

FAQs about Advance Health Directives

The answers below are general and apply to any form of AHD

1. What is an AHD?

An AHD is governed by the provisions of the GAA Act. It is a legally binding statutory instrument that sets out your decisions in relation to medical treatment at any time that you are not able to make reasonable judgments in respect of that treatment for any reason, e.g. that you are unconscious, in a coma or are no longer *compos mentis*. Note that capacity may come and go, for example if you have early onset dementia or the unconscious state is temporary (e.g. while under anaesthesia).

2. What is the difference between an advance care plan and an AHD?

An advance care plan is generally made by healthcare professionals in consultation with you and your family members, to prepare for end of life treatment. It is not a legally binding document.

An AHD is a statutory instrument which when properly executed and witnessed is at the top of the hierarchy of legal authority in relation to your treatment decisions. Unlike an advance care plan, it gives legal effect to your wishes. (The hierarchy of decision makers can be viewed here : <https://www.health.wa.gov.au/~media/Files/HealthyWA/New/hierarchy-of-decision-makers.pdf>)

3. Can someone else sign the AHD on my behalf? If so, must I be present when that person signs?

If you are physically incapable of signing an AHD, you may ask someone else to sign it for you provided you still have the capacity to understand the nature and intent of the AHD. You, the person signing on your behalf and the 2 witnesses (see 5 below) must all be present when the AHD is signed.

4. If I have appointed a guardian under an enduring power of guardianship (EPG), can my guardian override my AHD?

No - your guardian does not have the power to override your treatment directives as set out in your AHD. An AHD only *becomes effective* once you have lost the capacity to make and communicate your decisions for yourself (see 1 above). If, however, the circumstances in which a certain treatment decision is to apply are not clear, or the expression of the decision itself is not clear, then your health professionals may look to Parts 2 and 3 of the AHD (if you have completed those parts – see 10 below), or discuss with your guardian or family how your wishes should be interpreted.

5. Must an AHD be on the Department of Health form or can it be in any form so long as it is properly executed and witnessed?

Unless you are using a different form of AHD valid under the common law (see 6 below), your AHD must be “in the form or *substantially* in the form prescribed by the regulations”. It will be valid so long as it satisfies all the legal requirements specified in the GAA Act, including that you are an adult, have legal capacity and have signed it in the presence of two adult witnesses, one of whom must be an authorised witness under the Oaths, Affidavits and Statutory Declarations Act 2005.

The AHD must also clearly specify your treatment decisions and the circumstances in which they will apply.

6. What is a “living will”? Is a living will as effective as an AHD?

This may just be a matter of terminology. If you satisfy the requirements set out in 5 above, then a “living will” may be deemed to be “substantially in the form prescribed” and be effective as an AHD. If the living will does not satisfy the legal requirements to give it statutory force, it will still be an important document to communicate your wishes to your health professionals and family members.

Nevertheless, DWDWA encourages all of its members and supporters to use either the abbreviated version of the official form on its website, or the official form. The reason for this is that the Health Department has gone to considerable lengths to ensure that the health professionals in EDs of hospitals are familiar with the new form, and it may be very useful in an emergency for your medical team to be able to navigate the form quickly.

7. Can my own doctor witness my AHD?

Yes.

8. For an AHD to be valid and binding, is it a requirement that

- a) I have read the information about advance care planning and AHDs on the Department of Health website? **No**
- b) I have first obtained medical advice and/or legal advice? **No**
- c) I have discussed my directive with any other person? **No**

Although the answer is ‘No’ to all of the above, it is a good idea to discuss the content of your AHD with your doctor to ensure that it is clear and unambiguous, and with your family members so that they understand and, if possible, support your decisions. This will make it easier for your health professionals to respect and carry out your wishes.

No other person has the power to override your directives if they are lawful and validly made, but under the GAA Act there are some limitations to their operation. For example, in an emergency or after a suicide attempt, medical personnel may take appropriate action that may be contrary to instructions in an AHD.

Another exception is that a treatment decision in an AHD does not operate if circumstances exist or have arisen that the maker “would not have reasonably anticipated” and “would have caused a reasonable person in the maker’s position to have changed his or her mind about the treatment decision” (GAA Act, s 110S (3)). Since the age of your AHD may be a factor in deciding whether this exception applies it is useful to update your AHD regularly.

For these reasons the statement of your chosen treatment decisions and of the circumstances in which they are to apply should be very clear.

9. What should I do if there is doubt about whether I have the capacity to understand the nature and effect of the AHD I am signing?

You can obtain a medical assessment if there is doubt about whether you have such capacity. There is a presumption that you have capacity unless there is evidence to the contrary.

10. What are the main differences between the old form of AHD and the new form?

The main difference is in the length of the two forms – 5 pages vs 19 pages. But the form is in clear English and not all the Parts must be completed. It is not as daunting as it looks.

Only Parts 1 (your personal details); 4 (treatment decisions); and 6 (execution) must be completed.

Part 2 (your major health conditions and things that are important to you when talking about your health); Part 3 (your values and preferences); and Part 5 (people who helped me to complete this form) are optional and may be crossed out if you do not wish to complete them. It is helpful if you initial the deletions.

Although Parts 2, 3 and 5 are optional, they will all help your health professionals to understand who you are as a person and to interpret your treatment decisions accurately, especially if there is uncertainty in what you may have written.

11. What are the differences between the new official AHD and the DWDWA version of that form?

Many of the changes are minor or cosmetic, such as allowing you to insert your preferred name in Part 1 if this is different from your given name/s.

The most substantive change is that DWDWA has deleted the first “quick option” section in Part 4.1 regarding life-sustaining treatment decisions. The reason for this is that DWDWA believes that although some of these options look clear (and maybe sensible) at first glance, they may be too clear cut (insufficiently nuanced) or so categorical as to have unintended consequences. Unless you are on the alert for these possibilities, your decisions may not reflect what you actually want.

For example, option 2 essentially states that you want any life-sustaining treatment unless you are likely to end up on life support as a result. There is no way of easily modifying this to add “or I am unable to recognise my family”; “or I am unable to live independently” if those are things you feel strongly about.

Option 3 is very clear cut: no life sustaining treatment in any circumstances. But if you are nearing the end of life you may have in mind that *if you become ill* you do not want *any medical treatment* that will sustain or prolong your life, even if at the time of making the AHD you may still be in good health. The AHD form does not differentiate between the person who signs the document and the one for whom it is implemented, except that the latter lacks capacity. So if you suffer cardiac arrest under anaesthetic for a hip replacement, what does your medical team do? This sort of uncertainty is not helpful in an AHD.

A small but significant change has also been included in the table of choices set out in the next part of 4.1: in the official form, column 2 allows you to specify the circumstances in which you consent to particular treatments, leaving column 3 to imply that in all other circumstances consent is refused.

In contrast, the DWDWA form allows you to specify the circumstances for both consent and refusal of consent.

Finally there is Part 4.3, which is a lengthy questionnaire about medical research. It is not mandatory and DWDWA recommends that you delete it and initial the deletion. In our opinion an AHD is not the right place for these questions, especially as some would require capacity, e.g “consent to participate in focus groups” which by definition you would not have at the relevant time.

12. Is an AHD (or equivalent) from another state effective in WA if it has been properly signed and witnessed under the laws of that state?

Not without endorsement from the State Administrative Tribunal, but it would be persuasive in guiding your health professionals in determining your treatment.

13. What is My Health Record?

DWDWA recommends that you upload your AHD on to My Health Record, which is a secure online summary of an individual’s health information and is available to all Australians.

Authorised healthcare providers can access My Health Record to view and add to their patients' health information.

Uploading health information such as your AHD can be difficult but these are useful links: <https://www.healthdirect.gov.au/my-health-record> and <https://my.gov.au/en/about/help/mygov-website/link-services-to-your-account/link-my-health-record>

You may complete the new form (DWDWA version or official version) by hand or online, but deletions and the execution must be done by hand. The original signed version is what is required to be uploaded on to My Health Record. You can also use My Health Record to nominate a contact person, to record details of your guardian if you have made an EPG and for other purposes.

14. Is it likely that a separate register will be created for AHDs?

In the future it may be possible to register your AHD in a separate electronic register designated specifically for this purpose, although this aspiration may still be some time away from being realised.

On My Health Record and any future register, any new AHD that you register will automatically supersede the previous one. It is important that you keep your AHD up to date and registered so that your health professionals have access to your current treatment decisions.

15. Must my AHD be registered on My Health Record to be effective?

No, but it is sensible to register your AHD so that healthcare professionals will be aware of your treatment decisions irrespective of which medical facility you may find yourself in. You should also ensure that your own doctor and members of your family have a copy of your AHD. Any existing AHD should be updated from time to time to ensure that it clearly sets out your current wishes. Copies of your AHD do *not* need to be certified as true copies although this does make them look more official. (The authorised witness (see 5 above) is also authorised to certify a document as a true copy).

16. How else can I bring the existence of my AHD to the attention of health professionals, if (for instance) I am unconscious after an accident?

You may wish to carry an "alert card" in your wallet stating that you have made an AHD and/or organ donation request, but registration of these matters on My Health Record is much more effective in communicating this information to your health professionals and family members.

17. Can I include instructions about organ donation in my AHD?

Yes.

18. If I have made an AHD with full legal capacity but subsequently develop dementia or Alzheimer's, will my AHD still be effective?

Yes. An AHD becomes effective when you are unable to communicate your treatment decisions for yourself.

19. May I include in my AHD a directive that I wish to access voluntary assisted dying if I satisfy all the criteria in the *Voluntary Assisted Dying Act 2019*?

As the law stands at present, you will not be able to satisfy those criteria because one of them is that you have decision-making capacity at every stage of the process. However, including this as a "value statement" in Part 3 will indicate to your medical professionals that this would have been your wish, which may help them decide that terminal palliative sedation (which does not require the patient's consent and is a gradual way of bringing about a patient's death) may be appropriate in your case.

20. What if I have not specified the treatment decision I want in relation to my current medical condition?

In these circumstances it will be left to your health professionals to make the appropriate decision in discussion with your enduring guardian and your family and in accordance with any values you may have specified.

21. What sanctions apply if my health professionals do not follow the directives in my AHD?

It is professional malpractice not to follow the valid directives in your AHD but there are no specific sanctions or penalties imposed by the Guardianship and Administration Act.

22. Where can I get further information about advance care planning and AHDs?

The WA Cancer and Palliative Care Network: email acp@health.wa.gov.au or telephone support – 9222 2300.

Palliative Care WA is currently running workshops to help with completing the official AHD – for further information see <https://palliativecarewa.asn.au/carers-and-families/advance-care-planning/>

Department of Health: Guide to making an

AHD: <https://www.health.wa.gov.au/~media/HWA/Documents/Healthy-living/End-of-life/AHD-Guide.pdf>

Contact Dying with Dignity WA at info@dwdwa.org.au