

The legal aspects of Advanced  
Care Directives

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What are the foundations for ACD/ACP ?

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ETHICAL

LEGAL

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## Legal foundations

What are the sources of law ?

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Statutory Law

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Common Law

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Every jurisdiction in Australia recognises a valid ACD

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Under statute :

- Queensland
- Victoria
- South Australia
  
- ACT
- Northern Territory

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Under Common Law :

- NSW
- Tasmania
- Western Australia

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In NSW the clearest statement of the recognition of a valid ACD under the common law was in :

*Hunter and Newcastle Area Health Service v A* [2009] NSWSC 761

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The basis for this recognition is the common law right of a patient to refuse treatment

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The statement that :

“Advanced Care Directives/ Plans are not legally recognised in NSW”

is a myth.

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Yes it is true there is not an ACD statute in NSW

However - ACD are recognised under the common law

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What then constitutes a legally valid ACD ?

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- Competently
- Without Undue Influence
- Is clear and unambiguous
- Covers the circumstances

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## Competency

There is a presumption that the person was competent at the time they made their ACD

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That presumption is rebuttable –  
it can be challenged

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The elements of Competency

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- Understand
- Believe
- Reason
- Choose

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Without undue influence

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Is clear and unambiguous

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Covers the circumstances

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If there is any concern regarding the validity of the ACD –

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Treat in the patient's best interests

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Nowhere in these criteria is there any mention that an ACD must be made in a particular form.

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An ACD, under common law, made be made in a written or oral form

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The statement that :

“In NSW an ACD must be on a written document ...that is signed and witnessed “

is a myth.

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Conclusion

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- ACD directives are recognised under the common law in NSW
- The first step is determine whether it is valid

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- Competently
- Without Undue Influence
- Is clear and unambiguous
- Covers the circumstances

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A valid ACD should be followed

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If there are any concerns whether an ACD is valid or not :

- Treat according to the best interests of the patient
- Seek court advice

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