



[Click here for
Explanatory Memorandum](#)

AN BILLE UM RÉAMHCHINNTÍ CÚRAIM SLÁINTE 2010
ADVANCE HEALTHCARE DECISIONS BILL 2010

Mar a tionscnaíodh
As initiated

ARRANGEMENT OF SECTIONS

Section

1. Short title.
 2. Definitions generally.
 3. Advance Healthcare Decision.
 4. Definition of capacity.
 5. Making and altering Advance Healthcare Decisions.
 6. Validity and applicability of Advance Healthcare Decisions.
 7. Effect of Advance Healthcare Decisions.
 8. Where doubt exists about an Advance Healthcare Decision.
 9. Amendment to Powers of Attorney Act 1996.
-

ACTS REFERRED TO

Medical Practitioners Act 2007	2007, No. 25
Mental Health Act 2001	2001, No. 25
Mental Health Acts 2001 to 2008	
Powers of Attorney Act 1996	1996, No. 12



AN BILLE UM RÉAMHCHINNTÍ CÚRAIM SLÁINTE 2010
ADVANCE HEALTHCARE DECISIONS BILL 2010

BILL

entitled

5 AN ACT TO PROVIDE FOR THE MAKING OF MEDICAL
TREATMENT DECISIONS IN ADVANCE BY COM-
PETENT PERSONS WITH THE INTENTION OF THOSE
DECISIONS SUBSEQUENTLY PROVIDING FOR THE
10 WITHHOLDING OF CARE AT A TIME WHEN THE PER-
SON LOSES COMPETENCE TO MAKE TREATMENT
DECISIONS; TO AMEND THE POWERS OF ATTORNEY
ACT 1996 TO ALLOW FOR ATTORNEYS UNDER THAT
ACT TO TAKE HEALTHCARE TREATMENT
15 DECISIONS; AND TO PROVIDE FOR CONNECTED
MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—This Act may be cited as the Advance Healthcare Decisions Act 2010. Short title.

2.—In this Act—

Definitions
generally.

20 “basic care” means actions that are directed at providing warmth,
shelter, cleanliness and nutrition (other than by artificial means) and
hydration (even by artificial means) to a person who has made an
advance healthcare decision;

“court” means the High Court;

25 “registered medical practitioner” means a person registered as a
medical practitioner within the meaning of the Medical Practitioners
Act 2007;

“treatment” means any medical, nursing, surgical or other treatment
and includes diagnostic and other procedures but does not include
30 basic care.

3.—(1) In this Act, except where the context otherwise requires, Advance
Healthcare
Decision.
“advance healthcare decision” means a decision made by a person,
aged 18 years or older and where he or she has the capacity, within
the meaning of *section 4(1)*, to do so, that if—

- (a) at a later time and in such circumstances as he or she may specify, a specified treatment is proposed to be carried out or continued by a person or persons providing health care for him, and
- (b) at that later time, he or she lacks capacity within the meaning of *section 4(1)* to give or withhold consent to the carrying out or continuation of the treatment,

the specified treatment is not to be carried out or continued.

(2) Whether a person possesses capacity to make an advance healthcare decision or to take any decision in respect of treatment within the meaning of *section 2* (hereafter “any decision in respect of treatment”) shall be determined by reference to *section 4*.

Definition of capacity.

4.—(1) For the purposes of this Act a person shall lack the capacity to make an advance healthcare decision or any decision in respect of treatment if at the material time, he or she is unable—

- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his or her decision (whether by talking, using sign language or any other means) or, if the decision requires the act of a third party to be implemented, to communicate by any means with that third party.

(2) A person is not to be regarded as unable to understand the information relevant to an advance healthcare decision or any decision in respect of treatment if he or she is able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to an advance healthcare decision or any decision in respect of treatment for a short period only does not prevent him or her from being regarded as having the capacity to make an advance decision or any decision in respect of treatment.

(4) The information relevant to an advance decision or any decision in respect of treatment includes information about the reasonably foreseeable consequences of—

- (a) deciding one way or another, or
- (b) failing to make the decision.

(5) Any question as to whether a person has capacity to make an advance healthcare decision or any decision in respect of treatment shall be decided on the balance of probabilities.

(6) At any material time, it will be presumed that a person has capacity until the contrary is shown.

5.—(1) For the purposes of *section 3* an advance healthcare decision may be regarded as specifying a treatment or circumstances even though expressed in non-medical terms.

Making and altering
Advance
Healthcare
Decisions.

5 (2) In order to be valid, an advance decision or any alteration thereto must be—

(a) made in writing,

(b) dated with the date of its making and, where appropriate, any alteration,

10 (c) signed at the foot thereof and at the foot of any amendment by—

(i) the person who has made the advance healthcare decision,

15 (ii) a witness to the signature of the person who has made the advance healthcare decision, who may not be the same as the person referred to in *subsection (2)(d)*,

and

20 (d) accompanied by a signed and dated attestation (or attestations) from a registered medical practitioner (or practitioners), that at the time of the making of the advance healthcare decision and any amendment thereto, the person making the advance healthcare decision had at the material time the capacity to do so.

25 (3) A person who has made an advance healthcare decision may withdraw or alter that decision at any time when he has capacity to do so.

(4) A withdrawal of an advance decision (including a partial withdrawal) is not required to be in writing.

(5) A record in writing of an advance healthcare decision that is—

(a) contained in the medical notes of a person, and

30 (b) otherwise in conformity with the provisions of *subsection (2)*,

shall be capable of being considered an advance healthcare decision for the purposes of this Act.

35 (6) Without prejudice to the provisions of *subsection (2)* an advance healthcare decision may also include—

(a) full details of the person who has made the advance healthcare directive,

40 (b) an express statement that the advance healthcare decision should be used if the person who has made the advance healthcare decision ever lacks the capacity to make decisions in respect of treatment,

45 (c) a clear statement of the decision or decisions being taken, the treatment or treatments to be refused and the circumstances in which the advance healthcare decision will apply.

6.—(1) An advance healthcare decision does not affect the liability which a person may incur for carrying out or continuing a treatment in relation to the person who has made the advance decision unless the decision is at the material time—

(a) valid, and 5

(b) applicable to the treatment in question.

(2) An advance healthcare decision is not valid if the person who has made the advance healthcare decision—

(a) has withdrawn the decision at a time when he had capacity to do so, 10

(b) has, under a lasting power of attorney, created pursuant to the Powers of Attorney Act 1996, after the advance healthcare decision was made, conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates, or 15

(c) has done anything else clearly inconsistent with the advance healthcare decision remaining his fixed decision.

(3) An advance healthcare decision is not applicable to the treatment in question if at the material time the person who has made the advance healthcare decision has capacity to give or refuse consent to the treatment in question. 20

(4) An advance healthcare decision is not applicable to the treatment in question if—

(a) that treatment is not the treatment specified in the advance healthcare decision, 25

(b) any circumstances specified in the advance healthcare decision are absent, or

(c) there are reasonable grounds for believing that circumstances exist at the time when the treatment in question is to be commenced or continued which the person who has made the advance healthcare decision did not anticipate at the time of the advance healthcare decision and which would have affected his decision had he anticipated them. 30 35

(5) An advance healthcare decision is not applicable to life-sustaining treatment unless—

(a) the decision is verified by a statement by the person who made the advance decision to the effect that it is to apply to that treatment even if life is at risk, and 40

(b) the decision and statement comply with *subsection (6)*.

(6) A decision or statement complies with this subsection only if—

(a) it is in writing,

(b) it is signed by the person who has made the advance decision or by another person in the presence of the person who has made the advance decision and by the direction of the person who has made the advance decision,

5 (c) the signature is made or acknowledged by the person who has made the advance decision in the presence of a witness, and

10 (d) the witness signs it, or acknowledges his signature, in the presence of the person who has made the advance decision.

(7) The existence of any lasting power of attorney other than one of a description mentioned in *subsection (2)(b)* does not prevent the advance healthcare decision from being regarded as valid and applicable.

15 (8) An advance healthcare decision is not applicable to—

(a) treatment the purpose of which is to relieve pain or objective distress in the person who has made the advance decision,

20 (b) the administration of basic care to the person who has made the advance healthcare decision, or

(c) treatment that is lawful having regard to the provisions of the Mental Health Acts 2001 and 2008.

7.—(1) If the person who has made the advance healthcare decision has made an advance decision which is—

Effect of Advance
Healthcare
Decisions.

25 (a) valid, and

(b) applicable to a treatment,

the decision has effect as if he had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued.

30 (2) A person does not incur liability for the consequences of withholding or withdrawing a treatment from the person who has made the advance healthcare decision if, at the time, he reasonably believes that an advance decision exists which is valid and applicable to the treatment in question.

35 8.—(1) A person does not incur liability for carrying out or continuing the treatment unless, at the time, he is satisfied that an advance healthcare decision exists which is valid and applicable to the treatment.

Where doubt exists
about an Advance
Healthcare
Decision.

40 (2) Any person with responsibility for the treatment of a person who has made an advance healthcare decision who, for conscientious or other reasons, cannot comply with an advance healthcare decision and in circumstances where the advance healthcare decision is—

(a) valid, and

(b) applicable to a treatment,

shall transfer responsibility for the treatment of that person to another person who will comply with the advance healthcare decision.

(3) The Court may make a declaration as to whether an advance healthcare decision— 5

- (a) exists;
- (b) is valid;
- (c) is applicable to a treatment.

(4) Nothing in an advance healthcare decision stops a person—

- (a) providing life-sustaining treatment, or 10
- (b) doing any act he reasonably believes to be necessary to prevent a serious deterioration in the condition of the person who has made the advance decision,

while a decision concerning any issue relevant to the advance healthcare decision is sought from the Court. 15

Amendment to
Powers of Attorney
Act 1996.

9.—The Powers of Attorney Act 1996 is hereby amended as follows—

- (a) In section 2, the definition of “personal care decision” is amended by the insertion of the words—

“(g) giving or refusing consent to the carrying out or 20
continuation of a treatment by a person providing healthcare for the donor.”

- (b) Section 6 is amended by the insertion of a new subsection (8) as follows—

“(8) (a) Where a lasting power of attorney authorises 25
the donee (or, if more than one, any of them)
to make decisions about giving or refusing consent to the carrying out or continuation of a treatment by a person providing healthcare for the donor, the authority— 30

- (i) does not extend to making such decisions in circumstances other than those where the donor lacks, or the donee reasonably believes that the donor lacks, capacity within the meaning of the *Advance Healthcare Decisions Act 2010*, 35

- (ii) is subject to any decision made by the donor pursuant to the provisions of the *Advance Healthcare Decisions Act 2010* and 40

- (iii) extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for the donor.

(b) Subsection (8)(a)(iii)— 45

5

- (i) does not authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment, unless the instrument contains express provision to that effect, and

- (ii) is subject to any conditions or restrictions in the instrument.

- (c) No refusal of medical treatment by a donee under this Act shall be applicable to—

10

- (i) treatment the purpose of which is to relieve pain in the donor,

- (ii) the administration of any basic care within the meaning of the *Advance Healthcare Decisions Act 2010*,

15

- (iii) treatment of the donor that is lawful having regard to the provisions of the Mental Health Act 2001 (as amended),

- (iv) where the power of attorney has been revoked,

20

- (v) where the donor has the capacity (within the meaning of of the *Advance Healthcare Decisions Act 2010*) at the material time to take the treatment decision in question.”.



AN BILLE UM RÉAMHCHINNTÍ CÚRAIM SLÁINTE 2010
ADVANCE HEALTHCARE DECISIONS BILL 2010

EXPLANATORY MEMORANDUM

Purpose of the Bill

The purpose of this Bill is to make provision for the creation of an Advance Health Care Directive which formally records the wishes of an individual at a time when they have the capacity to do make decisions in relation to future health care decision that may arise in the future and at a time when the person no longer has the capacity to take a decision. Where valid, an advance healthcare decision with have the same force and effect as the contemporaneous refusal of treatment by a patient with capacity. In other words, no one (a clinician, a donee of a power of attorney, or a Court) can supplant the decision of the person.

At present in the State, there is no statutory recognition of “advance health care decisions” (sometimes called “advance statements”, “advance directives” or — more colloquially — “living wills”). The rationale for permitting such a document is that it ensures due regard to a person’s right of dignity, bodily integrity, privacy and autonomy (in accordance with the principles of the *Mental Capacity Bill 2008*) and allows a person to make advance plans covering future treatment, rather than having those plans made by others when the time comes. While there is no statutory recognition of advance statements, the need for such a measure seems to follow from the relevant case law (including the decision of the Supreme Court in *In re a Ward of Court (withholding medical treatment) (No. 2)* (1996) 2 IR 79) and is in keeping with the recommendations of the Law Reform Commission’s 2008 Consultation Paper *Bioethics: Advance Care Directives* (LRC CP 51 — 2008).

The enactment of the Bill would additionally place the State in harmony with international obligations created by the “2006 UN Convention of Persons with Disabilities” and relevant Council of Europe Standards.

It is intended that the Bill will present a workable instrument for those persons interested in planning for their medical treatment decisions. The Bill seeks to respond to the fear of many that, as a result of advancements in medical care, they may be kept alive indefinitely by life-prolonging treatment after they have lost their ability (mental capacity) to decide on their treatment options and to make their own views known. This Bill is compliant with the assumption that decision-making should remain for as long as possible in the hands of the patient involved and account must be taken of the person’s present wishes where they are ascertainable.

Under the proposed legislation, an advance health care directive could include an instruction to refuse life-sustaining treatment and additional safeguards are provided in that scenario.

The Bill also provides for an extension of Powers of Attorney, so that a person can give an attorney (under the Powers of Attorney Act 1996) the power to take certain designated healthcare decisions on his or her behalf.

Provisions of the Bill.

Section 1 is the title and citation section.

Section 2 provides definitions generally within the Bill.

Section 3 provides the specific definition of Advance Healthcare Decisions.

Section 4 provides the specific definition of capacity.

Section 5 provides the form that an advance healthcare decision must take, information that may be included in an advance healthcare statement and sets out the entitlement of a person to withdraw an advance healthcare decision at any time.

Section 6 sets out the consequences of the validity or invalidity of advance healthcare statements and the circumstances in which an advance healthcare statement will not be applicable to treatment including life-sustaining treatment.

Section 7 provides for the effect of a validly made advance healthcare treatment

Section 8 provides for applications that may be made to the High Court where there is doubt about the validity of an advance healthcare statement.

Section 9 provides for the Amendment of the Powers of Attorney Act to allow persons to appoint an attorney with the power to take healthcare decisions.

Senator Liam Twomey,
May, 2010.