



## Advance Care Directives and Medical Treatment Decision Makers - 4 things for health practitioners and facilities to be aware of



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The new *Medical Treatment Planning and Decisions Act 2016* has now been operable for almost two months. The new Act introduced legal Advance Care Directives and changed the mechanism for appointing a person to make decisions on your behalf if you lose capacity.

The Act introduced strict formal requirements for making Advance Care Directives ("ACDs") and appointing Medical Treatment Decision-Makers ("MTDMs") which individuals and health practitioners must comply with.

This article is intended to provide a brief overview of some of the key matters health practitioners and others working in the area have indicated they are still coming to terms with.

### Correctly witnessing and certifying an Advance Care Directive

While an ACD does not need to be completed in a specific form, it must contain certain information to be valid. It must include the person making the ACD's full name, address, date of birth and signature. In addition, the ACD must be witnessed and certified by **two** people. One must be a medical practitioner and neither can be the person's appointed MTDM.

The witnesses must witness each other's signatures as well as certify that the person appeared to have capacity and understand each of the statements made in the ACD. This means that the ACD must be made and signed with **all three people** involved present, that is, the person making the ACD and the two witnesses. An ACD will not be valid if it is made and signed by the person with help from an organisation's advance care planning team and then witnessed by a medical practitioner later.

If health facilities would like to assist individuals to make ACDs, they need to ensure that a medical practitioner is available to witness and certify the document at the same time it is signed by the individual. Ideally, the medical practitioner should be involved in the process as that enables them to certify that the person appeared to understand the statements contained in the ACD.

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## Is an Advance Care Plan an Advance Care Directive?

ACDs and Advance Care Plans sound similar, but are actually very different. A new ACD made under the Act is a binding legal document that allows people with capacity to make instructional or values directives about the type of medical treatment they would or would not like to receive in the event that they lose capacity. The two types of directives must be interpreted and used as follows:

- Instructional directives apply as though the person without capacity has consented to or refused the treatment themselves and does not require the health practitioner to confer with a MTDM; and
- Values directives must be taken into account by MTDMs when making a medical treatment decision.

An ACD cannot be made by a MTDM on behalf of another person. An Advance Care Plan on the other hand is generally put in place by an aged care facility or health service to guide a person's care and is often made on behalf of another person. An Advance Care Plan can take any form and the content may vary significantly between organisations.

An Advance Care Plan can be seen as similar to a values directive in an ACD but is not exactly the same. The Act doesn't require a MTDM to take into account an Advance Care Plan in the same way that a MTDM must consider any valid values directives. In short, while good practice would suggest that health practitioners and MTDMs would refer to an Advance Care Plan when making a decision, an Advance Care Plan doesn't carry the same weight as an ACD.

## Formal requirements for appointing a Medical Treatment Decision Maker

When appointing an MTDM the appointment document must be in English, must include the full name, date of birth and address of the person making it, must be signed by the person making it (unless they are physically incapable of doing so), may appoint more than one person as a MTDM, must be witnessed in accordance with the requirements of the Act, and must be accepted by each appointee on the appointment document.

**Two** individual adult witnesses (neither of whom is being appointed as a MTDM) must witness the appointment document. One of the witnesses must also be an authorised witness such as, a lawyer, a police officer, a judge or magistrate or a public notary. Both witnesses must:

- Sign and date the document in the presence of:
  - the person making the appointment; and
  - each other.

That means that the appointment document must be signed with **all four people** involved present, that is, the person making the appointment, the person or persons being appointed as the MTDM and the two witnesses.

Witnesses are also required to certify on the appointment document that:

- the person making the appointment appears to have decision-making capacity and appears to understand the nature and consequences of making or revoking the appointment;
- the person appeared to freely and voluntarily sign the document; and
- the person signed the document in the presence of two witnesses.

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## What to do when a Medical Treatment Decision needs to be made

If a person does not have capacity and a health practitioner believes a medical treatment decision needs to be made, the Act prescribes what a health practitioner should do.

1. Consider whether there is an ACD with an instructional directive that applies to the situation.

a. If yes, the instructional directive should be followed, unless an

exception applies.

b. If no, go to step 2.

2. Is there a MTDM (appointed, or by operation of the Act), who is available and willing to make a medical treatment decision?

a. If yes, the decision should be made by the MTDM, who is to consider any values directive in an ACD.

b. If no, go to step 3.

3. Is the treatment routine?

a. If yes, the health practitioner can administer the treatment without consent.

b. If no, go to step 4.

4. The treatment is significant and the health practitioner must seek consent from the Public Advocate.

See our previous article on [the new Medical Treatment Act and MTDMs](#).

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