

Advance Care Directive Factsheet

A clear path to care

Advance Care Directives and Mental Health Treatment Orders

The Advance Care Directive Act 2013 empowers adults to make legal arrangements for their future health care, end of life, preferred living arrangements and other personal matters, and/or appoint one or more substitute decision makers (SDM) to make decisions on their behalf when they are unable to do so themselves. (See ACD Fact Sheets for more information).

Advance Care Directives and Mental Health Treatment Orders

The ACDA does not allow for a person to refuse specific health care provided for under a Community Treatment Order or Inpatient Treatment Order of the *Mental Health Act 2009*. If an Advance Care Directive (ACD) contains directions that are unlawful, contravene professional standards or refuse care under a Community Treatment Order or Inpatient Treatment Order, those directions only (not the ACD itself) are void and of no effect.

However, a person's wishes and instructions in their Advance Care Directive should be upheld and implemented as far as is practicable. The treating team should make decisions about involuntary treatment and care on the basis of best clinical practice, the information provided by a person within their ACD and the requirements of the *Mental Health Act 2009*. If a Substitute Decision Maker/s (SDM) has been appointed, consent should be sought and/or decisions discussed with the appointed SDM/s.

What are Advance Care Plans and Ulysses Agreements?

An Advance Care Plan, though not legally binding, may have some legal weight under common law if signed by the person and an independent witness and/or the treating team and should be taken into account when decisions are being made for the person. A Ulysses Agreement is an example of an Advance Care Plan which is often signed by the person and the treating team and guides care and treatment for the person when they become ill.

People should be encouraged to formalise their ACP or Ulysses agreement by making an Advance Care Directive if they are competent to do so.

Electro Convulsive Therapy (ECT)

The *Mental Health Act 2009* regulates the use of ECT and requires consent from the person, their guardian or the SA Civil and Administrative Tribunal (formerly the Guardianship Board) before ECT can be administered. If a person has refused ECT in their ACD and the refusal is applicable to the current clinical situation, then it cannot be provided.

If the treating team or a person with a proper interest has concerns about the decision to refuse ECT, advice can be sought from the Public Advocate, who can mediate with the dissenting parties and/or refer the matter to the SA Civil and Administrative Tribunal to consider the validity of the ACD or the capacity of the person or their SDM to make decisions.

However, if there is an imminent risk to the person's health or life, and the medical practitioner believes the ACD was not intended to apply in the current circumstances, and the patient is incapable of consenting, and there is no guardian, SDM or person responsible available to consent, emergency ECT may be provided in accordance with section 13 of the *Consent to Medical Treatment and Palliative Care Act 1995* and section 42 of the *Mental Health Act 2009*.

How can Financial and Legal matters be managed?

An ACD cannot be used to make financial or legal decisions for the person.

A person will need to appoint an Enduring Power of Attorney under the *Powers of Attorney and Agency Act 1984* to deal with any financial and legal matters.

What if there is no Advance Care Directive?

If there is no ACD (or relevant provision) and a person loses their capacity to make decisions, then a **person responsible** can consent to or refuse health care in line with the ACDA and MHA 2009. A person responsible is in the following legal order of hierarchy:

- > a guardian appointed by the SA Civil and Administrative Tribunal to make health care decisions
- > a domestic partner or a prescribed relative with a close and continuing relationship (adult related to the patient by blood, marriage, adoption, or Aboriginal kinship/marriage)
- > Close friend who is available and willing to make the decision.

If none of the above are available/willing then:

- > someone charged with the patient's ongoing day to day care and well-being (such as Director of Nursing in aged or supported care)
- > SA Civil and Administrative Tribunal as a last resort option, on application.

A person responsible must try and make a decision they believe **the patient would have made** in the current circumstances. (Walk in their shoes)

It is not the health practitioners' obligation to determine the close and continuing relationship. Rather, a health practitioner can rely on the consent/refusal of the person responsible in good faith and without negligence.

What if there is a dispute?

Where decisions cannot be made, problems arise with decisions made under an ACD or there are concerns about the decision of a person responsible, advice can be sought about the decision/matter from the Office of the Public Advocate.

The Public Advocate has legal powers under the law to mediate health care disputes for both adults and children, including mental health treatment disputes. This is a 24 hour service and can be conducted onsite.

As a last resort, the SA Civil and Administrative Tribunal can also hear and determine health care disputes for both adults and children (including mental health) upon application.

In resolving disputes, the wishes of the person who gave the ACD are of paramount importance.

For more information

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