

Legal Issues

Advance Care Directive and Enduring Power of Attorney - Aboriginal



A person may, due to illness or an accident, lose the ability to make decisions. Loss of mental capacity or the ability to think clearly can also mean you are not able to tell anyone else what your personal wishes are.

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.

Many people, however, wish to plan ahead. To ensure that their wishes are followed as closely as possible in the future, should they lose capacity and there are no informal arrangements, they legally appoint a person or persons to make their personal, medical or financial decisions, or state their wishes regarding end-of-life decisions in legal documents. There are two main types of documents that cover these matters:

- **Advance Care Directive** – for health and accommodation decisions
- **Enduring Power of Attorney** – 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 to understand what the documents are and what they do. There must be no pressure or influence on a person to complete or sign such a document.

Written confirmation of the person's mental incapacity (not being able to make the decisions themselves) 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 where they live, holidays, relationships and medical or dental treatment, should mental competence be lost in the future.

This person will be known as the Substitute Decision-Maker and will be expected to make decisions respecting the wishes of the person (where this is known), rather than what the Substitute Decision Maker wants.

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.

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.

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 were going away for a while and needed someone else to sell your house or pay your bills. The General Power of Attorney will end when you lose capacity to make your own decisions.

How do I put these documents in place?

You need to complete the relevant forms.

The **Advance Care Directive DIY Kit** is available at www.advancedirectives.sa.gov.au. You can complete the form on line or you can download and print it. The kit includes a form, instructions on how to complete it and a sample ACD. It is also possible to purchase the kit (or just the form) on line from Services SA - <https://shop.service.sa.gov.au>.

The **Enduring Power of Attorney DIY Kit** contains a step-by-step guide, three Enduring Power of Attorney forms and a Revocation form. It is available for purchase from the **Legal Services Commission of SA** or on line from **Services SA**.

The EPA form and the EPA revocation form (but not the full kit) are also available for free download from the Lands Services SA website (links available at www.sa.gov.au/topics/family-and-community/planning-ahead/power-of-attorney-and-advance-directiveswebsite).

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

Advance care planning and My Health Record

My Health Record is a secure 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 myhealthrecord.gov.au, contact My Health Record help line **1800 723 471** 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 an 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 before the new Act **will continue to be valid** if they still reflect the person's wishes. For further information, contact the Legal Services Commission of SA.

The role of the South Australian Civil and Administrative Tribunal (SACAT)

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 are no Enduring Power of Attorney and Advance Care Directive 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 also no need to apply for guardianship or administration.

The application should contain relevant and accurate information that supports and shows the need for intervention and also shows how other less restrictive options have been tried 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. Its Law Handbook (available on line) contains useful advice on making an Enduring Power of Attorney.

Legal Help Line 1300 366 424;
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 resolve disputes about an advance care directive (health, accommodation or personal decisions) or a health consent issue without the need to go through a formal South Australian Civil and Administrative Tribunal process. It does this through a mediation service. 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. Phone **8168 8776 (SA country 1800 63 63 68)** to make an appointment.

Public Trustee provides assistance to prepare legal documents such as wills and enduring powers of attorney to eligible concession card holders or those subject to administration or protection orders issued by SACAT or the Courts. .

Tel. 8226 9200, 1800 673 119 (SA Country)
www.publictrustee.sa.gov.au.

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

Catalyst Foundation (including Seniors Information Service) is supported by the Australian Government Department of Health. Visit the website www.health.gov.au for more information. Although funding for this publication has been provided by the Australian Government, the material contained herein does not necessarily represent the views or policies of the Australian Government.

Updated September 2020