

# 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 a legal document that a person with decision-making 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 preferences about medical treatment and care** (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.

Learn more about substitute decision-making in the End of Life Law 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 (i.e. nobody has pressured the person to make the decision), when the person had capacity. The definition of **capacity** differs between Australian States and Territories. Learn when a person will have 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. Learn more in the **End of Life Law Toolkit factsheet *Substitute Decision-Making*** factsheet (<https://www.eldac.com.au/tabid/4963/Default.aspx>)

## Advance care planning

Advance care planning should be part of routine practice for health professionals providing aged care. For practical tips on how to undertake advance care planning with a person you care for visit *Advance Care Planning Australia* (<https://www.advancecareplanning.org.au/understand-advance-care-planning/advance-care-planning-in-specific-health-settings/advance-care-planning-and-aged-care>) 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>)

You can also use *How to do advance care planning: A quick guide for health professionals* ([https://end-of-life.qut.edu.au/\\_\\_data/assets/pdf\\_file/0016/1040209/How-to-do-Advance-Care-Planning.pdf](https://end-of-life.qut.edu.au/__data/assets/pdf_file/0016/1040209/How-to-do-Advance-Care-Planning.pdf))

## 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**.

Mental health legislation in Victoria and the Australian Capital Territory also allows people with mental health conditions to make specific types of Directives about their treatment preferences. Mental health Advance Care Directives are generally not about end of life decision-making so are not discussed further here.

The law on Advance Care Directives differs across Australia. Learn 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 a health professional or aged care worker when the person has capacity.

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.

## Can a Statutory Advance Care Directive made in one Australian State or Territory apply in another?

Some States and Territories recognise valid Statutory Advance Care Directives that were made interstate (provided certain requirements are met), while others do not.

Even if not formally recognised by another State or Territories' legislation, an Advance Care Directive could still be a valid Common Law Advance Care Directive which will apply across Australia, except in Queensland where these Directives are not legally binding.

If a person's Advance Care Directive is not recognised by another State or Territory it still provides guidance to health professionals and substitute decision-makers about the person's values, choices and treatment preferences.

Learn more about recognition of interstate 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>)

## 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. This might occur when the person is unconscious, or has severe cognitive impairment e.g. because of advanced dementia. The Directive 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.

Usually **a person's family or substitute decision-maker cannot disregard specific treatment decisions made by a person in a valid Advance Care Directive.**

There are some **limited circumstances** in which a Directive does not have to be followed.

Examples are:

- a Directive is too uncertain to guide decision-making
- circumstances have changed so much since the person made the Directive that it should not be followed, or
- the person has requested futile or non-beneficial treatment.

The law on this differs across Australia.

Learn 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 (<https://end-of-life.qut.edu.au/advance-care-directives/state-and-territory-laws>) in your **State or Territory** at *End of Life Law in Australia*.

Learn more about futile or non-beneficial treatment in the *End of Life Law Toolkit's Futile or Non-Beneficial Treatment* resources. (<https://www.eldac.com.au/tabid/4962/Default.aspx>)

## 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.
- Only the person can make a Directive. The person's family or substitute decision-maker cannot make a Directive for the person.
- Advance care planning discussions should occur early e.g. when a resident enters aged care. These discussions can also 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 *End of Life Law 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. It cannot be made by a person's family or substitute decision-maker.
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 valid Advance Care Directive. If they do not, they might be criminally or civilly liable. There are limited situations where an Advance Care Directive does not need to be followed.

## Mythbusters: 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: 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>)

### Myth 3: 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 4: 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 or non-beneficial.

Learn more in the **End of Life Law Toolkit's Futile or Non-beneficial Treatment factsheet**. (<https://www.eldac.com.au/tabid/4962/Default.aspx>)