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ADVANCE HEALTH DIRECTIVES

On 8 January 2010 the *Guardianship and Administration Act 1990* (“the Act”) was amended to introduce a new way of instructing your treating doctor or other health professional if you are incapacitated, known as Advance Health Directives (AHDs). Some people will know AHDs as Living Wills but this is not strictly correct as Living Wills, although very similar are prepared under the common or case law rather than the Act.

AHDs allow you to consent or refuse to consent to different types of treatment in particular circumstances. This is known as a treatment decision. We expect that the most common form of treatment decision will be to consent or refuse to consent to life sustaining treatment, including resuscitation, for terminally ill or seriously brain damaged persons. However, AHDs have the potential to be very flexible and can apply to any medical, surgical, dental or other health care.

The legislation introduces a prescribed form for AHDs. The form is relatively straightforward. It identifies the maker, lists a number of treatment decisions and provides for the signing and witnessing of the AHD. However, we recommend that you obtain medical and legal advice before making an AHD because there are a number of potential limitations that may prevent the implementation of your AHD. Indeed, the Act strongly encourages people intending to make an AHD to seek legal and medical advice.

Medical advice may be useful because a treatment decision operates only in the circumstances specified in the treatment decision. Thus, it is critically important that the appropriate circumstances are properly identified.

Legal considerations that may apply include:

1. Has the AHD been properly signed and witnessed?

- You must be an adult with full legal capacity to make an AHD. A person has full legal capacity if they are able to understand the nature and consequences of their decisions.
- If you are unable to sign, someone else may sign for you at your direction. You must still be present when the AHD is signed.
- Your signature must be witnessed by two adults, at least one of whom is authorised to take a statutory declaration.

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2. Has a treatment decision in your AHD been invalidly made, ceased to operate or been revoked?

- A treatment decision is invalid if it is involuntary, induced or coerced.
- A treatment decision is also invalid if its maker did not understand the nature and consequences of the treatment decision
- A treatment decision is considered to have been revoked if you change your mind, whether or not it has been formally revoked.
- A treatment decision does not operate if new circumstances have arisen since the treatment decision that the maker would not have foreseen and which would have caused the maker to change his or her mind about the treatment decision.

With regard to the last point, the nature of the condition to be treated and of the proposed treatment are important but the maker's age and the time since the treatment decision was made or last reviewed are equally important. Therefore, it is vital that AHDs are reviewed regularly and amended or replaced if they no longer reflect the maker's wishes.

3. Who do I go to, if I think there is something wrong with an AHD or treatment decision?

The State Administrative Tribunal has jurisdiction to:

1. declare that an AHD or treatment decision is invalid;
2. declare (or revoke a prior declaration) that a maker is unable to make reasonable judgments in respect of treatment, thus triggering the operation of an AHD;
3. give directions with regard to the interpretation of the terms of an AHD;
4. give directions with regard to the implementation of a treatment decision;
5. declare that a maker has changed their mind thus revoking a treatment decision; and
6. recognise an AHD or similar instrument created in another jurisdiction.

We expect that the exercise of many of these powers will be contentious. In particular, deciding whether someone has changed their mind necessarily brings in some highly subjective considerations.

If there is any way in which we can assist you with an AHD please contact us.