

Advance Care Plans and Advance Care Directives

Please note that the information provided on this website does not constitute legal or professional advice. Health care practitioners are encouraged to seek their own advice in relation to advance care planning in Victoria.

A National Framework for Advance Care Directives is an informative resource on Advance Care Planning and Advance Care Directives. It is available at (http://www.ahmac.gov.au/cms_documents/AdvanceCareDirectives2011.pdf)

What is Advance Care Planning (ACP)?

ACP is a process in which an adult discusses their future health and personal care preferences.

ACPs are intended to guide or direct decisions that need to be made after that person cannot make those decisions for themselves.

The ACP process may or may not result in the making of an Advance Care Directive (ACD).

What is an Advance Care Directive (ACD)?

An ACD is a written part of a plan that may either or both:

- appoint a substitute decision maker (someone to make decisions on behalf of the person should they later lose the capacity to do so)
- record the person's preferences or instructions for future health care intended to operate after that person's loss of capacity.

An ACD can either be:

- a common law ACD, that is, one recognised by the courts that apply earlier court decisions, or
- a statutory ACD, that is, one authorised by a law made in legislation.

What does it mean to be competent to make an ACD?

Competence is a legal term used to describe the mental ability required for an adult to perform a specific task.

To make an ACD the adult must understand the choices available to them and understand the legal effect of the ACD such as what powers are being given, when it will take effect, whether it can be revoked, and the consequences of it being used.

How is adequate competency determined?

An adult is presumed to be competent. When a person makes an ACD they can be asked open-ended questions to determine whether they do understand the matters in the previous paragraph. A person challenging competence must produce evidence of incompetence.

When can an ACD be used?

When the adult lacks the capacity to consent to or refuse medical treatment.

Having capacity means being able to understand and evaluate information about their condition and the options for treatment. It also means being able to consider those choices and to make and communicate a decision.

A person may have capacity to make some decisions but not others. In addition capacity may fluctuate. Capacity is not assessed by whether others think a decision is good or bad.

What statutory ACDs are there in Victoria?

- An Enduring Power of Attorney (Medical Treatment) that appoints a substitute decision maker called an agent.
- An Enduring Power of Guardianship that appoints a substitute decision maker called an enduring guardian.
- A Refusal of Treatment Certificate.

Are statutory ACDs appointing a substitute decision maker legally binding?

Yes, if the required form is used, the adult making it was competent and it has not been revoked.

In addition:

- An Enduring Power of Guardianship must be signed by the proposed guardian and there must be two witnesses (one of whom is able to witness statutory declarations) who sign that both the adult and the proposed guardian appeared to understand what they were signing and did so voluntarily.
- An Enduring Power of Attorney (Medical Treatment) must be signed by two witnesses (one of whom is able to witness statutory declarations).

Is a statutory ACD refusing treatment legally binding?

Yes, if the requirements are met:

- The only statutory ACD in Victoria is the Refusal of Treatment Certificate. It can be made by a competent adult or by an agent appointed under an Enduring Power of Attorney (Medical Treatment) or a guardian appointed by Victorian Civil and Administrative Tribunal (VCAT).
- A specific form must be used and there are detailed witnessing requirements. To be binding the refusal must relate to treatment for a current medical condition.

If all these conditions are met, it is an offence for a medical practitioner to provide treatment that has been refused.

What is a common law ACD?

It is simply a written appointment of a substitute decision maker or a statement of preferences or instructions for future health care. There are no specific requirements as to forms or witnessing.

Is a doctor (or anyone else) required to sign as witness to a common law ACD?

There is no requirement for any witness or signature. However, it is very much better for there to be a witness.

A witness may be able to remove doubts about the validity or applicability of an ACD. For example, doubt about whether the person was competent at the time of signing and was not unduly influenced.

If the witness is a doctor they may be able to provide even greater assurance about competence and, possibly, whether the adult intended the ACD to apply in the current clinical circumstances. This can be important when the common law ACD states that certain medical treatment is refused.

Are common law ACDs appointing a substitute decision maker legally binding?

Yes, provided that:

- the adult was competent and signed voluntarily and without any undue influence.
- there is no evidence of a later appointment or revocation.

A person appointed in writing to be a substitute decision maker is recognised in the Guardianship and Administration Act as a “person responsible”. Their authority outranks a person not appointed in writing such as a spouse or relative.

Are common law ACDs regarding future medical treatment legally binding documents?

Yes, unless there is a genuine and reasonable doubt about one of the following:

- Was the adult competent when making the ACD?
- Was the ACD made free from undue influence?
- Is the ACD current? (for example, is there evidence that the adult’s wishes or beliefs have changed?)
- Does the ACD apply to the clinical circumstances that now exist?

How should an oral ACD be considered?

It will not have the effect of appointing a substitute decision maker. Technically, there is no requirement for an ACD regarding future medical treatment to be written. However, there will be much less uncertainty about whether it is legally binding if it is.

The lack of a written document may give rise to genuine and reasonable doubts about validity and current applicability.

There are no Australian court decisions on oral ACDs. In practice the question may not arise. This is because when someone lacks capacity the person responsible must make a decision. They must do so in that person’s best interests. This requires them to weigh up the evidence and the relevance of any oral statements by the adult.

How can legal weight of an ACD be strengthened?

Anything that lessens the possibility of any genuine and reasonable doubt being raised will strengthen the legal weight of an ACD.

An ACD will be stronger if it contains evidence that, when signed, the person was competent and not unduly influenced. The use of witnesses may help here as may the qualifications of a witness, for example, a doctor.

A more recent ACD may be stronger as there may be less doubt about its currency.

An ACD that clearly contemplates the current clinical circumstances will reduce doubt about its applicability.

An ACD will be stronger if it avoids vague or imprecise language. For example, to say “I refuse life sustaining treatment unless I can be sure of a reasonable quality of life” is very difficult to apply because the question of what is “reasonable” will vary from person to person.

What should a health professional do if they are responding to an ACD but have doubts about its validity?

A health professional with genuine and reasonable doubts should refer the matter to the Victorian Civil and Administrative Tribunal (VCAT) or a court.

For example, if there is genuine doubt about an ACD that purports to refuse certain medical treatment that a health professional considers is clinically advisable they can seek a ruling on whether or not to provide that treatment.

Similarly if a health professional believes that an ACD appointing a substitute decision maker is valid but that the substitute decision maker is not acting in the person's best interests they can seek to have their authority revoked.

What medical treatments can people refuse or not refuse?

A competent adult can refuse any treatment, both now or in advance. A valid refusal may be based on religious, social or moral grounds, or upon no apparent rational grounds. This means that there are no limits on the type of treatment that can be refused in a common law ACD.

However, a statutory ACD – a Refusal of Treatment Certificate - cannot be used to refuse the provision of reasonable medical procedures for the relief of pain, suffering and discomfort, nor for the reasonable provision of food and water. The latter does not include enteral nutrition and hydration (which may be refused).

What wishes could be an indication of preferred care, but not legally binding? (e.g. specifying care / place of death rather than medical treatments)

An ACD can refuse but cannot compel the provision of specified medical treatment. For example, it cannot insist that artificial nutrition and hydration must be provided and must not be withdrawn.

An ACD that covers matters other than medical treatment is very valuable in guiding carers and substitute decision makers but does not require them to comply. For example, to provide medical treatment that had been refused would amount to battery but to allow a person die in hospital when they said they wanted to die at home would simply be not giving effect to their wishes.

Legally, could a values based ACD provide sufficient indication as to what the person's medical treatment preferences would be ?

This will depend upon how specific the information is and to what extent it can be related to the decisions to be made. A substitute decision maker must take into account the person's wishes as far as they can be ascertained.

If an ACD does not contain a person's wishes but discusses their values it may help to make a decision that the person themselves would have made.

What is the role of the substitute decision maker?

Except in limited circumstances, including an emergency, consent is required by a patient or someone on their behalf for all medical treatment. If an adult lacks capacity to consent, the law provides that someone will be the substitute decision maker.

In Victoria this is called a "person responsible". They must make a decision in the adult's best interests. This requires them to take into account the adult's wishes on the decision to be made. Therefore they will be greatly assisted by any evidence of the outcome of any advance care planning.

Authorised by the Victorian Government, Melbourne. To receive this publication in an accessible format contact Integrated Care by phone on 9096 2085.