



ADVANCE CARE DIRECTIVE

A competent adult may make an Advance Care Directive (ACD) -see *Advance Care Directive Act 2013 (SA)*. These are often prepared at the same time as a Will, for obvious reasons.

An ACD requires completion of a specific form – which can be done as long as the person has legal capacity, i.e. is legally "competent".

To be "competent" to make an ACD, a person must understand what an ACD is and the consequences of giving one.

Being physically incapacitated e.g. being paralysed and unable to sign documents does not mean that a person is necessarily not competent. The person may still be able to understand the document and its implications. If a person is able to communicate this in some way, then the person can be considered competent.

If there is any question about a person's competence, however, it is best to obtain a written medical opinion.

A person who induces another to make an ACD using dishonesty or undue influence is guilty of an offence, the maximum penalty for which is imprisonment for 10 years.

Witnessing an ACD Form

When a person has completed an ACD form, s/he must sign the form in the presence of a suitable witness.

When a Substitute Decision Maker is being appointed, the ACD must not be witnessed until each Substitute Decision Maker to be appointed has completed and signed the relevant part of the form.

Before the person signs the form, the witness must give the person an "*Advance Care Directive Information Statement*". The witness must also explain to the person the legal effects of giving an ACD. Giving the person an "ACD Information Statement" is taken to be an explanation of the legal effects of the document but there is a further obligation on the witness to form an opinion that the person actually understands the information and explanation and does not appear to be acting under any form of duress or coercion. Accordingly, the witness should have a conversation with the person about the proposed ACD. If there is any doubt about the existence of duress or coercion – or person's ability to understand the nature and effects of the ACD, the witness should not sign the form.

As making an ACD revokes any previous ACD, the witness should also ask the person whether s/he has previously made an ACD and confirm that the person understands the consequence of revoking the existing ACD.

A person cannot witness an ACD if s/he:

- is appointed as a Substitute Decision Maker under the ACD;
- has a direct or indirect interest in the estate of the person giving the ACD;
- is a health practitioner responsible (solely or with others) for the health care of the person giving the ACD;
- occupies a position of authority in a hospital, hospice, nursing home or other facility in which the person giving the ACD resides.

ACDs are important documents and it is a good idea to obtain legal advice and assistance throughout the process to ensure that if/when the ACD is needed, no problems arise.

Contact us to make an appointment for further information or to enable us to assist with the preparation and/or execution of an Advance Care Directive.