

TASMANIA

GUARDIANSHIP AND ADMINISTRATION AMENDMENT (ADVANCE CARE DIRECTIVES) BILL 2021

CONTENTS

1. Short title
2. Commencement
3. Principal Act
4. Long title amended
5. Section 3 amended (Interpretation)
6. Section 5 amended (Objects of Act)
7. Section 6 amended (Principles to be observed)
8. Section 11 amended (Procedure of Board)
9. Section 15 amended (Functions and powers of Public Guardian)
10. Section 17 amended (Investigations)
11. Section 25 amended (Authority of full guardian)
12. Section 27 amended (Exercise of authority by guardian)
13. Section 31 amended (Application by guardian to Board for advice or direction)
14. Section 32 amended (Appointment of enduring guardian)
15. Part 5A inserted
 - PART 5A – Advance care directives
 - Division 1 – Objects and principles*
 - 35A. Objects of Part
 - 35B. Principles to be taken into account

Division 2 – Preliminary

- 35C. Interpretation of Part
- 35D. Decision making ability
- 35E. Meaning of health care
- 35F. Meaning of medical research procedure

Division 3 – Advance care directives

- 35G. Giving an advance care directive
- 35H. Formal requirements for advance care directives
- 35I. Witnessing of advance care directive
- 35J. Formal requirements for advance care directive in language other than English
- 35K. Advance care directives that do not meet requirements
- 35L. Provisions that are void or of no effect in advance care directives

Division 4 – Operation of advance care directives

- 35M. Binding and non-binding provisions
- 35N. When advance care directives are in force
- 35O. Requirement to make reasonable inquiries as to advance care directive
- 35P. No variation of advance care directive

Division 5 – Consent to health care when advance care directive in effect

- 35Q. Consent given or refused in advance care directive
- 35R. Consent given or refused by authorised decision maker for person who has given an advance care directive
- 35S. Authorised decision maker to make decisions to give effect to advance care directive
- 35T. Health practitioners to give effect to advance care directives
- 35U. Circumstances where health practitioners may not comply with advance care directive
- 35V. Urgent health care
- 35W. Conscientious objection

Division 6 – Registration of advance care directives

- 35X. Registration of advance care directives

Division 7 – Revocation of advance care directives

- 35Y. Revoking advance care directive where person has decision making ability
- 35Z. Revoking or varying an advance care directive where person has impaired decision making ability

Division 8 – Validity and limitation of liability

- 35ZA. Presumption of validity

- 35ZB. Protection from liability
 - 35ZC. Preservation of liability
 - 35ZD. Validity of acts and decisions under revoked or varied advance care directive
 - 35ZE. Advance care directive to take precedence
 - Division 1 – Dispute resolution, review and appeals*
 - 35ZF. Interpretation of Division
 - 35ZG. Application of Division
 - 35ZH. Functions and powers of Public Guardian and Board
 - 35ZI. Resolution of matters by Public Guardian
 - 35ZJ. Public Guardian may refer matter to Board
 - 35ZK. Resolution of matters by Board
 - Division 2 – Miscellaneous*
 - 35ZL. Common law advance care directives not affected
 - 35ZM. Other legal rights not affected
 - 35ZN. Advance care directives from other jurisdictions
 - 35ZO. Advance care directive does not authorise appointment of power of attorney or enduring guardian
 - 35ZP. Review of Part
16. Section 36 amended (Application of Part 6)
 17. Section 41 amended (Medical or dental treatment without consent)
 18. Section 43 amended (Consent by persons responsible)
 19. Section 45 amended (Consent of Board)
 20. Section 69 amended (Notice of hearing)
 21. Section 73A amended (Interim order or determination on adjournment)
 22. Section 78 amended (Protection from liability)
 23. Section 85 amended (Protection relating to reports and information)
 24. Section 86 amended (Confidentiality of information)
 25. Section 89 amended (Duty to keep register)
 26. Section 90 amended (Regulations)
 27. Schedule 3 amended (Instruments Relating to Enduring Guardians)
 28. Repeal of Act

**GUARDIANSHIP AND ADMINISTRATION
AMENDMENT (ADVANCE CARE DIRECTIVES)
BILL 2021**

*(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 2021*.

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.

*No. 44 of 1995

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 4

4. Long title amended

The long title of the Principal Act is amended by inserting “, to recognise 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 definition after the definition of *administrator*:

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

- (b) by inserting the following definition after the definition of *function*:

government department means a Government department within the meaning of the *State Service Act 2000*;

- (c) by inserting the following definition after the definition of *guardianship order*:

impaired decision making ability – see section 35D;

- (d) by inserting “means a person who has parental responsibility and” after “***parent***” in the definition of *parent*;

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 6

- (e) by inserting the following definition after the definition of *represented person*:

service provider includes a financial institution or person with whom a proposed represented person has deposited money or on whose account money has been deposited;

- (f) by inserting the following definition after the definition of *spouse*:

State authority means a body or authority, whether incorporated or not, which is established or constituted by or under an Act or under the Royal Prerogative, where the body or authority or its governing authority, wholly or partly comprises a person or persons appointed by the Governor, a Minister or another such body or authority;

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):

(ba) to recognise the giving of advance care directives; and

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021
Act No. of 2021*

s. 7

- (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) “, directions, preferences and values” after “wishes”;
- (d) by inserting in paragraph (c) “or impaired decision making ability,” after “disability”;
- (e) by omitting from paragraph (c) “Act” and substituting “Act,”.

8. Section 11 amended (Procedure of Board)

Section 11 of the Principal Act is amended as follows:

- (a) by omitting subsection (1);
- (b) by inserting in subsection (11) “or the registrar” after “The Board”;

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 9

- (c) by inserting in subsection (11) “of the Board” after “any proceedings”;
- (d) by inserting in subsection (11) “health practitioner,” after “provider,”;
- (e) by inserting in subsection (11) “document,” after “provide a”;
- (f) by omitting from subsection (11) “of the Board”.

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

Section 15 of the Principal Act is amended as follows:

- (a) by inserting in subsection (1)(j) “or impaired decision making ability” after “disability”;
- (b) by omitting paragraph (k) from subsection (1) 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.
- (c) by inserting the following subsection after subsection (6):
 - (7) The Public Guardian may require any government department or

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 10

State authority, service provider, health practitioner, guardian or administrator to provide a document, report or information to the Public Guardian if the provision of that document, report or information is necessary for the performance of the Public Guardian's functions under this Act.

10. Section 17 amended (Investigations)

Section 17 of the Principal Act is amended by inserting after subsection (1) the following subsection:

(1A) The Public Guardian may, of its own motion or following a complaint or allegation, investigate any matter relating to action taken or proposed to be taken in relation to an advance care directive.

11. Section 25 amended (Authority of full guardian)

Section 25(2)(e) of the Principal Act is amended by inserting "Part 5A or" after "provided in".

12. Section 27 amended (Exercise of authority by guardian)

Section 27 of the Principal Act is amended as follows:

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 13

- (a) by inserting in subsection (2)(a) “, directions, preferences and values (including those expressed in an advance care directive)” after “wishes”;
- (b) by inserting the following subsection after subsection (2):
 - (3) A guardian must take reasonable steps to ascertain whether the person under guardianship has given an advance care directive.

13. Section 31 amended (Application by guardian to Board for advice or direction)

Section 31(3) of the Principal Act is amended as follows:

- (a) by omitting from paragraph (c) “application.” and substituting “application; and”;
- (b) by inserting the following paragraph after paragraph (c):
 - (d) if the person under guardianship has given an advance care directive, give such advice and direction in relation to the advance care directive as the Board considers appropriate.

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 14

14. Section 32 amended (Appointment of enduring guardian)

Section 32 of the Principal Act is amended as follows:

(a) by omitting paragraph (b) from subsection (2) and substituting the following paragraph:

(b) there is endorsed on it –

(i) 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

(ii) 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 obtained and understood any advance care directive given by the appointor; and

(b) by inserting the following subsection after subsection (7):

(8) The amendments to this section and Schedule 3 made by the

Guardianship and Administration Amendment (Advance Care Directives) Act 2021 do not apply in relation to an instrument of appointment of an enduring guardian made before the commencement of that Act.

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 their preferences and values in respect of their future health care, including by specifying outcomes or interventions they wish to avoid;
- (c) to ensure, as far as is reasonably practicable and appropriate, that

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

health care that is provided to a person who has given an advance care directive accords with the person's directions, preferences and values;

- (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 advance care directives.

35B. Principles to be taken into account

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

- (a) advance care directives enable persons with decision making ability to make decisions about their future health care by stating their own directions, values and preferences;
- (b) a person with decision making ability can decide what constitutes quality of life for that person and can express that in an advance care directive;

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

- (c) an adult is, in the absence of evidence or a law of the State to the contrary, to be presumed to have decision making ability in respect of decisions about the adult's health care;
- (d) a person must be allowed to make his or her own decisions about the person's health care to the extent that the person is able;
- (e) a person can exercise his or her autonomy by making self-determined decisions, making collaborative decisions within a family or community, or a combination of any of these, according to the person's culture, background, history, or spiritual or religious beliefs;
- (f) subject to this Part, an advance care 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 person giving effect to an advance care directive on behalf of another in accordance with this Part –

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

- (i) must, as far as is reasonably practicable, reflect the decision that the person would have made in the circumstances; and
 - (ii) must, in the absence of any specific directions or expressed views of the person, make decisions that are consistent with the proper care of the person and the protection of the person's interests; and
 - (iii) must, as far as is reasonably practicable, promote the human rights of the person including rights recognised in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of Persons with Disabilities;
- (h) in the event of a dispute arising in relation to an advance care directive, the directions,

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

preferences and values (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 preferences and values of a person who has given an advance care directive containing a direction that is unclear, consideration may be given to –

- (i) any past preferences and values 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 the person's life; and
- (iii) any other matter that is relevant in determining the preferences and values of the person in relation to the matter.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

Division 2 – Preliminary

35C. Interpretation of Part

(1) In this Part –

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

authorised decision maker, in relation to a person, means a person referred to in section 35R(1) who is authorised to provide consent or a refusal of consent to the provision of health care to that person;

binding provision – see section 35M;

health care decision, in relation to a person, means a decision regarding the provision of health care to that person;

health practitioner means the following:

- (a) a health practitioner within the meaning of the Health Practitioner Regulation National Law

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

(Tasmania) (other than a student);

- (b) any other professional that is prescribed for the purposes of this definition;

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

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, the provision of nutrition and hydration through artificial means and cardiopulmonary resuscitation;

medical research procedure – see section 35F;

non-binding provision – see section 35M;

registered health practitioner means a person who is registered under the Health Practitioner Regulation National Law (Tasmania) to practise a health

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

profession (other than as a student).

- (2) For the purposes of this Part, 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 Part, a reference to a provision of an advance care directive is to be taken to include a reference to a condition of or instruction or direction in an advance care directive.
- (4) Unless the contrary intention appears, a reference in this Part 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.

35D. 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 health care decision unless a health practitioner considering that ability under this Act reasonably believes that the adult has impaired decision making ability in respect of the decision.

(3) For the purposes of this Part, an adult has impaired decision making ability in respect of a health care decision if the adult is unable to –

- (a) understand information relevant to the decision; or
- (b) retain information relevant to the decision; or
- (c) use or weigh information relevant to the decision; or

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

- (d) communicate the decision
(whether by speech, gesture or
other means).
- (4) For the purposes of this Part, a child is
taken to have decision making ability in
respect of a health care decision only if a
registered health practitioner considering
that ability under this Act is satisfied
that –
 - (a) the child is sufficiently mature to
make the decision; and
 - (b) the child is able to –
 - (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).
- (5) However, an adult or child does not have
impaired decision making ability in
respect of a health care decision for the
purposes of this Part merely because –

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

- (a) the adult or child is not able to understand matters of a technical or trivial nature; or
- (b) the adult or child does not have a particular level of literacy or education; or
- (c) the adult or child can only retain information relevant to the decision for a limited time; or
- (d) the adult or child has decision making ability to make some decisions and not others; 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 or religious practices or beliefs; or
- (h) of the age of the adult or child; or
- (i) of the adult or child's appearance; or
- (j) the adult or child is perceived to be eccentric; or

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

- (k) the adult or child has engaged in illegal or immoral conduct; or
 - (l) the adult or child has a particular sexual orientation or expresses a particular sexual preference; or
 - (m) the adult or child has a disability, illness or other medical condition (whether physical or mental); or
 - (n) the adult or child requires practicable and appropriate support in order to make or communicate the decision, including –
 - (i) the use of information or formats tailored to the particular needs of the adult or child; and
 - (ii) assistance to communicate the adult or child's decisions; and
 - (iii) the giving of additional time to make the decision; and
 - (iv) the use of technology to alleviate the effects of the adult's or child's disability.
- (6) For the purposes of this Part –

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

- (a) an adult or child may be taken to understand information relevant to a health care decision if it reasonably appears that the adult or child is able to understand an explanation, of the nature and consequences of the decision, given in a way that is appropriate to the adult or child's circumstances (whether by words, signs or other means); and
 - (b) an adult or child may fluctuate between having impaired decision making ability and decision making ability.
- (7) A health practitioner is to take reasonable steps to ensure that an assessment of a person's decision making ability by the health practitioner occurs at a time and in an environment that best enables the person's decision making ability to be accurately assessed.

35E. Meaning of health care

- (1) Subject to subsection (2), in this Part, ***health care*** means health care of the following kinds:
 - (a) any care, health service, procedure or treatment (including medical or dental treatment) provided by, or under the

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- supervision of, a health practitioner for the purpose of diagnosing, preventing, assessing, maintaining or treating a physical condition or mental illness;
 - (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) a medical research procedure;
 - (d) any other kind of health care prescribed to be health care for the purposes of this Part.
- (2) In this Part, ***health care*** does not include –
- (a) any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears); or
 - (b) first-aid medical or dental treatment; or
 - (c) the administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in

the manufacturer's instructions (if the drug is one for which a prescription is not required and which is normally self-administered); or

- (d) any other kind of health care that is prescribed as not being health care for the purposes of this Part.

35F. Meaning of medical research procedure

- (1) Subject to subsection (2), in this Part, ***medical research procedure*** means –

- (a) a procedure carried out for the purposes of medical research, including, as part of a clinical trial –

- (i) the administration of pharmaceutical drugs; and

- (ii) the use of equipment or a device; or

- (b) a prescribed medical research procedure.

- (2) In this Part, ***medical research procedure*** does not include –

- (a) any non-intrusive examination including –

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (i) a visual examination of the mouth, throat, nasal cavity, eyes or ears; or
 - (ii) the measuring of a person's height, weight or vision; or
- (b) observing a person's activities; or
- (c) undertaking a survey; or
- (d) collecting or using information, including the following:
 - (i) personal information within the meaning of the *Personal Information Protection Act 2004*;
 - (ii) health information; or
- (e) any other procedure prescribed as not being a medical research procedure for the purposes of this Part.

Division 3 – Advance care directives

35G. Giving an advance care directive

- (1) Subject to this Part, a person may give an advance care directive containing provisions that reflect the directions, values and preferences of that person

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

with regard to that person's future health care.

- (2) A person may give an advance care directive if the person –
 - (a) has decision making ability; and
 - (b) understands what an advance care directive is; and
 - (c) understands the consequences of giving an advance care directive.
- (3) An advance care directive is invalid if the advance care directive –
 - (a) was not made voluntarily; or
 - (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: In the case of –

- (a) an individual, a fine not exceeding 100 penalty units; or
- (b) a body corporate, a fine not exceeding 500 penalty units.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (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) an individual, a fine not exceeding 100 penalty units; or
- (b) a body corporate, a fine not exceeding 500 penalty units.

35H. Formal requirements for advance care directives

- (1) In this section –

minor error includes, but is not limited to, a typographical, grammatical, spelling, punctuation, cross referencing or obsolete referencing error.

- (2) Subject to this Part, a person may give an advance care directive in writing, orally or by any other means that enables the directions, preferences and values of the person giving the advance care directive to be documented (including through audio visual recording).

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (3) A person giving an advance care directive in writing may give the advance care directive by completing an advance care directive form or causing an advance care directive form to be so completed.
- (4) An advance care directive given in writing must –
 - (a) include the name, residential address and date of birth of the person giving the advance care directive; and
 - (b) be signed and dated 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

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (c) be witnessed upon completion in accordance with section 35I(2); and
 - (d) comply with any prescribed requirements in relation to the giving of written advance care directives.
- (5) An advance care directive given by means, other than writing, must –
 - (a) include the name, residential address and date of birth of the person giving the advance care directive; and
 - (b) include the date on which the advance care directive was given; and
 - (c) be witnessed upon completion in accordance with section 35I(4); and
 - (d) comply with any prescribed requirements in relation to the giving of advance care directives by means other than writing.
- (6) An advance care directive, or a provision of an advance care directive, is not invalid under section 35K merely because –

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (a) in the case of a written advance care directive, 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 completed, other than a section specified in an instruction on the form as being a section that must be 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 medical, legal or other professional advice in relation to the advance care directive; or
- (d) the advance care directive contains a minor error that does not affect the ability to understand the directions, preferences and values of the person who gave the advance care directive; or
- (e) provisions in the advance care directive are expressed in informal language rather than

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

medical or technical terminology;
or

- (f) the person giving the advance care directive expressed his or her preferences and values in general terms rather than specific provisions, or his or her preference and values in relation to a particular matter need to be inferred from the advance care directive; or
- (g) provisions in the advance care directive are based on cultural or religious grounds.

35I. Witnessing of advance care directive

(1) In this section –

close relative, in relation to a person,
means the following persons:

- (a) a spouse of the person;
- (b) a parent of the person;
- (c) a person who has one or both parents in common with the person;
- (d) a child of the person;
- (e) a child of, or a parent of, the spouse of the person;

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

- (f) a grandparent of the person;
 - (g) an aunt or uncle of the person.
- (2) A written advance care directive must be witnessed by 2 persons as follows:
 - (a) each witness must sign and date the advance care directive in the presence of each other and the person giving the advance care directive;
 - (b) each witness must certify 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;
 - (ii) that the person giving the advance care directive appears to understand that the advance care directive is about future health care;
 - (iii) that the person giving the advance care directive appears to understand the nature and effect of each statement contained in the advance care directive;

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (iv) 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;
 - (v) that, in the opinion of the witness, the provisions contained in the advance care directive reflect the directions, preferences and values of the person making the advance care directive;
 - (c) in accordance with any other prescribed witnessing requirements.
- (3) If a written advance care directive is given by a child, one of the witnesses referred to in subsection (2) must be a registered health practitioner.
- (4) An advance care directive given by means other than writing must be witnessed –
- (a) by 2 persons (one of whom is a registered health practitioner) who are present at the same time; and
 - (b) in accordance with any prescribed witnessing requirements.

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

- (5) A person must not witness an advance care directive given under this Part –
- (a) if the person is a close relative of the person giving the advance care directive; or
 - (b) if the person is a carer for the person giving the advance care directive (whether those services are provided in a paid or voluntary capacity); or
 - (c) if the person has signed the advance care directive pursuant to section 35H(4)(b)(ii) on behalf of the person giving the advance care directive; or
 - (d) if the person has not attained 18 years of age; or
 - (e) if the person has a pecuniary interest in the estate of the person giving the advance care directive; or
 - (f) if the person 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) if the person has been appointed as the person's guardian under this Act; or

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (h) in any other prescribed circumstances in which a person may not be a witness in relation to an advance care directive.

35J. Formal requirements for advance care directive in language other than English

- (1) The following provisions apply if a person wishes to give an advance care directive in a language other than English:
 - (a) the advance care directive may be given with the assistance of an interpreter or translator who is qualified as an interpreter or translator in the language that the person who wishes to give the advance care directive understands;
 - (b) the advance care directive form must be completed in English;
 - (c) the interpreter or translator must certify on the advance care directive form that the interpreter or translator assisted in the interpretation or translation of the advance care directive form.
- (2) A person must not act as an interpreter or translator for a person who wishes to give an advance care directive under this

Part if the interpreter or translator is a person prohibited from witnessing the advance care directive under section 35I(5).

35K. Advance care directives that do not meet requirements

- (1) If a person has given, or attempted to give, an advance care directive in a form that does not meet a requirement under section 35H, 35I or 35J, that advance care directive is not valid unless the Board otherwise orders under subsection (2).
- (2) The Board may make an order declaring that an advance care directive is valid despite a failure to comply with a requirement under section 35H, 35I or 35J.
- (3) Despite subsection (1), if an advance care directive given by a person does not meet a requirement under section 35H, 35I or 35J, a provision of that advance care directive may be taken into account by a health practitioner, the Public Guardian, the Board or an authorised decision maker for that person, in determining the person's directions, preferences and values.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

35L. Provisions that are void or of no effect in advance care directives

(1) In this section –

mandatory health care means –

- (a) an assessment that is authorised under an assessment order under the *Mental Health Act 2013*; or
- (b) treatment that is authorised under a treatment order under the *Mental Health Act 2013*; or
- (c) health care of a kind prescribed for the purposes of this definition.

(2) Subject to this Part, a provision in an advance care directive is void and of no effect to the extent that the provision –

- (a) is unlawful; or
- (b) requires an unlawful act to be performed; or
- (c) comprises a refusal of mandatory health care; or
- (d) would, if given effect, cause a health practitioner or other person to provide health care that –
 - (i) contravenes a professional standard or code of conduct that applies to the

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

health practitioner or
person; or

(ii) would otherwise amount
to professional
misconduct or
unprofessional conduct
under the Health
Practitioner Regulation
National Law (Tasmania);
or

(e) is a type of provision prescribed
for the purposes of this section as
being void and of no effect.

(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 in an advance care directive
that compromises a refusal or withdrawal
of health care is not void under
subsection (2)(b) solely on the basis that

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

the refusal or withdrawal of that health care would result in the necessities of life not being provided.

- (5) For the purposes of subsection (4), the expression *necessaries of life* has the same meaning as in sections 144 and 145 of the *Criminal Code*.

Division 4 – Operation of advance care directives

35M. Binding and non-binding provisions

- (1) Subject to this section, a provision of an advance care directive that comprises a clear and unambiguous refusal or withdrawal of particular health care is 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.
- (4) For the purposes of this Part, a non-binding provision is a statement of a person's preferences and values with regard to their future health care and may include but is not limited to the following:

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

- (a) what is important to the person regarding any future health care;
 - (b) what gives the person quality of life;
 - (c) what health care outcomes the person regards as acceptable;
 - (d) the person's preferred places of care and place to die;
 - (e) cultural or religious beliefs which may impact on future health care;
 - (f) any other matter that the person wishes to be taken into account in making decisions about their future health care.
- (5) If an otherwise binding provision is unclear or ambiguous in relation to a particular circumstance but is still indicative of a person's preferences or values in relation to those circumstances, the provision is to be taken to be a non-binding provision for that particular circumstance.

35N. When advance care directives are in force

- (1) An advance care directive is taken to be in force from the time the advance care directive is witnessed in accordance with this Part.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

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

350. Requirement to make reasonable inquiries as to advance care directive

- (1) In this section –

health care facility means a hospital, nursing home or such other facility as is prescribed for the purposes of this definition.

- (2) If a health practitioner reasonably believes that an adult has impaired decision making ability in respect of a health care decision, the health practitioner must, before providing health care to that adult, make reasonable efforts –
 - (a) to ascertain if the adult has given an advance care directive; and

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (b) if the adult has given an advance care directive, obtain a copy of that advance care directive.
- (3) If a health practitioner reasonably believes that a child has given an advance care directive, the health practitioner must make reasonable efforts to obtain a copy of that advance care directive before providing health care to that child.
- (4) Subsections (2) and (3) apply subject to section 35V.
- (5) The person in charge of a health care facility must take reasonable steps –
 - (a) to ascertain if a person who is cared for in that facility has given an advance care directive; and
 - (b) if the person who is cared for in that facility has given an advance care directive, to ensure that a copy of the advance care directive is placed on the person's health records at the facility.

35P. No variation of advance care directive

An advance care directive may not be varied except by the Board pursuant to sections 35Z or 35ZK.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

Division 5 – Consent to health care when advance care directive in effect

35Q. Consent given or refused in advance care directive

- (1) A health practitioner may provide health care in accordance with a consent given or refused in an advance care directive if –
 - (a) at the relevant time, the person who gave the advance care directive has impaired decision making ability in respect of the health care decision; and
 - (b) the consent or refusal of consent to the health care is clear and unambiguous.
- (2) Clear and unambiguous consent to health care given or refused in an advance care directive –
 - (a) is taken to be the consent or refusal of consent (as the case requires) 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 who gave the advance care directive were capable of giving

such consent or the refusal of such consent.

35R. Consent given or refused by authorised decision maker for person who has given an advance care directive

- (1) A person may provide consent or a refusal of consent to the provision of health care to a person who has given an advance care directive if, at the relevant time –
 - (a) the health practitioner seeking consent reasonably believes that the person who gave the advance care directive has impaired decision making ability in respect of the decision; and
 - (b) the advance care directive does not provide clear and unambiguous consent or a refusal of consent to the health care; and
 - (c) the person being asked to provide the consent –
 - (i) is a person who would otherwise be authorised to provide consent to the provision of that health care under Part 6; or

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (ii) has been appointed as a guardian for the person who gave the advance care directive and that appointment provides authority for them to make a decision of the relevant kind; or
 - (iii) is the person responsible under this Act for the person who has given the advance care directive.
- (2) A consent provided under this section in respect of the provision of health care to a person who has given an advance care directive has effect as if –
 - (a) the person had been capable of giving consent to the provision of the health care; and
 - (b) the health care had been carried out with that person's consent.

35S. Authorised decision maker to make decisions to give effect to advance care directive

- (1) Subject to this Part, an authorised decision maker for a person who has given an advance care directive –

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (a) must comply with any binding provisions of the advance care directive; 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 expressed or implied); and
 - (iii) endeavour to make health care decisions in a manner that is consistent with the principles in section 35B; and
 - (iv) make health care decisions that the authorised decision maker reasonably believes the person who gave the advance care directive

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

would have made in the circumstances.

- (2) Despite subsection (1), an authorised decision maker for a person who has given an advance care directive must act in accordance with –
 - (a) any agreement reached in relation to the advance care directive at a mediation under section 35ZI; and
 - (b) any direction of the Board given in relation to the advance care directive.

35T. 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 health care decision –
 - (a) must comply with a binding provision of the advance care directive; and
 - (b) is to comply, as far as is reasonably practicable, with a non-binding provision of the advance care directive; and

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (c) must seek, as far as is reasonably practicable, to avoid any outcome or intervention that the 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 35ZI;
 - (b) any direction of the Board given in relation to the advance care directive.

35U. Circumstances where health practitioners may not comply with advance care directive

- (1) A health practitioner may refuse to comply with a provision of an advance care directive if the health practitioner believes on reasonable grounds that –

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (a) the person who gave the advance care directive did not intend the provision to apply in the particular circumstances; or
 - (b) the provision is ambiguous or does not appear to reflect the current wishes of the person who gave the advance care directive.
- (2) A health practitioner must, before refusing to comply with a provision of an advance care directive under subsection (1), make reasonable efforts to consult with the authorised decision maker for the person who gave the advance care directive.
- (3) A health practitioner who refuses to comply with a binding provision of an advance care directive must, in the clinical records of the person who gave the advance care directive, make a written record of the refusal and the reasons for the refusal.
- (4) A health practitioner is not compelled to comply with a provision of an advance care directive that –
 - (a) specifies a particular kind of health care that the person giving the advance care directive wishes to receive; or

- (b) in the opinion of the health practitioner would result in health care being provided that is futile in the circumstances; or
 - (c) requests a kind of health care that is not consistent with current standards of health care in this State.
- (5) Despite this section, a health practitioner is to –
 - (a) provide health care consistent with the values and preferences expressed in the advance care directive; and
 - (b) act in accordance with any direction of the Board given in relation to the advance care directive.

35V. Urgent health care

A health practitioner may provide health care to a person who has given an advance care directive, despite the health practitioner not having access to that advance care directive, if the health practitioner considers that providing the health care is necessary, as a matter of urgency –

- (a) to save the person's life; or

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (b) to prevent serious damage to the person's health; or
- (c) to prevent the person from suffering or continuing to suffer significant pain or distress.

35W. Conscientious objection

- (1) Despite any other provision of this Part, a health practitioner may refuse to comply with a provision of an advance care directive if the health practitioner has a conscientious objection to complying with the provision.
- (2) If a health practitioner refuses to comply with a provision of an advance care directive under subsection (1) the health practitioner –
 - (a) must refer the patient's care onto another health practitioner in the same profession as the referring health practitioner; and
 - (b) must not, in any event, provide treatment that would prevent provisions in an advance care directive from being given effect.

Division 6 – Registration of advance care directives

35X. Registration of advance care directives

- (1) The Board may, on application, register an advance care directive.
- (2) The Board may, at its discretion, refuse to register an advance care directive if the advance care directive does not comply with sections 35H, 35I or 35J.
- (3) An advance care directive is not invalid merely because it is not registered under this section.
- (4) The Board is to keep, or cause to be kept, a register of advance care directives.
- (5) The register of advance care directives maintained under subsection (4) –
 - (a) may be kept in any form, including electronic; and
 - (b) is to include copies of all advance care directives that are registered with the Board under this Act.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

Division 7 – Revocation of advance care directives

35Y. 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 prescribed manner 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 each person appointed as the person’s enduring guardian of the revocation; and
 - (b) to notify each other person or organisation that has been given a copy of the advance care directive of the revocation; and
 - (c) in the case of an advance care directive that has been registered, notify the Board of the revocation.
- (3) If a person gives an advance care directive, any previous advance care directive given by the person is revoked.

35Z. Revoking or varying an advance care directive where person has impaired decision making ability

- (1) A person may make an application to the Board in relation to an advance care directive if –
 - (a) the person who has given the advance care directive has impaired decision making; and
 - (b) the person has reasonable cause to believe that the person who gave the advance care directive wishes or may wish to revoke or vary the advance care directive; and
 - (c) the person is –
 - (i) a health practitioner who is providing, or is to provide, health care to the person who gave the advance care directive; or
 - (ii) an authorised decision maker for the person who gave the advance care directive; or
 - (iii) any other person who the Board is satisfied has a proper interest in the matter.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (2) An application to the Board under subsection (1) is to be lodged with the registrar in a manner and form determined by the Board.
- (3) The Board on receiving an application under subsection (1) may make such inquiries or investigations as the Board may think appropriate.
- (4) Subject to subsection (5), the Board may, on application under subsection (1) and after a hearing, revoke or vary an advance care directive if the Board is satisfied that –
 - (a) the person who gave the advance care directive wishes to revoke or vary the advance care directive; and
 - (b) the person who gave the advance care directive understands the nature and consequences of the revocation or variation; and
 - (c) the revocation or variation genuinely reflects the wishes of the person; and
 - (d) the revocation or variation is, in all the circumstances, appropriate.
- (5) If an advance care directive expressly provides that the advance care directive

is not to be revoked or varied in the circumstances contemplated by this section, the Board should not revoke or vary the advance care directive unless satisfied that the current wishes of the person who gave the advance care directive indicate a conscious wish to override such a provision.

- (6) If the Board revokes or varies an advance care directive under this section, the Board –
- (a) must advise the person who made the application under subsection (1) and any other person the Board is satisfied has a proper interest in the matter of the revocation or variation 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.
- (7) A person who, without reasonable excuse, refuses or fails to comply with a direction of the Board under subsection (6) 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

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

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 direction.

Division 8 – Validity and limitation of liability

35ZA. Presumption of validity

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

35ZB. Protection from liability

- (1) A health practitioner, authorised decision maker or other person acting under the authority of this Act does not incur any civil or criminal liability for an act done or omitted to be done by the person 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, regulatory, administrative or similar proceedings.

35ZC. Preservation of liability

Nothing in this Part relieves a person from liability, in respect of the provision of health care to a person to whom this Part applies, where the first-mentioned person would have been subject to that liability if –

- (a) the person to whom this Part applies had been capable of giving consent to the carrying out of the health care; and
- (b) the health care had been carried out with the person's consent.

35ZD. 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.

35ZE. Advance care directive to take precedence

If there is an inconsistency between a provision in an advance care directive and a direction specified in an instrument

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

appointing an enduring guardian, the provision of the advance care directive applies, to the extent of the inconsistency.

Division 1 – Dispute resolution, review and appeals

35ZF. Interpretation of Division

In this Division –

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

- (a) the person who gave the advance care directive;
- (b) an authorised decision maker 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 health service provider from whom a person who gave the advance care directive is receiving, or is proposed to receive, health care;
- (e) a party to a mediation held, in respect of the advance care

directive, by the Public Guardian under this Division;

- (f) 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.

35ZG. Application of Division

This Division applies to the following:

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

35ZH. 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 directions, preferences and values of the person who gave the advance care directive.

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

35ZI. 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 relating to an advance care directive, including by –
 - (a) ensuring that the parties to the matter are fully aware of their rights and obligations; and
 - (b) identifying any issues that are in dispute between parties to the matter; and
 - (c) canvassing options that may obviate the need for further proceedings; and
 - (d) where appropriate, facilitating full and open communication between the parties to a dispute; and
 - (e) seeking to resolve differences between eligible persons in relation to any other matter prescribed by the regulations for the purposes of this section.
- (2) The Public Guardian may, in providing preliminary assistance under subsection (1), arrange a mediation between parties

to a dispute if all parties to the dispute agree to such a mediation.

- (3) The Public Guardian must put procedures in place to allow a person who has given an advance care directive to attend any mediation relating to that advance care directive under this section unless the Public Guardian is satisfied that –
 - (a) the person does not wish to attend the mediation in person; or
 - (b) the personal attendance of the person at the mediation is impracticable or unreasonable, despite any arrangement that the Public Guardian may make.
- (4) If a matter under this section 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

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (d) if the advance care directive has been registered by the Board, the Board may cause a copy of the signed agreement to be attached to the copy of the advance care directive in the register kept under section 35X.
- (5) 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.
- (6) 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.
- (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.

- (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.

35ZJ. 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 ended a mediation under section 35ZI, 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.

35ZK. Resolution of matters by Board

- (1) The Board may, on application by an eligible person, provide advice or direction in relation to an advance care directive.
- (2) The Board may, at any time, hold a hearing in relation to an advance care directive to –
 - (a) review a matter dealt with by the Public Guardian under section 35ZI; or

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

- (b) make a determination in relation to any matter to which this Part applies.
- (3) A hearing in relation to an advance care directive under subsection (2) 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.
- (4) An application 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.
- (5) A person who has given an advance care directive is to be a party to any hearing before the Board relating to that advance care directive.
- (6) The Board must put procedures in place to allow a person who has given an advance care directive to attend any hearing relating to that advance care

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 15

directive unless the Board is satisfied that –

- (a) the person does not wish to attend the hearing in person; or
- (b) the personal attendance of the person at the hearing is impracticable or unreasonable, despite any arrangement that the Board may make.

(7) The Board may –

- (a) in the case of a review of a matter dealt with by the Public Guardian under section 35ZI, make an order confirming, varying or cancelling an agreement reached at a mediation under section 35ZI; or
- (b) in any case, make a determination in relation to the following matters:
 - (i) whether a person who gave an advance care directive did or did not have the decision making ability to make the advance care directive;
 - (ii) whether a person who gave an advance care directive did or did not

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

have impaired decision making ability in relation to any of the provisions in the advance care directive;

- (iii) whether an advance care directive, or a provision of an advance care directive, is invalid or valid;
 - (iv) whether a person has the authority to make a decision in relation to a provision in an advance care directive;
 - (v) such other determinations that the Board thinks necessary or desirable in the circumstances of the case.
- (8) If the Board is of the opinion that it is more appropriate that an application under subsection (3)(c) be dealt with by the Public Guardian, the Board may refer the matter to the Public Guardian.
- (9) A person who, without reasonable excuse, refuses or fails to comply with a determination of the Board under this section is guilty of an offence.

Penalty: Fine not exceeding 50 penalty units.

- (10) It is a defence in proceedings for an offence under subsection (9) 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 2 – Miscellaneous

35ZL. Common law advance care directives not affected

This Part does not affect common law recognition of instructions about health care given by an adult that are not given in an advance care directive under this Act.

35ZM. Other legal rights not affected

- (1) Subject to section 35ZE, this Part does not affect instructions about future health care included in an instrument appointing an enduring guardian made in accordance with Part 5.
- (2) Nothing in this Part is taken to affect any rights conferred by any other law to consent to, or to refuse to consent to, health care.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

(3) Nothing in this Part is to be taken to affect any rights conferred –

(a) by any law or a court; or

(b) by the inherent jurisdiction of a court –

to consent, or to refuse to consent, to the provision of health care to a person.

35ZN. Advance care directives from other jurisdictions

(1) In this section –

corresponding law means a law that is declared to be a corresponding law under subsection (2);

interstate advance care directive means an instrument, containing future health care decisions, made by a person in another State, or in a Territory or another country.

(2) Where it appears to the Minister that a law in force in another State, or in a Territory or country has substantially the same effect as Part 5A of this Act, the Minister may by notice published in the *Gazette* declare that the law is a corresponding law for the purpose of this section.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 15

- (3) Subject to this section, if an interstate advance care directive is made under a corresponding law and that directive complies with that corresponding law, that interstate advance care directive is taken to be an advance care directive given in accordance with this Part.
- (4) An interstate advance care directive that is taken to be an advance care directive under subsection (3) is valid only to the extent that it would be valid if it were an advance care directive given in accordance with this Part.
- (5) For the purposes of this section, a certificate, from an Australian legal practitioner or from the Registrar of a relevant Court, or Board, that the interstate advance care directive satisfies the requirements of the relevant corresponding law is evidence of that fact.
- (6) If an interstate advance care directive is not recognised, whether wholly or partly, as valid for the purposes of this Part, the advance care directive may nevertheless be taken into consideration under this Part as an expression of a person's preferences and values.
- (7) A notice under subsection (2) is not a statutory rule for the purposes of the *Rules Publication Act 1953*.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 16

35ZO. Advance care directive does not authorise appointment of power of attorney or enduring guardian

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.

35ZP. Review of Part

- (1) The Minister is to cause an independent review of the operation of this Part to be undertaken as soon as practicable after the fifth anniversary of its commencement.
- (2) The Minister is to cause a report on the outcome of the review to be tabled in each House of Parliament within 10 sitting-days of that House after the review is completed.

16. Section 36 amended (Application of Part 6)

Section 36 of the Principal Act is amended by inserting after subsection (2) the following subsection:

- (3) For the purposes of subsection (1), a person is capable of giving consent to the carrying out of medical or dental treatment if –

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 17

- (a) the person has given an advance care directive; and
- (b) the medical or dental treatment is carried out pursuant to that advance care directive in accordance with a consent given or refused under Part 5A.

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

Section 41 of the Principal Act is amended as follows:

- (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

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 18

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 as follows:

- (a) by inserting “, directions, preferences and values” after “wishes”;
- (b) 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 as follows:

- (a) by inserting “, directions, preferences and values” after “wishes”;
- (b) by inserting “(including those expressed in an advance care directive)” after “person”.

20. Section 69 amended (Notice of hearing)

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

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021*
Act No. of 2021

s. 21

- (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 any authorised decision maker for the person who has given the advance care directive; and

21. 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):
 - (1A) The Board may adjourn a hearing held in relation to an advance care directive and, if it considers that there may be grounds for the making, may make any interim order or determination 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”;
- (d) by inserting in subsection (3) “or determination” after “further interim order”.

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021
Act No. of 2021*

s. 22

22. 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.

23. Section 85 amended (Protection relating to reports and information)

Section 85 of the Principal Act is amended as follows:

- (a) by inserting in subsection (1) “provides a document,” after “who”;
- (b) by inserting in subsection (1) “or the Public Guardian” after “to the Board”;

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 24

- (c) by inserting in subsection (1) “providing the document,” after “liability for”;
- (d) by inserting in subsection (1) “document,” after “believing the”;
- (e) by inserting in subsection (2) “provides a document,” after “who”;
- (f) by inserting the following subsection after subsection (2):
 - (3) A person who is a personal information custodian, within the meaning of the *Personal Information Protection Act 2004*, acting in good faith, does not commit a breach of that Act by reason only of collecting, using, disclosing or otherwise dealing with personal information for the purposes of this Act.

24. 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”;
- (b) by inserting in paragraph (b) “, proposed represented person or person to whom Part 5A or Part 6 applies” after “person”.

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 25

25. Section 89 amended (Duty to keep register)

Section 89 of the Principal Act is amended as follows:

- (a) by inserting in subsection (1) “or cause a register to be kept,” after “register,”;
- (b) by inserting the following paragraph after paragraph (c) in subsection (1):
 - (d) any advance care directives registered with the Board under section 35X; and
- (c) by omitting subsection (2) and substituting the following subsection:
 - (2) The register is to be made available for inspection by persons in accordance with the regulations.

26. 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; and”;
- (b) by inserting the following paragraphs after paragraph (b):
 - (c) prescribing requirements in relation to the giving and

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 26

witnessing of advance care directives; and

- (d) the referral of a matter to which Part 5A applies to a mediation and the conduct of such a mediation; and
- (e) the consideration and resolution of matters relating to advance care directives by the Public Guardian; and
- (f) the referral of matters from the Public Guardian to the Board; and
- (g) the making of orders in relation to advance care directives by the Board; and
- (h) any matter relating to the process and procedure of any of the matters referred to in paragraphs (d), (e), (f) and (g); and
- (i) 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 kept under section 35X;

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021
Act No. of 2021*

s. 27

- (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.

27. Schedule 3 amended (Instruments Relating to Enduring Guardians)

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

Guardianship and Administration Amendment (Advance Care Directives) Act 2021
Act No. of 2021

s. 27

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 obtained 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 guardian*)

*Guardianship and Administration Amendment (Advance Care
Directives) Act 2021
Act No. of 2021*

s. 28

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)

28. Repeal of Act

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