

Policy Directive: compliance is mandatory

Advance Care Directives Policy Directive

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Summary

Advance Care Directives is the overarching term used to describe legal documents that enable competent adults to:

- appoint one or more Substitute Decision-Makers to make decisions on the person's behalf and/or
- write directions, wishes and values (provisions) regarding future health care, accommodation, residential or personal matters.

The Advance Care Directives Policy Directive provides advice to health care professionals on the best practice use of Advance Care Directives.

Keywords

Advance Care Directives, Medical Power of Attorney, Enduring Power of Guardianship, Anticipatory Direction, Medical Agent, Enduring Guardian, Directive, ACD, Substitute Decision-Maker, Person Responsible, Policy Directive

Policy history

Is this a new policy? **N**

Does this policy amend or update an existing policy? **Y**

Does this policy replace an existing policy? **Y**

If so, which policies?

Advance Care Directives Policy Directive v1.0

Applies to

All SA Health Portfolio

Staff impact

All Clinical, Medical, Nursing, Allied Health, Emergency, Dental, Mental Health, Pathology

PDS reference

D0319

Version control and change history

Version	Date from	Date to	Amendment
1.0	28/06/2013	30/06/2014	Original version
2.0	01/07/2014	Current	Formal review to support commencement of the <i>Advance Care Directives Act 2013</i>



Advance Care Directives Policy Directive

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SA Health

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01/07/2014	Principal Policy Officer, Policy and Legislation Unit, Corporate Governance and Policy Branch, Policy and Commissioning Division	V.2	Formally reviewed in line with 1-5 year scheduled timeline for review.
28/06/2013	Principal Policy Officer, Policy and Legislation Unit, Corporate Governance and Policy Branch, Policy and Commissioning Division	V.1	PE Approved version.

Endorsements

Date	Endorsed by
22/06/2014	Executive Director, Policy and Commissioning Division

Approvals

Date	Endorsed by
03/07/2014	Portfolio Executive

Advance Care Directives Policy Directive

1. Objective

To achieve a whole of SA Health system approach to the recognition, recording and responding to Advance Care Directives across the system. This policy sets out the requirements to achieve this. It also gives direction about health care service compliance requirements and health practitioners' obligations in relation to the *Advance Care Directives Act 2013*.

2. Scope

All adult SA Health services employees and persons who provide health services on behalf of SA Health must adhere to this policy.

3. Principles

The following principles underpin the application of advance care directives, including in the provision of health care and medical treatment and resolving disputes.

1. An Advance Care Directive enables a competent adult to make decisions about his or her **future** health care, residential and accommodation arrangements and personal affairs either by documenting their own wishes and instructions and/or through one or more Substitute Decision-Makers.
2. A competent adult can decide what constitutes quality of life for him or her and can express that in advance in an advance care directive.
3. An adult is presumed to have full decision-making capacity in respect of decisions about his or her health care, residential and accommodation arrangements and personal affairs unless there is evidence to the contrary.
4. An adult must be allowed to make their own decisions about their health care, residential and accommodation arrangements and personal affairs to the extent that they are able, and be supported to enable them to make such decisions for as long as they are able.
5. An adult can exercise their personal autonomy by making their own decisions, delegating decision-making to others, making collaborative decisions within a family or community, or a combination of any of these, according to a person's culture, background, history, spiritual or religious beliefs.
6. A valid Advance Care Directive (that is, one that is signed and witnessed), and each Substitute Decision-Maker appointed under a valid Advance Care Directive, has the same authority as the person who gave the Advance Care Directive had when he or she had full decision-making capacity.
7. A decision made by a person on behalf of another in accordance with this Act:
 - o must, as far as is reasonably practicable, reflect the decision that the person would have made in the circumstances, and
 - o must, in the absence of any specific instructions or expressed views of the person, be consistent with the proper care of the person and the protection of his or her interests and well-being, and

- must not, as far as is reasonably practicable, restrict the basic rights and freedoms of the person.
8. If a dispute arises in relation to an Advance Care Directive (or a decision being made under an Advance Care Directive), the wishes (whether expressed or implied) of the person who gave the Advance Care Directive are of paramount importance and should, insofar as is reasonably practicable, be given effect.
9. In determining the wishes of a person who gave an Advance Care Directive in relation to a particular matter, the following should be considered:
- any past wishes expressed by the person in relation to the matter; and
 - the person's values as displayed or expressed during the whole or any part of his or her life; and
 - any other matter that is relevant in determining the wishes of the person in relation to the decision.

4. Detail

4.1 Advance Care Directives

The *Advance Care Directives Act 2013* is operational from 1 July 2014.

4.1.1 Documents prepared under previous legislation

From 1 July 2014 a valid Enduring Power of Guardianship, Medical Power of Attorney and Anticipatory Direction will continue to be legally effective documents, subject to the terms set out in the documents. These previous documents will all be considered an Advance Care Directive for the purposes of the *Advance Care Directives Act 2013* until a new Advance Care Directive has been given. This means that the protections for health practitioners and the dispute resolution processes apply to these documents.

4.1.2 From hereon in a reference to an Advance Care Directive will include a reference to an Enduring Power of Guardianship, Medical Power of Attorney and Anticipatory Direction, unless it is otherwise stated.

A Substitute Decision-Maker (including a Medical Agent and Enduring Guardian) must follow any relevant instructions on the Advance Care Directive, if they are applicable to the current circumstance. This applies during any period of impaired decision-making capacity, not just at the end of life.

Instructions in pre-existing Anticipatory Directions must only be followed if the person is in the terminal phase of a terminal illness or persistent vegetative state and the person has impaired decision-making capacity.

4.2 Determination of decision-making capacity

Adults are deemed to have decision-making capacity if they are able to:

- understand the information relevant to the decision (ensuring it is provided in a way the person understands)
- weigh up relevant information to the decision, including the consequences of having or not having treatment or possible alternatives and
- make a decision and
- communicate their decision in some way.

A person is presumed to have decision-making capacity unless there is evidence to suggest otherwise. Decision-making capacity is dependent on the type or seriousness of the decision required.

A person's decision-making capacity may be adversely affected by chronic or acute illness, mental illness, effects from medications, sleep deprivation, dehydration or malnutrition. Even in such situations a person should be supported to make their own decisions, if possible. This may involve careful and repeated explanation and the use of information aids when available (e.g. information in simple English and/or by using diagrams). For some people from various cultural or linguistically diverse backgrounds, including Aboriginal people, the involvement of a professional interpreter may be essential.

Decision-making capacity can fluctuate, is decision specific and can be time specific. For example, a person may be unable to make a decision while medicated or delirious but will be able to do so at a later time.

In many situations it will be obvious that the person has impaired decision-making capacity (e.g. when they are unconscious or moribund). There are also occasions when a person's decision-making capacity may be questionable.

It is important that a person is given adequate time to process the information and information should be presented in a way which assists the person to make an informed decision.

In assessing a person's decision-making capacity, you should consider whether the person:

- a. understands the information about their condition and any proposed treatment including the consequences of not having treatment (this does not include information of a technical or trivial nature)
- b. can retain the information for a reasonable period of time
- c. is able to weigh up the information, including balancing risks and benefits
- d. believe what they are being told
- e. can maintain a choice over time and communicate it in some way.

A capacity assessment does not include assessing the choice or decision itself and is not necessarily a medical decision.

A person should be supported to make their own decisions for as long as they are able. See Office of the Public Advocate Fact sheet for more information (to be developed).

If still uncertain and the situation is complex, a capacity assessment should be considered and documented. See the Impaired decision-making fact sheet on the Advance Care Directives website or Attachment 1.

If there are questions or dispute about a person's capacity to make a decision the Office of the Public Advocate can be contacted for advice or a declaration (Toll Free 1800 066 969 or 8342 8200). This is a 24 hour service.

4.3 When does an Advance Care Directive take effect or apply and who makes decisions?

An Advance Care Directive does not take effect or apply until the person who gave the Advance Care Directive is unable to make a particular decision or decisions, that is they have impaired decision-making capacity.

In this situation, if the person has appointed a Substitute Decision-Maker (including a Medical Agent or Enduring Guardian), then that person has the **legal authority** to consent to or refuse to consent to treatment being offered, having regard to relevant provisions in the Advance Care Directive (or Medical Power of Attorney, Enduring Power of Guardianship or Anticipatory Direction).

If there is no appointed Substitute Decision-Maker, or there is no time to contact the Substitute Decision-Maker, and the provisions in the Advance Care Directive are relevant

and apply to the particular decision or situation, then the provisions of the Advance Care Directive apply and can be considered as legal consent or refusal of consent.

A failure to comply with a valid and applicable refusal of treatment may result in the health practitioner incurring criminal or civil liability for providing the treatment without consent or may risk a complaint being made to the relevant health practitioner Board for unprofessional conduct.

If a health practitioner has a conscientious objection to complying with a person's Advance Care Directive/Substitute Decision-Maker's decision, the practitioner must hand over the care of the person to another practitioner in accordance with the practitioner's professional Code of Conduct (issued by the relevant health practitioner Board).

Substitute Decision-Makers¹

The powers of Substitute Decision-Makers are determined by what is written in the Advance Care Directive, including under Part 2b *Conditions of Appointment* and Part 3 *What is important - My values and wishes* sections of the form.

If there are no recorded limitations in the Advance Care Directive, a Substitute Decision-Maker can make all the lawful decisions the person could make if they had decision-making capacity.

Substitute Decision-Makers are legally considered to be the person (who gave the Advance Care Directive), as standing in that person's shoes. As such Substitute Decision-Makers must try and make a decision the person would have made in the same circumstances, taking in to account what is written in the Advance Care Directive and what they know about the person.

Substitute Decision-Makers cannot refuse drugs to relieve pain and distress, for example palliative care medications, or the natural provision of food and water by mouth (this does not include artificial nutrition and hydration which is considered life-sustaining treatment and can be refused).

To make decisions under an Advance Care Directive, a Substitute Decision-Maker must produce the original Advance Care Directive, or a certified copy of the Advance Care Directive.

If there is more than one Substitute Decision-Maker appointed, health practitioners are only obligated to make contact with the first Substitute Decision-Maker (with health care decision-making powers) who can be contacted. It is the Substitute Decision-Maker's responsibility to contact any other appointed Substitute Decision-Makers, particularly if they are required to make decisions together.

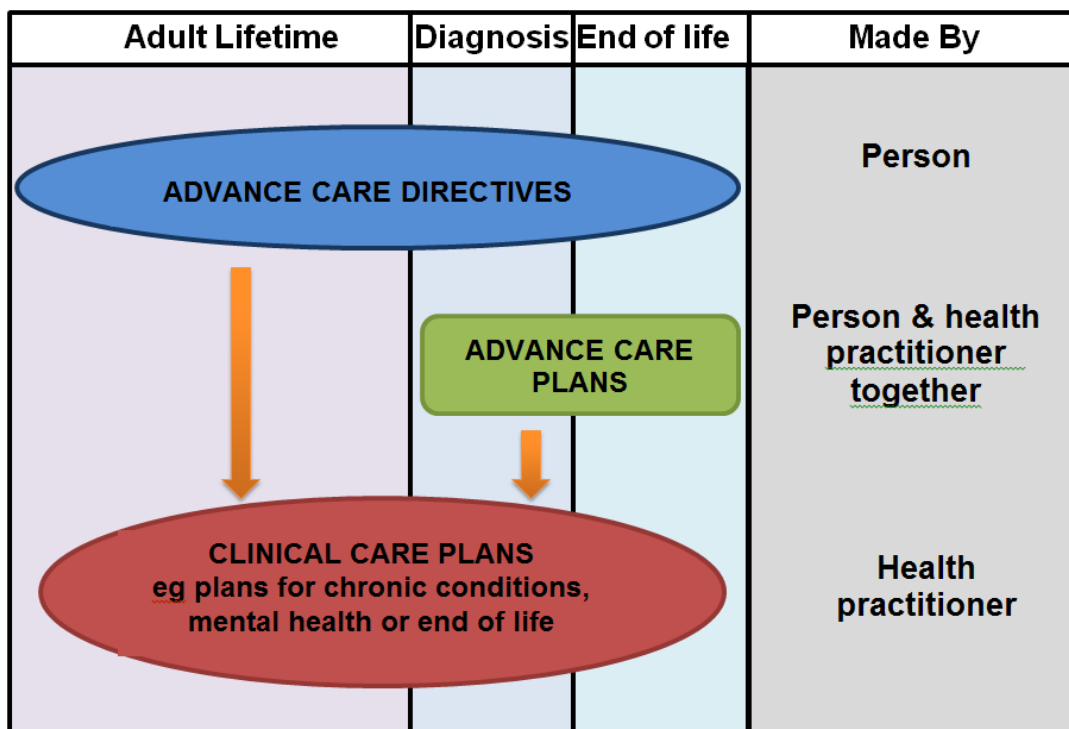
If the Advance Care Directive does not specify whether Substitute Decision-Makers should be making decisions together or separately, they are automatically appointed to make decisions either together or separately. This means that if only one Substitute Decision-Maker can be contacted, a health practitioner can rely on the decision of that Substitute Decision-Maker in good faith and are protected under the law for doing so.

4.4 Advance Care Directives, advance care plans and clinical care or treatment plans

Advance Care Directives and advance care plans must not be confused with clinical care plans, treatment plans or resuscitation plans written by clinicians to guide clinical care. When writing clinical care plans or treatment plans, health practitioners should be informed by the person's Advance Care Directive, Substitute Decision-Maker or other expressed wishes.

¹ Substitute Decision-Makers include Medical Agents and Enduring Guardians appointed under the previous documents

Relationship between Advance Care Directives, Advance Care Plans and Clinical Care Plans



4.5 Documenting and/or recording Advance Care Directives and advance care plans

SA Health facilities must ensure that all Advance Care Directives and advance care plans are clearly documented in the patient's medical record, including as an alert in electronic records (OASIS,PAS,CBIS and EPAS). The original document should be certified and the certified copy filed at the front of patient case notes and scanned into electronic health records as an alert for future reference.

4.6 Witnessing requirements and validity

To be valid an Advance Care Directive must be witnessed by an **independent** witness. Attachment 2 provides a list of suitable independent witnesses or further information can be found on the Advance Care Directives website.

To be a suitable witness, a witness must be **independent** of the person who gave the Advance Care Directive, and cannot be:

- A person who may benefit from the person's estate either directly or indirectly
- A health practitioner who may be responsible for that person's care, either now or in the future
- A person who holds a position of authority in a hospital, supported accommodation or residential aged care facility.

The witness must be satisfied that the person completing the Advance Care Directive is competent to do so (that is they understand the nature and effect of completing an Advance Care Directive) and are doing so free of coercion and of their own free will.

A health practitioner can rely on a valid and witnessed Advance Care Directive in good faith and without negligence, and can assume the person was competent when they completed the Advance Care Directive unless there is evidence otherwise. In this

situation advice could be sought from the Office of the Public Advocate to check the validity of the Advance Care Directive.

What can be included in an Advance Care Directive?

An Advance Care Directive can contain provisions about what is important to the person, their health care wishes and instructions (including refusals of health care and interventions to be avoided) as well as their preferred living arrangements, personal matters and dying wishes.

Substitute Decision-Makers, Person Responsible (if no appointed Substitute Decision-Makers) and health practitioners must comply with relevant and applicable refusals of health care. All other instructions and wishes should be taken into account by all parties when decisions are being made for a person under an Advance Care Directive.

Provisions which are void and of no effect

The following provisions in an Advance Care Directive are void and of no effect:

- A provision which is unlawful or would require an unlawful act to be performed, for example a request for euthanasia
- A provision that, if given effect, would cause a health practitioner to breach a professional code or standard, for example a demand for treatment which is considered to be futile
- A provision which comprises a refusal of mandatory treatment, for example treatment required under a community treatment order, involuntary treatment order (under the *Mental Health Act 2009*) or a court order.

If such provision/s are included in an Advance Care Directive, the provision itself is void and of no effect and therefore is not required to be followed. The remaining information or provisions in the Advance Care Directive remain legally effective.

Health Practitioner obligations

Under the *Advance Care Directives Act 2013* health practitioners have obligations in relation to an Advance Care Directive when the person is unable to make their own decisions. These include:

- If a Substitute Decision-Maker is appointed, contact the Substitute Decision-Maker to discuss care options and seek consent.
- If there is no Substitute Decision-Maker, and the Advance Care Directive contains relevant refusals of health care, must comply with refusals of health care (binding provisions).
- If reasonable, comply with non-binding provisions including consideration of what the person has specified is important to them.
- Avoid outcomes or interventions that the person did not want.

Emergency situations

If a person is incapable of consenting and a medical practitioner is of the opinion that the person needs treatment to meet an imminent risk to life or health (an emergency), then treatment can lawfully be provided:

- if, to the best of the medical practitioner's knowledge, the person has not previously refused to consent to the treatment (including in advance) and
- (only) if reasonably practicable to do so, the medical practitioner has made reasonable inquiries to determine if a person has an Advance Care Directive which relates to the current situation or condition.

If the person has given an Advance Care Directive appointing a Substitute Decision-Maker, and the medical practitioner is aware of this, that person's consent should be sought (section 13 of the *Consent to Medical Treatment and Palliative Care Act 1995*).

Despite a refusal of particular medical treatment in an Advance Care Directive, medical practitioners can lawfully provide treatment without consent in an emergency, **only** if the medical practitioner is of the opinion that the refusal was not intended by the person to apply to the current condition or circumstance.

This may be the case if the refusal is ambiguous, and there is no time to clarify the Advance Care Directive provision/s or the person's condition, or to discuss it with someone close to the person. The reasons should be clearly documented in the patient's medical notes.

Where to get help and advice

Local Health Networks should establish and train advisors or mentors in local services to be the point of contact to answer questions related to Advance Care Directives.

If there are questions or concerns which cannot be resolved locally, the Office of the Public Advocate has a 24 hour advisory service. The service can answer questions in relation to:

- the scope of a person's powers under an Advance Care Directive
- whether a Substitute Decision-Maker can make a decision under the Advance Care Directive
- whether the person who gave the Advance Care Directive is able to make their own decision or whether the Advance Care Directive applies

The Office of the Public Advocate can issue declarations in relation to the above which will give services certainty they are acting in accordance with the Advance Care Directive. This is a 24 hour service.

Dispute resolution

Local Health Networks should have staged dispute resolution processes locally, such as Advance Care Directive Mentor Advisers or clinical ethics committees, to assist in resolving disputes about Advance Care Directives. This service should be available 24/7.

If disputes cannot be resolved locally, the Office of the Public Advocate is able to mediate disputes onsite through a 24 hour service. The Office of the Public Advocate can be contacted on Toll Free 1800 066 969 or 8342 8200 and will have fact sheets available on its website.

It is not appropriate for the Guardianship Board to be the first point of contact to resolve disputes. Rather the Guardianship Board should be the last resort point of contact to assist resolve disputes.

5. Roles and Responsibilities

5.1 Chief Executive – SA Health is responsible for:

- 5.1.1 ensuring the resourcing and management of the system recognition and application of Advance Care Directives across SA Health is in accordance with this policy.

- 5.2 Director, Corporate Governance and Policy and Director, Safety and Quality will:
- 5.2.1 establish, maintain and periodically review the SA Health Advance Care Directives Policy Directive and Guideline and Education Framework, to ensure their consistency with current evidence and nationally agreed best practice
 - 5.2.2 monitor and evaluate the implementation of the Advance Care Directives Policy Directive and Guideline and Education Framework
 - 5.2.3 review reports provided by the Local Health Networks and through the Safety Learning System about issues concerning the use and application of Advance Care Directives. Use this information to conduct trend analysis, disseminate knowledge gained, and develop strategies for state-wide system improvement
 - 5.2.4 provide advice to Local Health Networks in response to specific queries about recognition and response to clinical deterioration.
- 5.3 Chief Executives of Local Health Networks will:
- 5.3.1 ensure the health services within their area of control have systems in place to ensure that clinical practice is in accord with this Policy Directive and accompanying Guideline and Education Framework
 - 5.3.2 ensure sufficient resources are in place to enable effective clinical practice, appropriate education and training for employees, and on-going evaluation of the effectiveness of systems to record and apply Advance Care Directives
 - 5.3.3 delegate the day-to-day responsibility for establishing and monitoring the implementation of this policy to the relevant senior managers and a clinical governance committee or equivalent
 - 5.3.4 ensure that incident data is collated, analysed and used to inform strategies for system improvement
 - 5.3.5 receive reports about the application of Advance Care Directives.
- 5.4 General Managers, Executive Directors, Heads of Service/ Department/Streams and other Senior Managers will:
- 5.4.1 provide organisational governance and leadership in relation to effective systems, processes and practice in relation to Advance Care Directives
 - 5.4.2 develop, implement and monitor local processes that support employees and other persons providing health services on behalf of SA Health, in relation to Advance Care Directives
 - 5.4.3 ensure that access to education programs about Advance Care Directives is available to staff
 - 5.4.4 demonstrate that systems are in place in accordance with this Policy Directive and Guideline to ensure standardised recognition and response to Advance Care Directives

- 5.4.5 ensure that incidents involving inappropriate response, delay or failure in the recognition and response to Advance Care Directives is taken in accordance with the SA Health Incident Management Policy Directive and Incident Management Guideline that incorporates Open Disclosure practice
 - 5.4.6 raise awareness about and promote the importance of having an Advance Care Directive to persons with chronic or life-limiting conditions
 - 5.4.7 ensure that any learning gained from a review of Advance Care Directive recognition and application processes within their area of control is fully implemented and monitored.
- 5.5 Safety and Quality Risk Managers will:
- 5.5.1 promote this policy and accompanying guidelines and education framework
 - 5.5.2 assist others to ensure that the health unit / Local Health Network meet its obligations under this policy and accreditation standards
 - 5.5.3 ensure that an evaluation strategy is in place to assess compliance with this policy
 - 5.5.4 provide data to their health unit / Local Health Network about Advance Care Directive processes and incidents, and any changes to practice arising.
- 5.6 All SA Health employees will:
- 5.6.1 adhere to the principles and aims of this Policy Directive and ensure they operate in accordance with its associated guideline and education framework
 - 5.6.2 ensure the recognition and response to care is timely and appropriate to the needs and wishes of the person as set out in the Advance Care Directive.
 - 5.6.3 participate in clinical teamwork that underpins effective recognition and response to Advance Care Directives and/or Substitute Decision-Makers' decisions
 - 5.6.4 ensure that any incidents relating to recognition and response to Advance Care Directives are reported via the appropriate process
 - 5.6.5 acknowledge that there is a duty to respond to person's Advance Care Directives to deliver person-centred care.

6. Reporting

Ensure that incidents relating to Advance Care Directives are reported, investigated and outcomes actioned in accordance with the SA Health Incident Management Policy Directive and Guideline.

7. EPAS

EPAS will have the ability to recognise and record a person's Advance Care Directive and/or Substitute Decision-Maker.

8. Exemption

N/A

9. Associated Policy Directives / Policy Guidelines

Advance Care Directive Guideline (being drafted)

Resuscitation and Care Planning – *7 Step Pathway* Policy Directive and Guideline (being drafted)

Consent to Health care, medical assessment and/or treatment (being drafted)

10. References, Resources and Related Documents

Relevant Legislation

[Advance Care Directives Act 2013](#)

[Consent to Medical Treatment and Palliative Care Act 1995](#)

[Mental Health Act 2009](#)

[Guardianship and Administration Act 1993](#)

Resources and Related Documents











Facts Sheets and a Guide have been developed and are available on the Advance Care Directives website at www.advancecaredirectives.sa.gov.au

Office of the Public Advocate information sheets will be available on its website at www.opa.sa.gov.au

11. Other

[NSW Capacity Toolkit](#)

12. National Safety and Quality Health Service Standards

									
National Standard 1	National Standard 2	National Standard 3	National Standard 4	National Standard 5	National Standard 6	National Standard 7	National Standard 8	National Standard 9	National Standard 10
Governance for Safety and Quality in Health Care	Partnering with Consumers	Preventing & Controlling Healthcare associated infections	Medication Safety	Patient Identification & Procedure Matching	Clinical Handover	Blood and Blood Products	Preventing & Managing Pressure Injuries	Recognising & Responding to Clinical Deterioration	Preventing Falls & Harm from Falls
✓	✓				✓			✓	

13. Risk Management

N/A

14. Evaluation

The number of Advance Care Directives recorded on the system.

The number of persons who are resuscitated against a clear refusal of life-sustaining measures.

The number of incidents in relation to Advance Care Directives reported on the Safety Learning System.

The number of recorded cases referred to the Office of the Public Advocate for advice.

The number/type of recorded cases which were referred to the Office of the Public Advocate for mediation.

The number/type of recorded cases which were referred to the Guardianship Board for a determination.

The number of complaints in relation to non-compliance with Advance Care Directives.

15. Attachments

Attachment 1 – Impaired decision-making fact sheet

Attachment 2 – Suitable witness' list

16. Definitions

Accreditation Standards

Accreditation Standards describe the systems required to ensure the minimum standards of safety and quality are met, and a quality improvement mechanism that allows health services to realise aspirational and developmental goals.

A South Australian Health Accreditation Resource has been developed to support Health Services and provides examples of South Australian tools and resources that can be used to demonstrate an action and standard has been met. Ten standards currently exist which range from medication safety standards to clinical handover standards and deterioration.

Advance Care Directive

An Advance Care Directive is a legal form written by competent adults. It can record a person's wishes and instructions for future health care decisions, preferred living arrangements and other personal decisions. An Advance Care Directive can also be used to appoint one or more adults to make these decisions for the person (a Substitute Decision-Maker). An Advance Care Directive takes effect if a person has impaired decision-making capacity in relation to decision(s). An Enduring Power of Guardianship, Medical Power of Attorney and an Anticipatory Direction are considered to be an Advance Care Directive for the purposes of the *Advance Care Directives Act 2013* until such time that a new Advance Care Directive is given.

Advance care plan

Advance care plan is a general term referring to informal documents which record a person's wishes regarding future care and medical treatments, in the event the person loses decision-making capacity.

Informal advance care plans include but are not limited to the Good Palliative Care Plan, the Statement of Choices (Respecting Patient Choices), Ulysses Agreements (Mental Health) and forms from aged care facilities (Facility Form) in which a person's end-of-life care preferences are documented.

Treatment and Care Plans

Clinical care plans are written by the clinician responsible for the person's treatment and care, in the context of the current clinical situation including for chronic conditions, mental health care and end of life care.

Clinical care plans should be informed by the person's wishes, including those expressed on their Advance Care Directive, and/or advance care plan, or by their Substitute Decision-Maker or Person Responsible.

Clinical care plans for resuscitation and end-of-life care should contain specific instructions about resuscitation and end-of-life care and set out a practical treatment plan, based on the clinical status of the person and treatment options that are appropriate, available or acceptable.

Competence

Competence is a legal term used to describe the mental ability required for an adult to complete a legal document. Competence is a requirement for completing a legal document that prescribes future actions and decisions, such as an Advance Care Directive.

An adult is deemed to be either competent or not competent to complete an Advance Care Directive; there are no shades of grey. Competence is assumed unless there is evidence to suggest otherwise. Having a diagnosis is not always evidence of lack of competence and the below test must be considered.

To be competent and therefore be able to write an Advance Care Directive, a person must be:

- 18 years old or over
- know what an Advance Care Directive is
- know what it will be used for, and
- know when it will be used.

It is the witness' role to be satisfied that the person writing an Advance Care Directive is competent.

Decision-Making Capacity

A person's decision-making capacity relates to their ability to make a particular decision. It is not a global assessment of a person's ability to manage their own affairs and it is not linked to a diagnosis. Determining whether a person has decision-making capacity is not necessarily a medical assessment. It is the ability to think, understand, make a decision and communicate this in some way; it is not dependent on verbal or written communication. A person's decision-making capacity can fluctuate. A person may have impaired decision-making capacity temporarily or permanently.

A person has decision-making capacity, in relation to a specific decision, if they can:

1. Understand information about the decision.
2. Understand and appreciate the risks and benefits of the choices.
3. Remember the information for a short time.
4. Tell someone what the decision is and why they have made the decision.

If a person is unable to do these four things, it means they are unable to make the decision (called impaired decision-making capacity) and someone else will need to make the decision for them (e.g. Substitute Decision-Maker, Person Responsible)

Decision-Making

1) Supported decision-making

A person must be allowed to make their own decision to the extent they have decision-making capacity and be supported/assisted to make their own decisions for as long as they can.

Supporters can assist a person to consider their main choices, understand the consequences, and can assist them to communicate their decision. However the person makes the decision not the supporter.

2) Substitute decision-making

A substitute decision-maker provides consent on behalf of another when that person lacks the capacity to make a particular decision. A Substitute Decision-Maker must make a decision they believe the person would have made.

3) Substituted judgement decision-making

With this approach the decision maker should try to decide as that person would have decided in the current circumstances – (step into their shoes).

Substitute Decision-Makers (including Enduring Guardians, Medical Agents and Person Responsible) are expected to use substituted judgement when making decisions on behalf of another.

End of Life

'End-of-life' is the term used to describe the stage of life where a person is living with, and impaired by, an eventually fatal (or terminal) condition, even if the prognosis is ambiguous or unknown.² It may be the last one to two years of life.

End stage of an illness

The final period or phase in the course of a progressive disease leading to a person's death, when there is no real prospect of recovery or remission of symptoms.

Enduring Power of Attorney

A person appointed under an Enduring Power of Attorney is authorised to make financial and legal decisions. They are not authorised to make health care or medical treatment decisions, unless they are also appointed under an Advance Care Directive (including Medical Power of Attorney or Enduring Power of Guardianship).

Health care

Health care is used to refer to care, treatment (including medical treatment and life-sustaining treatment) and services or procedures to diagnose, maintain or treat a person's physical or mental condition. Health care may be carried out by a range of health practitioners or may be under the direction or supervision of a health practitioner. Health care includes:

- medical treatment
- life-sustaining treatment
- surgery
- mental health treatment
- medications
- dental treatment
- maternity care
- emergency care
- podiatry (foot care)
- physiotherapy
- occupational therapy
- psychological therapy
- palliative care
- alternative therapies such as Chinese medicine

Health care does not include the transport of persons from one service to another or from a place of residence to a health service.

Health practitioners

Health practitioners include registered practitioners³ such as medical, nursing and dental practitioners and other registered practitioners who provide health care including Aboriginal and Torres Strait Islander health workers and some allied health staff. It also includes ambulance officers and paramedics.

Life-sustaining treatment

Life-sustaining treatment is any medical intervention, technology, procedure or medication that is administered to keep a person alive but not necessarily administered to improve their health. These treatments may include mechanical ventilation, artificial hydration and

² Palliative Care Australia, *Palliative and End-of-life Care – Glossary of Terms*. PCA, Canberra

³ Registered under the *Health Practitioner Regulation National Law*.

nutrition, dialysis, cardiopulmonary resuscitation and certain medications, including antibiotics at the end of life.

Mediation

Mediation is when a third party facilitates two or more conflicting people or groups to assist them to reach a mutual agreement or compromise. When resolving disputes under or in relation to an Advance Care Directive, it is the wishes of the person who gave the Advance Care Directive which are of paramount consideration.

Medical treatment

Medical treatment refers to administration of therapy by either physical, surgical or psychological means, or administration of medications to prevent disease, to restore or replace body function in the face of disease or injury, or to improve the comfort and quality of life. Recent Court judgments have confirmed that artificial hydration and enteral feeding are forms of medical treatment rather than nourishment.⁴

Palliative Care

Palliative care is treatment that aims to improve the quality of life of persons facing life-threatening illnesses, through the prevention and management of symptoms and pain and can be provided at all stages of a terminal illness. Palliative care also provides support for both the person and their family after death.

Personal decisions

'Personal decisions' can be about a person's pets, employment, personal grooming, important relationships and many other things.

Person Responsible

A Person Responsible is a person close to the person who is available and willing to consent to or refuse consent to health care (including medical treatment and life-sustaining measures) when the person has impaired decision-making capacity. The person can be a family member, close friend or a culturally acceptable person from the same community.

In the absence of an Advance Care Directive (relevant instructions or Substitute Decision-Maker), the Person Responsible is determined in the following order:

1. Guardian (if appointed by the Guardianship Board)
2. Prescribed relative (adult with a close and continuing relationship)
 - Spouse/domestic partner
 - Adult related by blood, marriage or by adoption
 - Aboriginal or Torres Strait Islander kinship/marriage
3. Adult friend (with a close and continuing relationship)
4. Adult charged with overseeing ongoing day-to-day care of the person
5. Guardianship Board (as a last result)

⁴ *Gardner; re BWV [2003] VSC 173 (29 May 2003) in Victoria; Brightwater Care Group (Inc) -V- Rossiter [2009] WASC 229 in Western Australia.*

A Person Responsible must try and make a decision the person would have made if they were capable of making their own decision, not a decision which the Person Responsible thinks is in the person's best interest.

Residential and accommodation decisions

'Residential and accommodation decisions' can include where a person wishes to live, whether to go into supported care, whether they prefer to have a view of the garden, live by the sea, live with others or on their own.

Substitute Decision-Maker

A Substitute Decision-Maker is an adult one can choose and appoint in an Advance Care Directive to make decisions about their *future* health care, living arrangements and other personal matters when the person giving the Advance Care Directive is unable to make their own decision/s.

An Enduring Guardian and a Medical Agent are considered to be Substitute Decision-Makers for the purposes of the *Advance Care Directives Act 2013*.

Impaired Decision-Making Factsheet

A clear path to care

What is impaired decision-making capacity and how is it assessed?

The Advance Care Directives Act 2013 and the Consent to Medical Treatment and Palliative Care Act 1995 now specify when a patient is unable to consent/refuse. This is called impaired decision-making capacity. Assessing decision-making capacity is not a global assessment but decision specific and should be determined at the time consent is being obtained.

In respect of a particular decision, impaired decision-making capacity means the person is not capable of:

- > understanding any information that may be relevant to the decision, including the consequences
- > retaining such information, even for a short time
- > using information to make decisions
- > communicating the decision (in any way).

When determining if a person has decision-making capacity you may want to consider the following questions:

Does the person understand the nature and effect of the treatment at the time that the medical or dental decision is required, not hours or days before or after it is made?

Does the person know the 'nature' of the treatment? That means, do they understand broadly and in simple language:

- > What the medical or dental treatment is?
- > What the procedure involves?
- > Why it is proposed?
- > That there are other options? If choosing between options, the person must understand what each option is, what it involves, the effect of each option, and the risks and benefits of each option.
- > What it will mean if they don't have the treatment?

Does the person understand the 'effect' of the treatment? Are they aware, in simple terms, of the main benefits and risks of the treatment?

Does the person have the ability to indicate whether they want the treatment? Can they communicate any decision made, with assistance if necessary?

Has the person made the decision freely and voluntarily?

A person has a right to refuse treatment. If they have refused, consider the following:

- > Is refusal of treatment consistent with the person's views and values?
- > Is this behaviour usual for the person?
- > Has all the relevant information been given to the person in a way they can understand?

Tips on Questioning

Remember, when assessing whether a person has the capacity to make medical or dental decisions, it is important you:

- > ask open-ended question
- > do not ask leading questions
- > try to quickly identify whether a person needs support or help to make the decision or requires a Substitute Decision-Maker to make a decision for them. In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.
- > ensure it is the person being assessed who answers the questions.

Questions to ask the patient

Here are some specific questions you may ask as part of the assessment process to determine if the person has capacity to make medical and dental decisions.

- > Tell me about your health or teeth and why you need medical or dental treatment?
- > What is the medical or dental treatment that you might be having? Can you explain it to me?
- > Where will you be having the treatment? How long will it take?
- > How will the treatment help you? What are the good things about the treatment?
- > Will there be any bad things about the treatment? What are they?
- > How do you think you will be able to deal with these?
- > What are the risks of having the treatment?
- > Is there any other treatment you might be able to have? Can you tell me about it?
- > How would this other treatment help you?
- > What are the risks of having this other treatment?
- > Which do you think is the best treatment? Why?
- > What would happen if you didn't have any treatment at all?
- > What do your family and friends think of the treatment?
- > What do they want you to do? Why?

Case Study

Medical Decisions

'Jovesa and I were visiting the doctor because he had developed tremors and a very fast heartbeat. The doctor explained that the problem was actually because of a part of his body in his neck called his thyroid. He needed medication and regular blood tests to monitor whether his new medication was working.

The blood tests showed that things were not settling down. The doctor then talked about what he could do next to stop the thyroid from causing these things to happen. He gave Jovesa a pamphlet to explain:

- > why the thyroid was playing up and why the medication wasn't working
- > the different things that he could do to stop the thyroid causing problems
- > the treatment he recommended for Jovesa and why
- > the risks of having or not having the treatment
- > that Jovesa has a right to decide whether or not to have the treatment.

The pamphlet used really simple language and photos to explain everything. When I took Jovesa home we went through the pamphlet together on a few occasions. I asked him various questions to work out whether he understood the information or not. Then we went back to the doctor. Jovesa told the doctor that he had decided to have the treatment, even though he was scared about it.

The doctor asked Jovesa some questions about how the treatment worked and why he had decided to have it, and came to the conclusion that he had the capacity to make the decision about the treatment himself.'

Felise, carer

Other health decisions

There may be a need to assess the capacity of a person to make other health decisions, such as whether to:

- > have a non-intrusive examination by a doctor or dentist, for example, having the mouth, teeth, throat, nose, ears or eyes looked at
- > take over the counter chemist medication
- > have alternative therapies.

The person needs to understand the nature and effect of the type of examination, medication or therapy that they are deciding upon.

You can use the capacity test (checklist and questions) above, as a guide to capacity assessment for other health decisions.

For more information

SA Health
Policy and Commissioning Division
Email: policy&legislation@health.sa.gov.au
Subject line: Advance Care Directive

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SA Health

Authorised witnesses

(note that authorised witnesses can also certify copies of the original Advance Care Directive).

The following persons, or classes of persons, are authorised witnesses:

- Agents of the Australian Postal Corporation in charge of an office supplying postal services to the public or permanent employees of the Australian Postal Corporation with 5 or more years
- Australian Consular Officers or Australian Diplomatic Officers
- Bailiffs; sheriffs; sheriff's officers
- Bank, Building Society or Credit Union Officers or Finance Company Holders with 5 or more continuous years of service
- Chief executive officers of Commonwealth courts
- Clerks of courts
- Commissioners for taking affidavits and/or declarations
- Employees of the Australian Trade Commission, or employees of the Commonwealth who are in a country or place outside Australia
- Fellows of the National Tax Accountants' Association
- Health practitioners
- Statutory Office Holders
- Judges of Courts, Magistrates or Masters of Court or Court Registrars or Deputy Registrars
- Justices of the Peace
- Marriage celebrants or Ministers of religion registered under the *Marriage Act 1961*
- Members of: Chartered Secretaries Australia; Engineers Australia; Association of Taxation and Management Accountants; Australasian Institute of Mining and Metallurgy
- Australian Defence Force Officer or non-commissioned officer or a warrant officer with 5 or more years of continuous service; or
- Members of the Institute of Chartered Accountants in Australia; the Australian Society of Certified Practising Accountants or the National Institute of Accountants
- Members of Commonwealth, State or Territory legislatures/Parliaments; or local, State or Territory government authorities
- Notary public
- Patent attorneys or trade mark attorneys;
- Permanent employees of a Commonwealth, State, Territory or a local government authority with 5 or more years of continuous service who are not specified in another item in this list
- Legal practitioners enrolled on the roll of a State or Territory Supreme Court, or the High Court of Australia
- Persons before whom a statutory declaration may be made under the law of the State or Territory in which the declaration is made
- Police officers
- Senior Executive Service employees of the Commonwealth or a Commonwealth, State or Territory authority
- Full-time teachers at a school or tertiary education institution
- Veterinary surgeons.