

Advance Care Directives: legislative reform is needed to support audio-visual witnessing and uptake during COVID-19 and beyond

2020

Advance Care Planning Australia
BE OPEN | BE READY | BE HEARD

Acknowledgements

Advance Care Planning Australia is funded by the Australian Government Department of Health and administered via Austin Health.

Advance Care Planning Australia delivers national advance care planning leadership, advocacy, communications, advisory services, prevalence audit toolkit, and education and information resources for consumers, the health and aged care workforce, and/or service providers.

Our program is focused on improving advance care planning policy and systems, community awareness, understanding and uptake, workforce capability and quality monitoring and evidence. We promote a national collaborative approach to achieving excellence in advance care planning.

ACPA acknowledges the valuable advance care planning work being undertaken by others throughout Australia. This report was developed with support from Ms Casey Haining from the University of Melbourne Law School and Dr Ashley Macleod.

Further information regarding this report can be obtained by contacting the Advance Care Planning Program Director at Austin Health on phone +61 3 9496 5660 or email acpa@austin.org.au. A copy of the report is available at advancecareplanning.org.au.

Recommended citation:

Sheridan J, Cairns W, Moy C, and Nolte L. 2020. Advance Care Directives: legislative reform is needed to support audio-visual witnessing and uptake during COVID-19 and beyond. Advance Care Planning Australia, Austin Health, Melbourne.

Disclaimer:

This report has been prepared by Advance Care Planning Australia for the purpose of describing recent changes to Australian state and territory legislation in response to the novel Coronavirus (COVID-19) pandemic to permit witnessing of legal documents via audio-visual technologies. It should not be relied upon by any other party or for any other purpose. While the Australian Government Department of Health has contributed to the funding of this project, the information contained in it does not necessarily reflect the views of the Australian Government and is not advice that is provided, or information that is endorsed, by the Australian Government. Advance Care Planning Australia are not responsible in negligence or otherwise for any injury, loss or damage however arising from the use of or reliance on the information provided in this report and will not be liable to any person who relies upon the report.

© Austin Health, August 2020

Austin HEALTH

Contents

Acknowledgements 1
Contents 2
1 Introduction 3
2 Background 3
2.1 The legal status of Advance Care Directives in Australia 5
2.2 Overview of the elements 6
2.2.1 Element one: An adult with capacity 6
2.2.2 Element two: Signature 6
2.2.3 Element three: Witnessing 6
3 Witnessing an ACD 6
3.1 Witnessing via audio-visual means: A response to the COVID-19 pandemic 7
3.1.1 The COVID-19 pandemic 7
3.1.2 Overcoming witnessing requirements during COVID-19: Audio-visual witnessing 7
4 The possibility of audio-visual witnessing post-COVID-19 11
4.1 Existing use of technologies 11
4.1.1 Within the legal profession 11
4.1.2 Within health care 11
4.2 The potential for audio-visual witnessing of ACDs 12
4.2.1 Witnessing requirements 12
4.2.2 Accessing technologies 13
5 Conclusion 14
6 Glossary 15
7 References 17
7.1 Articles/ Books/ Reports 17
7.2 Cases 18
7.3 Legislation/ Regulations/ Parliamentary Debates 18
7.4 Other 18

1 Introduction

Advance care planning (ACP) is a critical component of Australia's response to the Coronavirus Disease 2019 (COVID-19) that can ensure that the preferences of seriously ill people, who lose the capacity to make decisions, are known and respected. With known low rates of ACP and advance care directives (ACDs),[1] and in the context of social distancing as part of the necessary control measure for COVID-19, mandatory in-person witnessing formalities create a significant obstacle and fewer people have been able to engage successfully in ACP. Legislative reform to enable uptake during this crisis is paramount. This report focuses on the witnessing formalities relating to advance care planning legislation in Australia. It examines recent legislative reform designed to support audio-visual witnessing or electronic signature of personal legal documentation, an important response to the COVID-19 pandemic. Our findings suggest that the current amendments in most jurisdictions are inadequate to promote advance care planning uptake amongst the community during COVID-19 and beyond.

2 Background

In early 2020, Australia reported its first cases of COVID-19, a novel coronavirus that had begun to impact countries worldwide. In March 2020, a global pandemic was declared by the World Health Organisation.[2] Recognising the pandemic potential of COVID-19, the Australia Government developed the *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)*.[3] This document was informed by the *Australian Health Management Plan for Pandemic Influenza*[4] published by the Australian Government in mid-2019, to address the potential impact and risks associated with pandemic influenza.[5] Importantly, both management plans highlight that advance [care] planning directives should be encouraged by aged care providers and for residents as part of the early action response to a pandemic.[6]

The COVID-19 virus produces a range of severe and sometimes fatal effects in a significant proportion of those infected.[7] Many people hospitalised with COVID-19 lose the capacity to participate in ACP due to COVID-19 related delirium[8] or the necessity for intubation and sedation in an Intensive Care Unit

[1] Kimberly Buck et al, *Prevalence of Advance Care Planning Documentation in Australian Health and Residential Aged Care Services Report*, (Advance Care Planning Australia, Austin Health, 2019) 4 ('*Prevalence of Advance Care Planning Documentation in Australian Health and Residential Aged Care Services Report').*
[2] World Health Organisation, *Timeline of WHO's Response to COVID-19* (30 June 2020) <https://www.who.int/news-room/detail/29-06-2020-covidtimeline>.
[3] Commonwealth of Australia- Department of Health, *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)* (2020) ('*Australian Health Sector Response Plan for Novel Coronavirus (COVID-19)'*). Note the term advance planning directive is incorrect, from herein the correct term of advance care directive will be used.
[4] Australian Government Department of Health, *Australian Health Management Plan for Pandemic Influenza* (Management Plan, 2019).
[5] Ibid 3.
[6] Ibid 75; *Australian Health Sector Response Plan for Novel Coronavirus (COVID-19),* above n 3, 38.
[7] Yufang Shi et al, 'COVID-19 infection: The Perspectives on Immune Responses' (2020) 27 *Cell Death Differ* 1451–1454.
[8] Katarzyna Kotfis et al, 'COVID-19: ICU Delirium Management during SARS-CoV-2 Pandemic' (2020) 24 *Critical Care* 1-9.

(ICU).[9] Health professionals and any substitute decision-makers seeking to ensure that the preferences and values of a patient are respected, need to be aware of what the person would want should they become unable to make or communicate their decisions.

ACP is a means by which people can plan for their future health and personal care. The individual considers their values, beliefs and preferences, and creates and communicates a record of their deliberations. This will be subsequently used to guide decision-making in the future, in the event that the individual becomes unable to make their own decisions.[10] The activities and processes a person engages in when planning for future health care are wide-ranging. They may include discussions with family, carers, and health care professionals, and perhaps the creation of a legally binding ACD.[11]

Recognising that situations may arise whereby a person becomes unable to make their own healthcare-related decisions, jurisdictional legislation enables individuals to establish an ACD. An ACD is a document that outlines the person's values, preferences and/or appoints a substitute decision-maker for future care and medical treatment decisions. It may include directions for future consent, refusal and/or withdrawal of treatment. An ACD cannot insist on a treatment that is not available or clinically indicated. An ACD does not become active and enacted by the treating healthcare team unless and until the person loses decision-making capacity.

The development of an ACD is associated with several noted benefits including reduced stress, anxiety and depression for families.[12] Furthermore, ACDs increase the likelihood that a person receives care that aligns with their preferences.[13] However, rates of completion of ACDs by Australians remain low at only 25% for people aged 65 years and above (6% in general practice; 11% in hospitals; 38% in residential aged care facilities).[14] Consequently, some people who lose capacity do not receive the care that they would have chosen themselves and it may mean they receive unwanted life-prolonging treatment if they become unwell or if their health deteriorates. Of note, 64% of ACDs for community-dwelling older Australians and 65% of ACDs for residential aged care facility residents request no life-prolonging treatment.[15]

---

[9] Dusan Hanidziar and Edward A .Bittner, 'Sedation of Mechanically Ventilated COVID-19 Patients: Challenges and Special Considerations' (2020) 131(1) *Anesthesia & Analgesia* e40-e41.

[10] '*Prevalence of Advance Care Planning Documentation in Australian Health and Residential Aged Care Services Report',* above n 1, 8-9, 25.

[11] Advance Care Planning Australia, 'What is Advance Care Planning?' (2018) < https://www.advancecareplanning.org.au/individuals/what-is-advance-care-planning>; D. Aw et al , 'Advance Care Planning and the Older Patient' (2012) 105(3) *QJM: An International Journal of Medicine* 225, 225 ('*Advance Care Planning and the Older Patient'*).

[12] *'Advance Care Planning and the Older Patient'*, ibid 226*;* Joanna Mitropoulous et al, 'Decision-making for Older Patients by Australian and New Zealand Doctors with Advance Care Directives: A Vignette-based Study' (2019) 19(9) *Internal Medical Journal* 1146, 1146; Karen M Detering et al, 'The Impact of Advance Care Planning on End of Life Care in Elderly Patients: Randomised Controlled Trial' (2010) 340 *British Medical Journal*, 1.

[13] Karen Detering et al, 'Prevalence and Correlates of Advance Care Directives Among Older Australians Accessing Health and Residential Aged Care Services: Multicentre Audit Study' (2019) 9(1) *BMJ Open* 1, 1.

[14] '*Prevalence of Advance Care Planning Documentation in Australian Health and Residential Aged Care Services Report',* above n 1, 8-9, 25.

[15] Ibid 36.

The uptake of ACDs and identification of the person's substitute decision-maker, may play an important and valuable role in responding to the COVID-19 pandemic crisis.[16] In recognition of the vital role of ACDs, national policy reinforces ACP as part of the important initial response to the COVID-19 pandemic crisis.[17] However, being inhibited by the social distancing requirements associated with the COVID-19 pandemic has resulted in many challenges to the documentation of an ACD as part of the response plan. The greatest challenges are posed by the witnessing formalities of advance care directive and substitute decision-maker legislation prescribed by each jurisdiction. These witnessing challenges have also been recognised for other personal legal documents including those related to financial documents, powers of attornies and wills.

In response to the COVID-19 pandemic, several jurisdictions have acknowledged the challenges posed by social distancing mandates, by amending legislation to enable witnessing through audio-visual means or electronic signature. It is important to understand to what extent these changes apply to the different witnessing requirements for the creation of ACDs for preferences of care and the creation of a substitute decision-maker.

2.1 The legal status of Advance Care Directives in Australia

An ACD is a written advance care planning document. An ACD enables an individual to outline their values, preferences for care, acceptable health outcomes and/or appoint a substitute decision-maker to make decisions on their behalf at a future time, if they lose the capacity to make their own decisions.[18] As there is no Commonwealth legislation governing the development of a legally valid ACD in Australia, ACDs, depending on the jurisdiction, are governed by either the common law or specific legislation. ACDs in Australia in each jurisdiction are governed by its own statute, except New South Wales and Tasmania where the common law applies.[19] An ACD may also be known as an Advance Health Directive, Advance Personal Plan or Health Direction depending on the jurisdiction.

Despite the different legislation, all jurisdictions using statutes to govern ACDs require an ACD to satisfy three consistent legislative elements. First, the ACD must be made by an adult with capacity.[20] Second, the ACD must be signed and dated. Third, specific witnessing requirements must be met, as set out by the statute.

[16] Craig Sinclair et al, 'Advance Care Planning in Australia During the COVID-19 Outbreak: Now More Important Than Ever' (2020) *50*(8) *Internal Medicine Journal* 918-923.
[17] '*Australian Health Sector Response Plan for Novel Coronavirus (COVID-19)'*, above n 3, 38.
[18] '*Prevalence of Advance Care Planning Documentation in Australian Health and Residential Aged Care Services Report',* above n 1, 4.
[19]Casey Haining ,Linda Nolte and Karen Detering '*Australian Advance Care Planning Laws: Can we Improve Consistency?'* (Advance Care Planning Australia, Austin Health, 2019) 14.
[20] With the exception of the *Medical Treatment Planning and Decisions Act 2016* (Vic) ('*MTPD Act'*) which permits ACDS to be created by children and adults, see s 13.

2.2 Overview of the elements

2.2.1 Element one: An adult with capacity

For an ACD to be considered legally valid, the ACD must apply to an adult who, at the time the ACD was developed, had decision-making capacity.[21] Given the significant and potentially irreversible consequences of a decision related to medical treatment, the person must be able to understand the impact of the decisions that they outline within their ACD.

2.2.2 Element two: Signature

An ACD must be signed and dated by the person to whom it applies. As circumstances can occur where a competent person can express their values and preferences of care but are physically unable to sign the ACD, most statutes allow for a person, with the authority of the person to whom the ACD applies, to sign on behalf of the person to whom the directive applies.[22]

2.2.3 Element three: Witnessing

In addition to the document being created, signed and dated by a competent individual, an ACD must also be witnessed by at least one other person.[23] A person who is authorised to witness an ACD differs between jurisdictions. Although the requirement of having a person witness an ACD may be considered a barrier to establishing a valid ACD, witnessing is important as to ensure that the individual to whom the directive applies was competent, understood the nature of their decision given the significance of the decisions contained within an ACD, and acted freely and voluntarily in signing the document.

3 Witnessing an ACD

In jurisdictions where ACDs are governed by legislation, a legally valid ACD must be witnessed by an approved individual. Although witnessing a document may be considered a barrier to establishing a valid ACD, witnessing serves two significant purposes. First, the witnessing of a document acts to minimise fraud. Second, having a document witnessed helps ensure the integrity of the document being signed.[24] Given the significance of statements and directions contained within an ACD, witnessing is an important safeguard. Witnessing exists to ensure the individual to whom the directive applies was competent at the time the document was created, that they understood the nature of the decisions contained in the directive, and that they acted freely and voluntarily in signing the document.

Although each Australian jurisdiction where ACDs are governed by legislation prescribes different requirements that must be satisfied with regards to witnessing, common to each of these statutes is

[21] *Medical Treatment (Health Directions) Act 2006* (ACT) s 7 (*'MTHD Act'*); *Advance Personal Planning Act 2013* (NT) s 8(1) (*'APP Act'*); *Power of Attorney Act 1998* (Qld) s 35 & 42 (*'PoA Act'*) ; *Advance Care Directives Act 2013* (SA) s 11 (*'ACD Act'*); *MTPD Act*, s 13; *Guardianship and Administration Act 1990* (WA) s 110P (*'GA Act'*).
[22] *MTHD Act* s 8; *APP Act* s 10(1)(b); *PoA Act* ss 30 & 44(3)(a)(ii); *GA Act 1990* s 110Q(1)(c); *MTPD Act* s 16(2).
[23] *MTHD Act* s 8(b); *APP Act* s 10(2); *PoA Act* s 44(3)(b); *ACD Act* s 15; *MTPD Act* s 17; *GA Act* s 110Q(1)(d).
[24] Christine Smyth, 'What's New in Succession Law: COVID Conundrums: Consideration Needed on the Question of 'Presence'' (2020) 40(4) *Proctor* 44, 44.

the requirement for a document to be signed in the presence of the witness.[25] Although not specific to ACDs, the case of *Legal Services Commissioner v Bentle*y, established that the phrase 'in the presence of' means that the parties must meet physically.[26] Nonetheless, it was recognised that there is scope for this phrase to be interpreted in future cases where questions arise regarding the use of technology and communications with regards to witnessing documents.[27]

3.1 Witnessing via audio-visual means: A response to the COVID-19 pandemic

3.1.1 The COVID-19 pandemic

In response to the uncertainties of the unprecedented situation produced by the COVID-19 pandemic, Australians have been subjected to a series of physical distancing measures that aim to reduce contact with others in the hope of reducing the spread of COVID-19.[28] Although social distancing measures are an effective method of reducing the spread of the virus, the constraints on face-to-face contact has made it difficult for legal documents such as ACDs to be appropriately witnessed. Nonetheless, individuals must have the opportunity to establish a legally valid ACD that reflects their values and preferences for health and medical care, especially during a global health crisis.

3.1.2 Overcoming witnessing requirements during COVID-19: Audio-visual witnessing

As a result of the COVID-19 pandemic restrictions, several Australian jurisdictions have introduced legislation enabling legal document witnessing through audio-visual methods, primarily through its supporting regulations.[29] Although each jurisdiction's definition of 'audio-visual' varies, in the most general sense, audio-visual can be defined as the use of technologies that enable communication between two or more people who are not in the same physical location (see Table 1).

Table 1. Legislative definitions of audio-visual

Jurisdiction	Legislative Instrument	Section	Definition
ACT	*COVID-19 Emergency Response Act*	4(5)	'Audio-visual link means a system of 2-way communication linking different places so that a person at any of them can be seen and heard at other places'
NSW	*Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020*	1	'Audio-visual link means technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video conferencing.'
QLD	*Justice Legislation (COVID-19 Emergency*	Sch 1	'Audio-visual link means facilities that enables reasonably contemporaneous and continuous

[25] *MTHD Act* s 8(c); *APP Act* s 10(2); *PoA Act* ss 44(4)(a) & (5)(a); *MTPD Act* s 17(1)(b); *GA Act* s 110Q(1)(c); *Advance Care Directives Regulations 2014* (SA) s 7(1)(b).
[26] Smyth, above n 24, 44; *Legal Services Commissioner v Bentley* [2016] QCAT 185.
[27] *Legal Services Commissioner* [2016] QCAT 185 [38].
[28] Department of Health, *Physical Distancing for Coronavirus (COVID-19)* (26 June 2020) < https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/physical-distancing-for-coronavirus-covid-19>.
[29] *COVID-19 Emergency Response Act 2020* (ACT), *COVID-19 Emergency Response Act 2020* (SA); *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic); *COVID-19 Omnibus (Emergency Measures)(Electronic Signing and Witnessing) Regulations 2020* (Vic); *COVID-19 Emergency Response Act 2020* (Qld); *Justice Legislation (COVID-19 Emergency Response- Wills and Enduring Documents) Regulation 2020* (Qld).

Jurisdiction	Legislative Instrument	Section	Definition
	Response- Wills and Enduring Documents) Regulation 2020[30]		communication between persons at different places and includes video conferencing.'
SA	*Evidence Act 1929*	591A	'A system of two-way communication linking different places so that a person speaking at any one of the two places can be seen and heard at the other.'
TAS	*Evidence (Audio and Audio Visual Links) Act 1999*	1	'Audio visual link means facilities (including closed-circuit television) that enable audio visual communication persons at different places)'
VIC	*Evidence (Miscellaneous Provisions) Act 1958*	42C	'Facilities (including closed-circuit television) that enable audio and visual communication between persons at different places'

Despite the potential benefits of nation-wide changes to legislation addressing the challenges related to *in-person witnessing* during the COVID-19 pandemic, at the time of writing only six jurisdictions (ACT, NSW, QLD, SA, TAS and VIC) have responded by amending legislation to allow for the audio-visual witnessing of specific types of legal documents during COVID-19. It should be noted, however, that the COVID-19 Response and Economic Recovery Omnibus Bill 2020 (WA) was introduced into the Western Australian Government on 11 August 2020, but the bill is yet to be passed at the time of writing.[31] Of relevance to advance care planning legislation, audio-visual witnessing or electronic transactions are allowed in ACT and QLD for ACDs[32] and substitute decision-maker appointment,[33] and in NSW for the appointment of a substitute decision-maker[34](see Table 2).

Interestingly, ACDs were mentioned in the second reading speech in South Australia, yet the *COVID-19 Emergency Response Act 2020 (SA)* did not extend to include ACDs.[35] The Victorian legislative reform did not extend to the *Medical Treatment Planning and Decisions Act 2016 (Vic)*. Similarly the reform in Tasmania did not extend to substitute decision-making. The lack of inclusion of audio-visual witnessing for ACDs in jurisdictions that have amended legislation likely reflects low awareness of ACP and ACDs in general.

[30] For noting: The *Justice Legislation (COVID-19 Emergency Response- Documents and Oaths) Regulation 2020* (Qld) amended the *Power of Attorney Act 1998* (Qld) so that nurse practitioners can now sign the requisite certificate needed for a valid advance health directive to indicate that the person appeared to have capacity at the time making the advance health directive, but can no longer witness the person's advance health directive if they sign off on capacity. See s 11 of the *Justice Legislation (COVID-19 Emergency Response- Documents and Oaths) Regulation 2020* and ss 44(6)-(7) of the *Power of Attorney Act 1998* (Qld).

[31] 'COVID-19 Response and Economic Recovery Omnibus Bill 2020' (Web Page, 18 August 2020) < <https://www.parliament.wa.gov.au/Parliament/Bills.nsf/BillProgressPopup?openForm&ParentUNID=69AB30C543FEBC84482585C10009B971>

[32] Referred to as Health Direction in ACT and Advance Health Directives in Qld.

[33] Referred to as an Enduring Power of Attorney.

[34] Referred to as an Enduring Guardian.

[35] South Australia, *Parliamnetary Debates,* House of Assembly , 7 April 2020, 653 (Vickie Chapman).

Table 2. Documents where remote witnessing is authorised

Jurisdiction	Legislation	Documents where remote witnessing is authorised	Are ACDs included?
ACT	*COVID-19 Emergency Response Act 2020*	• An affidavit • Will • Health Directive • Enduring Power of Attorney[36]	**Yes,** for a 12 month period during which no COVID-19 declaration has been in force.[37] Appointment of a substitute decision-maker are also included.
NSW	*Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020*	The following documents listed under section 1: • Will • Power of attorney or enduring power of attorney • Deed or agreement • Enduring guardianship appointment • Affidavit, including annexure or exhibit to the affidavit Statutory declaration	ACDs are governed by the common law principles established in *Hunter and New England Area Health Service v A.*[38] Audio-visual witnessing is permitted for the appointment of a substitute decision-maker.
QLD	*Justice Regulation (COVID-19 Emergency Response- Wills and Enduring Documents) Regulation 2020*	• Wills (as per *Succession Act 1981 (QLD).*[39] • Enduring document (as per *Powers of Attorney Act 1998 (QLD.)*[40]	**Yes**, only until 31 December 2020 Substitute decision-makers can also be appointed by an audio-visual link.[41]
SA	*COVID-19 Emergency Response Act 2020*	List of Acts provided not inclusive of Powers of Attorney and Agency Act or Advance Care Directive Act. Transactions that require two or more persons to meet physically in order to complete a transaction can occur through audio-visual, audio or other means of communication as prescribed by the regulations.[42]	**No** Where a person is required to 'be physically present to witness the witnessing, execution, certification or stamping of the document or to take any oath, affirmation or declaration in relation to a document' the document cannot be witnessed remotely.[43] An ACD must be witnessed in person.[44]

[36] *COVID-19 Emergency Responses Act 2020* (Act), ss 4(2)(a), 4(5) 'relevant document'.
[37] Ibid s 5(1).
[38] *Hunter and New England Area Health Service v A* [2009] NSWSC 761 ('*Hunter*')
[39] *Justice Regulation (COVID-19 Emergency Response- Wills and Enduring Documents) Regulation 2020* (Qld) s 6.
[40] Ibid s 9.
[41] Ibid.
[42] *COVID-19 Emergency Response Act 2020* (SA) s 17.
[43] *COVID-19 Emergency Response Act 2020 Regulations (Section 17)* (SA) s 4.
[44] *Advance Care Directives Regulations 2014* (SA) s 7(1)(b).

Jurisdiction	Legislation	Documents where remote witnessing is authorised	Are ACDs included?
VIC	*COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*	Documents under the following statutes:[45] • *Oaths and Affirmations Act 2018 (VIC)* – Oaths and affirmations – Affidavits – Statutory Declarations • *Powers of Attorney Act 2014 (VIC)* – Non-enduring powers of attorney – Enduring powers of attorney • *Wills Act 1997 (VIC)* – Wills	**No** ACDs and appointment of a Medical Treatment Decision Maker are regulated by the *Medical Treatment Planning and Decisions Act 2016* (*Vic*).[46]
TAS	*COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*[47]	Any Acts specified in Schedule 1 including: • *Children, Young Persons and Their Families Act* • *Community Protection (Offender Reporting) Act 2005* • *Domestic Violence Order (National Recognition) Act 2016* • *Family Violence Act 2004* • *Justices Act 1959* • *Sentencing Act 1997* • *Youth Justice Act 1997* • *Bail Act 1994* • *Justice (Restraint Orders) Rules 2013* • *Justices Rules 2003*	**No.** ACDs are governed by the common law principles established in *Hunter and New England Area Health Service v A.* [48] Substitute decision-makers are not listed in Schedule 1.

While not all Australian states and territories have been equally impacted by the COVID-19 pandemic or social distancing rules, many of the challenges now faced by metropolitan residents have been problematic in rural and remote areas for years. For remote and rural Australians, who may have difficulty having their legal documents witnessed *in person* by an appropriate witnesses, the introduction of legislation allowing audio-visual witnessing for legal documents highlights an important legislative change that could permanently increase the ability of individuals to produce legally-valid ACDs in rural and remote Australia.

[45] *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic) s 1.
[46] *MTPD Act*, pt 2.
[47] *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) s 17(1); Tasmania, *Gazette: Covid-19 Disease Emergency,* No 21 998, 17 June 2020, 1.
[48] *Hunter* (n 38).

4 The possibility of audio-visual witnessing post-COVID-19

The introduction of legislation, although limited, allowing documents to be witnessed through electronic means demonstrates some progress within the legal domain. The law must adapt to new technologies to promote efficiency, and in the particular instance of the COVID-19 pandemic, which is still ongoing, work to protect a person's health while adhering to COVID-19 social distancing requirements. The legislative changes allowing audio-visual witnessing in response to the COVID-19 pandemic demonstrates that the law can be responsive to the needs of society, and that the justice system is open to the use of technology to meet these needs. However, the absence of legislation relating to ACDs in these amendments for most jurisdictions highlights a lack of recognition by legislators of the importance of ensuring legally valid advance care planning activities, such as ACDs, can continue during a pandemic.

Unfortunately, so far there has been a general lack of legislative response and reform to support ACP uptake as per the *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)*.

4.1 Existing use of technologies

4.1.1 Within the legal profession

Historically, many legal transactions were completed in person. However, the use of technologies to complete legal transactions is well established and the remote signing of documents through technologies is occurring more frequently.[49] The adoption of the COVID-19 legislation in some jurisdictions enabling the use of audio-visual technologies to satisfy the witnessing requirements of legal documents highlights that it is possible to entrench such technologies into the legal sphere.

4.1.2 Within health care

Technological advancements have allowed healthcare services to be delivered remotely via 'telehealth'. Telehealth involves the use of telecommunication technologies to deliver health services and transmit health information over both long and short distances.[50] Although using these technologies in health care is not new, there has been a rapid increase in telehealth appointments since the beginning of the COVID-19 pandemic, with 1.1 million telehealth consultations occurring through phone or video conference in March 2020 alone.[51]

Using audio-visual technology in health care settings has several noted benefits. For example, during the COVID-19 pandemic, the Australian Government's Department of Health has recognised that telehealth conferences assist in protecting health care professionals, their staff, and patients from

[49] Bruce Whittaker, 'Remote signings under Australian law' (2016) 44(4) *Australian Business Law Review* 229, 229.
[50] Department of Health, 'Telehealth' (7 April 2015) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/e-health-telehealth>.
[51] Thomas S. Nesbitt and Jana Katz-Bell, 'Chapter 1: History of Telehealth' in Karen Schulder, Rheuban and Elizabeth A. Krupinski (eds), *Understanding Telehealth* (McGraw-Hill Education, 2018); *Faculty* of Medicine, *New Data Show Surge in Telehealth Consults Amidst COVID-19 {andemic* (5 June 2020) The University of Queensland < https://medicine.uq.edu.au/article/2020/06/new-data-shows-surge-telehealth-consults-amidst-covid-19-pandemic>.

unnecessary risk of infection.[52] Outside of the COVID-19 pandemic, telehealth consultations have benefitted rural Australians by reducing expenses and inconveniences related to accessing health services and improving service delivery for rural patients, while simultaneously benefiting health professionals, hospitals and society more broadly.[53]

Telehealth services can be beneficial in providing individuals with access to the health care they might not have otherwise been able to access. However, there are barriers associated with the provision of telehealth services, such as the cost of implementing a telehealth service, and concerns that the relationship between a patient and health care professional may be weakened or that communication issues may arise.[54]

4.2 The potential for audio-visual witnessing of ACDs

NSW, ACT and QLD have made temporary legislative changes to permit audio-visual witnessing. In ACT and QLD, audio-visual witnessing is permitted for ACDs and the appointment of substitute-decision makers.[55] However, in NSW audio-visual witnessing is explicitly permitted only for the appointment of a substitute decision-maker, [56] given that NSW ACDs are governed by common law. Nonetheless, it evident that technologies are being incorporated into both the legal and healthcare industries more generally to promote efficiency. As a legal document pertaining to healthcare, there is potential for ACDs to be witnessed through audio-visual means given the current use of audio-visual technologies within the legal and healthcare industries.

4.2.1 Witnessing requirements

Given the significance of decisions that may be recorded within an ACD, it is vital that current requirements relating to witnessing remain, regardless of whether the document is witnessed audio-visual means or in person. Current legislative requirements for producing valid ACDs include the number of witnesses who must witness the document and the acceptable occupations for a legally recognised witness.[57]

When introducing the *COVID-19 Emergency Response Bill 2020* in QLD, it was acknowledged that amendments to legislation allowing for remote witnessing of documents such as ACDs 'may increase the potential for identity theft and fraud or undue influence and unconscionable dealing in the absence of personal witnessing requirements.'.[58] Given an overarching goal of advance care planning is to promote personal autonomy, it is imperative that opportunities for fraud, unconscionable dealing and undue influence are minimised. Consequently, it is vital to ensure the current witnessing

[52] Department of Health, *Providing Health Care Remotely During COVID-19* (22 May 2020) < https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-advice-for-the-health-and-aged-care-sector/providing-health-care-remotely-during-covid-19>.
[53] Jennifer J. Moffat and Diann S. Eley, 'The Reported Benefits of Telehealth for Rural Australians' (2010) 34 *Australian Health Review* 276, 277-279.
[54] Casey W. Neville, 'Telehealth: A Balanced Look at Incorporating this Technology into Practice' (2018) 4 *SAGE Open Nursing* 4.
[55] *COVID-19 Emergency Response Act 2020* (ACT) s 4(5); *Justice Regulation (COVID-19 Emergency Reponse- Wills and Enduring Documents) Regulation 2020 (Qld)* s 9.
[56] *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (NSW)* s 1
[57] *MTHD Act,* ss 8(b)-(c); *APP Act*, ss 10(2), 10(5); *PoA Act*, ss 31(1), 44(3)(b); *ACD Act,* ss 11(2)(b), 15(1)(a), 15(2); *Advance Care Directives Regulations 2014* (SA) s 7(3); *MTPD Act,* s 17(1)(a)-(d); *GA Act,* ss 110Q(1)(d), 110Q(3).
[58] Explanatory Memorandum, COVID-19 Emergency Response Bill 2020 (Qld), 13.

formalities and certifications apply to both in-person and audio-visual witnessing. These safeguards will help ensure a person creating their ACD was competent and acting voluntarily at the time of signing while promoting the authenticity and reliability of the document.

4.2.2 Accessing technologies

Witnessing documents remotely through audio-visual means requires access to technologies such as telecommunications, the internet, computers, and other similar technologies. Access to these technologies may be dependent on the individual's socioeconomic status, with suggestions that disadvantaged groups and rural and remote populations are disproportionately impacted.[59] For example, the Australian Bureau of Statistics found that although 88% of households in major cities were likely to have internet access at home, only 77% of households in rural and remote areas were likely to have internet access at home.[60] Furthermore, Indigenous households were 75% less likely than non-Indigenous households to have an internet connection.[61]

Although access to technologies across Australia is disproportionate, where access exists, the use of technologies can connect communities. In particular, technology provides those in rural and remote areas with access to services they might not have otherwise been able to access.[62] Consequently, allowing audio-visual witnessing for ACDs may promote the uptake of these documents in communities that may have otherwise faced barriers related to witnessing requirements. Similarly, by ensuring the in-person witnessing of ACDs remain permitted, those who are unable to access adequate technologies will remain able to complete an ACD. These changes would help make the advance care planning process as accessible as possible for all demographics.

[59] Ibid.
[60] Australian Bureau of Statistics, *Household Use of Information Technology, Australia 2016-17* (2018) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8146.0Main+Features12016-17?OpenDocument>.
[61] Australian Government, *Australia's Tech Future- Delivering a strong, safe and inclusive digital economy* < https://www.industry.gov.au/sites/default/files/2018-12/australias-tech-future.pdf>.
[62] Jennifer J, Moffatt and Diann S, Eley, 'The Reported Benefits of Telehealth for Rural Australians' (2010) 34(3) *Australian Health Review* 276, 277.

5 Conclusion

Ensuring the preferences and values of a person are recognised and respected in health care settings, even when the individual is no longer able to communicate these preferences, is a vital aspect of person-centred care. Given the increased risk of a person experiencing a loss of capacity through delirium or medical treatment if hospitalised for COVID-19, it is especially important that these preferences are documented in an ACD. In line with this, the Australian Government has identified ACDs as an important initial action in Australia's public health response in their influenza and COVID-19 pandemic health sector management plans.

For many Australian jurisdictions, legislative amendments enabling audio-visual witnessing of documents throughout the COVID-19 pandemic have not included legislation governing the witnessing requirements of ACDs.[63] This lack of inclusion of ACD legislation in amendments permitting audio-visual witnessing during the pandemic is problematic, given the significant role ACDs have for rights-based healthcare, planning of health services and involving substitute decision-makers in medical treatment decisions.

Despite limitations in current ACD legislation, excepting that in ACT, NSW and QLD, the COVID-19 pandemic has provided an impetus for the introduction of audio-visual witnessing of ACDs in a post-COVID-19 society. Audio-visual technologies are already used within the legal and healthcare domains and should be extended to the witnessing of ACDs. This could facilitate an increased uptake of ACDs for those experiencing the COVID-19 restrictions, as well as those in remote communities and for other isolated individuals. Doing so, however, will require jurisdictional commitment and careful consideration of how to ensure adequate safeguards remain in place to promote both self-autonomy for the person and ensure the authenticity of the information contained in the ACD.

[63] *COVID-19 Emergency Response Act 2020* (SA); *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic).

6 Glossary

Term	Definition
Advance care directive [a]	Advance Care Directive is a catch-all term to refer to the instruments which are recognised in each jurisdiction under advance care directive legislation or common law. This includes Advance Care Directive, Advance Health Directive, Advance Personal Plan and Health Direction. A written advance care planning document completed and signed by a competent adult (i.e. voluntary, person-driven document). In Australia, advance care directives are recognised either by specific legislation (statutory advance care directive) or by common law (non-statutory advance care directive). Advance care directives can record the person's preferences for future care, and/or record the appointment of a substitute decision-maker to make decisions about the person's health care.
Non-statutory Advance Care Directive (Common Law Advance Care Directive) [a]	A structured written advance care planning document that is not a legislated state-based advance care directive. Non-statutory advance care directives should be completed and signed by a competent adult. This includes: ▪ A document completed and signed by a competent person in a jurisdiction which does not have legislation authorising an Advance Care Directive regarding preferences for care (that is, New South Wales and Tasmania). ▪ An instruction or directive completed and signed by a competent person, in a jurisdiction with advance care planning legislation, but where the document does not comply with the requirements set out in this legislation and is recognised instead by common law.
Statutory Advance Care Directive [a]	A structured document that focuses on an individual's values and preferences for future health and medical treatment decisions completed and signed by a competent person, using a statutory form and/or meets formalities within relevant legislation.
Advance care directive legislation [a]	A catch-all term to refer to jurisdictional legislation that promotes advance care planning and advance care directives. Legislation, including, but not limited to advance care directives, advance personal planning, guardianship and administration, and medical treatment decisions.
Advance care planning (ACP) [b]	Advance care planning is a process of planning for future health and personal care whereby the person's values, beliefs and preferences are made known.
Jurisdiction [c]	A state or territory within Australia.
Person [c]	Consumers of services provided by hospitals, residential aged care facilities and general practice. Used interchangeably with consumer, resident, patients and clients.

Term	Definition
Substitute decision-maker [a]	Substitute decision-maker is a person appointed or identified by law to make substitute healthcare decision(s) on behalf of a person whose decision-making is impaired. A substitute decision-maker may be appointed by the person, appointed for (on behalf of) the person, or identified as the default decision-maker within legislation. Substitute decision-makers listed in Advance Care Directives are statutory appointments. Substitute decision-makers listed in Advance Care Plans are not legally binding.

Definition source:

a. National Framework for Advance Care Planning Documents
b. National Palliative Care Strategy https://www.health.gov.au/sites/default/files/national-palliative-care-strategy-2018.pdf
c. Advance Care Planning Australia, Austin Health, Melbourne.

7 References

7.1 Articles/ Books/ Reports

Australian Health Ministers; Advisory Council, *A National Framework for Advance Care Directives*', (Report, September 2011)

Aw, D. et al, 'Advance care planning and the older patient' (2012) 105(3) *QJM: An International Journal of Medicine* 225

Buck, Kimberly et al, '*Prevalence of Advance Care Planning Documentation in Australian Health and Residential Aged Care Services Report*', (Advance Care Planning Australia, Austin Health, 2019)

Commonwealth of Australia, *Australian Health Management Plan for Pandemic Influenza* (2019)

Commonwealth of Australia- Department of Health, *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)* (2020)

Detering, Karen M et al, 'Prevalence and Correlates of Advance Care Directives Among Older Australians Accessing Health and Residential Aged Care Services: Multicentre Audit Study' (2019) 9(1) *BMJ Open*, 1

Detering, Karen M et al, 'The Impact of Advance Care Planning on End of Life Care in Elderly Patients: Randomised Controlled Trial' (2010) 340 *British Medical Journal*, 1

Haining, Casey et al, *Australian Advance Care Planning Laws: Can we Improve Consistency?* (Advance Care Planning Australia, Austin Health, 2019)

Hanidziar, Dusan and Edward A .Bittner, 'Sedation of Mechanically Ventilated COVID-19 Patients: Challenges and Special Considerations' (2020) 131(1) *Anesthesia & Analgesia* e40-e41.

Kotfis, Katarzyna et al, 'COVID-19: ICU Delirium Management During SARS-CoV-2 Pandemic' (2020) 24 *Critical Care* 1-9.

Mitropoulous, Joanna et al, 'Decision-making for Older Patients by Australian and New Zealand Doctors with Advance Care Directives: a Vignette- Based Study' (2019) 19(9) *Internal Medical Journal*, 1146

Moffat, Jennifer J. and Diann S, Eley, 'The Reported Benefits of Telehealth for Rural Australians' (2010) 34 *Australian Health Review* 276

Nesbitt, Thomas S. and Jana Katz-Bell, 'Chapter 1: History of Telehealth' in Karen Schulder, Rheuban and Elizabeth A. Krupinski (eds), *Understanding Telehealth* (McGraw-Hill Education, 2018)

Neville, Casey W, 'Telehealth: A Balanced Look at Incorporating this Technology into Practice' (2018) 4 *SAGE Open Nursing* 1

Shi, Yufang et al. 'COVID-19 Infection: The Perspectives on Immune Responses' (2020) 27 *Cell Death Differ* 1451–1454.

Sinclair, Craig et al 'Advance care planning in Australia during the COVID-19 outbreak: Now more important than ever' (2020) *50*(8) *Internal Medicine Journal* 918-923.

Smyth, Christine, 'What's new in succession law: COVID conundrums: Consideration needed on the question of 'presence' (2020) 40(4) *Proctor* 44

Whittaker, Bruce, 'Remote signings under Australian law' (2016) 44(4) *Australian Business Law Review* 229

7.2 Cases

Hunter and New England Area Health Service v A [2009] 761 NSWSC

Legal Services Commissioner v Bentley [2016] QCAT 185

7.3 Legislation/ Regulations/ Parliamentary Debates

Advance Care Directives Act 2013 (SA)

Advance Care Directives Regulations 2014 (SA)

Advance Personal Planning Act 2013 (NT)

COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 (TAS)

COVID-19 Emergency Responses Act 2020 (ACT)

COVID-19 Emergency Response Act 2020 (SA)

COVID-19 Emergency Response (Section 17) Regulations (SA)

COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (Vic)

Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (NSW)

Evidence Act 1929 (SA)

Evidence (Audio and Audio Visual Links) Act 1999 (Tas)

Evidence (Miscellaneous Provisions) Act 1958 (Vic)

Explanatory Memorandum, COVID-19 Emergency Response Bill 2020 (Qld)

Guardianship and Administration Act 1990 (WA)

Justice Legislation (COVID-19 Emergency Response- Documents and Oaths) Regulation 2020

Justice Regulation (COVID-19 Emergency Response - Wills and Enduring Documents) Regulation 2020 (Qld)

Medical Treatment (Health Directions) Act 2006 (ACT)

Medical Treatment Planning and Decisions Act 2016 (Vic)

Powers of Attorney Act 1998 (Qld)

South Australia, *Parliamnetary Debates,* House of Assembly , 7 April 2020, 653 (Vickie Chapman)

Tasmania, *Gazette: Covid-19 Disease Emergency*, No 21 998, 17 June 2020

7.4 Other

Advance Care Planning Australia, 'What is Advance Care Planning?' (2018) < https://www.advancecareplanning.org.au/individuals/what-is-advance-care-planning>.

Australian Bureau of Statistics, *Household Use of Information Technology, Australia 2016-17* (2018) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8146.0Main+Features12016-17?OpenDocument>.

Australian Government, *Australia's Tech Future- Delivering a Strong, Safe and Inclusive Digital Economy* < https://www.industry.gov.au/sites/default/files/2018-12/australias-tech-future.pdf>.

Department of Health, 'Telehealth' (7 April 2015) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/e-health-telehealth>.

Department of Health, *Physical Distancing for Coronavirus (COVID-19)* (26 June 2020) < https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/physical-distancing-for-coronavirus-covid-19>.

Department of Health, *Providing Health Care Remotely during COVID-19* (22 May 2020) < https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-advice-for-the-health-and-aged-care-sector/providing-health-care-remotely-during-covid-19>.

Faculty of Medicine, *New Data Show Surge in Telehealth Consults Amidst COVID-19 Pandemic* (5 June 2020) The University of Queensland < https://medicine.uq.edu.au/article/2020/06/new-data-shows-surge-telehealth-consults-amidst-covid-19-pandemic>.

World Health Organisation, *Timeline of WHO's Response to COVID-19* (30 June 2020) <https://www.who.int/news-room/detail/29-06-2020-covidtimeline>.

Advance Care Planning Australia

BE OPEN | BE READY | BE HEARD