

# Advance care planning: have the conversation

Module 7: Activate – When and how  
to implement an advance care directive



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# Advance care planning: have the conversation

## Module 7: Activate – When and how to implement an advance care directive

**Healthcare settings:** GP practice, hospital, aged care

**Target skills:** Communication skills, confidence, knowing your role

**Time:** 10 mins

## 7.1 Activate

An advance care directive should be activated when the patient cannot make a medical treatment decision because a proper assessment has determined that the patient does not have decision-making capacity.

→ **View Module 2.2 for instructions on how to assess capacity**

This will involve all doctors linked to the patient's care, both internal and external to the health service, in collaboration with the medical treatment decision maker and/or family.



## 7.2 A 10 step guide to implementing an advance care directive

1. Access the patient's medical record and locate their advance care directive.
2. Enquire about whether an advance care directive exists elsewhere (such as with their GP, nursing home or family).
3. Locate the most recent advance care directive. It could be a standard form, a letter, or in another format, but it must comply with the formal requirements in the *Medical Treatment Planning and Decisions Act 2016*.
4. It could be located in the medical records, with the GP, with the medical treatment decision maker, or the custodian could be identified on the patient's My Health Record.
5. Identify and contact the medical treatment decision maker, using the medical treatment decision maker hierarchy.
6. Involve the patient as much as possible in the decision making process, even if they do not have decision-making capacity to make a specific decision.
7. Discuss the advance care directive with the medical treatment decision maker and treating team.
8. Interpret and include the patient's expressed values and preferences in their clinical care and medical treatment plan.
9. If the advance care directive includes a relevant instructional directive, this may constitute consent to or refusal of treatment, and the medical treatment decision maker cannot overrule the patient's decision. If there is not a relevant instructional directive, the medical treatment decision maker may consent to or refuse the proposed medical treatment. This decision must be based on what they reasonably believe the patient would have decided in the circumstances.
10. Where a patient does not have a relevant instructional directive or medical treatment decision maker, then the doctor may proceed with routine medical treatment without consent. If the medical treatment is significant, the doctor must obtain the consent of the Public Advocate.
11. Communicate with the GP, other treating doctors, Medical Deputising Service, nursing home and other people involved in the patient's care (such as through a treatment or discharge plan).



## 7.3 The role of the medical treatment decision maker

The medical treatment decision maker is an expert on the patient. They represent the preferences and values of a patient who does not have decision-making capacity.

The role of the medical treatment decision maker is to 'stand in the shoes' of the patient who lacks decision-making capacity, and to discuss medical treatment options as the patient's representative.

The aim is for a shared understanding between the medical treatment decision maker and the doctor about what the patient would want in the circumstance if they had decision-making capacity and to ensure medical decisions are consistent with this.

Medical treatment decision makers should be included by doctors in both the development and implementation of the patient's advance care directive. The medical treatment decision maker substitutes for the patient's decisions and not the decisions of the doctor.



## 7.4 5 steps to involve and support medical treatment decision makers

The following 5 steps are based on information from the Office of the Public Advocate.

1. The appropriate doctor to communicate with the medical treatment decision maker and discuss the patient's health care preferences is the doctor who:
    - has examined the patient,
    - is responsible for performing the proposed procedure or treatment, and
    - is aware of the specific risks to the patient.
  2. Explain to the medical treatment decision maker what their role is in the process.
  3. The duty to inform is now directed towards the medical treatment decision maker. Inform them in clear and plain language about the patient's health status, and any proposed healthcare procedures and treatments. Explain the details of specific risks to the patient that may result from the discussed procedures and treatments.
  4. Actively listen to the medical treatment decision maker, as they are now the 'voice' of the patient and the expert on the patient's health care preferences.
  5. Confirm that the medical treatment decision maker understands the proposed next steps for the patient by asking them to explain what you have discussed in their own words.
- **View Module 4.4 for a guide to explaining the dying process and end of life treatments in plain language.**

## 7.5 The role of doctors in relation to different types of medical treatment decision makers

All explanations of the role of the doctor in this module are credited to Willmott et al. 2011.

### 7.5.1 Medical treatment decision maker hierarchy

If a patient does not have decision-making capacity to make a decision about their own treatment, the doctor must obtain a decision from the medical treatment decision maker. The medical treatment decision maker is the first person listed below who is reasonably available and willing to make medical and dental treatment decisions on behalf of the patient.

The *Medical Treatment Planning and Decisions Act 2016* (Vic) sets out the medical treatment decision maker hierarchy:

- an appointed medical treatment decision maker (if there is more than one, the first listed who is available and willing);
- a guardian appointed by VCAT with the power to make medical treatment decisions under that appointment;
- the first of the following with a close and continuing relationship with the person:
  - the spouse or domestic partner;
  - the primary carer of the person;
  - the first of the following and, if more than one fits the description in the subparagraph, the oldest of those persons -
    - an adult child of the person;
    - a parent of the person; and
    - an adult sibling of the person.

The first person who is available, willing and able to act in any given circumstances will be the medical treatment decision maker. The medical treatment decision maker can consent to or refuse a medical treatment. This decision has the effect as though the patient has consented to, or refused the medical treatment.



## 7.5.2 The role of the doctor: Where the medical treatment decision maker is not making a decision that is consistent with the person's preferences and values

If the doctor considers that the medical treatment decision maker is not making a decision they reasonably believe the patient would have made, they could apply to VCAT:

- to have the person removed as a medical treatment decision maker; or
- to limit the power of the medical treatment decision maker; or
- for the appointment of a guardian.

If the medical treatment decision maker refuses significant medical treatment in circumstances where a doctor reasonably believes that the preferences and values of the person are not known or are unable to be known or inferred by the medical treatment decision maker, the doctor must notify the Public Advocate. The Public Advocate will be responsible for determining whether this refusal is reasonable.



## 7.6 The role of the doctor: In life-sustaining treatment decisions

### 7.6.1 Where the doctor considers life-sustaining treatment to be non-beneficial

- You are under no obligation to treat where “no benefit at all would be conferred”.
- Disputes may arise as to whether a treatment is of benefit, and those close to the patient may wish to challenge a medical professional’s determination of this in the Supreme Court. In this situation, you are the initial decision maker, and must be aware that the law does not require provision of non-beneficial treatment.
- You need to be aware of avenues for legal review before the Supreme Court. You should also obtain a second opinion if you wish to pursue these pathways.

### 7.6.2 Where the doctor is required to make an urgent decision about life-sustaining treatment

- Where an urgent decision about medical treatment is required, you are the legal decision maker and are authorised (by the *Medical Treatment Planning and Decisions Act 2016*) to provide medical treatment without consent if you believe on reasonable grounds that the treatment is necessary, as a matter of urgency:
  - a. to save the patient’s life; or
  - b. to prevent serious damage to the patient’s health; or
  - c. to prevent the patient from suffering or continuing to suffer significant pain or distress.

## 7.7 Manage conflict

There may be times when conflict arises from the implementation of an advance care directive.

- **Refer to Module 4.3 for guidance on how to manage conflict between doctors and substitute decision makers, carers, and the patient's family members.**

### 7.7.1 The role of the doctor: Where conflict exists with family members and/or medical treatment decision makers

There will be times when medical treatment is offered but the medical treatment decision maker considers the patient would not have consented to such treatment, or the family is requesting treatment that is either non-beneficial or contrary to the person's advance care directive.

- If differences of opinion exist, resolution can often be achieved through sensitive and clear communication. This sometimes requires the involvement of experienced colleagues. Refer to the advance care directive to consider what treatment the person would have wanted.
- Remember that where treatment would be non-beneficial to the patient, the medical treatment decision maker, family members or carers cannot demand that treatment be provided.
- Where there is clinical uncertainty about the effectiveness of treatment, treatment should be provided if it is consented to through an instructional directive or medical treatment decision maker. It can then be withdrawn, if inappropriate or not beneficial.
- Where you believe that a decision made by a medical treatment decision maker is not in accordance with what the patient would want, it may be necessary to seek advice from the Office of the Public Advocate about whether and how to challenge the decision.
- As a last resort the Office of the Public Advocate and VCAT can provide assistance. The Office of the Public Advocate has a telephone advice service and can advise as to the relevant legislation. VCAT can provide advice as to the processes for making and hearing applications.