

TASMANIA

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**GUARDIANSHIP AND ADMINISTRATION  
AMENDMENT (ADVANCE CARE DIRECTIVES)  
BILL 2020**

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**GUARDIANSHIP AND ADMINISTRATION  
AMENDMENT (ADVANCE CARE DIRECTIVES)  
BILL 2020**

*(Brought in by the Minister for Justice, the Honourable Elise  
Nicole Archer)*

**A BILL FOR**

**An Act to amend the *Guardianship and Administration Act  
1995***

Be it enacted by Her Excellency the Governor of Tasmania, by  
and with the advice and consent of the Legislative Council and  
House of Assembly, in Parliament assembled, as follows:

**1. Short title**

This Act may be cited as the *Guardianship and  
Administration Amendment (Advance Care  
Directives) Act 2020*.

**2. Commencement**

This Act commences on a day to be proclaimed.

**3. Principal Act**

In this Act, the *Guardianship and  
Administration Act 1995*\* is referred to as the  
Principal Act.

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\*No. 44 of 1995

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**4. Long title amended**

The long title of the Principal Act is amended by inserting “, to enable the giving of advance care directives” after “administrator”.

**5. Section 3 amended (Interpretation)**

Section 3(1) of the Principal Act is amended as follows:

- (a) by inserting the following definitions after the definition of *administrator*:

*advance care directive* means an advance care directive given under Part 5A that is in force;

*advance care directive order* means an order of the Board made under section 35ZG;

- (b) by omitting “Part 6” from paragraph (d) of the definition of *special treatment* and substituting “this definition”.

**6. Section 5 amended (Objects of Act)**

Section 5 of the Principal Act is amended as follows:

- (a) by inserting the following paragraph after paragraph (b):

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- (ba) to enable the giving of advance care directives; and
- (b) by omitting from paragraph (c) “with a disability”.

**7. Section 6 amended (Principles to be observed)**

Section 6 of the Principal Act is amended as follows:

- (a) by inserting in paragraph (b) “or impaired decision making ability,” after “disability”;
- (b) by omitting from paragraph (b) “Act” and substituting “Act,”;
- (c) by inserting in paragraph (c) “or impaired decision making ability,” after “disability”;
- (d) by omitting from paragraph (c) “Act” and substituting “Act,”.

**8. Section 7A amended (Role of President)**

Section 7A(b) of the Principal Act is amended by inserting “giving an advance care directive” after “application,”.

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**9. Section 15 amended (Functions and powers of Public Guardian)**

Section 15(1) of the Principal Act is amended as follows:

- (a) by inserting in paragraph (j) “or impaired decision making ability” after “disability”;
- (b) by omitting paragraph (k) and substituting the following paragraph:
  - (k) to perform such other functions as are assigned to the Public Guardian by this Act or any other Act or law.

**10. Section 17 amended (Investigations)**

Section 17(1) of the Principal Act is amended by inserting “or an advance care directive” after “attorney”.

**11. Section 20 amended (Guardianship order)**

Section 20 of the Principal Act is amended by inserting after subsection (6) the following subsection:

- (7) A condition or restriction imposed under subsection (1) should, as far as is reasonably practicable, be consistent with the terms of any advance care directive



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given by the proposed represented person.

**12. Section 25 amended (Authority of full guardian)**

Section 25(2)(e) of the Principal Act is amended by inserting “or Part 5A” after “Part 6”.

**13. Section 27A inserted**

After section 27 of the Principal Act, the following section is inserted in Division 3:

**27A. Guardian to give effect to advance care directive**

- (1) A person appointed as a guardian must –
  - (a) take reasonable steps to ascertain whether the person under guardianship has given an advance care directive; and
  - (b) if the person under guardianship has given an advance care directive, as far as is reasonably practicable –
    - (i) give effect to any provision in the advance care directive; and
    - (ii) seek to avoid any outcome or intervention that the person under

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guardianship would wish  
to be avoided.

- (2) Subsection (1)(b) does not apply to a person appointed as a limited guardian if he or she is not empowered under the guardianship order to make health care decisions in respect of the person under guardianship.

**14. Section 32 amended (Appointment of enduring guardian)**

Section 32(2) of the Principal Act is amended by omitting paragraph (b) and substituting the following paragraph:

- (b) there is endorsed on it –
- (iii) an acceptance in the form or to the effect of the acceptance specified in Form 1 signed by each person appointed as an enduring guardian; and
  - (iv) a declaration in the form or to the effect of the declaration specified in Form 1 signed by each person appointed as an enduring guardian that the person has read and understood any advance care directive given by the appointor; and

**15. Part 5A inserted**

After section 35 of the Principal Act, the following Part is inserted:

**PART 5A – ADVANCE CARE DIRECTIVES**  
*Division 1 – Objects and principles*

**35A. Objects of Part**

The objects of this Part include the following:

- (a) to enable persons with decision making ability to give directions about their future health care;
- (b) to enable persons with decision making ability to express the person's preferences and values as the basis on which the person would like health care decisions to be made on the person's behalf (including, but not limited to specifying health care outcomes or interventions the person wishes to avoid);
- (c) to ensure, as far as is reasonably practicable and appropriate, that health care that is provided to a person who has given an advance care directive accords with the person's directions, preferences and values;

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- (d) to protect health practitioners and others giving effect to the directions, preferences and values of a person who has given an advance care directive;
- (e) to provide mechanisms for the resolution of disputes in relation to an advance care directive.

**35B. Principles to be observed**

The following principles must be taken into account in connection with the administration, operation and enforcement of this Part:

- (a) an advance care directive enables a person with decision making ability to make decisions about his or her future health care by stating his or her own wishes and instructions;
- (b) a person with decision making ability can decide what constitutes quality of life for him or her and can express that in advance in an advance care directive;
- (c) a person is, in the absence of evidence or a law of the State to the contrary, to be presumed to have decision making ability in

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- respect of decisions about his or her health care;
- (d) a person must be allowed to make his or her own decisions about his or her health care to the extent that they are able;
  - (e) a person can exercise his or her autonomy by making self-determined decisions, delegating decision making to others, making collaborative decisions within a family or community, or a combination of any of these, according to a person's culture, background, history, spiritual or religious beliefs;
  - (f) subject to this Part, an advance care directive, and the responsible person acting under that directive, has the same authority as the person who gave the advance care directive had when he or she had decision making ability;
  - (g) a decision made by a person on behalf of another in accordance with this Part –
    - (i) must, as far as is reasonably practicable, reflect the decision that the person would have

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made in the  
circumstances; and

- (ii) must, in the absence of any specific instructions or expressed views of the person, be consistent with the proper care of the person and the protection of his or her interests; and
  - (iii) must not, as far as is reasonably practicable, restrict the basic rights and freedoms of the person;
- (h) in the event of a dispute arising in relation to an advance care directive, the wishes (whether expressed or implied) of the person who gave the advance care directive are of paramount importance and should, insofar as is reasonably practicable, be given effect;
- (i) subject to this Part, in determining the wishes of a person who gave an advance care directive in relation to a particular matter, consideration may be given to –

- (i) any past wishes expressed by the person in relation to the matter; and
- (ii) the person's values as displayed or expressed during the whole or any part of his or her life; and
- (iii) any other matter that is relevant in determining the wishes of the person in relation to the matter.

***Division 2 – Preliminary***

**35C. Interpretation of Part**

- (1) In this Part –

***advance care directive form*** means a form approved by the President for the giving of advance care directives or a form to similar effect;

***binding provisions*** – see section 35L;

***decision making ability*** – see section 35E;

***health care*** – see section 35D;

***health care decision***, in relation to a person, means a decision

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regarding the provision of health care to that person;

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

- (a) a health profession within the meaning of the Health Practitioner Regulation National Law (Tasmania);
- (b) a profession or practice that is prescribed for the purposes of this definition;

***health service*** has the same meaning as in the Health Practitioner Regulation National Law (Tasmania);

***impaired decision making ability*** – see section 35E;

***life sustaining measures*** means health care that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation, and includes assisted ventilation, artificial nutrition and hydration and cardiopulmonary resuscitation;



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*non-binding provision* – see section 35L.

- (2) For the purposes of this Act, a reference to an act is to be taken to include a reference to an attempt to do the act, and a refusal or omission to act.
- (3) For the purposes of this Act, a reference to a provision of an advance care directive is to be taken to include a reference to a condition, instruction or direction of an advance care directive.
- (4) Unless the contrary intention appears, a reference in this Act to the provision of health care to a person is to be taken to include a reference to the withdrawal, or withholding, of health care to the person (including the withdrawal or withholding of life sustaining measures).
- (5) Subject to any provision of an advance care directive to the contrary, a reference in an advance care directive to particular health care is to be taken to include a reference to any other health care that is of substantially the same kind, or that is only distinguishable on technical grounds not likely to be understood or appreciated by the person who gave the advance care directive.

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**35D. Meaning of health care**

- (1) In this Part, ***health care*** means health care of any kind including the following:
- (a) any care, health service, procedure or treatment (including medical and dental treatment) provided by, or under the supervision of, a health practitioner for the purpose of diagnosing, maintaining or treating a physical or mental condition;
  - (b) an intimate forensic procedure and a non-intimate forensic procedure normally carried out by a person authorised to carry out the procedure under section 40 of the *Forensic Procedures Act 2000*;
  - (c) any other kind of health care prescribed to be health care for the purposes of this Part.
- (2) Despite subsection (1), in this Part, ***health care*** does not include –
- (a) the assessment and treatment of a patient’s mental health under the *Mental Health Act 2013*; or
  - (b) the carrying out of special treatment on a person; or

- (c) any other kind of health care that is prescribed not to be health care for the purposes of this Part.

**35E. Decision making ability**

- (1) In this section –

*information*, relevant to a decision, includes information on the consequences of –

- (a) making the decision one way or the other; and
  - (b) deferring the making of the decision; and
  - (c) failing to make the decision.
- (2) For the purposes of this Part, an adult is taken to have decision making ability in respect of a decision unless a person or body considering that ability is satisfied that the adult has impaired decision making ability in respect of the decision.
  - (3) An adult has impaired decision making ability in respect of a decision if –
    - (a) the adult is unable to –
      - (i) understand information relevant to the decision; or

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- (ii) retain information relevant to the decision;  
or
    - (iii) use or weigh information relevant to the decision;  
or
    - (iv) communicate the decision (whether by speech, gesture or other means);  
or
  - (b) the adult has satisfied any requirement in an advance care directive given by the adult that sets out when the adult is to be considered to have impaired decision making ability (however described) in respect of a decision of the relevant kind.
- (4) For the purposes of this Part, a child is taken to have impaired decision making ability in respect of a decision unless a person or body considering that ability is satisfied that the child has decision making ability in respect of the decision.
- (5) A child has decision making ability in respect of a decision if –
- (a) the child is sufficiently mature to make the decision; and
  - (b) the child is able to –

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- (i) understand information relevant to the decision; and
  - (ii) retain information relevant to the decision; and
  - (iii) use or weigh information relevant to the decision; and
  - (iv) communicate the decision (whether by speech, gesture or other means).
- (6) For the purposes of this Part, an adult or child does not have impaired decision making ability in respect of a decision merely because –
- (a) the adult or child requires practicable and appropriate support in order to make the decision; or
  - (b) the adult or child is not able to understand matters of a technical or trivial nature; or
  - (c) the adult or child does not have a particular level of literacy or education; or

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- (d) the adult or child can only retain information relevant to the decision for a limited time; or
  - (e) a decision made by the adult or child results, or may result, in an adverse outcome for the adult or child; or
  - (f) a decision made by the adult or child is unwise in the opinion of other persons; or
  - (g) the adult or child makes a decision because of cultural, political or religious practices or beliefs; or
  - (h) of the age of the adult or child.
- (7) For the purposes of this section –
- (a) an adult or child may be taken to understand information relevant to a decision if it reasonably appears that he or she is able to understand an explanation of the nature and consequences of the decision given in a way that is appropriate to his or her circumstances (whether by words, signs or other means); and
  - (b) an adult or child may be taken to be able to retain information relevant to a decision even if he

or she may only be able to retain the information briefly; and

- (c) an adult or child may fluctuate between having impaired decision making ability and decision making ability.

***Division 3 – Advance care directives***

**35G. Giving an advance care directive**

- (1) A person may give an advance care directive containing decisions in respect of the person's future health care if the person –
  - (a) has decision making ability in respect of each provision in the advance care directive; and
  - (b) understands what an advance care directive is; and
  - (c) understands the consequences of giving an advance care directive.
- (2) Nothing in this Part authorises a person to give an advance care directive for or on behalf of another person.
- (3) An advance care directive is invalid if the advance care directive –
  - (a) was not made voluntarily; or

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(b) was made as a result of dishonesty, inducement or coercion.

- (4) A person must not by dishonesty or undue influence induce another person to give an advance care directive or include a provision in an advance care directive.

Penalty: Fine not exceeding 100 penalty units.

- (5) A person must not require another person to give an advance care directive, or include a provision in an advance care directive, as a precondition to providing a service.

Penalty: In the case of –

(a) a body corporate, a fine not exceeding 500 penalty units; or

(b) an individual, a fine not exceeding 100 penalty units.

**35H. Requirements for advance care directive**

- (1) Subject to this section, a person may give an advance care directive by completing an advance care directive form, or causing an advance care directive form to be so completed.



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- (2) An advance care directive given under subsection (1) is not valid unless –
- (a) it is signed by –
    - (i) the person giving the advance care directive; or
    - (ii) an adult on behalf of the person giving the advance care directive, only if the signing by that adult –
      - (A) is requested by the person giving the advance care directive and
      - (B) is made in the presence of the person giving the advance care directive; and
  - (b) the completed advance care directive form is witnessed in accordance with this Part; and
  - (c) the advance care directive complies with any other requirements prescribed by the regulations in relation to the giving of advance care directives.

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- (3) An advance care directive, or a provision of an advance care directive, is not invalid merely because –
- (a) the person giving the advance care directive did not complete a particular section of the advance care directive form, or did not cause it to be so completed; or
  - (b) the person giving the advance care directive was not fully informed in relation to each medical condition, or any other circumstance, to which the advance care directive relates; or
  - (c) the person giving the advance care directive did not seek legal or other professional advice in relation to the advance care directive; or
  - (d) the advance care directive contains a minor error (being an error that does not affect the ability to understand the wishes and instructions of the person who gave the advance care directive); or
  - (e) instructions in the advance care directive are expressed in informal language rather than

medical or technical terminology;  
or

- (f) the person giving the advance care directive expressed his or her wishes in general terms rather than specific instructions, or that his or her wishes in relation to a particular matter need to be inferred from the advance care directive; or
- (g) instructions in the advance care directive are based solely on religious, moral or social grounds.

### **35I. Witnessing of advance care directive**

- (1) An advance care directive form will only be taken to have been witnessed in accordance with this Part if –
  - (a) there are at least 2 attesting witnesses to the advance care directive; and
  - (b) each witness confirms on the advance care directive form the following:
    - (i) that he or she is satisfied as to the identity of the person giving the advance care directive;

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- (ii) that the person giving the advance care directive appears to understand that the advance care directive is about future health decisions;
    - (iii) that, in the opinion of the witness, the person giving the advance care directive did not appear to be acting under any form of duress or coercion; and
  - (c) any other requirements prescribed by the regulations in relation to the witnessing of advance care directives have been complied with.
- (2) However, a person may not witness an advance care directive –
- (a) if he or she is a relative of, or a paid carer for, the person giving the advance care directive; or
  - (b) if he or she has signed the advance care directive pursuant to section 35H(2)(a)(ii) on behalf of the person giving the advance care directive; or
  - (c) if he or she is less than 18 years of age; or

- (d) if he or she has a direct or indirect interest in the estate of the person giving the advance care directive (whether as a beneficiary of the person's will or otherwise); or
- (e) if he or she is a health practitioner who is responsible (whether solely or with others) for the health care of the person giving the advance care directive; or
- (f) if he or she occupies a position of authority in a hospital, hospice, nursing home or other facility at which the person giving the advance care directive resides; or
- (g) in any other circumstances prescribed by the regulations in which a person cannot be a witness in relation to a particular advance care directive.

**35J. Formal requirements for advance care directive if English not first language**

The following provisions apply where a person for whom English is not his or her first language wishes to give an advance care directive:

- (a) the advance care directive may be given with the assistance of an interpreter;

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- (b) any information required under this Part to be given to the person in relation to the advance care directive must be given to the person through the interpreter;
- (c) the advance care directive form must be completed in English;
- (d) the interpreter must certify on the advance care directive form that –
  - (i) in his or her opinion, any information required under this Part to be given to the person giving the advance care directive was given to, and appeared to be understood by, the person; and
  - (ii) the information recorded in the advance care directive form accurately reproduces in English the original information and instructions of the person provided in the course of giving the advance care directive.

**35K. Provisions that cannot be included in advance care directives**

- (1) In this section –

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*mandatory health care* means –

- (a) health care ordered under an assessment order or a treatment order under the *Mental Health Act 2013*; or
  - (b) health care of a kind prescribed for the purposes of this definition.
- (2) Subject to this Part, an advance care directive cannot include provisions of the following kinds:
- (a) a provision –
    - (i) that is unlawful; or
    - (ii) that would require an unlawful act to be performed; or
    - (iii) that would, if given effect, cause a health practitioner or other person to contravene a professional standard or code of conduct applying to the health practitioner or person;
  - (b) a provision that comprises a refusal of mandatory medical treatment;

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- (c) a provision purporting to give a power of attorney, appoint an enduring guardian or give another person power to make decisions on behalf of the person giving the advance care directive;
  - (d) any other provision of a kind prescribed by the regulations as being of a kind that cannot be provided for in an advance care directive.
- (3) For the purposes of subsection (2), a reference to a professional standard or code of conduct does not include a reference to a standard or code of conduct that –
  - (a) is prepared by or on behalf of a hospital, clinic, hospice, nursing home or any other place at which health care is provided to a person; and
  - (b) regulates the provision of health care or other services at that place.
- (4) A provision of an advance care directive that contravenes subsection (2) is, to the extent of the contravention, void and of no effect.



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***Division 4 – Operation of advance care directives***

**35L. Binding and non-binding provisions**

- (1) Subject to this section, a provision of an advance care directive comprising a refusal of particular health care (whether express or implied) is, for the purposes of this Act, to be taken to be a binding provision.
- (2) If a binding provision of an advance care directive is expressed to apply, or to be binding, only in specified circumstances, the provision is to be taken to be a binding provision only in respect of those circumstances.
- (3) All other provisions of an advance care directive are non-binding provisions.

**35M. When advance care directives are in force**

- (1) An advance care directive is taken to be in force from the time that the advance care directive is witnessed in accordance with this Part.
- (2) Subject to this Part, an advance care directive remains in force until the earliest of the following:
  - (a) if an expiry date is specified in the advance care directive, that date;

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- (b) it is revoked in accordance with this Act;
- (c) the death of the person who gave the advance care directive.

**35N. No variation of advance care directive**

Subject to this Part, an advance care directive cannot be varied.

***Division 5 – Health care decisions under advance care directives***

**35O. When things can happen under an advance care directive**

- (1) Subject to this Part, a person responsible for a person who has given an advance care directive may make a health care decision on behalf of that person under the advance care directive if, at the relevant time, the person who gave the advance care directive has impaired decision making ability in respect of the health care decision.
- (2) A health practitioner may only provide health care pursuant to a consent granted under an advance care directive if, at the relevant time, the person who gave the advance care directive has impaired decision making ability in respect of the health care decision.

- (3) Nothing in this section prevents a provision of an advance care directive being taken into account when determining the wishes of the person who gave the advance care directive.

**35P. Person responsible to give effect to advance care directive**

- (1) Subject to this Part, if a person has given an advance care directive, the person responsible for that person, in making a health care decision in relation to that person –
- (a) must comply with any binding provisions of the advance care directive that relates to health care of the relevant kind; and
  - (b) is to, as far as is reasonably practicable –
    - (i) comply with any non-binding provisions of the advance care directive that relates to health care of the relevant kind; and
    - (ii) seek to avoid any outcome or intervention that the person who gave the advance care directive would wish to be avoided (whether such wish is

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- expressed or implied);  
and
  - (iii) obtain, and have regard to, the wishes of the person who gave the advance care directive (whether such wishes are expressed or implied);  
and
  - (iv) endeavour to make the decision in a manner that is consistent with the principles in section 35B;  
and
  - (c) must make the decision that he or she reasonably believes the person who gave the advance care directive would have made in the circumstances; and
  - (d) must act in good faith and with due diligence.
- (2) Despite subsection (1), in making a health care decision in relation to a person under an advance care directive, the person responsible for the person must act in accordance with –
- (a) any agreement reached in relation to the advance care directive at a mediation under section 35ZE;  
and

- (b) any advance care directive order.
- (3) A failure to comply with this section does not, of itself, result in any civil or criminal liability on the part of the person responsible for a person who has given an advance care directive.

**35Q. Requirement to make reasonable inquiries as to advance care directive**

- (1) In this section –
  - health care facility* means a hospital, residential aged care facility or such other facility as is prescribed for the purposes of this definition.
- (2) Before a health practitioner provides health care to a person who has impaired decision making ability in respect of the health care decision, the health practitioner must make reasonable efforts in the circumstances to ascertain if the person has given an advance care directive.
- (3) The person in charge of a health facility must –
  - (a) take reasonable steps to ascertain if a person who is cared for in that facility has given an advance care directive; and

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- (b) if he or she ascertains that a person who is cared for in that facility has given an advance care directive, take reasonable steps to ensure that a copy of the advance care directive is placed on the person's health records at the facility.

**35R. Health practitioners to give effect to advance care directives**

- (1) Subject to this Part, a health practitioner who is providing, or is to provide, health care to a person who has given an advance care directive and who has impaired decision making ability in respect of a decision that is required in relation to the health care –
  - (a) must comply with a binding provision of the advance care directive that relates to health care of the relevant kind; and
  - (b) is to, as far as is reasonably practicable, comply with a non-binding provision of the advance care directive that relates to health care of the relevant kind; and
  - (c) must, as far as is reasonably practicable, seek to avoid any outcome or intervention that the

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person who gave the advance care directive would wish to be avoided (whether such wish is expressed or implied); and

- (d) must endeavour to provide the health care in a manner that is consistent with the principles set out in section 35B.
- (2) Despite subsection (1), a health practitioner who is providing, or is to provide, health care to a person who has given an advance care directive, must, in providing that health care, act in accordance with the following:
- (a) any agreement reached in relation to the advance care directive at a mediation under section 35ZE;
  - (b) any advance care directive order.
- (3) Subsection (2) applies to the health practitioner despite the advance care directive containing a health care decision that is inconsistent with an agreement reached, or an advance care directive order made, in relation to the advance care directive.

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**35S. Circumstances where health practitioners may not be compelled to provide particular health care**

- (1) A health practitioner may refuse to comply with –
  - (a) a provision of an advance care directive that specifies particular health care that the person giving the advance care directive wishes to receive; or
  - (b) a health care decision made under an advance care directive that specifies particular health care that the person giving the advance care directive is to receive.
- (2) Subsection (1) does not apply –
  - (a) to, or in relation to, a binding provision of an advance care directive; or
  - (b) if the particular health care specified in the advance care directive comprises the withdrawal, or withholding, of health care to a person (including the withdrawal or withholding of life sustaining measures).
- (3) A health practitioner may refuse to comply with a provision of an advance



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care directive if the health practitioner believes on reasonable grounds that –

- (a) the person who gave the advance care directive did not intend the provision to apply in the particular circumstances; and
  - (b) it is not reasonably practicable at the time at which the health care decision is being made to have the matter dealt with by the Public Guardian or the Board under this Part.
- (4) A health practitioner may provide health care to a patient who needs urgent health care to save his or her life despite the patient having given an advance care directive containing a decision that is inconsistent with the provision of that health care if –
- (a) it is not practicable for the health practitioner to determine whether or not the patient has given an advance care directive before providing the health care; or
  - (b) the health practitioner is unable to locate the advance care directive before providing the health care after having made reasonable inquiries; or

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- (c) the provision of the health care prevents the patient from suffering or continuing to suffer significant pain or distress.
- (5) Despite any other provision of this Part, a health practitioner may refuse to comply with a provision of an advance care directive on conscientious grounds.
- (6) If a health practitioner refuses to comply with a provision of an advance care directive under subsection (5), the health practitioner must notify the Board of the practitioner's decision to refuse to comply with the provision.

**35T. Consent taken to be that of person who gave advance care directive**

For the purposes of the law of this State, a consent to particular health care given or refused pursuant to an advance care directive –

- (a) is taken to be the consent or refusal of consent of the person who gave the advance care directive; and
- (b) is taken to have the same effect for all purposes as if the person were capable of giving such consent or refusing such consent.

**35U. Consent taken to be withdrawn in certain circumstances**

- (1) If, at any time before particular health care is provided pursuant to a consent granted under an advance care directive, the person who gave the advance care directive expressly or implicitly withdraws his or her consent to the health care, the consent will, for the purposes of the law of the State, be taken to have been withdrawn.
- (2) Subsection (1) does not apply in relation to particular health care, or health care of a particular kind –
  - (a) if the advance care directive expressly excludes its operation; or
  - (b) in any other circumstances prescribed by the regulations.
- (3) Any act or omission done or made in good faith, without negligence and in accordance with an advance care directive before consent was withdrawn under this section, is to be taken to be valid, and always to have been valid.

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***Division 6 – Registration of advance care directives***

**35V. Registration of advance care directives**

- (1) The Board is to, on application, register an advance care directive.
- (2) The Board must not register an advance care directive unless the advance care directive complies with this Part.
- (3) An advance care directive is not invalid merely because it is not registered under this section.
- (4) A register of advance care directives must be established and maintained by the Board.

***Division 7 – Revocation of advance care directives***

**35W. Revoking advance care directive where person has decision making ability**

- (1) A person giving an advance care directive may revoke the advance care directive at any time in the manner prescribed by the regulations if he or she has decision making ability and understands the consequences of revoking the advance care directive.
- (2) On revoking an advance care directive, the person who revoked the advance care

directive must, as soon as is reasonably practicable take reasonable steps –

- (a) to advise any guardian of that person of the revocation; and
  - (b) to notify each other person who has been given a copy of the advance care directive of the revocation.
- (3) If a person gives an advance care directive, any previous advance care directives given by the person are revoked.

**35X. Revoking advance care directive where person has impaired decision making ability**

- (1) This section applies to a person giving an advance care directive if he or she –
- (a) has impaired decision making ability; or
  - (b) does not appear to understand the consequences of revoking an advance care directive.
- (2) A person who becomes aware that a person to whom this section applies wishes, or may wish, to revoke an advance care directive must, as soon as is practicable and in accordance with any

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requirements prescribed by the regulations, advise the Board of that fact.

- (3) The Board, on being advised under subsection (2), may give any directions to specified persons or bodies that the Board thinks necessary or desirable in the circumstances of the case.
- (4) A person who, without reasonable excuse, refuses or fails to comply with a direction under subsection (3) is guilty of an offence.

Penalty: Fine not exceeding 50 penalty units.

- (5) It is a defence in proceedings for an offence under subsection (4) if the defendant establishes that he or she did not know, and could not reasonably have been expected to know, that his or her conduct amounted to a failure to comply with the direction.
- (6) Subject to subsection (7), the Board must revoke an advance care directive if –
- (a) the person who gave the advance care directive, or a person acting on his or her behalf, applies to the Board for the revocation in a manner and form determined by the Board; or
  - (b) the Board –

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- (i) is advised under subsection (2) of a person's wish to revoke an advance care directive; and
  - (ii) having made such inquiries as it thinks fit, is satisfied that –
    - (A) the person who gave the advance care directive understands the nature and consequences of the revocation; and
    - (B) the revocation genuinely reflects the wishes of the person; and
    - (C) the revocation is, in all the circumstances, appropriate.
- (7) If an advance care directive expressly provides that the advance care directive is not to be revoked in the circumstances contemplated by this section, the Board should not revoke the advance care directive unless satisfied that the current

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wishes of the person who gave the advance care directive indicate a conscious wish to override such a provision.

- (8) If the Board revokes an advance care directive under this section, the Board –
- (a) must advise the person responsible for the person who gave the advance care directive of the revocation as soon as is reasonably practicable; and
  - (b) may give such advice and directions as the Board considers necessary or desirable in the circumstances of the case.

***Division 8 – Validity and limitation of liability***

**35Y. Presumption of validity**

A health practitioner, responsible person or other person is entitled to presume that an apparently genuine advance care directive is valid and in force unless he or she knew, or ought reasonably to have known, that the advance care directive was not valid or in force.

**35Z. Protection from liability**

- (1) A health practitioner, responsible person or other person incurs no criminal or civil



liability for an act or omission done or made in good faith, without negligence and in accordance with, or purportedly in accordance with, an advance care directive.

- (2) For the purposes of this section, a reference to the civil liability of a person includes a reference to liability arising under disciplinary proceedings or similar proceedings.

**35ZA. Validity of acts and decisions under revoked or varied advance care directive**

Subject to this Act, the variation of an advance care directive by the Board or the revocation of an advance care directive does not affect the validity of any act done or decision made in accordance with the advance care directive before the variation or revocation.

*Division 9 – Dispute resolution, review and appeals*

**35ZB. Interpretation of Division**

In this Division –

*eligible person* in respect of an advance care directive, means the following persons:

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- (a) the person who gave the advance care directive;
- (b) a person responsible for the person who gave the advance care directive;
- (c) a health practitioner providing, or proposing to provide, health care to the person who gave the advance care directive;
- (d) a party to a mediation held in respect of the advance care directive by the Public Guardian under this Division;
- (e) any other person who satisfies the Public Guardian or the Board that the person has a proper interest in a particular matter relating to the advance care directive.

**35ZC. Application of Division**

This Division applies to the following:

- (a) the giving or revoking of an advance care directive;
- (b) a health care decision, or proposed health care decision, made pursuant to an advance care directive;

- (c) the provision, or proposed provision, of health care to a person who has given an advance care directive;
- (d) any other matter prescribed by the regulations for the purposes of this section.

**35ZD. Functions and powers of Public Guardian and Board**

The Public Guardian and the Board must, in performing a function or exercising a power under this Division in respect of an advance care directive, seek, as far as is reasonably practicable, to give full effect to the wishes of the person who gave the advance care directive.

**35ZE. Resolution of matters by Public Guardian**

- (1) The Public Guardian may, on application by an eligible person in respect of an advance care directive or on the Public Guardian's own initiative, provide preliminary assistance in resolving a matter to which this Part applies, including by –
  - (a) providing advice or direction on the matter; and

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- (b) ensuring that the parties to the matter are fully aware of their rights and obligations; and
  - (c) identifying any issues that are in dispute between parties to the matter; and
  - (d) canvassing options that may obviate the need for further proceedings; and
  - (e) where appropriate, facilitating full and open communication between parties to a dispute.
- (2) The Public Guardian may, on application by an eligible person in respect of an advance care directive, mediate a matter to which this Part applies.
- (3) If a matter is resolved by mediation –
- (a) the parties must sign an agreement setting out the terms of the settlement; and
  - (b) the Public Guardian must cause a copy of the signed agreement to be provided to each of the parties; and
  - (c) the Public Guardian must cause a copy of the signed agreement to be provided to the Board; and

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- (d) if the advance care directive has been registered by the Board, the Board must cause a copy of the signed agreement to be attached to the copy of the advance care directive in the register.
- (4) The Public Guardian may bring a mediation to an end at any time –
  - (a) if, in the opinion of the Public Guardian, it is more appropriate that the matter be dealt with by the Board; or
  - (b) at the request of a party to the mediation.
- (5) Evidence of anything said or done in the course of a mediation under this section is not admissible in subsequent proceedings except by consent of all parties to the proceedings.
- (6) The Public Guardian may give such advice to an eligible person –
  - (a) that the Public Guardian considers necessary or desirable in the circumstances of the case; and
  - (b) despite the absence of any person who may be affected by the Public Guardian’s advice.

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- (7) An application under this section –
- (a) must be made in a manner and form determined by the Public Guardian; and
  - (b) must be accompanied by such information as the Public Guardian may reasonably require; and
  - (c) must be accompanied by the prescribed fee.
- (8) The Public Guardian may refuse to provide preliminary assistance in resolving a matter under this section if, in the opinion of the Public Guardian, it is more appropriate that the matter be dealt with by the Board.

**35ZF. Public Guardian may refer matter to Board**

The Public Guardian may refer a matter to which this Part applies to the Board if the Public Guardian has under section 35ZE ended a mediation, or refused to provide preliminary assistance in resolving a matter, on the grounds that it is more appropriate that the matter be dealt with by the Board.

**35ZG. Making of orders in relation to advance care directive by Board**

- (1) The Board may at any time hold a hearing to –
  - (a) review a matter dealt with by the Public Guardian under section 35ZE; or
  - (b) make an order in relation to any matter to which this Part applies.
- (2) A hearing under subsection (1) may be held by the Board –
  - (a) of its own motion; or
  - (b) on referral by the Public Guardian; or
  - (c) on application by an eligible person.
- (3) An application by an eligible person to the Board under this section is to –
  - (a) be lodged with the registrar in a manner and form determined by the Board; and
  - (b) be accompanied by such information as the Board may reasonably require; and
  - (c) be accompanied by the prescribed fee.

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- (4) A person who gave an advance care directive is to be a party to any hearing before the Board relating to that advance care directive.
  
- (5) The Board may –
  - (a) in the case of a review of a matter dealt with by the Public Guardian under section 35ZE, make an order confirming, varying or cancelling an agreement reached at a mediation under section 35ZE; or
  - (b) in any case, make the following orders:
    - (i) that a person who gave an advance care directive did or did not have the decision making ability to make the advance care directive;
    - (ii) that a person who gave an advance care directive did or did not have impaired decision making ability in relation to any of the decisions in the advance care directive;
    - (iii) that an advance care directive is invalid or valid;



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- (iv) an order determining the nature and scope of a person's powers and responsibilities under an advance care directive;
  - (v) that a particular health care that is recommended by a health practitioner be given to or not given to a person;
  - (vi) that a particular act or omission is or is not within the powers, or discharges the responsibilities, of a person under an advance care directive;
  - (vii) that a person is or is not the person responsible for another person;
  - (viii) such other orders that the Board thinks necessary or desirable in the circumstances of the case.
- (6) If the Board is of the opinion that it is more appropriate that an application under subsection (2)(c) be dealt with by the Public Guardian, the Board may refer the matter to the Public Guardian.

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- (7) A person who, without reasonable excuse, refuses or fails to comply with an order of the Board under this section is guilty of an offence.

Penalty: Fine not exceeding 50 penalty units.

- (8) It is a defence in proceedings for an offence under subsection (7) if the defendant establishes that he or she did not know, and could not reasonably have been expected to know, that the defendant's conduct amounted to a failure to comply with the order.

***Division 10 – Miscellaneous***

**35ZH. Other legal rights not affected**

- (1) This Part does not affect the operation of any other law in relation to a person's entitlement to make decisions in respect of the person's future health care.
- (2) This Part does not affect the operation of any other law that allows a person to take health care action for another person without that other person's consent.
- (3) Nothing in this Part is to be taken to affect any rights conferred, by any other law, on the Supreme Court or the Family Court to consent, or to refuse to consent, to the administration to a child of

treatment, special psychiatric treatment, or any other medical or psychiatric services.

- (4) Nothing in this Part is to be taken to render unlawful any treatment, special psychiatric treatment, or any other medical or psychiatric services provided in accordance with a consent given by the Supreme Court or the Family Court to such treatment.

**35ZI. Advance care directives from other jurisdictions**

- (1) In this section –

*corresponding law* means a law of the Commonwealth, or of another State or Territory, that is declared by the regulations to be a law that corresponds to this Part;

*interstate advance care directive* means an instrument made under a corresponding law that is within a class of instrument that is prescribed for the purposes of this definition.

- (2) Subject to this section –

- (a) for the purposes of the laws of this State, an interstate advance care directive has effect as if it

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- were an advance care directive given under this Part; and
- (b) this Part applies to an interstate advance care directive as if it were an advance care directive given under this Part; and
  - (c) the powers and responsibilities of a substitute decision maker for the person who gave the interstate advance care directive will be determined in accordance with the corresponding law under which the interstate advance care directive was given.
- (3) For the purposes of this Part, a provision of an interstate advance care directive of a kind contemplated by sections 35K, 35S or 35ZJ is to be taken to be void and of no effect regardless of whether the provision was able to be included in the interstate advance care directive in the jurisdiction in which it was made.

**35ZJ. Advance care directive not to give power of attorney**

Nothing in this Act authorises an advance care directive to have the effect of authorising the appointment of a power of attorney or an enduring guardian.

**16. Section 36 amended (Application of Part 6)**

Section 36 of the Principal Act is amended by omitting subsection (2) and substituting the following subsection:

- (2) For the purposes of subsection (1), a person is incapable of giving consent to the carrying out of medical or dental treatment if –
- (a) the person –
    - (i) is incapable of understanding the general nature and effect of the proposed treatment; or
    - (ii) is incapable of indicating whether or not he or she consents or does not consent to the carrying out of the treatment; and
  - (b) the person has not given an advance care directive that makes provision in respect of the carrying out of treatment of the relevant kind on the person.

**17. Section 41 amended (Medical or dental treatment without consent)**

Section 41 of the Principal Act is amended as follows:

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

(1A) For the purposes of subsection (1)(d), a person may indicate an objection to the carrying out of the treatment in writing, orally or in another way.

(b) by omitting from subsection (3)(b) “treatment.” and substituting “treatment; and”;

(c) by inserting the following paragraph after paragraph (b) in subsection (3):

(c) the medical practitioner or dentist has made reasonable inquiries to ascertain whether the person has given an advance care directive, and if so, has taken reasonable steps to locate the advance care directive.

**18. Section 43 amended (Consent by persons responsible)**

Section 43(2)(a) of the Principal Act is amended by inserting “(including those expressed in an advance care directive)” after “person”.

**19. Section 45 amended (Consent of Board)**

Section 45(2)(a) of the Principal Act is amended by inserting “(including those expressed in an advance care directive)” after “person”.

**20. Section 65 amended (Emergency orders)**

Section 65 of the Principal Act is amended by inserting after subsection (1) the following subsection:

(1A) Where the Board considers it proper to do so by reason of urgency, the Board may in respect of a person who has given an advance care directive under part 5A make any order or give any direction considered appropriate in the circumstances.

**21. Section 67 amended (Review of orders)**

Section 67 of the Principal Act is amended by omitting “or administration order” and substituting “, an administration order or an advance care directive order”.

**22. Section 68 amended (Order after review)**

Section 68(1) of the Principal Act is amended by omitting “or administration order” and substituting “, an administration order or an advance care directive order”.

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**23. Section 69 amended (Notice of hearing)**

Section 69(1) of the Principal Act is amended by inserting after paragraph (f) the following paragraph:

- (fa) if the matter relates to the provision of health care pursuant to an advance care directive, the health practitioner proposing to provide the health care; and

**24. Section 73A amended (Interim order or determination on adjournment)**

Section 73A of the Principal Act is amended as follows:

- (a) by inserting the following subsection after subsection (1):
  - (2A) The Board may adjourn a hearing held in relation to an advance care directive and, if it considers that there may be grounds for making, may make any interim orders or determinations it considers appropriate in the circumstances.
- (b) by inserting in subsection (2) “or determination” after “order”;
- (c) by inserting in subsection (3) “or determination” after “an interim order”;



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- (d) by inserting in subsection (3) “or determination” after “further interim order”.

**25. Section 78 amended (Protection from liability)**

Section 78 of the Principal Act is amended by inserting after subsection (3) the following subsections:

- (4) The Public Guardian and any person acting under the direction of the Public Guardian do not incur any personal liability in respect of any act done or omitted to be done in good faith in the performance or exercise, or purported performance or exercise, of any function or power of the Public Guardian.
- (5) Subsection (4) does not preclude the Crown or the Public Guardian from incurring liability that the Public Guardian or other person mentioned in subsection (4) would, but for that subsection, incur.

**26. Section 86 amended (Confidentiality of information)**

Section 86(1) of the Principal Act is amended as follows:

- (a) by inserting “Part 5A or” after “a person to whom”;

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- (b) by inserting in paragraph (b) “, proposed represented person or person to whom Part 5A or Part 6 applies” after “person”.

**27. Section 89 amended (Duty to keep register)**

Section 89(1) of the Principal Act is amended by inserting after paragraph (c) the following paragraph:

- (ca) any advance care directives registered with the Board under section 35V; and

**28. Section 90 amended (Regulations)**

Section 90(2) of the Principal Act is amended as follows:

- (a) by omitting from paragraph (b) “Act.” and substituting “Act;”;
- (b) by inserting the following paragraphs after paragraph (b):
  - (c) mediations held in respect of advance care directives by the Public Guardian;
  - (d) the referral of matters from the Public Guardian to the Board;
  - (e) any matter relating to the process and procedure of any of the matters referred to in paragraphs (c) and (d);

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- (f) any matter that is necessary or convenient for the registration of advance care directives, including the following:
  - (i) the form and manner in which the register must be established and maintained;
  - (ii) the contents of the register, including proof of the contents;
  - (iii) who may apply for registration;
  - (iv) the procedure for registration, including the alteration and removal of entries in the register;
  - (v) who may have access to or obtain information from the register;
  - (vi) the procedure for accessing or obtaining information from the register.

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**29. Schedule 3 amended (Instruments Relating to Enduring Guardians)**

Schedule 3 to the Principal Act is amended by omitting Form 1 and substituting:

**FORM 1 – APPOINTMENT OF ENDURING GUARDIAN**

1 – I (*insert name, address and occupation of appointor*), appoint (*insert name, address and occupation of proposed guardian*) to be my guardian.

2 – I authorize my guardian, in the event that I become unable by reason of a disability to make reasonable judgments in respect of matters relating to my personal circumstances, to exercise the powers of a guardian under section 25 of the *Guardianship and Administration Act 1995*.

3 – I require my guardian to observe the following conditions in exercising, or in relation to the exercise of, the powers conferred by this instrument:–

*(State any conditions to which the powers are subject)*

4 – This is an appointment of an enduring guardian made under Part 5 of the *Guardianship and Administration Act 1995*.

.....  
*(Signature of appointor)*

**ACCEPTANCE OF APPOINTMENT**

I, (*insert name, address and occupation of proposed guardian*) accept appointment as a guardian under this instrument, declare that I have read and understood any advance care directives given by my appointor and undertake to exercise the powers conferred honestly and in accordance with the provisions of the *Guardianship and Administration Act 1995*.

.....  
*(Signature of proposed guardian)*

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CERTIFICATE OF WITNESSES

We (*insert name, addresses and occupations of at least 2 witnesses*) certify –

- (a) that the appointor has signed this instrument freely and voluntarily in our presence; and
- (b) that the appointor appeared to understand the effect of this instrument.

.....

.....

*(Signature of at least 2 witnesses)*

**30. Repeal of Act**

This Act is repealed on the first anniversary of the day on which it commenced.