

Advance Care Directives

An Advance Care Directive can be a useful tool for people to communicate instructions about future health care decisions. This factsheet explains the key legal principles on Advance Care Directives.

Clarifying the law

This factsheet explains:

- What an Advance Care Directive is, and how it can be used
- When a person can make an Advance Care Directive
- What types of Advance Care Directives there are
- When an Advance Care Directive must be followed

About Advance Care Directives

An Advance Care Directive (Directive) is an instruction that a person with capacity makes about future health care decisions. It can be used to:

1. **Make specific decisions about future treatment.** This can include consenting in advance to treatment but more commonly involves refusing treatment, even if that might result in death.
2. **Express general wishes** (for example goals of care, or wanting to die at home rather than in hospital) **and personal values** (spiritual, religious or cultural beliefs relevant to the person's care).

3. In most States and Territories, **appoint a substitute decision-maker** to make future health care decisions if the person loses capacity. Substitute decision-making is discussed further in the Legal Toolkit factsheet *Substitute Decision-Making*. (<https://www.eldac.com.au/tabid/4963/Default.aspx>)

Making an Advance Care Directive

A Directive will be valid if it is made **voluntarily** by the person (no-one else has pressured the person to make the decision), when the person had capacity. The definition of **capacity** differs between Australian States and Territories. Find out more about the meaning of 'capacity' in your State or Territory at *End of Life Law in Australia*. (<https://end-of-life.qut.edu.au/capacity>)

A person who has lost capacity cannot make an Advance Care Directive. In that case, generally a substitute decision-maker e.g. a family member or friend must be called upon to make a decision. Find out more from the ELDAC *Legal Toolkit Substitute Decision-Making* factsheet (<https://www.eldac.com.au/tabid/4982/Default.aspx>)

Making a Directive forms part of the broader process of **Advance Care Planning**. For practical tips on how to undertake Advance Care Planning with your patient visit *Advance Care Planning Australia* (<https://www.advancecareplanning.org.au/>) and explore the *Advance Care Planning in Aged Care Implementation Guide*. (<https://www.advancecareplanning.org.au/docs/default-source/acpa-resource-library/acpa-publications/advance-care-planning-in-aged-care-implementation-guide.pdf>)

People from diverse social and cultural backgrounds, or those with dementia or mental health conditions may have different beliefs and advance planning needs. Learn more at *Advance Care Planning Australia*. (<https://www.advancecareplanning.org.au/for-health-and-care-workers/in-various-settings>)

Types of Advance Care Directives

Australia has two types of Advance Care Directives:

- **Common law Advance Care Directives** which are recognised by the common law (decisions made by judges in the courts) and generally must be followed. These types of Directives exist in **all States and Territories except Queensland**.
- **Statutory Advance Care Directives** which are governed by State and Territory legislation. These types of Directives exist in **all States and Territories except New South Wales and Tasmania**.

The law on Advance Care Directives differs across Australia. Find out more about the law in your State or Territory at End of Life Law in Australia. (<https://end-of-life.qut.edu.au/advance-care-directives/state-and-territory-laws>)

How are Advance Care Directives made?

Common Law Advance Care Directives

A common law Advance Care Directive does not have to be in a particular form – it can be verbal or in writing. There are no other formal requirements, except that it be made voluntarily, by a person with capacity. Witnesses are not required.

Examples of a common law Advance Care Directive include:

- A written document which refuses some type of treatment.

- A card in a person's wallet which refuses treatment (such as a blood transfusion or resuscitation).
- A verbal direction refusing specific treatment that is given to health professional or carer when the person has capacity.

For the Directive to be binding, there is no requirement for the person to first receive information about the treatment they want to refuse or request.

Statutory Advance Care Directives

Most statutory Advance Care Directives must be:

- **made in writing**. Most legislation about Directives has an 'approved form' which can or must be used,
- **signed by the person making the Directive** (who must have capacity and make the Directive voluntarily), and
- **witnessed**. In some places it must also be witnessed by a health professional.

In some States and Territories, the person must also receive information or medical advice about the treatment they want to refuse or request.

When must an Advance Care Directive be followed?

When Advance Care Directives apply

A Directive will generally apply **only when the person loses capacity** to make the treatment decision. It must also apply to the health care situation that has arisen.

In the **Australian Capital Territory**, a statutory Health Direction will apply both when the person has capacity or lacks capacity.

Following an Advance Care Directive

Generally, **a valid Directive must be followed** by a health professional, even if it refuses life-sustaining treatment which will result in a person's death. If they do not, a health professional could be liable under the criminal or civil law.

There are some **limited circumstances** in which a Directive does not have to be followed. Examples are where a Directive is too uncertain to guide decision-making or where circumstances have changed so much since completing the Directive that it should not be followed. The law on this differs across Australia.

Find out more about the law on following **common law Advance Care Directives**, (<https://end-of-life.qut.edu.au/advance-care-directives/common-law-advance-care-directives>) or statutory Advance Care Directives in your **State or Territory** at *End of Life Law in Australia*. (<https://end-of-life.qut.edu.au/advance-care-directives/state-and-territory-laws>)

Practical tips: Advance Care Planning in aged care

It is important to remember that:

- Making an Advance Care Directive is voluntary – a person may choose not to make a Directive, and cannot be required by an aged care provider to do so.
- Advance Care Planning discussions can occur early e.g. when a resident enters aged care, or can be undertaken by staff with residents (and if the person consents, their family) at any time.
- It is good practice after a person experiences deterioration e.g. is hospitalised and returns to a facility, or experiences a significant change to their health, to revisit Advance Care Planning discussions and/or review existing documents.

For more practical tips and information visit: *Advance Care Planning Australia* (<https://www.advancecareplanning.org.au/docs/default-source/acpa-resource-library/acpa-publications/advance-care-planning-in-aged-care-implementation-guide.pdf>) or the ELDAC Legal Toolkit *Advance Care Directives* resources (<https://www.eldac.com.au/tabid/4961/Default.aspx>)

Key points to remember

1. An Advance Care Directive records a person's decisions, wishes, or values about health care now in case they lack decision-making capacity in the future.
2. It can request or refuse health care, including life-sustaining treatment. In some parts of Australia it can be used to appoint a substitute decision-maker.
3. Advance Care Directives are recognised throughout Australia by the common law (except in Queensland) and by legislation in all States and Territories (except New South Wales and Tasmania). The law is different in each jurisdiction.
4. An Advance Care Directive must be made voluntarily, when the person has capacity.
5. For an Advance Care Directive to apply, the person must not have capacity, and it must relate to the health care situation that has arisen. A statutory Advance Care Directive must also meet formal requirements of legislation.
6. A health professional generally must follow a binding Advance Care Directive. If they don't, they might be criminally or civilly liable. There are limited situations where an Advance Care Directive does not need to be followed.

Myth-busters: Advance Care Directives

Myth 1: A person must have an Advance Care Directive

No. Making an Advance Care Directive is every person's choice, and that choice should be respected. Advance Care Directives are a useful advance care planning tool, but there may be legitimate reasons why a person chooses not to have a Directive.

Myth 2: A person can't use their Advance Care Directive to refuse treatment needed to keep them alive (life-sustaining treatment)

No. A person can refuse life-sustaining treatment in their Advance Care Directive, even if following the directive will result in death.

Myth 3: A health professional must always give a person the treatment they request in their Advance Care Directive

No. The law generally does not require a health professional to provide treatment they believe is non-beneficial, futile, or not in the person's best interests. Where a person's Advance Care Directive requests such treatment, a health professional does not breach the law, or other professional obligations, by not giving that treatment. The position in Queensland is different where the person does not have capacity, and treatment is futile. Find out more in the ELDAC Legal Toolkit's *Futile or Non-beneficial Treatment* factsheet. (<https://www.eldac.com.au/tabid/4979/Default.aspx>)

Myth 4: Advance Care Directives are just recommendations to inform clinical decision-making

No. Advance Care Directives can be legally binding documents that health professionals are obliged to follow. For example, the law will generally require a health professional to follow a refusal of treatment in an Advance Care Directive where:

- the Directive is legally valid (made voluntarily, when the person had capacity, and meets any formal requirements required by State and Territory legislation), and
- it applies to the health care situation that has arisen.

There are situations where Advance Care Directives do not have to be followed and this varies by State and Territory. Visit **State and Territory Advance Care Directives at End of Life Law in Australia** for more information. (<https://end-of-life.qut.edu.au/advance-care-directives/state-and-territory-laws>)