30 September 2019

The Hon Vickie Chapman MP
Attorney-General
PO Box 464
ADELAIDE SA 5000

By email: agd@agd.gov.sa.au

Dear Ms Attorney

Report on the Review of the Advance Care Directives Act 2013


2. The Society has a number of concerns about the Advanced Care Act 2013 (SA) (“the Act”), Advance Care Directives Regulations 2014 (SA) (“the Regulations”), the Advanced Care Directive Form and DIY Kit, and have expressed these concerns consistently over a number of years, including most recently to the Minister for Health and Wellbeing on 24 May 2019 (enclosed).

3. The Society has considered the Report and while it has adopted a number of the Society’s recommendations, the Society remains concerned with respect to matters such as the order of signing. Given the recommendations contained in the Report are likely to inform reform to the Act and Regulations, the Society raises the following issues for your consideration ahead of any legislative change.

Order of signing

4. One of the Society’s key concerns with the current ACD process is the requirement under the Regulations that a person appointed as a substitute decision-maker (SDM) must sign their acceptance of the appointment prior to execution of the ACD by the person making the appointment. The current process is causing ongoing angst and difficulties for a large section of the population, the reasons why are outlined in the Society’s letter of 24 May 2019.

5. The Society notes Professor Lacey found that there was no practical or legal basis for changing the order of signing with regards to ACDs in her Report. The Society strongly disagrees with Professor Lacey’s reasoning and this finding and urges you to further consider amending the requirement under the Regulations that the SDM must sign their acceptance of the appointment prior to the execution of the ACD by the person making the appointment.

6. From a legal perspective the order of signing makes little sense; the Society is unaware of other legal documents where the agent must sign before the principal. This is contrary to the well-
established laws of agency, whereby actual authority arises where a principal grants, and an agent accepts, authority for the agent to perform specific tasks on behalf of the principal.¹ This is essentially conceded by Professor Lacey in her Report. When the legislation was first enacted in South Australia in 2014, the order of signing was traditional. There has been no explanation as to why this was later reversed in 2016. In addition, the Society is aware that the South Australian ACD form was modelled on the Queensland version, however, the order of signing is not reversed in Queensland.

7. Furthermore, this requirement causes unnecessary delays and costs, prejudices those in regional and remote areas, and further increases the risk of a person losing capacity before an ACD is completed.

8. Alternatively, the Society suggests for your consideration that the order of signing be disregarded completely (i.e. remove any prescription for the order of signing and thereby facilitate both alternate orders of signing). This would address the concerns raised by permitting the principal to sign first if more convenient/necessary.

**The legislation should be under the jurisdiction of the Attorney-General**

9. The Society has, since the introduction of the above legislation, taken and maintained the view that this legislation should be under the jurisdiction of the Attorney-General, not that of the Health Minister. Advance Care Directives are legally binding documents that can have an enormous impact on the lives of elderly and vulnerable people. The Society maintains that there is a need for legal oversight by the Attorney-General’s Department at a macro level.

10. There are a number of deficiencies in the current system that the Society is concerned have not been adequately addressed in the Report. Most critically, the order of signing. The Society calls for reform to this requirement, not in the interests of our Members, but in the interests of the general public who are being affected by the unnecessary complexity of preparing and signing this important document.

I would be pleased to meet with you to discuss this matter further.

Yours sincerely

Amy Nikolovski  
**PRESIDENT**

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Encl: Letter to the Hon Stephen Wade MLC re Review of the Advanced Care Directives Act 2013

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