

CLAUSE NOTES

Guardianship and Administration Amendment (Advance Care Directives) Bill 2021

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| Clause 1 | Short title
Specifies the name of the proposed Act. |
| Clause 2 | Commencement
Provides that the Act commences on a day to be proclaimed. |
| Clause 3 | Principal Act
Provides that the Principal Act being amended is the <i>Guardianship and Administration Act 1995</i> . |
| Clause 4 | Long title amended
Amends the title of the Principal Act to insert reference to advance care directives. |
| Clause 5 | Section 3 amended (Interpretation)
Inserts definitions of 'advance care directive' and 'impaired decision making' and amends the definition of 'parent' to clarify that the term refers to a person who has parental responsibility. Also moves definitions of 'government department', 'service provider' and 'State authority' from s11 of the Principal Act to s3 to enable broader application. |
| Clause 6 | Section 5 amended (Objects of Act)
Provides for the recognition of advance care directives and removes reference to persons with disability as a limiting factor in provisions governing the authorisation and approval of medical and dental treatment. |
| Clause 7 | Section 6 amended (Principles to be observed)
Provides that functions or powers under the Act are performed in the best interests of a person with impaired decision making ability and that their wishes, directions, preferences and values are to be given effect. |
| Clause 8 | Section 11 amended (Procedures of the Board)
This section amends s11(11) of the Principal Act to clarify that in addition to the Board, the Registrar may also for the purpose of any proceedings require the provision of a report or information on matters before the Board. Expands the bodies to which a request can be made to include health practitioners and the class of information that may be requested to include documents. |
| Clause 9 | Section 15 amended (Functions and powers of Public Guardian)
This section extends the functions of the Public Guardian to enable the provision of advice on powers that may be exercised under the Act relating to persons with impaired decision making ability and to perform any such functions as authorised |

by the Principal Act. Inserts a new sub-section providing authority to the Public Guardian to request a document, report or information if necessary for the performance of their functions under the Act.

Clause 10 Section 17 amended (Investigations)

This section provides authority to the Public Guardian to investigate any matter related to action taken or proposed to be taken in relation to an advance care directive.

Clause 11 Section 25 amended (Authority of full guardian)

This section limits the ability of a full guardian to consent, refuse or withdraw consent to health care in circumstances where valid consent has been provided in an advance care directive.

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

This section inserts provisions requiring a guardian to act in accordance with directions, preferences and values expressed in an advance care directive and requires a guardian to take reasonable steps to ascertain whether the person under guardianship has given an advance care directive.

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

This section extends the matters in which a guardian may apply to the Board for advice or direction to include matters related to an advance care directive given by the person under guardianship.

Clause 14 Section 32 amended (Appointment of enduring guardian)

This section requires that an instrument of appointment for an enduring guardian include a declaration to be signed by each person appointed as an enduring guardian that they have obtained and understood any advance care directive given by the appointor. Inserts a new subsection which validates instruments of appointment of an enduring guardian made prior to the passage of the amending Act.

Clause 15 Part 5A inserted

Provides for a new Part (Part 5A – Advance Care Directives) to be inserted in the Principal Act.

- **Section 35A Objects of Part**

This section sets out the objects of the Part.

- **Section 35B Principles to be taken into account**

This section sets out principles that must be taken into account in connection with the administration, operation and enforcement of the Part.

- **Section 35C Interpretation of Part**

Subsection 35C(1) defines key terms used in the Part. Subsection 35C(2) provides that a reference to an act also includes reference to an attempt to do the act, and a refusal or omission to act. Subsection 35C(3) provides that reference to a

provision of an advance care directive includes a reference to a condition of or instruction or direction in an advance care directive. Subsection 35C(4) provides that unless the contrary intention appears, a reference to the provision of health care includes reference to the withdrawal or withholding of health care. Subsection 35C(5) provides that a reference to a particular form of health care extends to other health care that is of substantially the same kind so that a person making an advance care directive is not required to be unduly technical in their descriptions of treatments etc.

- **Section 35D Decision making ability**

Subsection 35D(2) provides that an adult is taken to have decision making ability unless a health practitioner determines otherwise. Subsection 35D(3) sets out when an adult is taken to have impaired decision making ability. Subsection 35D(4) provides that a child is taken to have impaired decision making ability unless a registered health practitioner determines otherwise and sets out when a child has decision making ability. Subsection 35D(5) sets out the types of matters which should not automatically lead to an assumption of impaired decision making ability. Subsection 35D(6) provides conditions on which a determination of decision making ability can be made and provides that decision making ability may be fluctuate. Subsection 35D(7) requires a health practitioner to take reasonable steps to conduct an assessment of decision making ability at a time and in circumstances that best enables the person's ability to be accurately assessed.

- **Section 35E Meaning of health care**

Subsection 35E(1) provides a definition of health care to include any care, service procedure or treatment to treat a physical condition or mental illness; forensic procedures; medical research procedures; and any other kind of prescribed health care. Subsection 35D(2) excludes non-intrusive examinations, first-aid, and/or the administration of non-prescription drugs from the definition of health care.

- **Section 35F Meaning of medical research procedure**

Subsection 35F(1) provides a definition of medical research procedure. Subsection 35F(2) excludes from the definition of medical research procedure routine non-intrusive examinations; observing a person's activities; undertaking a survey and collecting or using information.

- **Section 35G Giving an advance care directive**

This section sets out the conditions for giving an advance care directive. Subsection 35G(1) provides that a person may give an advance care directive containing directions, preferences and values related to their future health care. Subsection 35G(2) requires that a person giving an advance care directive must have decision making ability; must understand what an advance care directive is; and the consequences of giving an advance care directive. Subsection 35G(3) provides that an advance care directive is invalid if it was not made voluntarily or was made as a result of dishonesty, inducement or coercion. Subsection 35G(4) provides penalty provisions for anyone who dishonestly or through undue influence induces another person to make an advance care directive. Subsection 35G(5) provides that a person must not require another person to give an advance care directive as a precondition for providing a service and includes penalty provisions for doing so.

- **Section 35H Formal requirements for advance care directives**

This section sets out the formal requirements for an advance care directive. Subsection 35H(2) provides that an advance care directive can be given in writing, orally or by any other means that enable the directions, preferences and values of the person giving the advance care directive to be documented. Subsection 35H(3) provides that an advance care directive may be given in writing by using an advance care directive form or form to similar effect or causing an advance care directive form to be so completed. Subsection 35H(4) provides that a written advance care directive is not valid unless it has been signed by the person making the advance care directive or an adult on behalf of that person if that adult is requested to do so by the person giving the advance care directive and it is made in the presence of the person giving the advance care directive. The subsection also requires that the advance care directive is witnessed in accordance with the Act and that it complies with any other prescribed requirements. Subsection 35H(5) requires that advance care directives given by means other than in writing include relevant information, are appropriately witnessed and meet any other prescribed requirements. Subsection 35H(6) sets out circumstances in which an advance care directive is not invalid including failure to complete all sections of the form other than those that must be completed; failure to seek medical or legal advice; minor errors such as spelling errors or typos; the use of informal language; or the expression of wishes in general terms.

- **Section 35I Witnessing of advance care directive**

This section sets out the requirements for witnessing an advance care directive. Subsection 35I(1) sets out definitions of a close relative. Subsection 35I(2) requires that written advance care directives must be witnessed by 2 persons each of which must sign and date the document in the presence of each other and the person making the advance care directive. Each witness is to certify that her or she is satisfied as to the identity of the person giving the advance care directive; that the person appears to understand that the advance care directive is about future health care; that the person understands the nature and effect of each statement in the advance care directive; and that the person does not appear to be under any form or duress or coercion. Subsection 35I(3) provides that an advance care directive given by a child must be witnessed by two persons, one of who must be a registered health practitioner. Subsection 35I(4) provides that an advance care directive given by means other than in writing must also be witnessed by 2 persons, one of whom is a registered health practitioner, who are present at the same time and meet any other prescribed requirements. Subsection 35I(5) limits the category of persons who may witness an advance care directive including those who are a close relative of or carer of the person giving the advance care directive or anyone who has a direct or indirect interest in the estate of the person giving the advance care directive.

- **Section 35J Formal requirements for advance care directives in language other than English**

This section sets out how a person can give an advance care directive if English is not their first language. It requires the interpreter to certify on the advance care directive form that they assisted in the interpretation or translation of the advance care directive form. Subsection 35J(2) provides that a person may not act as an

interpreter or translator if the person is prohibited from being a witness to the advance care directive under subsection 35I(5).

- **Section 35K Advance care directives that do not meet formal requirements**

This section provides authority to enable the Board to make an order declaring an advance care directive to be valid if it does not comply with the formal requirements. It also authorises health practitioners and others to take into account the directions, preferences and values contained in a person's advance care directive even if it does not meet the formal requirements.

- **Section 35L Provisions that are void or of no effect in advance care directives**

This section provides that some provisions contained within an advance care directive may be void and of no effect. This includes provisions that are unlawful or would require an unlawful act to be performed; comprise a refusal of mandatory health care; or would cause a health practitioner to contravene a professional standard or code of conduct. Provisions contained within an advance care directive of this nature are void and of no effect to the extent of the contravention. Subsection 35L(4) has the effect of clarifying that a provision in an advance care directive that comprises a refusal or withdrawal of health care is not void solely on the basis that the refusal would result in a necessary of life not being provided.

- **Section 35M Binding and non-binding provisions**

This section sets out what is meant by a binding provision of an advance care directive and the circumstances in which it is to apply. It also sets out the types of matters that may be included as non-binding provisions which decision makers must give effect to as far as is reasonably practicable.

Subsection 35M(1) provides that binding provisions are directives which provide clear and unambiguous refusal or withdrawal of health care. Subsection 35M(3) provides that all other directives are non-binding and may include statements of a person's preferences and values with regard to their future health care. Subsection 35M(5) provides that if an otherwise binding provision is unclear or ambiguous it is to be taken as a non-binding provision.

- **Section 35N When advance care directives are in force**

This section provides that an advance care directive is in force from the time it is witnessed and remains in force until it expires (if an expiry date is included); is revoked; or if the person making the advance care directive dies.

- **Section 35O Requirement to make reasonable inquiries as to advance care directive**

This section requires a health practitioner, other in circumstances where urgent health care is required, to make reasonable efforts to ascertain whether a person has given an advance care directive. It also requires health care facilities to take reasonable steps to ascertain whether a person has an advance care directive and, if they do, to place a copy on the person's health records at the facility.

- **Section 35P No variation of advance care directive**

This section clarifies that, subject to powers conferred on the Board to vary the terms of an advance care directive, an advance care directive cannot be varied. A new directive must be made to change its terms.

- **Section 35Q Consent given or refused in an advance care directive**

Subsection 35Q(1) provides that a health practitioner may provide health care in accordance with a consent given or refused in an advance care if at the relevant time the person has impaired decision making ability and the consent is clear and unambiguous. Subsection 35Q(2) provides that if the consent meets the criteria set out in subsection 35Q(1) it is taken to have the same effect as if the person who gave the directive were capable of giving such consent or refusal.

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

This section provides that a person may provide consent or refusal of consent to health care if the person who has given the advance care directive has impaired decision making and clear and unambiguous consent is not contained in the advance care directive. Subsection 35R(1)(c) sets out the relevant decision maker in these circumstances according to whether the decision is one which the Guardianship and Administration Board is required to make and/or whether a guardian has been appointed with authority to make the decision. Consent given or refused in these circumstances has the same effect as if the person who gave the advance care directive were capable of giving such consent or refusal.

- **Section 35S Authorised decision maker to make decisions to give effect to advance care directives**

This section provides that, other than in circumstances where an agreement has been reached at mediation or the Board has directed otherwise, an authorised decision maker must comply with a binding provision contained within an advance care directive and must as far as is reasonably practicable comply with any non-binding provisions and seek to avoid any outcome or intervention that the person who made the advance care directive would wish to avoid.

- **Section 35T Health practitioners to give effect to advance care directives**

This section requires, other than in circumstances where an agreement has been reached at mediation or the Board has directed otherwise, that health practitioners comply with binding provisions of an advance care directive and as far as is reasonably practicable comply with non-binding provisions of an advance care directive.

- **Section 35U Circumstances where health practitioners may not comply with advance care directives**

This section sets out circumstances in which a health practitioner may refuse to comply with provisions of an advance care directive. Subsection 34U(1) provides that a health practitioner may refuse to comply with an advance care directive where they believe on reasonable grounds that the person giving the directive did not intend to apply in the particular circumstances or where the provision is ambiguous or does not appear to reflect the current wishes of the person who

gave the advance care directive. Subsection 35U(2) provides that if a health practitioner intends to refuse to comply with an advance care directive they are required to consult with any person who is authorised to make decisions on behalf of the person who gave the advance care directive. Subsection 35U(3) requires the health practitioner to make a written record of the refusal in the clinical records. Subsection 35U(4) provides that a health practitioner is not compelled to provide a particular form of health care or to provide health care that is futile in the circumstances or not consistent with current standards of health care. Subsection 35U(5) provides that in circumstances where a health practitioner does not comply with the provisions of an advance care directive, they are still to provide health care consistent with the values and preferences expressed by the person who made the advance care directive and to act in accordance with any directions given by the Board.

- **Section 35V Urgent health care**

This section authorises a health practitioner to provide urgent health care to a person despite not having access to their advance care directive.

- **Section 35W Conscientious objection**

This section allows a health practitioner to refuse to comply with a provision of an advance care directive on conscientious grounds. If the health practitioner has such an objection they are required to refer the person to another practitioner and, in any event, not provide treatment that would prevent the provisions of the advance care directive being given effect.

- **Section 35X Registration of advance care directives**

This section provides for the registration of advance care directives by the Board. Subsection 35X(2) provides discretion to the Board to register an advance care directive that does not meet validity requirements. Subsection 35X(3) provides that an advance care directives is not invalid merely because it has not been registered. Subsection 35X(3) requires the Board to keep, or cause to be kept, a register for this purpose.

- **Section 35Y Revoking advance care directive where person has decision making ability**

This section sets out how a person with decision making ability can revoke their advance care directive. Subsection 35Y(2) sets out arrangements for notifying relevant persons that the advance care directive has been revoked, including the Board or any person appointed as an enduring guardian.

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

This section applies to person who lack decision making ability in circumstances where it appear they may wish to revoke their advance care directive. Subsection 35Z enables a health practitioner providing care to the person, authorised decision maker or other persons to make application to the Board to have the matter considered. Subsection 35Z(4) provides authority to the Board after hearing to revoke or vary the advance care directive. In exercising its authority under this section, the Board is required to satisfy itself that the variation or revocation genuinely reflects the wishes of the person who gave the advance care directive.

Penalty offences are included in circumstances where a person fails to comply with a direction of the Board.

- **Section 35ZA Presumption of validity**

This section provides that a person is entitled to presume that an apparently genuine advance care directive is valid and in force unless they knew, or ought reasonably to have known, that it was not.

- **Section 35ZB Protection from liability**

This section removes civil or criminal liability for an act or omission of a person done in good faith, without negligence and in accordance with an advance care directive.

- **Section 35ZC Preservation of liability**

This section preserves liability for acts done where a person would have been liable had the person with the advance care directive had been capable of giving consent.

- **Section 35ZD Validity of acts and decisions under revoked or varied advance care directive**

This section provides that things done pursuant to an advance care directive remain valid despite its later revocation or variation.

- **Section 35ZE Advance care directives to take precedence**

This section provides that if there is inconsistency between the provisions in an advance care directive and a direction specified in an instrument appointing an enduring guardian, the advance care directive prevails to the extent of the inconsistency.

- **Section 35ZF Interpretation of Division**

This section sets out eligibility requirements for persons who are able to participate in dispute resolution processes.

- **Section 35ZG Application of Division**

This section provides that the Division applies to the giving or revoking of advance care directives, the provision or proposed provision of health care to a person with an advance care directive and any other prescribed matter.

- **Section 35ZH Functions and powers of Public Guardian and Board**

This section inserts provisions requiring that the Public Guardian and Board in exercising their dispute resolution functions seek as far as is possible to give full effect to the wishes, values and preferences of the person who gave the advance care directive.

- **Clause 35ZI Resolution of matters by Public Guardian**

Subsection 35ZH(1) provides that the Public Guardian may provide preliminary assistance to resolve a dispute between parties relating to an advance care directive. Subsection 35ZH(2) authorises the Public Guardian to use mediation as a means of providing preliminary assistance. Subsections 35ZI(3)-(7) sets out arrangements for the conduct of mediation. Subsection 35ZH(8) provides that the Public Guardian may refuse to mediate if in their opinion the matter is best dealt with by

the Board. Subsection 35ZI(9) authorises the Public Guardian to seek reports or information on matters related to the mediation.

- **Clause 35ZJ Public Guardian may refer matters to the Board**

This section provides authority for the Public Guardian to refer matters to the Board in circumstances where a mediation has ended or where it is more appropriately dealt with by the Board.

- **Resolution of matters by the Board**

This section sets out arrangements for the Board to resolve disputes relating to advance care directives. Subsection 35ZJ(1) provides the Board with authority to provide advice or directions in relation to an advance care directive. Subsection 35ZJ(2) provides that the Board may hold a hearing into either a review of a matter dealt with by the Public Guardian or the any other matter. Subsection 35ZJ(3) enables the Board to hold a hearing on its own motion, on referral by the Public Guardian or on application by any eligible person. Subsection 35ZJ(4)-(6) sets out procedures for hearing matters. Subsection 35ZJ(7) provides authority to the Board to make an order varying or cancelling an agreement reached at mediation or to make any other determination it thinks necessary or desirable. Subsection 35ZJ(8) enables the Board to refer a matter to be dealt with by the Public Guardian. Subsection 35ZJ(9) provides penalty provisions for person who fail to comply with a determination of the Board.

- **Clause 35ZL Common law advance care directives not affected**

This section confirms the validity of advance care directives made under common law.

- **Clause 35M Other legal rights not affected**

This section preserves legal rights conferred by any other law on a court or by inherent jurisdiction of a court to consent or refuse to consent to the provision of health care to a person. Subsection 35ZM(1) also preserves the legality of instructions about future health care contained in an instrument appointing an enduring guardian.

- **Clause 35ZN Advance care directives from other jurisdictions**

This section provides authority to the Minister to publish a notice in the Gazette declaring that a law of another jurisdiction is a corresponding law for the purposes of the Act. Subsection 35ZN(3) provides that if an interstate advance care directive is made under and complies with a corresponding law it is taken to be an advance care directive for the purposes of Part 5A. Subsection 35ZN(4) provides, however, that an interstate advance care directive is only valid to the extent that it would be valid if it were made in accordance with Part 5A. An advance care directive that is not recognised as valid for the purposes of Part 5A may still be taken into consideration as an expression of a person's wishes, preferences and values.

- **Clause 35ZO Advance care directive does not authorise appointment of power of attorney or enduring guardian**

This section provides that an advance care directive cannot be used as an instrument of appointment of a power of attorney or an enduring guardian.

- **Clause 35ZP Review of Part**

This section requires an independent review of the operation of Part 5A to be undertaken as soon as possible after the fifth anniversary of its commencement.

Clause 16 Section 36 amended (Application of Part 6)

This section amends s36 of the Principal Act to provide that for the purposes of Part 6 of the Principal Act a person is capable of giving consent to the carrying out of medical or dental treatment if that consent is given or refused in an advance care directive.

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

This section provides that a person may object to the carrying out of medical or dental treatment to which Part 6 applies orally, in writing or by any other means. Clause 16(c) also provides that a medical practitioner or dentist is to make reasonable enquiries to ascertain whether the person has given an advance care directive.

Clause 18 Section 43 amended (Consent by person responsible)

This section provides that for purposes of determining whether medical or dental treatment to which the Part applies is in the best interests of the person, the person responsible must take into account the directions, preferences and values of that person as expressed in an advance care directive.

Clause 19 Section 45 amended (Consent of the Board)

This section provides that for purposes of determining whether medical or dental treatment to which the Part applies is in the best interests of the person, the Board must take into account the directions, preferences and values of that person as expressed in an advance care directive.

Clause 20 Section 69 amended (Notice of hearing)

This section provides that the Board is also to provide notice of hearing to a health practitioner proposing to provide health care pursuant to an advance care directive and to any authorised decision maker for the person who has given the advance care directive.

Clause 21 Section 73 amended (Interim order or determination on adjournment)

This section provides authority to the Board to adjourn a hearing held in relation to an advance care directive and make any interim orders or determinations it considers appropriate in the circumstance.

Clause 22 Section 78 amended (Protection from liability)

This section extends protection from liability to the Public Guardian and any person under the direction of the Public Guardian for acts done in good faith in the performance or exercise of any function or power or purported performance or exercise of any power given under the Act.

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

This section extends protection from liability for persons providing documents, reports or information to the Public Guardian and protects persons who are personal information custodians against breach of the *Personal Information Protection Act 2004* relating to personal information collected, disclosed or otherwise dealing with for the purposes of the Act.

Clause 24 Section 86 amended (Confidentiality of information)

This section extends protection against disclosure of information obtained by the Board or the Public Guardian to information that deals with the personal history or records of persons to whom Part 5A applies.

Clause 25 Section 89 amended (Duty to keep register)

This section amends the s89 to require that the Board also keep a register of advance care directives registered with the Board and inserts a regulation making power providing for arrangements for inspection of the register.

Clause 26 Section 90 (Regulations)

This section extends the regulation making powers under the Act to include new matters associated with advance care directives, including the conduct of mediation, the referral of matters from the Public Guardian to the Board, the making of orders in relation to advance care directives and matters related to the registration of advance care directives.

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

This section amends the form for the appointment of an enduring guardian to provide that the person being appointed attests that they have read and understood any advance care directive given by the appointor.

Clause 28 Repeal of Act

This automatically repeals the amending legislation on the first anniversary of the day on which the Act commences.