

End of life law in New South Wales: An overview for aged care

This factsheet explains key laws in **New South Wales** relevant to decision-making with older people about medical treatment.

The information in this factsheet is an overview only. For detailed information about end of life law in New South Wales visit *End of Life Law in Australia* (<https://end-of-life.qut.edu.au/>).

All content in this factsheet is sourced from *End of Life Law in Australia*.



Consent to medical treatment and health care

For medical treatment to be lawful, a person must consent to it. Consent to treatment is valid if:

- **the person has decision-making capacity ('capacity') to consent,**
- **consent is given freely and voluntarily,** and
- **consent relates to the proposed treatment.**

If treatment is given without consent, a health professional or personal care worker may be liable under civil or criminal law.

In some (limited) situations treatment can be given without consent to a person without capacity. These are:

- Where the treatment is **needed urgently to save the person's life** e.g. in an emergency.
- **Non-intrusive examinations for diagnostic purposes** (e.g. a visual examination of mouth, throat, nose, eyes, or ears), **first aid**, or **administering non-prescription medication**.
- It is **minor treatment and there is no person responsible**. The treatment must be necessary to promote the person's health and wellbeing, and the person must not object to it. **Minor treatment is any treatment that is not major treatment** (e.g. any treatment with a substantial risk of death, serious injury, or extreme distress is major treatment).

For further information and legal requirements visit:

- the *End of Life Law in Australia* Capacity and consent to medical treatment webpage. (<https://end-of-life.qut.edu.au/capacity>)
- the ELDAC End of Life Law Toolkit factsheet *Consent for minor or routine treatment in aged care*. (<https://www.eldac.com.au/Portals/12/Documents/Factsheet/Legal/Consent-for-minor-or-routine-treatment-in-aged-care.pdf>)

Decision-making capacity

Every adult is presumed to have capacity to make their own medical treatment and health care decisions.

A person will have capacity if they can:

- **understand the general nature and effect of the proposed treatment**, and
- **indicate whether or not they consent to the treatment being carried out.**

Best practice is to provide a person with support to enable them to make their own decisions and participate in decision-making (supported decision-making). For example, providing information to a person in a way they can understand e.g. by adjusting language or using visual aids or technology.

If a **person does not have decision-making capacity**, consent can be given:

- in a valid **Advance Care Directive**,
- by a **substitute decision-maker**, or
- by the **New South Wales Civil and Administrative Tribunal** (NCAT) or the **Supreme Court of New South Wales**.

For further information visit the *End of Life Law in Australia* Capacity and consent to medical treatment webpage. (<https://end-of-life.qut.edu.au/capacity#statetercap>)

Advance Care Directives

An **Advance Care Directive** is an instruction for health care or medical treatment made when a person has capacity, to apply in the future when they do not have capacity.

An Advance Care Directive may be made in writing or orally. It can include specific instructions about types of treatment, request or refuse treatment (e.g. refusing a blood transfusion or cardiopulmonary resuscitation), or detail a person's end of life preferences (e.g. wanting to die at home, not in hospital).

An Advance Care Directive can only be followed once the person no longer has capacity to decide.

Generally, health professionals must follow a valid and applicable Advance Care Directive, unless the person's circumstances have changed since the Directive was made.

For further information visit the *End of Life Law in Australia* Advance Care Directives New South Wales webpage. (<https://end-of-life.qut.edu.au/advance-care-directives/state-and-territory-laws/new-south-wales>)

Substitute decision-making

If a **person does not have capacity** and there is no Advance Care Directive, or there is a Directive but it does not apply to the treatment situation, a medical treatment decision may be made by a **person responsible**, who will be one of the following (in order of priority):

- a **guardian who has been given power to make medical treatment decisions**. This may be either:
 - a **guardian appointed by the NCAT**, or
 - an **Enduring Guardian appointed by the person under an Enduring Guardian document**.
- the person's **spouse or partner** if the relationship is close and continuing.
- the person's **unpaid carer**.
- a **relative or friend** who has a close personal relationship, frequent personal contact and a personal interest in the person's welfare (they cannot be a paid carer).

If there is no one willing and available to be the person responsible, the NCAT may provide consent for major treatment.

Generally a substitute decision-maker's decision should be followed. There are some limited situations where it may not be followed e.g. if treatment is futile or non-beneficial, or if the person objects to the treatment. These situations are discussed at *End of Life Law in Australia*.

For further information about substitute decision-making visit the *End of Life Law in Australia New South Wales Treatment decisions* webpage. (<https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/new-south-wales>)

Urgent medical treatment

In an emergency, if a **person has capacity** a health professional or personal care worker must obtain the person's consent to treatment.

If a person with capacity refuses treatment and/or transfer to hospital, **their refusal should be respected**. This is the case even if treatment is needed to save their life and they will die without it. It is an **assault to provide treatment when the person has refused it**.

If a **person does not have capacity**, treatment can be provided without consent if it is needed urgently to:

- save the person's life,
- prevent serious damage to health, or
- prevent the person suffering significant pain and distress.

Though not required by the law, it is still good practice for health professionals to obtain a substitute decision-maker's consent to urgent treatment if possible.

Urgent treatment cannot be provided if it has been refused:

- by the person, if they have capacity (this may be done verbally),
- in a valid Advance Care Directive, or
- by a substitute decision-maker.

For further information visit the *End of Life Law in Australia* New South Wales Treatment decisions webpage. (<https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/new-south-wales>)

Legal protection for administering pain and symptom relief

Under the *Aged Care Act 2024* (Cth), older people have a right to equitable access to palliative care when required.

Providing pain and symptom relief is a critical component of palliative care. In some cases, **medication may have the unintended effect of hastening the person's death**. If this occurs, the person who provided the medication **will not be liable for the person's death so long as their intention was to relieve pain or symptoms, and not to hasten death**.

This legal protection is known as the **doctrine of double effect**. It applies when:

- the primary intention is to relieve pain and symptoms, not hasten death,
- the medication is prescribed and administered by or at the direction of a doctor caring for the person, and
- the person is near death.

For further information visit the *End of Life Law in Australia* Legal protection for providing pain and symptom relief webpage. (<https://end-of-life.qut.edu.au/pain-relief>)

Withholding and withdrawing life-sustaining treatment

A person with capacity can refuse medical treatment, including treatment needed to keep the person alive. Health professionals must respect a person's refusal and can withhold (not start) or withdraw (stop) life-sustaining treatment, even if this might result in the person's death.

If a **person does not have capacity and they have an Advance Care Directive** refusing life-sustaining treatment (i.e. withholding or withdrawing treatment), this must be followed.

If a person without capacity does not have an Advance Care Directive, a person responsible can decide. However, their powers (i.e. whether they can consent to or refuse life-sustaining treatment) depend on the type of person responsible:

- An **Enduring Guardian** appointed for **health care decisions** can consent to or refuse life-sustaining treatment. If however they are appointed for **consent to medical treatment**, they only have power to consent to (not refuse) treatment.
- A **guardian** appointed by NCAT can:
 - if a **plenary appointment** (i.e. appointed to make all decisions), consent to or refuse treatment.
 - if **appointed for consent to medical treatment**, consent to (not refuse) treatment.
- Other **persons responsible** (i.e. spouses, unpaid carers, relatives or friends) can consent to (but not refuse or withdraw consent to) treatment.

For further information visit the *End of Life Law in Australia* New South Wales Treatment decisions webpage. (<https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/new-south-wales>)

Futile or non-beneficial treatment

Futile or non-beneficial treatment is **treatment which is of no benefit, cannot achieve its purpose, or is not in the person's best interests**. Health professionals decide whether or not treatment is futile on a case-by-case basis.

Health professionals **may withhold or withdraw treatment that is futile or non-beneficial**. They have no obligation to provide treatment that is not in the person's best interests or is inconsistent with good medical practice.

A person, their family, or substitute decision-maker cannot require or demand that futile or non-beneficial treatment be given. Their consent is not needed to withhold or withdraw it. A request for futile or non-beneficial treatment in an Advance Care Directive need not be followed.

However, it is good medical practice for health professionals to involve a person or their substitute decision-maker in treatment decision-making, including when treatment is considered futile.

For further information about futile or non-beneficial treatment visit the *End of Life Law in Australia New South Wales Treatment decisions* webpage. (<https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/new-south-wales>)

Learn more about end of life law in New South Wales:

For further information visit:

- the ELDAC End of Life Law Toolkit for factsheets, mythbusters and cases studies on each topic above. (<https://www.eldac.com.au/Toolkits/End-of-Life-Law>)
- *End of Life Law in Australia*, a website about the law in each Australian State and Territory. (<https://www.end-of-life.qut.edu.au/>)
- *End of Life Law for Clinicians*, a free online training program for medical practitioners, nurses, and allied and other health professionals about end of life law across Australia. (<https://ellc.edu.au>)