



ANNO TRICESIMO QUARTO

# ELIZABETHAE II REGINAE

A.D. 1985

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No. 122 of 1985

An Act to amend the Mental Health Act, 1977.

[Assented to 10 November 1985]

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

Short title.

1. (1) This Act may be cited as the "Mental Health Act Amendment Act, 1985".

(2) The Mental Health Act, 1977, is in this Act referred to as "the principal Act".

Commencement.

2. This Act shall come into operation on a day to be fixed by proclamation.

Interpretation.

3. Section 5 of the principal Act is amended—

(a) by inserting after the definition of "the Commission" the following definitions:

"consent", in relation to the carrying out of a medical procedure or a dental procedure, means an informed consent given after proper and sufficient explanation of the nature and likely consequences of the procedure:

"dental procedure" means any procedure carried out by, or pursuant to directions given by, a dentist in the course of practice as a dentist:

"dentist" means a person who is registered on the general register or specialist register under the Dentists Act, 1984::

(b) by inserting after the definition of "the former Act" the following definitions:

"medical practitioner" means a person who is registered on the general register under the Medical Practitioners Act, 1983:

"medical procedure" means any procedure, including a sterilization procedure and a termination of pregnancy, car-

ried out by, or pursuant to directions given by, a medical practitioner in the course of practice as a medical practitioner;

- (c) by inserting after the definition of “the Minister” the following definition:

“parent”, in relation to a minor, includes a guardian of the minor or a person acting *in loco parentis* in relation to the minor;

- (d) by striking out from the definition of “psychiatrist” the passage “legally qualified”;

- (e) by striking out from the definition of “senior psychiatrist” the passage “legally qualified”;

and

- (f) by inserting after the definition of “senior psychiatrist” the following definition:

“sterilization procedure” means any procedure carried out on a person that results, or is likely to result, in the person being infertile.

4. The heading preceding section 19 of the principal Act is amended by striking out the passage “PATIENTS IN APPROVED HOSPITALS” and substituting the passage “PERSONS SUFFERING FROM MENTAL ILLNESS”.

Amendment of heading preceding s. 19.

5. Section 19 of the principal Act is amended—

- (a) by inserting in subsection (1) after the passage “Subject to this section,” the passage “but notwithstanding any other provision of this Act,”;

Amendment of s. 19—  
Restriction on psychiatric treatment.

- (b) by striking out from subsection (1) the passage “patient detained in an approved hospital” and substituting the passage “person suffering from a mental illness who is a patient in any hospital (whether an approved hospital or not)”;

- (c) by striking out subparagraphs (i) and (ii) of paragraph (b) of subsection (1) and substituting the following subparagraphs:

(i) where the patient is capable of giving an effective consent—of the patient;

(ii) where the patient is incapable of giving an effective consent and is less than 16 years of age—of a parent of the patient;

and

(iii) where the patient is incapable of giving an effective consent and is of or over the age of 16 years—of the Board;

- (d) by striking out from subsection (2) the passage “or a guardian or relative,” and substituting the passage “a parent or the Board”;

and

(e) by inserting after subsection (2) the following subsection:

(2a) A person who contravenes subsection (1) shall be guilty of an indictable offence.

Insertion of new Part IVA.

6. The following Part is inserted after section 28 of the principal Act:

#### PART IVA

#### CONSENT TO MEDICAL OR DENTAL PROCEDURES CARRIED OUT ON PERSONS SUFFERING FROM MENTAL ILLNESS OR MENTAL HANDICAP

Application of this Part.

28a. This Part applies in relation to a person who is suffering from a mental illness or mental handicap and who is, by reason of that mental illness or mental handicap, incapable of giving effective consent, whether or not the person is a protected person.

Consent of parent or Board is effective in certain circumstances.

28b. (1) Where a person to whom this Part applies is less than 16 years of age—

(a) the consent of a parent of the person in respect of a medical procedure (not being a sterilization procedure or termination of pregnancy) or a dental procedure to be carried out on the person shall be deemed to be a consent given by the person and to have the same effect for all purposes as if the person were capable of giving effective consent;

and

(b) the consent of the Board in respect of a sterilization procedure or termination of pregnancy to be carried out on the person shall, if given in accordance with this Part, be deemed to be a consent given by the person and to have the same effect for all purposes as if the person were capable of giving effective consent.

(2) Where a person to whom this Part applies is of or above the age of 16 years, the consent of the Board in respect of a medical procedure or dental procedure to be carried out on the person shall, if given in accordance with this Part, be deemed to be a consent given by the person and to have the same effect for all purposes as if the person were capable of giving effective consent.

(3) An application for the consent of the Board to the carrying out of a medical procedure or dental procedure on a person to whom this Part applies may only be made by—

(a) the medical practitioner or dentist proposing to carry out the procedure;

(b) a parent of the person;

or

(c) any other person who the Board is satisfied has a proper interest in the matter.

Sterilization and abortion procedures not to be carried out without consent of Board.

28c. (1) Except where prescribed circumstances exist for the purposes of section 28g (1), a medical practitioner shall not carry out a sterilization procedure or a termination of pregnancy on a person to

whom this Part applies unless the Board has consented to the carrying out of that procedure or termination.

(2) A medical practitioner who contravenes subsection (1) shall be guilty of an indictable offence.

28d. (1) Upon receiving an application for its consent to the carrying out of a sterilization procedure or termination of pregnancy on a person and determining that the person is a person to whom this Part applies, the Board shall then determine whether or not to grant its consent.

Determination by Board of application for consent to sterilization procedure or abortion.

(2) In making any determination under subsection (1) in respect of a person, the Board—

(a) shall afford—

- (i) where it is practicable to do so, the person;
- (ii) subject to subsection (3), any parent of the person;
- and
- (iii) any other person who the Board is satisfied has a proper interest in the matter,

an opportunity to appear before, and make representations to, the Board;

(b) shall give due consideration to the expressed wishes (if any) of the person;

and

(c) shall give due consideration to the object of minimizing interference with the rights of the person so far as is consistent with the proper protection and care of the person.

(3) The Board is not obliged to afford a parent of a person to whom this Part applies (except where the parent is the applicant for consent) an opportunity to appear before, and make representations to, the Board—

(a) if the whereabouts of the parent cannot, after reasonable enquiries, be ascertained;

(b) if, in the particular circumstances, it is not reasonably practicable to do so;

or

(c) if the Board is satisfied that it would not be in the best interests of the person the subject of the application to do so.

(4) The Board shall determine any application relating to a proposed termination of pregnancy as expeditiously as is reasonably practicable.

28e. (1) Where the Board, on an application for consent to the carrying out of a sterilization procedure on a person to whom this Part applies, is satisfied that it is therapeutically necessary for the

Consent to sterilization procedure.

procedure to be carried out, it may consent to the carrying out of the procedure.

(2) Where the Board, on an application for consent to the carrying out of a sterilization procedure on a person to whom this Part applies, being a procedure that the Board is not satisfied is therapeutically necessary—

(a) is satisfied—

(i) that there is no likelihood of the person acquiring at any time the capacity to give an effective consent;

(ii) that the person is physically capable of procreation;

and

(iii) that—

(A) the person is, or is likely to be, sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied;

or

(B) in the case of a woman, cessation of her menstrual cycle would be in her best interests and would be the only reasonably practicable way of dealing with the social, sanitary or other problems associated with her menstruation;

and

(b) has no knowledge of any refusal on the part of the person to consent to the carrying out of the procedure, being a refusal made by the person while capable of giving effective consent and communicated by the person to a medical practitioner,

the Board may, in those circumstances, consent to the carrying out of the sterilization procedure, but not otherwise.

(3) A consent given under this section has no force or effect until the expiration of the period during which an appeal against a determination of the Board in respect of the giving of the consent may be instituted or, if such an appeal is instituted, until the appeal is determined (the consent not being revoked on the appeal) or the appeal is withdrawn.

28f. Where the Board, on an application for consent to the carrying out of a termination of pregnancy on a woman to whom this Part applies—

(a) is satisfied—

(i) that the carrying out of the termination would not constitute an offence under the Criminal Law Consolidation Act, 1935;

and

- (ii) that there is no likelihood of the woman acquiring the capacity to give an effective consent within the period of time that is reasonably available for the safe carrying out of the termination;

and

- (b) has no knowledge of any refusal on the part of the woman to consent to the termination, being a refusal made while capable of giving effective consent and communicated by her to a medical practitioner,

the Board may, in those circumstances, consent to the carrying out of the termination, but not otherwise.

(2) A consent given under this section has no force or effect until the expiration of the period during which an appeal against a determination of the Board in respect of the giving of the consent may be instituted or, if such an appeal is instituted, until the appeal is determined (the consent not being revoked on the appeal) or the appeal is withdrawn.

28g. (1) Where a medical procedure is carried out in prescribed circumstances by a medical practitioner on a person to whom this Part applies, the person shall be deemed to have consented to the carrying out of the procedure and the consent shall be deemed to have the same effect for all purposes as if the person were capable of giving effective consent.

Emergency  
medical  
procedures carried  
out on persons  
unable to consent.

(2) Prescribed circumstances exist for the purposes of subsection (1) if—

(a) the medical practitioner carrying out the medical procedure—

- (i) is of the opinion that the procedure is necessary to meet imminent risk to the person's life or health;

and

- (ii) has no knowledge of any refusal on the part of the person to consent to the procedure, being a refusal made by the person while capable of giving effective consent and communicated by the person to the medical practitioner or some other medical practitioner;

(b) the opinion of the medical practitioner referred to in paragraph (a) is, unless it is not reasonably practicable to do so having regard to the imminence of the risk to the person's life or health, supported by the written opinion of one other medical practitioner;

and

(c) in the case of a medical procedure (not being a sterilization procedure or termination of pregnancy) to be carried out on a person who is less than 16 years of age, no parent of the person is reasonably available or, being

available, the parent, having been requested to consent to the carrying out of the procedure, has failed or refused to do so.

Delegation by Board of its power to consent.

28h. (1) Subject to this section, the Board may delegate to any person the power vested in the Board under this Part to consent to the carrying out of a medical procedure or dental procedure on a person to whom this Part applies.

(2) The Board is not empowered to delegate its power to consent to the carrying out of a sterilization procedure or termination of pregnancy.

(3) The Board shall not delegate its power to consent to the carrying out of a medical procedure or dental procedure on a person to any medical practitioner or dentist who is likely to be involved in the carrying out of the procedure.

(4) A delegation under this section may be subject to such conditions or limitations as the Board thinks fit, is revocable at will, and does not prevent the exercise by the Board of the power delegated.

Evidentiary provisions.

28i. (1) Any consent to the carrying out of a medical procedure or a dental procedure given by the Board or its delegate under this Part must be in writing.

(2) In any legal proceedings, a document purporting to be signed by a member of the Board, or a delegate of the Board, and to be the consent of the Board, or the delegate, to the carrying out of a medical procedure or a dental procedure shall be conclusive proof of the consent of the Board, or the delegate, to the carrying out of the procedure and of the validity of that consent.

(3) In any legal proceedings, a certificate purporting to be signed by a member of the Board and to certify that a specified person was, on a specified day or during a specified period, a delegate of the Board for the purposes of this Part shall, in the absence of proof to the contrary, be proof of the matters so certified.

This Part does not derogate from other enactments.

28j. The provisions of this Part are in addition to, and do not derogate from, the provisions of any other enactment.

Minister to review and report to Parliament on operation of this Part.

28k. (1) The Minister shall, as soon as practicable after the expiration of 2 years from the commencement of this Part, cause a review and report to be made on the operation of this Part.

(2) The Minister shall, as soon as practicable after receiving the report, cause a copy of it to be laid before each House of Parliament.

Amendment of s. 37—  
Appeals from determinations and orders of the Board.

7. Section 37 of the principal Act is amended—

(a) by inserting after subsection (1) the following subsections:

(1a) Where the Board has made a determination under Part IVA on an application for its consent to the carrying out of a sterilization procedure or termination of pregnancy on a person, any of the following persons may appeal to the Tribunal against the determination:

- (a) the person the subject of the application;
- (b) any parent of the person;
- or
- (c) any other person who the Tribunal is satisfied has a proper interest in the matter.

(1b) Subject to subsection (1c), an appeal under this section must be instituted within one month of the making of the order or determination the subject of the appeal.

(1c) An appeal against a determination made in respect of an application for consent to the carrying out of a termination of pregnancy must be instituted within 2 working days of the making of the determination.

(1d) The Tribunal shall hear and determine an appeal under this section as expeditiously as is reasonably practicable and shall give priority to the hearing and determination of any appeal against a determination made in respect of an application for consent to the carrying out of a termination of pregnancy.;

and

- (b) by striking out from subsection (2) the passage "affirm, vary or revoke the order of the Board" and substituting the passage "affirm or vary the order or determination of the Board or may revoke the order or determination and may make in its place any other order or determination that the Board could have made".

**8. Section 38 of the principal Act is amended—**

- (a) by inserting after subsection (1) the following subsection:

(1a) A decision or order made by the Tribunal on an appeal against a determination of the Board in respect of giving its consent to the carrying out of a sterilization procedure or a termination of pregnancy is not appealable.;

and

- (b) by striking out from subsection (2) the passage "The appeal" and substituting the passage "An appeal under this section".

**9. Section 49 of the principal Act is amended by striking out the passage "two thousand dollars" and substituting the passage "\$5 000".**

Amendment of s. 38—  
Appeals from decisions and orders of the Tribunal.

Amendment of s. 49—  
Penalty for indictable offence.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

D. B. DUNSTAN, Governor