

Western Australia

**Acts Amendment (Consent to Medical
Treatment) Act 2008**

As at 19 Jun 2008

No. 25 of 2008

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Acts Amendment (Consent to Medical Treatment) Act 2008

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Western Australia

Acts Amendment (Consent to Medical Treatment) Act 2008

No. 25 of 2008

An Act to amend the following —

- **the *Guardianship and Administration Act 1990*;**
- **the *Civil Liability Act 2002*;**
- ***The Criminal Code*.**

[Assented to 19 June 2008]

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary matters

1. Short title

This is the *Acts Amendment (Consent to Medical Treatment) Act 2008*.

2. Commencement

- (1) This Act comes into operation on a day fixed by proclamation.
- (2) Different days may be fixed under subsection (1) for different provisions.

**Part 2 — *Guardianship and Administration*
Act 1990 amended**

3. The Act amended

The amendments in this Part are to the *Guardianship and Administration Act 1990**.

[* *Reprint 3 as at 1 April 2005.*

*For subsequent amendments see Western Australian
Legislation Information Tables for 2005, Table 1, p. 198 and
Act No. 34 of 2004.]*

4. Long title amended

The long title is amended by deleting “to make provision for a power of attorney to operate after the donor has ceased to have legal capacity,” and inserting instead —

“

**to provide for enduring powers of attorney, enduring powers
of guardianship and advance health directives,**

”.

5. Section 3 amended

- (1) Section 3(1) is amended by deleting the definition of “treatment”.
- (2) Section 3(1) is amended by inserting in the appropriate alphabetical positions —

“

“advance health directive” means —

- (a) an advance health directive made under Part 9B; or
- (b) an instrument recognised as such under section 110ZA;

“enduring guardian” means —

- (a) the person who is the enduring guardian under an enduring power of guardianship; or
- (b) the persons who are the joint enduring guardians under an enduring power of guardianship,

and includes a substitute enduring guardian while he or she is the enduring guardian or a joint enduring guardian under an enduring power of guardianship;

“enduring power of guardianship” means —

- (a) an enduring power of guardianship made under Part 9A; or
- (b) an instrument recognised as such under section 110O;

“life sustaining measure” means a medical, surgical or nursing procedure directed at supplanting or maintaining a vital bodily function that is temporarily or permanently incapable of independent operation, and includes assisted ventilation and cardiopulmonary resuscitation;

“palliative care” means a medical, surgical or nursing procedure directed at relieving a person’s pain, discomfort or distress, but does not include a life sustaining measure;

“substitute enduring guardian” means a person appointed as a substitute enduring guardian under section 110C(1);

“treatment” means —

- (a) medical or surgical treatment, including —
 - (i) a life sustaining measure; and
 - (ii) palliative care;
- or

- (b) dental treatment; or
- (c) other health care;

“treatment decision”, in relation to a person, means a decision to consent or refuse consent to the commencement or continuation of any treatment of the person.

”.

6. Section 45 amended

(1) Section 45(2) is amended as follows:

- (a) by deleting “may —” and inserting instead —
“ may do any of the following — ”;
- (b) by deleting paragraph (d) and inserting instead —
“
(d) subject to subsection (4), make treatment decisions for the represented person;

”;

(c) after paragraph (g) by deleting “and”.

(2) Section 45(3) is amended as follows:

- (a) by deleting “may not —” and inserting instead —
“
cannot do any of the following on behalf of the represented person —

”;

- (b) after paragraph (c) by deleting “or”;
- (c) after paragraph (d) by deleting the comma and inserting a full stop instead;
- (d) by deleting “on behalf of a represented person; or”;
- (e) by deleting paragraph (e).

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(3) After section 45(3) the following subsection is inserted —

“

(4) A plenary guardian cannot consent to the sterilisation of the represented person, except in accordance with Division 3.

”.

7. Section 50 amended

Section 50 is amended as follows:

- (a) by deleting “consent given,” and inserting instead —
“ consent given or refused, ”;
- (b) by inserting after “given,” in the second place where it occurs —
“ refused, ”.

8. Section 55A inserted

After section 55 the following section is inserted in Part 5 Division 2 —

“

55A. Priority of guardianship order

- (1) To the extent a guardianship order relates to the making of a treatment decision for the represented person, the priority to be given to the order is determined in accordance with section 110ZJ.
- (2) To the extent a guardianship order relates to the performance of any other function in relation to the represented person, the priority to be given to the order is determined in accordance with section 119.

”.

9. Section 104 amended

- (1) At the beginning of section 104 the following subsection is inserted —

“

- (1a) A person who has reached 18 years of age and has full legal capacity may create an enduring power of attorney.

”.

- (2) Section 104(2) is amended by deleting paragraph (a) and “and” after it and inserting instead —

“

- (a) there are 2 attesting witnesses to the instrument —
- (i) both of whom are authorised by law to take declarations; or
 - (ii) of whom —
 - (I) one is authorised by law to take declarations; and
 - (II) the other has the qualifications specified in subsection (3);

and

”.

- (3) After section 104(2) the following subsection is inserted —

“

- (3) A witness referred to in subsection (2)(a)(ii)(II) must be a person —
- (a) who has reached 18 years of age; and
 - (b) who is not a person appointed to be a donee or substitute donee of the power.

”.

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10. Section 104C inserted

After section 104B the following section is inserted —

“

104C. Eligibility for appointment as donee or substitute donee

A person is eligible to be appointed as a donee or substitute donee of an enduring power of attorney if the person has reached 18 years of age and has full legal capacity.

”.

11. Parts 9A to 9D inserted

After section 110 the following Parts are inserted —

“

Part 9A — Enduring powers of guardianship

Division 1 — Preliminary matters

110A. Meaning of “appointor”

In this Part —

“**appointor**”, in relation to an enduring power of guardianship, means the maker of the power.

Division 2 — Making of enduring power of guardianship

110B. Appointing enduring guardian

A person who has reached 18 years of age and has full legal capacity may make an enduring power of guardianship appointing —

- (a) a person as the enduring guardian of the person;
- or

- (b) 2 or more persons as the joint enduring guardians of the person.

110C. Substitute enduring guardians

- (1) An appointor may, in the enduring power of guardianship, appoint one or more persons to be substitute enduring guardians.
- (2) A substitute enduring guardian becomes the enduring guardian or a joint enduring guardian (as the case may be) in the circumstances specified in the enduring power of guardianship.

110D. Who is eligible to be appointed

A person is eligible to be appointed under section 110B or 110C(1) if the person has reached 18 years of age and has full legal capacity.

110E. Formal requirements

- (1) An enduring power of guardianship is not valid unless —
 - (a) it is in the form or substantially in the form prescribed by the regulations; and
 - (b) it is signed by the appointor or by another person in the presence of, and at the direction of, the appointor; and
 - (c) the signature referred to in paragraph (b) is witnessed by 2 persons —
 - (i) both of whom are authorised by law to take declarations; or
 - (ii) of whom —
 - (I) one is authorised by law to take declarations; and

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- (II) the other has the qualifications specified in subsection (2);
 - and
 - (d) it is signed by the witnesses referred to in paragraph (c) in the presence of —
 - (i) the appointor; and
 - (ii) the person who signed it at the appointor's direction (if applicable); and
 - (iii) each other;
 - and
 - (e) it is signed by each person being appointed as an enduring guardian or substitute enduring guardian (an **“appointee”**) to indicate the appointee's acceptance of the appointment; and
 - (f) the signature of the appointee is witnessed by 2 persons —
 - (i) both of whom are authorised by law to take declarations; or
 - (ii) of whom —
 - (I) one is authorised by law to take declarations; and
 - (II) the other has the qualifications specified in subsection (2);
 - and
 - (g) it is signed by the witnesses referred to in paragraph (f) in the presence of the appointee and each other.
- (2) A witness referred to in subsection (1)(c)(ii)(II) or (f)(ii)(II) must be a person —
- (a) who has reached 18 years of age; and
 - (b) who is not —
 - (i) the appointor; or

- (ii) the person who signed the enduring power of guardianship at the appointor's direction (if applicable); or
- (iii) an appointee.

Division 3 — Operation of enduring power of guardianship

110F. When enduring guardian may act

An enduring power of guardianship has effect, subject to its terms, at any time the appointor is unable to make reasonable judgments in respect of matters relating to his or her person.

110G. Functions generally

- (1) Subject to this section, an enduring guardian has the same functions under section 45(1) and (2), and is subject to the same limitations under section 45(3) and (4), in relation to the appointor as a plenary guardian has and is subject to in relation to a represented person.
- (2) An enduring power of guardianship may limit the functions of the enduring guardian to the functions specified in the power.
- (3) An enduring power of guardianship may limit the circumstances in which the enduring guardian may act to the circumstances specified in the power.
- (4) An enduring power of guardianship may include directions about how the enduring guardian is to perform any of his or her functions.

110H. Certain provisions apply in relation to enduring guardian and appointor

The following provisions apply (with the necessary changes) in relation to an enduring guardian and appointor as if they were a guardian and represented person respectively —

- (a) sections 48 to 51;
- (b) section 53(a);
- (c) subject to the terms of the enduring power of guardianship, section 54 as if it were not subject to section 85;
- (d) Part 5 Division 3 other than section 57(2).

110I. Priority of enduring power of guardianship

- (1) To the extent an enduring power of guardianship relates to the making of a treatment decision for the appointor, the priority to be given to the power is determined in accordance with section 110ZJ.
- (2) To the extent an enduring power of guardianship relates to the performance of any other function in relation to the appointor, the priority to be given to the power is determined in accordance with section 119.

Division 4 — Jurisdiction of State Administrative Tribunal

110J. Who may apply

A person who, in the opinion of the State Administrative Tribunal, has a proper interest in the matter may apply to the Tribunal for a decision under this Division.

110K. Declaration about validity of enduring power of guardianship

- (1) The State Administrative Tribunal may declare that an enduring power of guardianship is valid or invalid.
- (2) A declaration made under subsection (1) has effect according to its terms.

110L. Declaration of incapacity of appointor

- (1) The State Administrative Tribunal may declare that the appointor under an enduring power of guardianship is unable to make reasonable judgments in respect of matters relating to his or her person.
- (2) A declaration made under subsection (1) has effect according to its terms.
- (3) The Tribunal may revoke a declaration made under subsection (1).

110M. Directions as to construction of terms etc.

The State Administrative Tribunal may give directions as to matters connected with —

- (a) the exercise of an enduring power of guardianship; or
- (b) the construction of the terms of an enduring power of guardianship.

110N. Revocation or variation of enduring power of guardianship

- (1) The State Administrative Tribunal may make an order —
 - (a) revoking an enduring power of guardianship; or
 - (b) revoking the appointment of one or some of the persons who are joint enduring guardians under

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an enduring power of guardianship if the person or each of the persons —

- (i) wishes to be discharged; or
- (ii) has been guilty of such neglect or misconduct or of such default as, in the opinion of the Tribunal, renders the person unfit to continue as an enduring guardian; or
- (iii) appears to the Tribunal to be incapable by reason of mental or physical incapacity of carrying out the person's duties;

or

- (c) revoking or varying any of the terms of an enduring power of guardianship.
- (2) If the Tribunal makes an order under subsection (1)(b), subject to the terms of the enduring power of guardianship, the remaining enduring guardian or guardians may act under the power.
 - (3) An order made under subsection (1) may be expressed to come into effect at a time earlier than immediately after it is made.

1100. Recognition of instrument created in another jurisdiction

- (1) The State Administrative Tribunal may make an order recognising an instrument created under a law of another jurisdiction as an enduring power of guardianship under this Part if satisfied the instrument corresponds sufficiently, in form and effect, to an enduring power of guardianship made under this Part.
- (2) The Tribunal may revoke an order made under subsection (1).

Part 9B — Advance health directives

Division 1 — Making of advance health directive

110P. Making advance health directive

A person who has reached 18 years of age and has full legal capacity may make an advance health directive containing treatment decisions in respect of the person's future treatment.

110Q. Formal requirements

- (1) An advance health directive is not valid unless —
 - (a) it is in the form or substantially in the form prescribed by the regulations; and
 - (b) the maker is encouraged to seek legal or medical advice; and
 - (c) it is signed by its maker or by another person in the presence of, and at the direction of, its maker; and
 - (d) the signature referred to in paragraph (c) is witnessed by 2 persons —
 - (i) both of whom are authorised by law to take declarations; or
 - (ii) of whom —
 - (I) one is authorised by law to take declarations; and
 - (II) the other has the qualifications specified in subsection (3);
- and
- (e) it is signed by the witnesses in the presence of —
 - (i) its maker; and

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- (ii) the person who signed it at its maker's direction (if applicable); and
 - (iii) each other.
- (2) Despite subsection (1)(b), the validity of an advance health directive is not affected by a failure to comply with subsection (1)(b).
- (3) A witness referred to in subsection (1)(d)(ii)(II) must be a person —
 - (a) who has reached 18 years of age; and
 - (b) who is not —
 - (i) the maker of the advance health directive; or
 - (ii) the person who signed the directive at its maker's direction (if applicable).

110QA. Maker may indicate in directive whether advice obtained

The form prescribed by the regulations for section 110Q(1)(a) must include provision for the maker, if the maker wishes —

- (a) to indicate whether the maker obtained legal or medical advice about the making of the directive; and
- (b) if so, to identify from whom the maker obtained the advice.

110R. Requirements in relation to treatment decision in advance health directive

- (1) A treatment decision in an advance health directive is invalid if the treatment decision —
 - (a) is not made voluntarily; or
 - (b) is made as a result of inducement or coercion.

- (2) A treatment decision in an advance health directive is invalid if, at the time the directive is made, its maker does not understand —
- (a) the nature of the treatment decision; or
 - (b) the consequences of making the treatment decision.

110RA. Registration of advance health directive

An advance health directive may be registered in the register referred to in section 110ZAA.

Division 2 — Operation of advance health directive

110S. Operation generally

- (1) A treatment decision in an advance health directive operates in respect of the treatment to which it applies —
- (a) at any time the maker of the directive is unable to make reasonable judgments in respect of that treatment; and
 - (b) as if —
 - (i) the treatment decision had been made by the maker at that time; and
 - (ii) the maker were of full legal capacity.
- (2) Subject to subsection (3), a treatment decision in an advance health directive operates only in the circumstances specified in the directive.
- (3) Subject to subsection (4), a treatment decision in an advance health directive does not operate if circumstances exist or have arisen that —
- (a) the maker of that directive would not have reasonably anticipated at the time of making the directive; and

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- (b) would have caused a reasonable person in the maker's position to have changed his or her mind about the treatment decision.
- (4) In determining whether or not subsection (3) applies in relation to a treatment decision that is in an advance health directive, the matters that must be taken into account include the following —
- (a) the maker's age at the time the directive was made and at the time the treatment decision would otherwise operate;
 - (b) the period that has elapsed between those times;
 - (c) whether the maker reviewed the treatment decision at any time during that period and, if so, the period that has elapsed between the time of the last such review and the time at which the treatment decision would otherwise operate;
 - (d) the nature of the condition for which the maker needs treatment, the nature of that treatment and the consequences of providing and not providing that treatment.
- (5) For the purpose of determining whether or not subsection (3) applies in relation to a treatment decision that is in an advance health directive, subject to the terms of the directive, any of the following persons may be consulted —
- (a) if the maker has an enduring guardian — the enduring guardian;
 - (b) if the maker has a guardian — the guardian;
 - (c) a person who has a relationship with the maker described in section 110ZD(3)(a) to (d);
 - (d) any other person considered appropriate in the circumstances.

- (6) Subject to section 110T, a treatment decision in an advance health directive is taken to have been revoked if the maker of the directive has changed his or her mind about the treatment decision since making the directive.

110T. Effect of subsequent enduring power of guardianship

For the purposes of this Act —

- (a) a treatment decision in an advance health directive is not taken to have been revoked; and
- (b) the maker of the directive is not taken to have changed his or her mind about the treatment decision since making the directive,

merely because the maker subsequently makes an enduring power of guardianship (whether about the same matter as the treatment decision or a different matter).

110U. Priority of treatment decision in advance health directive

The priority to be given to a treatment decision in an advance health directive is determined in accordance with section 110ZJ.

Division 3 — Jurisdiction of State Administrative Tribunal

110V. Who may apply

A person who, in the opinion of the State Administrative Tribunal, has a proper interest in the matter may apply to the Tribunal for a decision under this Division.

110W. Declaration about validity of directive or treatment decision

- (1) The State Administrative Tribunal may declare that —
 - (a) an advance health directive; or
 - (b) a treatment decision in an advance health directive,is valid or invalid.
- (2) A declaration made under subsection (1) has effect according to its terms.

110X. Declaration of incapacity of maker

- (1) The State Administrative Tribunal may declare that the maker of an advance health directive is unable to make reasonable judgments in respect of the treatment to which a treatment decision in the directive applies.
- (2) A declaration made under subsection (1) has effect according to its terms.
- (3) The Tribunal may revoke a declaration made under subsection (1).

110Y. Directions as to construction of terms etc.

The State Administrative Tribunal may give directions as to matters connected with —

- (a) the giving of effect to a treatment decision in an advance health directive; or
- (b) the construction of the terms of an advance health directive.

110Z. Declaration that treatment decision has been revoked

- (1) The State Administrative Tribunal may declare that a treatment decision in an advance health directive is taken to have been revoked under section 110S(6).
- (2) A declaration made under subsection (1) has effect according to its terms.
- (3) The Tribunal may revoke a declaration made under subsection (1).

110ZA. Recognition of instrument created in another jurisdiction

- (1) The State Administrative Tribunal may make an order recognising an instrument created under a law of another jurisdiction as an advance health directive made under this Part if satisfied the instrument corresponds sufficiently, in form and effect, to an advance health directive made under this Part.
- (2) The Tribunal may revoke an order made under subsection (1).

Division 4 — Miscellaneous matters

110ZAA. Register of advance health directives

- (1) A register of advance health directives must be established and maintained.
- (2) The regulations may provide for any matter that is necessary or convenient for the registration of advance health directives, including the following —
 - (a) who must establish and maintain the register;
 - (b) the form and manner in which the register must be established and maintained;

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- (c) the contents of the register, including proof of the contents;
 - (d) who may apply for registration;
 - (e) the procedure for registration, including the alteration and removal of entries in the register;
 - (f) who may have access to or obtain information from the register;
 - (g) the review by the State Administrative Tribunal of decisions allowing, or refusing to allow, people to have access to or obtain information from the register;
 - (h) the procedure for accessing or obtaining information from the register.
- (3) No fee or charge is payable in respect of any matter connected with the register or registration.

110ZAB. Disclosure of information obtained from register

- (1) In this section —
“**register**” means the register referred to in section 110ZAA.
- (2) A person who has access to the register must not disclose any information on the register unless the disclosure is authorised by subsection (4).
Penalty: \$5 000.
- (3) A person who obtains any information from the register must not disclose the information unless the disclosure is authorised by subsection (4).
Penalty: \$5 000.
- (4) For subsections (2) and (3), a disclosure is authorised if it is —
- (a) authorised by, or made for the purposes of, this Act; or

- (b) made with the consent of the maker of the advance health directive to which the information relates; or
- (c) made for a purpose, or in a circumstance, prescribed by the regulations; or
- (d) otherwise authorised or required by law.

110ZAC. Regulations to facilitate national register

- (1) In this section —
 - “**advance health directive**” means —
 - (a) an advance health directive made under this Part; or
 - (b) an instrument created under the law of another State or a Territory that corresponds sufficiently, in form and effect, to an advance health directive made under this Part, whether or not the instrument is recognised under section 110ZA(1).
- (2) The regulations may make provision to facilitate —
 - (a) the establishment of a national register of advance health directives; and
 - (b) if a national register is established — the registration of advance health directives on it.

110ZB. Common law preserved

This Part does not affect the common law relating to a person’s entitlement to make treatment decisions in respect of the person’s future treatment.

Part 9C — Persons responsible for patients

Division 1 — Preliminary matters

110ZC. Meaning of “patient”

In this Part —

“**patient**” means a person who needs treatment.

Division 2 — Treatment decisions by persons responsible for patients

110ZD. Circumstances in which person responsible may make treatment decision

- (1) If a patient is unable to make reasonable judgments in respect of any treatment proposed to be provided to the patient, the person responsible for the patient under subsection (2) may make a treatment decision in respect of the treatment.
- (2) The person responsible for the patient is the first in order of the persons listed in subsection (3) who —
 - (a) is of full legal capacity; and
 - (b) is reasonably available; and
 - (c) is willing to make a treatment decision in respect of the treatment.
- (3) For subsection (2), the persons are the following —
 - (a) the patient’s spouse or de facto partner if that person —
 - (i) has reached 18 years of age; and
 - (ii) is living with the patient;
 - (b) the patient’s nearest relative who maintains a close personal relationship with the patient;
 - (c) the person who —
 - (i) has reached 18 years of age; and

- (ii) is the primary provider of care and support (including emotional support) to the patient, but is not remunerated for providing that care and support;
- (d) any other person who —
 - (i) has reached 18 years of age; and
 - (ii) maintains a close personal relationship with the patient.
- (4) For subsection (3)(b), the patient's nearest relative is the first in order of priority of the following relatives of the patient who has reached 18 years of age —
 - (a) the spouse or de facto partner;
 - (b) a child;
 - (c) a parent;
 - (d) a sibling.
- (5) For subsection (3)(b) and (d)(ii), a person maintains a close personal relationship with the patient only if the person —
 - (a) has frequent contact of a personal (as opposed to a business or professional) nature with the patient; and
 - (b) takes a genuine interest in the patient's welfare.
- (6) For subsection (3)(c)(ii), a person is not remunerated for providing care and support to the patient although the person receives a carer payment or other benefit from the Commonwealth or a State or Territory for providing home care for the patient.
- (7) The person responsible for the patient cannot consent to the sterilisation of the patient.
- (8) When making a treatment decision for the patient, the person responsible for the patient must act according to the person's opinion of the best interests of the patient.

- (9) A treatment decision made by the person responsible for the patient has effect as if —
- (a) the treatment decision had been made by the patient; and
 - (b) the patient were of full legal capacity.

110ZE. Priority of treatment decision of person responsible

The priority to be given to a treatment decision of a person responsible for a patient under section 110ZD is determined in accordance with section 110ZJ.

Division 3 — Jurisdiction of State Administrative Tribunal

110ZF. Who may apply

A person who, in the opinion of the State Administrative Tribunal, has a proper interest in the matter may apply to the Tribunal for a decision under this Division.

110ZG. Declaration that person responsible may make treatment decision

- (1) The State Administrative Tribunal may declare —
- (a) that a patient is unable to make reasonable judgments in respect of the treatment proposed to be provided to the patient; and
 - (b) that the person identified in the declaration is the person responsible for the patient under section 110ZD.
- (2) A declaration made under subsection (1) has effect according to its terms.
- (3) The Tribunal may revoke a declaration made under subsection (1).

Part 9D — Treatment decisions in relation to patients under legal incapacity

Division 1 — Preliminary matters

110ZH. Terms used in this Part

In this Part —

“**advance health directive**” includes a directive given by a person under the common law containing treatment decisions in respect of the person’s future treatment;

“**health professional**” has the meaning given to that term in the *Civil Liability Act 2002* section 5PA;

“**patient**” means a person who needs treatment;

“**urgent treatment**” means treatment urgently needed by a patient —

- (a) to save the patient’s life; or
- (b) to prevent serious damage to the patient’s health; or
- (c) to prevent the patient from suffering or continuing to suffer significant pain or distress,

but does not include the sterilisation of the patient.

Division 2 — Provision of treatment

110ZI. Urgent treatment generally

- (1) Subsection (2) applies if —
 - (a) a patient needs urgent treatment; and
 - (b) the patient is unable to make reasonable judgments in respect of the treatment; and
 - (c) it is not practicable for the health professional who proposes to provide the treatment to

determine whether or not the patient has made an advance health directive containing a treatment decision that is inconsistent with providing the treatment; and

- (d) it is not practicable for the health professional to obtain a treatment decision in respect of the treatment from the patient's guardian or enduring guardian or the person responsible for the patient under section 110ZD.
- (2) The health professional may provide the treatment to the patient in the absence of a treatment decision in relation to the patient.

110ZIA. Urgent treatment after attempted suicide

- (1) Subsection (2) applies if —
- (a) a patient needs urgent treatment; and
 - (b) the patient is unable to make reasonable judgments in respect of the treatment; and
 - (c) the health professional who proposes to provide the treatment reasonably suspects that the patient has attempted to commit suicide and needs the treatment as a consequence.
- (2) The health professional may provide the treatment to the patient despite —
- (a) the patient having made an advance health directive containing a treatment decision that is inconsistent with providing the treatment; or
 - (b) the patient's guardian or enduring guardian or the person responsible for the patient under section 110ZD having made such a treatment decision in relation to the patient.

110ZJ. Order of priority of persons who may make treatment decision in relation to patient

- (1) Subject to sections 110ZI and 110ZIA, this section applies if a patient is unable to make reasonable judgments in respect of any treatment proposed to be provided to the patient.
- (2) If the patient has made an advance health directive containing a treatment decision in respect of the treatment, whether or not the treatment is provided to the patient must be decided in accordance with the treatment decision.
- (3) If —
 - (a) subsection (2) does not apply; and
 - (b) the patient has an enduring guardian who —
 - (i) is authorised to make a treatment decision in respect of the treatment; and
 - (ii) is reasonably available; and
 - (iii) is willing to make a treatment decision in respect of the treatment,

whether or not the treatment is provided to the patient must be decided by the enduring guardian.

- (4) If —
 - (a) subsections (2) and (3) do not apply; and
 - (b) the patient has a guardian who —
 - (i) is authorised to make a treatment decision in respect of the treatment; and
 - (ii) is reasonably available; and
 - (iii) is willing to make a treatment decision in respect of the treatment,

whether or not the treatment is provided to the patient must be decided by the guardian.

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- (5) If —
- (a) subsections (2) to (4) do not apply; and
 - (b) there is a person responsible for the patient under section 110ZD,

whether or not the treatment is provided to the patient must be decided by the person responsible.

110ZK. Reliance by health professional on treatment decision

- (1) In this section —
- “take treatment action”** means —
- (a) to commence or continue any treatment of a patient; or
 - (b) to not commence or to discontinue any treatment of a patient.
- (2) If a health professional —
- (a) takes treatment action —
 - (i) reasonably believing that the patient is unable to make reasonable judgments in respect of the treatment action; and
 - (ii) relying in good faith on what is purportedly a treatment decision —
 - (I) in an advance health directive made by the patient; or
 - (II) made by the patient’s guardian or enduring guardian or the person responsible for the patient under section 110ZD;
- or
- (b) takes treatment action —
 - (i) in circumstances where it is reasonable for the health professional to rely on some other health professional having

ascertained whether the treatment action is in accordance with a treatment decision; and

- (ii) reasonably assuming that some other health professional has ascertained that the treatment action is in accordance with a treatment decision,

the health professional is taken for all purposes to take the treatment action in accordance with a treatment decision that has effect as if —

- (c) it had been made by the patient; and
 - (d) the patient were of full legal capacity.
- (3) For subsection (2)(a)(ii), a health professional is taken to have relied in good faith on what was purportedly a treatment decision if, after considering whether or not to rely on it, the health professional acted honestly in relying on it.
- (4) For the purpose of determining under subsection (2)(b)(ii) whether the health professional's assumption was reasonable, the following matters must be taken into account —
- (a) whether the health professional sighted any written evidence that some other health professional had ascertained that the treatment action was in accordance with the treatment decision;
 - (b) anything else relevant to the determination.

110ZL. Validity of certain treatment decisions

If a health professional —

- (a) commences or continues palliative care in relation to a patient; or

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- (b) does not commence or discontinues any treatment of a patient,

in accordance with a treatment decision that is —

- (c) in an advance health directive made by the patient; or
- (d) made by the patient’s guardian or enduring guardian or the person responsible for the patient under section 110ZD,

the health professional is taken for all purposes to have done so in accordance with a valid treatment decision, even if an effect of doing so is to hasten the death of the patient.

Division 3 — Jurisdiction of State Administrative Tribunal

110ZM. Who may apply

A person who, in the opinion of the State Administrative Tribunal, has a proper interest in the matter may apply to the Tribunal for a decision under this Division.

110ZN. Declaration as to who may make treatment decision

- (1) The State Administrative Tribunal may declare whether section 110ZJ(2), (3), (4) or (5) applies in respect of any treatment proposed to be provided to a patient.
- (2) A declaration made under subsection (1) has effect according to its terms.
- (3) The Tribunal may revoke a declaration made under subsection (1).

”.

12. Section 113 amended

After section 113(1) the following subsection is inserted —

“

- (1a) Subsection (1) does not apply to information obtained from the register referred to in section 110ZAA, and section 110ZAB applies to that information instead.

”

13. Section 119 replaced

Section 119 is repealed and the following section is inserted instead —

“

119. Order of priority of enduring guardian and guardian for matters other than treatment decisions

- (1) This section applies if a person is unable to make reasonable judgments in respect of a matter relating to his or her person other than treatment proposed to be provided to the person.
- (2) If the person has an enduring guardian who —
- (a) is authorised to make a decision in respect of the matter; and
 - (b) is reasonably available; and
 - (c) is willing to make a decision in respect of the matter,

a decision in respect of the matter must be made by the enduring guardian.

- (3) If —
- (a) subsection (2) does not apply; and
 - (b) the person has a guardian who —
 - (i) is authorised to make a decision in respect of the matter; and

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- (ii) is reasonably available; and
- (iii) is willing to make a decision in respect of the matter,

a decision in respect of the matter must be made by the guardian.

”.

14. Review of the *Guardianship and Administration Act 1990*

- (1) The Minister administering the *Guardianship and Administration Act 1990* is to carry out a review of the operation and effectiveness of the provisions of the *Guardianship and Administration Act 1990* and the relevant sections of *The Criminal Code* as soon as practicable after the expiration of 3 years from the commencement of this Act.
- (2) The Minister is to prepare a report based on the review made under subsection (1) and cause the report to be laid before each House of Parliament within 4 years after the commencement of this Act.

Part 3 — *Civil Liability Act 2002* amended

15. The Act amended

The amendments in this Part are to the *Civil Liability Act 2002**.

[* *Reprint 1 as at 10 February 2006.*]

16. Section 5PA amended

Section 5PA is amended as follows:

(a) by deleting “includes” and inserting instead —
“ means ”;

(b) by deleting paragraph (m) and inserting instead —

“

(m) any other person who practises a discipline or profession in the health area that involves the application of a body of learning.

”.

Part 4 — *The Criminal Code* amended

17. The Act amended

The amendments in this Part are to *The Criminal Code**.

[* *Reprint 12 as at 1 June 2005 (see the Schedule to the Criminal Code Act 1913 appearing as Appendix B to the Criminal Code Act Compilation Act 1913).*
For subsequent amendments see Western Australian Legislation Information Tables for 2005, Table 1, p. 112 and Acts Nos. 3 and 10 of 2006.]

18. Section 259 amended

Section 259 is amended as follows:

- (a) by inserting before “A person” the subsection designation “(1)”;
- (b) by deleting “treatment —” and inserting instead —
“ treatment (including palliative care) — ”;
- (c) at the end of the section by inserting —

“

- (2) A person is not criminally responsible for not administering or ceasing to administer, in good faith and with reasonable care and skill, surgical or medical treatment (including palliative care) if not administering or ceasing to administer the treatment is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.

”.

19. Section 265 amended

Section 265 is amended by inserting after “treatment” —

“ (including palliative care) ”.

20. Section 275 amended

Section 275 is amended by deleting “treatment, and” and inserting instead —

“ treatment (including palliative care), and ”.

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