

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

This factsheet explains key laws in **South Australia** 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 South Australia 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**
- **the consent relates to the proposed treatment.**

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

Treatment can be given without consent to a person without capacity if it is **needed urgently to save the person's life** e.g. in an emergency, and it is not possible to obtain consent from a substitute decision-maker.

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. A person's capacity is assessed in relation to the particular decision – a person may have capacity to make some decisions, but not others.

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

- **understand information relevant to the treatment decision,**
- **retain the information,**
- **use the information to make the decision, or**
- **communicate their decision in any way.**

Best practice is to provide a person with available supports to enable them to make their own decisions and participate in decision-making (supported decision-making). For example, a support person may give assistance to help the person understand options, work out their views and preferences about treatment, and communicate the decision.

A person may have an Advance Care Directive that refuses particular treatment, or provides guidance about preferred treatment, to apply if they have impaired capacity to make a particular decision.

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

- a **substitute decision-maker**,
- a **person responsible**, or
- the **South Australian Civil and Administrative Tribunal (SACAT)** or the **Supreme Court of South Australia**.

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 about health care 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 South Australia:

- a **common law Advance Care Directive**, made in writing or verbally, and
- a **statutory Advance Care Directive**. It must be made in writing, in a prescribed form. It can also appoint a substitute decision-maker to make future decisions. This section relates to statutory Advance Care Directives only.

A **statutory Advance Care Directive can contain binding and non-binding sections:**

- Refusals of specific treatment, including life-sustaining treatment (e.g. CPR) are **binding and must be followed by health professionals**.
- All other directions are **non-binding but should be followed by health professionals if possible**.

If the person has capacity to make the decision, their Advance Care Directive does not apply in that instance, and consent is not required from the person's substitute decision-maker.

There are some limited situations where binding directions do not have to be followed e.g. if the direction does not reflect the person's current wishes. Other situations are discussed at *End of Life Law in Australia*.

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

Substitute decision-making

If a person has impaired decision-making capacity for a particular decision and has made an Advance Care Directive appointing a substitute decision-maker, the substitute decision-maker can decide.

If there is no Advance Care Directive, the decision can be made by a **person responsible**. This will be the first person in the following list who is **available and willing to make the decision** (in order of priority):

- an existing **guardian** appointed by the SACAT with power to consent to medical treatment
- a **relative of the person** with a close and continuing relationship (there is no order of priority for which relatives can decide). This includes:
 - the person's husband or wife, or
 - the person's adult domestic partner (where they have been in a close personal relationship with the person for 3 years, or there is a child of the relationship), or
 - **an adult related to the person by blood or marriage, or adoption, or according to Aboriginal or Torres Strait Islander kinship rules.**
- an **adult friend** of the person so long as the relationship is close and continuing
- an **adult who oversees the person's ongoing day-to-day supervision, care and well-being.**

If there is no person responsible, an application can be made to the SACAT for consent or the appointment of a guardian for health decisions.

A substitute decision-maker's decision should be followed unless the treatment is futile or non-beneficial (see Futile or non-beneficial treatment below).

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

Urgent medical treatment

Where the person has capacity

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 must 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**.

Where the person does not have capacity

If the person has a substitute decision-maker under an Advance Care Directive, or a person responsible willing and available to make the decision, urgent treatment cannot be administered without their consent.

If it is not possible to obtain consent from the substitute decision-maker or a person responsible, a medical practitioner can provide treatment without consent if:

- it is needed urgently to meet an imminent risk to life or health, and another medical practitioner who has examined the persons agrees (where practicable),

- the person has not refused the treatment (to the best of the medical practitioner's knowledge), and
- the medical practitioner has made reasonable inquiries about whether the person has an Advance Care Directive.

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 Advance Care Directive, or
- by a substitute decision-maker.

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

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 pain relief is given:

- to a person in the terminal phase of a terminal illness (i.e. the person's illness is at the stage where there is no real prospect of recovery or remission),
- with the intention to relieve pain or distress,
- with the consent of the person or their decision-maker,
- in good faith and without negligence, and
- in accordance with proper professional standards of palliative care.

A substitute decision-maker under an Advance Care Directive cannot refuse pain relieving medication or natural provision of food and liquids by mouth.

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, a health professional must follow a refusal of life-sustaining treatment by:**

- the **person, in their Advance Care Directive**, or
- a **substitute decision-maker**,

and withhold or withdraw that treatment.

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

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 intrusive, burdensome and futile.

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

Learn more about end of life law in South Australia

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/Our-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://elc.edu.au>)
- Office of the Public Advocate South Australia factsheets on Advance Care Directives, substitute decision-making, and consent to medical treatment (<https://www.opa.sa.gov.au/information-service/fact-sheets>)