



# A Clear Path to Care

## Part 3

*Advance Care Directives Act 2013* and changes to third party consent

### **The Detail**



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# This presentation will:

- Determination of Impaired decision-making capacity
  - Know when an ACD comes into effect
  - When consent from someone other than patient is required (third party consent)
- ACD Form
  - SDM, Witnessing, Copy Certification, Interpreter, Revocation
- Obtaining Consent
  - Who can consent and the legal hierarchy
  - Emergencies (adult and children)
  - ACDs old and new
- ACDs and Mental Health



# Decision-Making Capacity

Under the Act, decision-making capacity:

- is presumed
- should be supported
- residual capacity respected – can understand some things but not others
- fluctuating capacity respected

Impaired decision-making capacity- Only relates to a particular decision when consent is required

In respect of a particular decision, impaired decision-making capacity means they cannot:

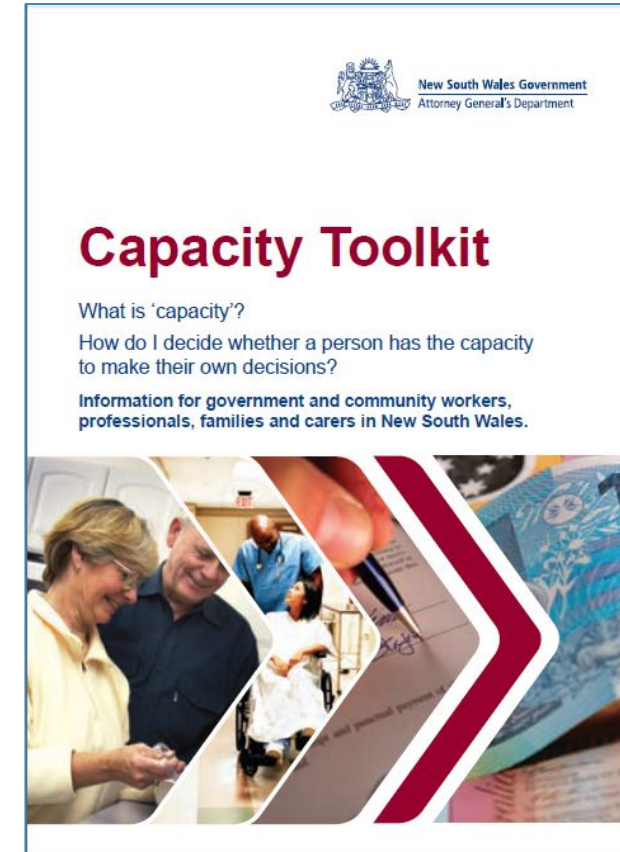
- understand relevant information
- retain such information
- use information to make the decision- i.e. risks vs benefits
- communicate the decision (in any manner)



# Decision-Making Capacity

To determine capacity, you may consider:

- A general assessment - consider the definition
- Fact Sheet
- Obtain a second opinion
- Carry out a capacity assessment - NSW Capacity Toolkit
- Refer to local procedure for further assistance
- Contact the Public Advocate



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# The ACD Form

**Advance Care Directive Form**

By completing this Advance Care Directive you can choose to:

1. Appoint one or more Substitute Decision-Makers and/or
2. Write down your values and wishes to guide decisions about your future health care, living arrangements and other personal matters and/or
3. Write down healthcare you do not want in particular circumstances.

**Part 1**  
You must fill in this Part.

**Part 2a**  
Only fill in this Part if you want to appoint one or more Substitute Decision-Makers.

**Your Substitute Decision-Maker fills in this section. →**

**Part 1: Personal details**

Name: \_\_\_\_\_  
(Full name of person giving Advance Care Directive)

Date of birth: \_\_\_/\_\_\_/\_\_\_

**Part 2a: Appointing Substitute Decision-Makers**

I appoint: \_\_\_\_\_  
(Name of appointed Substitute Decision-Maker)

Ph: \_\_\_\_\_ ☎ Date of birth: \_\_\_/\_\_\_/\_\_\_

I, \_\_\_\_\_  
(Name of appointed Substitute Decision-Maker)

am over 18 years old, and I understand and accept my role and the responsibilities of being a Substitute Decision-Maker as set out in the Substitute Decision-Maker Guidelines.

Signed: \_\_\_\_\_ Date: \_\_\_/\_\_\_/\_\_\_  
(Signature of appointed Substitute Decision-Maker)

**AND**

I appoint: \_\_\_\_\_  
(Name of appointed Substitute Decision-Maker)

Ph: \_\_\_\_\_ ☎ Date of birth: \_\_\_/\_\_\_/\_\_\_

I, \_\_\_\_\_  
(Name of appointed Substitute Decision-Maker)

am over 18 years old, and I understand and accept my role and the responsibilities of being a Substitute Decision-Maker as set out in the Substitute Decision-Maker Guidelines.

Signed: \_\_\_\_\_ Date: \_\_\_/\_\_\_/\_\_\_  
(Signature of appointed Substitute Decision-Maker)

Your initial  Witness initial

Part 2a  
(continued over page)

1 of 4

**Advance Care Directive Form**

Name of appointed Substitute Decision-Maker: \_\_\_\_\_

Date of birth: \_\_\_/\_\_\_/\_\_\_

Name of appointed Substitute Decision-Maker: \_\_\_\_\_

Date: \_\_\_/\_\_\_/\_\_\_

**Appointment**

or more Substitute Decision-Makers would decisions together or separately?

2 of 4

**Advance Care Directive Form**

**What is important to me – my values and wishes:**

are being made for me, I want people to consider

g refusal/s of particular health care:  
Please, you must state when and in what circumstances followed, pursuant to section 18 of the Act, if relevant.

3 of 4

**Advance Care Directive Form**

person giving this Advance Care Directive

Advance Care Directive of my own free will information contained in the Statement.

Date: \_\_\_/\_\_\_/\_\_\_

Name of Witness: \_\_\_\_\_

giving this Advance Care Directive certify that:

understand the information and explanation given under any form of duress or coercion.

Directive in my presence.

(Occupation of Witness)

Date: \_\_\_/\_\_\_/\_\_\_

Statement was given through of person giving Advance Care Directive) understand the information and explanation given, are Directive form accurately and instructions of the person.

Date: \_\_\_/\_\_\_/\_\_\_

Advance Care Directives Act 2013 (SA)

4 of 4



# The ACD Form: Substitute Decision Makers

Substitute Decision Makers cannot:

- Be a person with a conflict of duty
- e.g. a responsible health practitioner, nurse or paid professional carer
- Refuse drugs to relieve pain or distress
- Refuse food and water by mouth

SDMs must act in good faith/without negligence.

To act on SDM's decisions:

- original ACD or certified copy must be sighted

Health practitioners are protected for relying on an SDM decision.



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# The ACD Form: Witnessing

Suitable witnesses must be an **independent** authorised witness as defined by regulations:

(e.g. registered professionals such as doctors, nurses, pharmacists, psychologists, teachers, accountants) employees of a government authority with more than 5 years service (e.g. SA Health , lawyers, Justices of the Peace, Ministers of religion)

Witnesses must be independent of the person and cannot be:

- A SDM
- A person who may be a beneficiary of a will
- A professional providing care e.g. a doctor, nurse
- A person in a position of authority in a hospital or nursing home e.g. DON

The witness must certify that the person:

- understood the nature and effect of completing an ACD
- is doing so free of coercion

You can rely on a valid, witnessed ACD, unless there was evidence to the contrary at the time it was being made.





# The ACD Form: Interpreters

In regard to interpreters and completion of the form:

- No requirement under Act for interpreter to be formally qualified
- Interpreter must attest on ACD Form that the individual understood the information provided and the translation reflects the person's wishes



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# The ACD Form:

## Certification of copies of the original ACD Form

### Who can certify an ACD?

- Health practitioners (doctors, nurses, physiotherapists, psychologists, podiatrists, pharmacists etc.)
- Justices of the Peace and lawyers
- SA Health staff (government authority) with more than 5 years service

### The certifier needs to:

- Sight original ACD and check that copy is identical
- Write a certification statement on front of copy  
*e.g. "I, (insert your name), (occupation) certify this and the following ... (insert number of pages) pages to be a true copy of the original as sighted by me"*
- Initial each page and sign



# Revocation of ACD

The individual can revoke their ACD:

- if they understand the nature and effect of revocation

Completion of a new ACD automatically revokes an older one

If individual does not understand the effects of revoking their ACD and the wish to revoke it, if appropriate, Guardianship Board can revoke an ACD or relevant provisions (on application).


- The person must notify SDM and others who may have a copy of the old ACD
- If Guardianship Board revoke- must try and notify SDM/others



# Miscellaneous points

- Recognition of interstate ACDs
- Increased penalties for those who hold out, give false statements, undue influence





Changes to the *Consent to Medical Treatment and Palliative Care Act 1995*  
after July 1st 2014



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# Who can consent?

- 1) A person (16 or over) with decision-making capacity
- 2) For children (under 16 years):
  - Parent/guardian; or
  - The child if:
    - child is capable of understanding the nature, consequences and risks and
    - treatment is in interests of the child's health and well-being and
    - opinion is supported in writing by another medical practitioner who has personally examined the child

**Unchanged.**



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# Who can consent?

- If impaired decision-making capacity:
  - no ACD (old or new, with SDM/instructions)
  - **Person Responsible** can consent
- Person Responsible must make a “substituted judgement” – i.e. as if in the person’s shoes
- Penalties for holding out as a Person Responsible
- Protections for health practitioners relying on consent of Person Responsible



# Consent: Persons Responsible Hierarchy

- 1) Guardian (appointed by the Guardianship Board)
- 2) Prescribed relative with a *close and continuing relationship* \* and who must be available and willing to make the decision (the following are all equal)
  - Spouse/domestic partner
  - Adult related by blood, marriage, or adoption
  - Aboriginal or Torres Strait Islander related by kinship/marriage
- 3) Adult friend with a close and continuing relationship and who must be available and willing to make the decision

If none above then:

- 4) Adult charged with overseeing the day-to-day care of the patient
- 5) Guardianship Board, upon application (last resort)

Note that the close and continuing relationship determines order of hierarchy; it is not a health practitioners role to work out a close and continuing relationship



# Consent in Emergencies

If the patient does not have decision-making capacity to consent **and**

- The treatment is necessary to meet an imminent risk to life or health (where practicable, this is supported in writing by another medical practitioner) **and**
- The patient has not refused to consent to the treatment **and**
- There is no SDM appointed on an ACD, or they are not available **and**
- There is no ACD
  - with relevant instructions
  - or reason to believe that instructions were not intended to apply
  - or no time to work it out **and**
- There is no Person Responsible available and willing to consent
- Emergency medical treatment can be provided without consent





# Consent in Emergencies: Children

If the patient is a child (under 16):

- Consent of a parent or guardian must be sought
- The child's health and well-being are paramount and, if the parent or guardian refuses, treatment may be provided despite the refusal if the treatment is in the child's best interests



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# ACD's Old and New

What effect do Anticipatory Directions, Medical Power of Attorney (MPA) and Enduring Guardianships (EG) have after 1 July 2014?

- If new ACD form completed, all older ACDs, including MPA and EG revoked
- If no new Advance Care Directive form completed:
  - Any appointed MPA and EG will become SDMs- with equal status (MPA= EG)
  - MPA and/or EG now have priority over instructions in co-existing Anticipatory Direction i.e. reversal of the previous order.



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# ACD's Old and New

Legal order prior to July 1<sup>st</sup> 2014:

- 1) Anticipatory Direction
- 2) Medical Power of Attorney
- 3) Enduring Guardianship

Legal order from July 1<sup>st</sup> 2014 if an individual only has older instruments:

- 1) Medical Power of Attorney = Enduring Guardianship
- 2) Anticipatory Direction



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# The Legal Hierarchy

**The legal hierarchy of who can consent (and refuse to consent) for a person with impaired decision-making capacity:**

- 1) A Substitute Decision-Maker if one is appointed on an individual's ACD
- 2) If no SDM is appointed, relevant Instructions or Wishes documented in an ACD
- 3) If there is no ACD - a Person Responsible has legal authority

A Person Responsible is (in the following order):

- Guardian appointed by the Guardianship Board/Tribunal
- Prescribed relative with a close and continuing relationship available and willing to make the decision (spouse/domestic partner, adult related by blood or marriage, person related by adoption, Aboriginal or Torres Strait Islander kinship/marriage)
- Close friend available and willing to make the decision

If none of the above, then:

- Someone charged with day to day care and well-being of patient (e.g. a Director of Nursing in aged care)
- Guardianship Board/Tribunal (last resort)

**But just a reminder - if an individual has capacity, you must talk to them first to get consent - this is something that is often forgotten**



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# The Consenting Hierarchy

## 3. CONSULTATION

If possible, discuss the clinical situation (e.g. diagnoses, prognosis, treatment options and recommendations) with the patient, substitute decision-makers, person responsible and/or relatives.

**IMPORTANT: Interpreter use is recommended for non or limited English speakers.**

Does the patient have decision-making capacity?

Yes  The clinical situation must be discussed with the patient

No  This must be documented in the case notes and a reasonable attempt should be made to consult at least one of the following documents (if the patient has one) or individuals - in order of priority below:

1. *Person with an Advance Care Directive under the Advance Care Directives Act 2013*

- Substitute Decision-Maker appointed for health care decisions under an Advance Care Directive  
Name/s: .....
- Advance Care Directive with relevant instructions and NO Substitute Decision-Maker

2. *If they do not have a new Advance Care Directive (Advance Care Directives Act 2013)*

- A Medical Agent or an Enduring Guardian  
Name/s: .....
- Anticipatory Direction

3. *If none of the above, a **Person Responsible** in the following legal order:*

- Guardian appointed by the Guardianship Board  
Name/s: .....
- Prescribed relative (adult with a close and continuing relationship, available and willing, and who is related to the person by blood, marriage, domestic partner, adoption or Aboriginal kinship rules/marriage)  
Name/s:.....
- Close adult friend who is available and willing to make a decision  
Name/s:.....

*If there is no one in the above categories then:*

- Someone charged with the day-to-day care and well-being of the patient  
Name/s:.....
- Guardianship Board, upon application.

OR

Yes  If the patient does not have capacity, and it has not been possible to find one of the above documents or individuals in time, complete the Resuscitation Plan in line with Good Medical Practice\*

*Note: If there is an Advance Care Plan (eg Statement of Choices, Good Palliative Care Plan), it must be referred to by those making decisions above.*



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Does this mean that a SDM or Person Responsible can demand treatment?

If someone has an SDM, do I ignore the instructions on the ACD?

**NO!**

Substitute Decision Makers and Persons Responsible:

CAN:

- Consent or refuse to consent to:
  - Health care
  - Life sustaining treatment

CANNOT

- Demand treatment which is of no benefit
- Refuse:
  - drugs to relieve pain or distress or
  - food and water by mouth



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# Mental Health and ACDs

## Advance Care Directives and Mental Health Treatment Orders

- If ACD contains provisions which refuse care under a Community Treatment Order or Inpatient Treatment Order, these provisions (not the ACD itself) are void and of no effect.

## Ulysses Agreements

- A “Ulysses Agreement” is an Advance Care **Plan** - in mental health settings person can indicate interventions they would prefer/refuse for future periods when mentally unwell e.g. ECT, medications
- Encourage formalising Ulysses agreement > ACD if competent to do so.
- If a treating team has concerns about a person’s long-term health and safety, or the capacity of the person or their SDM to make decisions, the team can request the Public Advocate can review the ACD and the capacity of the person or the SDM.
- For more information see Factsheet: Advance Care Directives and Mental Health Treatment



# Mental Health and ACDs

## **Electro Convulsive Therapy (ECT)**

- *Mental Health Act 2009* regulates use of ECT and consent must be sought to administer it
- If person has refused ECT in their ACD and this is applicable to clinical situation, then it cannot be provided.

## **If concerns:**

- If a treating team has concerns about a person's long-term health and safety, or the capacity of the person or their SDM to make decisions, the team can request the Office of the Public Advocate review the ACD and the capacity of the person or the SDM.
- For more information see Factsheet: Advance Care Directives and Mental Health Treatment





# Resolving disputes

- 1) Local level dispute resolution processes: second opinion, mentors, risk managers
- 2) If in doubt/dispute:

## **Office of the Public Advocate**

Ph: 8342 8200

Country SA Toll Free:  
1800 066 969



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# Summary

## ACD and Consent Part 3

- Impaired decision-making capacity described
- An ACD comes into effect and third party consent required when patient has impaired decision-making capacity
- Specific requirements for witnessing, certifying, interpreters and revoking ACD's.
- New law provides clear directions on who can consent and the hierarchy
- Provisions for Emergencies (adult and children)
- SDMs/Person Responsible:
  - Can consent or refuse but cannot demand health care and life sustaining treatment
  - Cannot refuse drugs to relieve pain or distress or food and water by mouth
- Interactions between ACDs old and new were detailed
- ACDs and Mental Health described



# Further information

- Advance Care Directives Website: [www.advancecaredirectives.sa.gov.au](http://www.advancecaredirectives.sa.gov.au)  
Information for:
  - Consumers
  - SDMs
  - Health practitioners
  - Other professionals
- SA Health Internet
  - Factsheets
  - Policies and Guidelines
- Policy and Legislation Unit: [Policy&legislation@health.sa.gov.au](mailto:Policy&legislation@health.sa.gov.au)

