

End of life law in the Australian Capital Territory: An overview for aged care

This factsheet explains key laws in the **Australian Capital Territory** 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 the Australian Capital Territory 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

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
- **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.

If a person does not have capacity, treatment can be given without consent if it is **needed urgently to save the person's life** e.g. in an emergency. However, it is good medical practice to first obtain a substitute decision-makers consent, if possible.

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>)

Decision-making capacity

Every adult is presumed to have capacity to make their own medical treatment decisions. **Whether a person has decision-making capacity depends on the circumstances:**

- if the person has an **Enduring Power of Attorney**, the attorney can only make treatment decisions if the person cannot decide and does not understand the nature and effect of the decision.
- if the person has a **guardian or health attorney**, they can only make decisions if the person has impaired decision-making ability. This means the person's decision-making ability is impaired because of a physical, mental, psychological or intellectual condition or state, whether a diagnosable illness or not.

Guardians and health attorneys must provide support for the person with impaired decision-making ability to understand the decision to be made, participate in decision-making, and communicate their wishes (supported decision-making). For example, providing information to the person in a way they can understand e.g. by adjusting language, or using visual aids or technology. If the person can decide with support, they will have decision-making ability.

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

- in a valid **Health Direction**,
- by a **substitute decision-maker**, or
- by the **Supreme Court of the Australian Capital Territory**.

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>)

Health Directions

An **Advance Care Directive** is an instruction about health care made when a person has capacity. There are two types of Advance Care Directives in the Australian Capital Territory:

- a **common law Advance Care Directive** (made in writing or verbally). It applies only once a person no longer has capacity.
- a statutory Advance Care Directive, called a **Health Direction** (made verbally, in writing, or another way). In a Health Direction, a person can refuse medical treatment or require that treatment be withdrawn.

It can apply both when the person has capacity or when they no longer have capacity.

Generally, health professionals must follow a valid and applicable Health Direction. However, **if the person still has capacity**, a Health Direction can only be followed if the health professional believes the person has understood information provided about the treatment, weighed the options, and confirmed their decision to refuse or withdraw the medical treatment.

For further information visit the *End of Life Law in Australia* Australian Capital Territory Advance Care Directives webpage. (<https://end-of-life.qut.edu.au/advance-care-directives/state-and-territory-laws/australian-capital-territory>)

Substitute decision-making

If a **person does not have capacity** and there is no Health Direction (or it does not apply to the treatment situation), a medical treatment decision may be made by one of the following **substitute decision-makers** (there is no order of priority):

- an **attorney appointed by the person under an Enduring Power of Attorney**.
- a **guardian** appointed by the ACT Civil and Administrative Tribunal (ACAT).
- if there is no attorney or guardian, a **health attorney**. This will be the first adult from the following list who the health professional believes is best able to represent the views of the person (in priority order):
 - the person's **domestic partner (e.g. spouse, civil partner)** if they have a close and continuing relationship with the person,
 - an **unpaid carer**, or
 - a **close relative or friend**, in a close relationship with the person, who has frequent contact and interest in the person's welfare.

If there is no suitable health attorney, ACAT may appoint the Public Trustee and Guardian as guardian.

Generally a health attorney'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).

For further information visit the *End of Life Law in Australia* Australian Capital Territory Treatment decisions webpage. (<https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/australian-capital-territory>)

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 for treatment, **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 given without anyone's consent if it is needed urgently to:

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

While not required by law, it is still good practice to obtain a substitute decision-maker's consent if possible.

Urgent treatment **cannot be provided if it has been lawfully refused**:

- by the person if they have capacity (this may be done verbally),
- in a valid and available **Health Direction**, or
- by a substitute decision-maker.

For further information visit the *End of Life Law in Australia* Australian Capital Territory Treatment decisions webpage. (<https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/australian-capital-territory>)

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** and will apply when:

- the primary intention is to relieve pain and symptoms, not hasten death;
- the medication is prescribed and administered by or under 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 decision-making ability 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 decision-making ability or capacity**, a **health professional must follow a refusal of life-sustaining treatment or request for withdrawal of treatment made by:**

- the **person in their Health Direction**,
- a **guardian with power (granted by ACAT) to withhold or withdraw life-sustaining treatment**, and
- **the person's attorney under an Enduring Power of Attorney**. An attorney can only ask for treatment to be withheld or withdrawn if they have consulted a doctor about the nature of the person's illness, alternative treatments available, and the consequences of the person remaining untreated. The attorney must also reasonably believe it is the decision the person would have made themselves if they had capacity.

For further information visit the *End of Life Law in Australia* Australian Capital Territory Treatment decisions webpage. (<https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/australian-capital-territory>)

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 need not be followed.

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

For further information visit the *End of Life Law in Australia* Australian Capital Territory Treatment decisions webpage. (<https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/australian-capital-territory>)

Learn more about end of life law in the Australian Capital Territory

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 to assist the community to navigate end of life law, and to access information 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://ellic.edu.au>)