 medical examination; and

(2) Section 56—after subsection (4):

(4a) To avoid doubt, the powers under subsection (3) are exercisable regardless of whether the person to whom this section applies is—

(a) in a treatment centre or other place; or

(b) has been transported to a treatment centre or other place before the power is exercised.

(4b) For the purposes of this section, a reference to ***transport the person from place to place*** includes a reference to conveying the person from somewhere within a building or facility to somewhere else within the same building or facility.