

Consent for minor or routine treatment in aged care

Obtaining consent for medical treatment is a fundamental requirement of the law and good clinical practice. However, sometimes treatment or health care that is minor or routine in nature - e.g. suturing a wound - may be able to be provided without consent.

This factsheet explores the law on consent for minor or routine treatment or health care.

Before you begin

The law on consent to medical treatment and decision-making capacity is explored in the End of Life Law Toolkit's factsheet *Overview: Capacity and Consent to Medical Treatment*. (<https://www.eldac.com.au/Toolkits/End-of-Life-Law/Capacity-and-Consent-to-Medical-Treatment/Overview>) It is suggested you read that factsheet as a starting point.

Consent to medical treatment or health care

Consent should be obtained *before* a person receives medical treatment or undergoes a medical examination e.g. a physical examination involving touching.

Not obtaining consent can result in a health professional being liable under civil or criminal law, or subject to disciplinary action.

A person with decision-making capacity can consent to their own medical treatment or health care. If they do not have capacity, consent can be given in an Advance Care Directive or by a substitute decision-maker.

The law on Advance Care Directives and substitute decision-making is discussed in the **End of Life Law Toolkit's *Advance Care Directives*** (<https://www.eldac.com.au/Toolkits/End-of-Life-Law/Advance-Care-Directives>) and ***Substitute Decision-Making*** factsheets. (<https://www.eldac.com.au/Toolkits/End-of-Life-Law/Substitute-Decision-Making>)

There are limited situations where consent is not required. For example, treatment or health care that is urgently needed to save a person's life or prevent serious injury can be given if the person does not have capacity, does not have a valid Advance Care Directive, and it is not possible to obtain consent from their substitute decision-maker.

Learn more about the law on urgent treatment in the End of Life Law Toolkit's factsheet ***Urgent Medical Treatment***. (<https://www.eldac.com.au/Toolkits/End-of-Life-Law/Urgent-Medical-Treatment/Factsheet>)

Another situation where consent may not be required is where the treatment is 'minor' or 'routine'.

Minor or routine treatment and the rules on consent

Victoria, New South Wales, Queensland, and Tasmania

In **Victoria, New South Wales, Queensland, and Tasmania**, guardianship and medical treatment legislation allows medical treatment or health care that is minor or routine to be given without consent to a person without capacity **in some limited situations**.

The laws in **New South Wales, Queensland, and Tasmania** also allow first aid, administration of non-prescription medication, and visual examinations to be given or undertaken without consent.

The table below provides *possible examples* of minor or routine treatment or health care relevant to aged care, and when consent is not required.

Other types of treatment or health care not listed here may also be considered minor or routine.

Though the law does not require consent in these situations, it is still good clinical practice to obtain consent (and make a record of this) if possible before providing treatment.

If a person without capacity refuses consent or objects in some other way (e.g. physically or verbally) to minor or routine treatment, consent will be required from a substitute decision-maker. This area of law is complex and legal advice should be sought.

Table: Minor or routine treatment laws: Victoria, New South Wales, Queensland, and Tasmania

State	Types of treatment and terminology	Rule	Explanations and possible examples of minor or routine treatment or health care relevant to aged care	Useful resources
Victoria	Routine treatment	<p>May be given without consent to a person without capacity if an Advance Care Directive or a medical treatment decision-maker cannot be located.</p> <p>If treatment or health care is routine, health professionals must record their decision in the person's clinical records.</p>	<ul style="list-style-type: none"> • Standard antibiotics • Suturing or dressing a wound • Needles – subcutaneous/ intramuscular/intravenous (cannula) • Personal care, such as hygiene care • Insulin • Ventolin • Analgesic – paracetamol, aspirin • Rehabilitative exercises, including physiotherapy, occupational therapy and speech pathology • Visual examination • Physical examination (touching) • Teeth cleaning and imaging • Standard x-rays, ultrasounds and respiratory function tests <p>Important note If the treatment may cause the person a significant degree of bodily intrusion, or significant risk, side effects, or distress it is <i>significant treatment requiring consent</i>.</p>	<p>The <i>Significant treatment clinical guidelines for Medical Treatment Planning and Decisions Act 2016</i> (https://www.health.vic.gov.au/publications/significant-treatment-clinical-guidelines-for-the-medical-treatment-planning-and) can help health professionals decide if medical treatment for a person without capacity is routine treatment.</p>

State	Types of treatment and terminology	Rule	Explanations and possible examples of minor or routine treatment or health care relevant to aged care	Useful resources
Queensland	Minor or uncontroversial health care	<p>May be given without consent to a person without capacity if it is:</p> <ul style="list-style-type: none"> • necessary and of the type that will best promote the person's health and wellbeing, • the person does not object (including in an Advance Health Directive), and • the health practitioner is not aware of any previous decisions or disputes about the treatment. <p>It must be noted in the person's clinical records that these requirements have been met.</p>	<p>Has to be 'minor and uncontroversial'.</p> <p>Examples:</p> <ul style="list-style-type: none"> • Providing an antibiotic that has been acquired by prescription • Giving a tetanus or hepatitis injection • Taking blood pressure • Giving asthma medication • A flu vaccination • Giving eye drops • Checking teeth 	<p>The <i>Queensland Office of the Public Guardian</i>. (https://www.publicguardian.qld.gov.au/health-decisions/making-health-care-decisions-for-others) has information about minor and uncontroversial health care.</p>
	Visual examinations, first aid, non-prescription medication	<p>No consent required for a person without capacity.</p>	<ul style="list-style-type: none"> • Non-intrusive examinations (for diagnostic purposes) e.g. a visual examination of the mouth, throat, nasal cavity, eyes or ears • First aid • Administration of <i>non-prescription</i> medication within recommended dosages, normally self-administered (e.g. paracetamol) 	

State	Types of treatment and terminology	Rule	Explanations and possible examples of minor or routine treatment or health care relevant to aged care	Useful resources
New South Wales	Minor treatment	<p>Can be given without consent to a person without capacity if:</p> <ul style="list-style-type: none"> • there is no person responsible or they cannot, will not or are unable to consent, • the treatment is necessary and of the type to promote the person's health and wellbeing, and • the person does not object (and has not previously objected) to the treatment. <p>It must be certified in the person's clinical records that the treatment was necessary and to promote the person's health and wellbeing, and that the person does not object to the treatment.</p>	<p>Minor treatment is anything that is <i>not major or special treatment</i>. It is treatment that does <i>not</i> involve, e.g.:</p> <ul style="list-style-type: none"> • Drugs of addiction • General anaesthetic or sedation (except to manage broken or dislocated limbs or for a diagnostic endoscopy) • 'restricted substance' (except for specified therapeutic purposes) • Substantial risk of: <ul style="list-style-type: none"> - death - brain damage - paralysis - permanent loss of function of any organ or limb - permanent and disfiguring scarring - extreme pain or distress to the person - removal of a substantial number of teeth. 	<p>NCAT Guardianship Division factsheets:</p> <ul style="list-style-type: none"> • Consent to medical or dental treatment. (https://ncat.nsw.gov.au/documents/factsheets/gd_factsheet_consent_to_medical_or_dental_treatment.pdf) • Person responsible (see pg. 2). (https://ncat.nsw.gov.au/documents/factsheets/gd_factsheet_person_responsible.pdf)
	Visual examinations, first aid, non-prescription medication	<p>No consent required for a person without capacity.</p>	<ul style="list-style-type: none"> • Non-intrusive examinations (for diagnostic purposes) e.g. a visual examination of the mouth, throat, nasal cavity, eyes or ears • First aid • Administration of <i>non-prescription</i> medication within recommended dosages, which is normally self-administered (e.g. paracetamol). 	

State	Types of treatment and terminology	Rule	Explanations and possible examples of minor or routine treatment or health care relevant to aged care	Useful resources
Tasmania	Medical or dental treatment without consent	<p>May be given without consent to a person without capacity if:</p> <ul style="list-style-type: none"> • there is no person responsible, • the treatment is necessary and will promote the person's health and wellbeing, and • the person does not object to having the treatment. <p>It must be certified in the person's clinical records that:</p> <ul style="list-style-type: none"> • the treatment was necessary and to promote the person's health and wellbeing, and • reasonable inquiries and steps have been taken to find out if the person has an Advance Care Directive and to locate it. 	<p>Any treatment <i>not</i> involving:</p> <ul style="list-style-type: none"> • drugs of addiction (except for cancer or palliative care for the terminally ill) • a restricted substance to control the person's conduct (i.e. chemical restraint) • removal of a substantial number of teeth • substantial risk of: <ul style="list-style-type: none"> - death - brain damage - paralysis - permanent loss of function of any organ or limb - permanent and disfiguring scarring - extreme pain or distress to the person. 	<p>The Tasmanian Legal Handbook, Hobart Community Legal Service Inc, has a section on <i>When consent is not required</i>. (https://www.hobartlegal.org.au/handbook/medical-treatment-and-medical-products/medical-treatment/consent/)</p> <p>TASCAT factsheets:</p> <ul style="list-style-type: none"> • <i>Consent to Medical or Dental treatment</i>. (https://www.tascat.tas.gov.au/__data/assets/pdf_file/0006/684123/4.-Consent-to-Medical-or-Dental-Treatment.pdf) • <i>Consent to Medical treatment by a Person Responsible</i>. (https://www.tascat.tas.gov.au/__data/assets/pdf_file/0005/684122/3.-Consent-to-Medical-or-Dental-Treatment-by-a-Person-Responsible.pdf)
	Visual examinations, first aid, non-prescription medication	No consent required for a person without capacity.	<ul style="list-style-type: none"> • Non-intrusive examinations (for diagnostic purposes) e.g. a visual examination of the mouth, throat, nasal cavity, eyes or ears • First aid • Administration of <i>non-prescription</i> medication within recommended dosages, which is normally self-administered (e.g. paracetamol). 	

Western Australia, South Australia, the Australian Capital Territory, and the Northern Territory

In **Western Australia, South Australia, the Australian Capital Territory, and the Northern Territory** consent is required from the person (or, if they do not have capacity, their substitute decision-maker) for all types of treatment or health care, even if it is minor or routine in nature.

However, if the treatment is needed urgently e.g. in an emergency, it can be given without consent if the person does not have capacity and it is not possible to obtain consent from their substitute decision-maker.

Practice tip

If you are uncertain about whether consent to treatment is required, discuss this with your facility manager. The Office of the Public Advocate or Public Guardian in your State or Territory may also be able to provide information. If you are a GP, you can seek advice from your medical insurer or medical defence organisation.

This case study provides an example of how the laws on consent for minor or routine treatment or health care apply in aged care.

Consent for examining and treating Myra

Myra has advanced dementia and resides in a residential aged care facility (RACF). A month ago she was assessed by a geriatrician as not having capacity for medical treatment decision-making. Her cognition has deteriorated since that time, and her capacity remains impaired.

Anna, a care worker, discovers Myra has a wound on her arm that looks red, swollen, and infected. Arrangements are made for Myra's GP, Chris, to visit. Chris prescribes antibiotics for Myra and asks Rahul, an enrolled nurse, to clean and dress the wound.

Whether consent must be sought to examine Myra, administer oral antibiotics, and clean and dress her wound depends on the State or Territory Myra resides in.

1. Consent for GP's medical examination

In **Queensland, New South Wales, and Tasmania**, consent for Chris to visually examine Myra is not required.

In **Victoria**, consent must be sought from Myra's medical treatment decision-maker. If the medical treatment decision-maker cannot be located, then the examination can proceed without consent.

In **Western Australia, South Australia, the Australian Capital Territory, and the Northern Territory**, consent from Myra's substitute decision-maker is required.

2. Administering oral antibiotics

In **Queensland**, the antibiotics can be administered to Myra without consent.

In **New South Wales and Tasmania**, Myra's substitute decision-maker (e.g. a person responsible) must be contacted for consent. If there is no person responsible, or (in New South Wales) a person responsible cannot, will not or is unable to consent, the antibiotics can be administered without consent, so long as Myra does not object.

In **Victoria**, consent must be sought from Myra's medical treatment decision-maker. If the medical treatment decision-maker cannot be located, then the antibiotics can be given without consent.

In **Western Australia, South Australia, the Australian Capital Territory, and the Northern Territory**, consent must be obtained from Myra's substitute decision-maker.

3. Cleaning and dressing the wound

In **all States and Territories**, the answer to whether consent is needed for Rahul to clean and dress Myra's wound is the same as for number 2 above (consent for administering oral antibiotics).

Key points to remember

1. In most situations consent must be obtained before medical treatment or health care can be lawfully provided to a person. Treating without consent could lead to civil or criminal liability, except in some limited circumstances.
2. Some States have legislation about consent to minor or routine treatment or health care. These laws enable minor or routine treatment or health care to be given without consent to a person who does not have decision-making capacity in limited situations.

For more information about the law on consent to medical treatment visit:

- ELDAC End of Life Law Toolkit factsheets:
 - *Consent to medical treatment: A guide for aged care providers.* (https://www.eldac.com.au/Portals/12/Documents/Factsheet/Legal/Consent-to-medical-treatment_A-guide-for-aged-care-providers.pdf)
 - *Overview: Capacity and Consent to Medical Treatment.* (<https://www.eldac.com.au/Toolkits/End-of-Life-Law/Capacity-and-Consent-to-Medical-Treatment/Overview>)
- End of Life Law in Australia (for State and Territory laws about consent). (<https://end-of-life.qut.edu.au/capacity#statetercap>)
- End of Life Law for Clinicians online Module 2: Capacity and consent to medical treatment. (<https://ellc.edu.au>)