ELDAC
End of Life Directions for Aged Care

End of life law in Victoria: An overview for aged care

This factsheet explains key laws in **Victoria** 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 Victoria 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,**
- **the person consents freely and voluntarily**, and
- **the 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.
- It is **routine treatment and an Advance Care Directive or a medical treatment decision-maker cannot be located**. Examples of routine treatment include standard antibiotics, suturing or dressing a wound, insulin, Ventolin, visual or physical examinations, personal care, and standard x-rays, ultrasounds, and respiratory function tests. If however the treatment may cause the person a significant degree of bodily intrusion, or significant risks, side effects, or distress it is **significant treatment requiring consent**.

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)
- 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 decisions.

A person will have decision-making capacity if they can:

- **understand the information relevant to the decision and its effect,**
- **retain and use or weigh that information to make the decision**, and
- **communicate the decision, and the person's views and needs about the decision.**

A person will also have decision-making capacity if they can make a decision with appropriate support (supported decision-making). For example, a support person may help the person to understand options, work out their views and preferences about treatment, and communicate the decision.

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

- in a valid **Instructional Directive in an Advance Care Directive** (an Instructional Directive),
- by a **medical treatment decision-maker**,
- by the **Public Advocate** (if it is significant treatment), or
- by the **Supreme Court of Victoria**.

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. There are two types of Advance Care Directives in Victoria: **common law Advance Care Directives** (made in writing or orally), and **statutory Advance Care Directives** (which must be made in writing). This section relates to statutory Advance Care Directives only.

A statutory Advance Care Directive can contain either or both an Instructional Directive or a Values Directive, and must be in writing.

An **Instructional Directive** is binding i.e. it must be followed. It can include specific instructions about types of treatment, or request or refuse treatment (e.g. refusing a blood transfusion or cardiopulmonary resuscitation).

A **Values Directive** is not binding but should be followed if possible. It states the person's preferences and values about treatment and care, including palliative care, to guide medical treatment decision-making for the person. Health professionals must consider a person's Values Directive before offering and administering medical treatment.

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

For further information visit the *End of Life Law in Australia* Victoria Advance Care Directives webpage. (https://end-of-life.qut.edu.au/advance-care-directives/state-and-territory-laws/victoria)

Medical treatment decision-making

Substitute decision-making

If a **person does not have capacity** and has no Instructional Directive (or there is an Instructional Directive but it does not apply to the treatment situation), the decision can be made by one of the following **medical treatment decision-makers** (in order of priority):

- **someone appointed by the person**, either as their:
  - **medical treatment decision-maker**, or
  - **decision-maker** under a Medical Enduring Power of Attorney, an Enduring Power of Attorney, or an Enduring Power of Guardianship, with power to make decisions before 12 March 2018.
- a **guardian appointed by the Victorian Civil and Administrative Tribunal** (VCAT) to make medical treatment decisions.
- the person's:
  - **spouse** or **domestic partner**
  - **primary carer**, provided they are unpaid and not doing voluntary work for a community organisation or as part of a training course
  - **oldest adult child**
  - **oldest parent**
  - **oldest adult sibling**.

If there is **no Instructional Directive and no medical treatment decision-maker available**, then:

- **consent for significant treatment** (i.e. treatment involving a significant degree of bodily intrusion, risk, side effects, or distress) must be sought from the Public Advocate.
- **routine treatment** (i.e. treatment that is not significant treatment) may be provided without consent. This must be noted in the person's records.

Medical treatment decision-makers must make the decision they believe the person would have made if they had capacity, taking into account the person's Values Directive. When a person's values and preferences are not known or cannot be inferred, and the medical treatment decision-maker refuses significant treatment, the person's health practitioner must advise the Public Advocate who will review the decision.

Generally a medical treatment 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 (see *Futile or non-beneficial treatment* below).

Supported decision-making

In Victoria a medical **support person** or **supportive guardian** may be appointed to assist a person to make decisions and participate in medical treatment decision-making. They do **not** make decisions for the person, but support the person to make and communicate their own decisions.

A medical **support person** is appointed by a person with decision-making capacity. Their role is to:

- **support the person** to make, communicate, and give effect to the person's medical treatment decisions, and
- **represent the person's interests** in relation to medical treatment, including when the person does not have capacity to decide.

A **supportive guardian is appointed by VCAT** to support a person to make or give effect to the person's decisions, including medical treatment decisions.

For further information visit the *End of Life Law in Australia* Victoria Treatment decisions webpage. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/victoria)

Supported decision-making for aged care

For older people in aged care, decision-making about aged care services (e.g. accommodation, funding, aged care assessments) can occur with support from a person known as a supporter. This a different type of supporter to those discussed above. The role of a supporter in aged care **does not include supporting medical treatment decision-making**.

For more information about supporters in aged care, and differences to supported decision-making for medical treatment, read this End of Life Law for Clinicians factsheet (forthcoming).

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 medical treatment 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 Instructional Directive, or
- by a medical treatment decision-maker.

For further information visit the *End of Life Law in Australia* Victoria Treatment decisions webpage. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/victoria)

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.

A health professional may give palliative care (including pain and symptom relief) to any person who does not have capacity, even if the person's medical treatment decision-maker refuses it, but they must consider the person's values or preferences.

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 without capacity has an Instructional Directive** refusing life-sustaining treatment (i.e. withholding or withdrawing treatment) this must be followed.

If a **person without capacity does not have an Instructional Directive**, a medical treatment decision-maker can consent to withholding or withdrawing life-sustaining treatment. The person's stated preferences in a Values Directive must be considered by the medical treatment decision-maker when deciding.

For further information visit the *End of Life Law in Australia* Victoria Treatment decisions webpage. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/victoria)

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 medical treatment decision-maker in treatment decision-making, including when treatment is considered futile.

For further information visit the *End of Life Law in Australia* Victoria Treatment decisions webpage. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/victoria)

Learn more about end of life law in Victoria:

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)
- Office of the Public Advocate Victoria resources on Advance Care Directives, substitute decision-making, and consent to medical treatment. (https://www.publicadvocate.vic.gov.au/medical-treatment)