

Legal Issues

Advance Care Directive and Enduring Power of Attorney



A person may, due to illness or an accident, lose the ability to make decisions for themselves, understand the consequences of the decisions made and / or to communicate these decisions to others.

Mental incapacity is defined in the *Guardianship and Administration Act 1993* as 'the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs'.

What happens when someone loses mental capacity?

A family member is usually able to step in and make those decisions on an informal basis. However, it is recommended to plan ahead. To ensure that your wishes are followed as closely as possible in the future, should you lose capacity, you can appoint a person to make decisions on your behalf. There are two main types of legal documents that cover these matters:

- **Advance Care Directive (ACD)** – for health care, lifestyle, accommodation and end-of-life decisions
- **Enduring Power of Attorney (EPA)** – for financial decisions

Validity and operation

For an Advance Care Directive and an Enduring Power of Attorney to be legally valid, the person making them must be mentally competent (i.e. have mental capacity) to understand the nature and purpose of the documents. A person cannot be coerced to complete or sign such a document. Written confirmation of the person's mental incapacity can be provided by a medical practitioner and may be required for an Enduring Power of Attorney or Advance Care Directive to be used by the appointee/s. However, you can declare your EPA to become effective upon signing it and to remain effective after you lose your mental capacity.

Advance Care Directive (ACD)

This document allows a person to appoint a friend, family member or another trusted person to make important personal decisions such as accommodation, relationships and medical or dental treatment, should mental capacity be lost in the future. This person will then become the *Substitute Decision-Maker*.

A *Substitute Decision-Maker* is expected to make decisions reflecting the wishes of the person (where this can be determined), rather than impose their own views and values.

When preparing your ACD you can specify the conditions of appointment and your values and wishes that the *Substitute Decision-Maker* will need to consider when acting on your behalf. You can specify types of treatment or interventions that you would not accept and your preferred end-of-life arrangements.

Enduring Power of Attorney (EPA)

This document allows a person to appoint a friend, family member or another trusted person to make financial decisions, including property transactions on their behalf.

Note: Enduring Power of Attorney is different from a General Power of Attorney. Use a General Power of Attorney to give someone else the power to make financial decisions on your behalf for a specific period /event. For example, you might choose to appoint an attorney if you are going overseas and need someone else to sell something you own or pay your bills. The General Power of Attorney will end when you lose capacity to make your own decisions.

How do I put them in place?

You need to complete the relevant forms. The **Advance Care Directive DIY Kit** is available at www.advancecaredirectives.sa.gov.au. You can complete the form online or you can download and print it. The kit includes a form,

instructions on how to complete it and a sample ACD. Alternatively, you can obtain a free professionally printed hard copy of the Advance Care Directive Kit:

- from Service SA (postage fees apply)
- in person from Service SA
- in person from selected local public libraries or from Catalyst Foundation.

Several South Australian metropolitan and regional local councils conduct activities aimed at supporting community members to understand and complete their own ACD. If you are receiving government-funded home support and care services, your provider may also be able to assist.

The **Enduring Power of Attorney Kit** contains a step-by-step guide, three Enduring Power of Attorney forms and a Revocation form. It is available for purchase online from **Service SA** or for free download from the **Legal Services Commission** website page

https://lsc.sa.gov.au/cb_pages/power_of_attorney_kit.php.

Editable versions of the EPA form and the EPA revocation form are also available for free download from the Lands Services SA website <https://landservices.com.au/businesses-and-property-industry-professionals/land-transactions/forms-and-guidance-notes> (links located under 'Registration forms').

Alternatively, you may engage a solicitor to assist you with preparing these documents.

Advance care planning on My Health Record

My Health Record is an online summary of your health information. The system is managed by the Australian Government. It includes an Advance Care Planning section, which allows you make your ACD information available to health care providers at the time and place it is needed. For more information visit

<https://www.digitalhealth.gov.au/initiatives-and-programs/my-health-record>, contact My Health Record help line **1800 723 471 (option1)** or speak with your GP.

What if there is no Advance Care Directive or Enduring Power of Attorney?

If there is no Advance Care Directive (or a previous document covering the same issues) or an Enduring Power of Attorney and a person loses the ability to make decisions, the South Australian Civil and Administrative Tribunal (SACAT) may appoint a guardian and/or administrator to make personal and financial decisions for that individual. This can be a relative, friend or the Public Advocate/Public Trustee.

How about previous documents?

The Advanced Care Directive Act 2013 came into effect on 1st July 2014. The new Act created a single Advance Care Directive to replace the previous Enduring Power of Guardianship (EPG), Medical Power of Attorney (MPA) and Anticipatory Direction (AD).

Existing documents completed prior to the new Act **will continue to be valid** and can be used, if they still reflect the person's current wishes. If changes are needed however, an Advance Care Directive should be completed replacing them. For further information, contact the Legal Services Commission of SA.

The role of SACAT

The South Australian Civil and Administrative Tribunal (SACAT) can appoint a guardian to make decisions for a person with mental incapacity including those related to medical treatment, accommodation, health and lifestyle. SACAT is also able to appoint an administrator if required; this refers to managing the incapacitated person's money, legal and business affairs.

An application to SACAT should only be made as a last resort when all other options have been considered. If there is no Enduring Power of Attorney or Advance Care Directive in existence, but the person is coping in the community, being adequately cared for by family or friends, and there is no conflict between the parties, there is no need to apply for guardianship or administration.

The application should contain relevant and accurate information that supports and demonstrates the need for intervention, and show how other less restrictive options have been tested and why legal protective orders are required. **Tel. 1800 723 767;**
www.sacat.sa.gov.au.

Useful contacts and resources

Legal Services Commission offers free legal advice to the general public. It publishes resources (available online) containing useful information on Powers of Attorney and Enduring Power of Attorney. Call the **Legal Help Line** on **1300 366 424** or visit www.lsc.sa.gov.au

To find a **Justice of the Peace** to witness your Advance Care Directive in South Australia, visit www.sa.gov.au/topics/rights-and-law/rights-and-responsibilities/justices-of-the-peace/find-a-jp

The **Office of the Public Advocate** is authorised to help resolve disputes about an advance care directive and may use mediation. It also provides information about the *Guardianship and Administration Act 1993*, the *Mental Health Act 2009*, the operation of these Acts and related issues. **Tel. 8342 8200;** www.opa.sa.gov.au

South Australian Government – Advance Care Directives website features information, online and downloadable form, and useful contacts. www.advancecaredirectives.sa.gov.au.

Catalyst Foundation (including **Seniors Information Service**) can assist you with accessing the relevant forms and additional information.
Tel. 8168 8776 or email information@catalystfoundation.com.au

Advance Care Planning Australia is a national initiative funded by the Australian Government Department of Health and Aged Care and administered by Brisbane South Palliative Care Collaborative, Metro South Health. It is aimed at assisting people with planning for their future health care. Its website features a range of information resources. Its National Advance Care Planning Support Service can be contacted on

1300 208 582 or by email at acpa@advancecareplanning.org.au.
<https://www.advancecareplanning.org.au/>

End-of-life planning

The Legal Services Commission publishes an *End of Life Planning Checklist and Worksheet* which can be downloaded from its website or ordered. https://lsc.sa.gov.au/cb_pages/end_of_life_planning_checklist_and_worksheet.php.

The **South Australian Voluntary Assisted Dying Act 2021** commenced 31 January 2023.

The process enables eligible people to voluntarily access a medication that will cause their death, in accordance with the steps and process set out in the Act.

Note: A desire to access voluntary assisted dying expressed in the Advance Care Directive will not be considered a request for voluntary assisted dying, as the person needs to have decision-making capacity throughout the entire process, to make sure their decision remains voluntary and consistent.

Further information on voluntary assisted dying can be found at www.sahealth.sa.gov.au/vad. The South Australian Voluntary Assisted Dying Care Navigator Service can be contacted by phone on **0403 087 390** or email Health.VADCareNavigators@sa.gov.au

The information contained here is general in nature and is not intended as legal advice

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