

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 **support person** or **supportive guardian** may be appointed to support a person to make decisions and participate in medical treatment decision-making. They are **not** decision-makers.

A **support person** is appointed by a person with capacity. Their role is to:

- **support a person with decision-making capacity** 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>)

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://elc.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>)

© March 2025. ELDAC is funded by the Australian Government Department of Health and Aged Care.

Disclaimer: The content in this factsheet is provided for your information only. It is not legal advice and is not a substitute for advice from a qualified lawyer. ELDAC is excluded from all liability for any losses suffered as a result of any reliance on this information.