Overview: Capacity and Consent to Medical Treatment

A person may consent to or refuse medical treatment if they have decision-making capacity. Generally health professionals must obtain consent before medical treatment can be provided to an older person. This factsheet explains the law on decision-making capacity, and consent to medical treatment.

Clarifying the law

This factsheet explains:

- When consent to treatment is required, and when it will be valid
- When a person will have capacity to make decisions about medical treatment
- Whether a person with capacity can make a decision that others disagree with
- Whether a person's capacity can change over time

Consent to medical treatment when a person has capacity

A person with decision-making capacity has the right to decide what is or is not done to their bodies. This means they **can consent to medical treatment, or refuse it**.

The following section provides a brief overview of the law on consent to treatment. For detailed information access the End of Life Law Toolkit factsheet *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)

When is a person's consent to treatment required?

Valid consent should be obtained from a person with capacity **prior to examining them or providing medical treatment**.

A health professional who examines or treats a person without consent could be liable under civil or criminal law (for example, being charged with assault), or be subject to disciplinary action.

Consent is not required from a person when:

- **urgent medical treatment** is needed to save the person's life, prevent serious damage to health, or prevent significant pain and distress, and neither the person nor their substitute decision-maker can provide consent; or
- they have **impaired decision-making capacity** (discussed below). In this situation, consent can be provided in an Advance Care Directive or by a substitute decision-maker. This is discussed further 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)

In Queensland, New South Wales, Victoria, Tasmania, and the Northern Territory, minor or routine treatment may be given without consent to a person without capacity in exceptional circumstances.

Learn more about minor or routine treatment in the 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)

What is valid consent to treatment?

For consent to be valid:

- the person must have **capacity** to consent;
- the person must provide that consent **freely and voluntarily**. This means the decision is made without undue influence, coercion or manipulation; and
- the **consent must apply to the treatment to be given**.

Appropriate advice and decision-making support from the person's family and health professionals will not be undue influence so long as the person is still making the decision they want. However, a person changing their treatment decision when another person is present may alert a health professional to possible undue influence.

Are there formal requirements for consent?

Consent can be given verbally or be implied (for example, if a person offers their arm so that a nurse can take blood). Sometimes, (for example, before a major procedure), **it may be appropriate to obtain written consent**.

A health professional should also provide information about treatment risks and consequences, and any other information a person needs to provide consent. This is part of a health professional's duty of care to the person they care for, as well as good practice. Not doing this could result in civil liability for not warning about an adverse outcome.

Learn more about consent in the End of Life Law Toolkit factsheet *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)

Decision-making capacity

When does a person have capacity?

All adults are presumed to have capacity to consent to or refuse treatment, unless it can be shown that they do not.

A person will have capacity for a medical treatment decision if they can:

- **comprehend and retain the information** needed to make the decision, including the consequences of the decision; and
- **use and weigh that information** as part of their decision-making process.

Information about treatment can include the proposed treatment and alternatives, and the consequences and risks of different treatment options.

Guardianship and medical treatment legislation in each State and Territory sets out similar capacity tests, but some have additional requirements e.g. the person must also be able to communicate the decision in some way.

Learn about the requirements for a person to have decision-making capacity in your State or Territory at *End of Life Law in Australia*. (https://end-of-life.qut.edu.au/capacity#statetercap)

Supported decision-making

It may be possible in some situations for a person, such as an adult with cognitive impairment, to have capacity to make their own decisions with assistance and participate in decision-making. This is known as **supported decision-making**.

In Victoria, Queensland, the Australian Capital Territory, Tasmania, and the Northern Territory, a **person will have decision-making capacity for medical treatment decisions if they can make a decision with appropriate support**.

Support for decision-making can include a health professional adjusting their language to communicate about treatment in a way the person understands; using visual aids; or giving the person more time e.g. during a consultation to process and discuss the information with others.

Learn more about supported decision-making at *End of Life Law in Australia*:

- Victoria. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/victoria#supported)
- Queensland. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/queensland#qldsupported)
- Australian Capital Territory. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/australian-capital-territory#supported)
- Northern Territory. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/northern-territory#ntsupported)
- Tasmania. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/tasmania#tassupported)

Who decides whether or not someone can make their own decisions?

Generally **capacity is assessed by a person's doctor or a medical practitioner with expertise in capacity assessment** e.g. a psychologist, but in some cases, such as if there is doubt about a person's capacity, a court or tribunal might be asked to decide this.

What if a person makes a decision that others disagree with?

A person with capacity **can make a decision that others disagree with**, and that decision must be respected. A person does not lack capacity just because they make a decision someone disagrees with, or that a health professional considers is not in the person's interests.

For example, **a person with capacity can refuse life-sustaining medical treatment, even if it is recommended by a doctor.** Or, they can refuse to be transferred to hospital, even if a health professional or family member thinks they should go.

This is because capacity relates to the person's ***ability* to make a decision, not what decision they make**. However, an unwise or unusual decision may be a prompt for health professionals to check a person's capacity, for example, by referring the person to a medical practitioner with expertise in capacity assessment.

Learn about refusals of treatment in the End of Life Law Toolkit factsheet *Withholding and Withdrawing Life-Sustaining Treatment.* (https://www.eldac.com.au/Toolkits/End-of-Life-Law/Withholding-and-Withdrawing-Life-Sustaining-Medical-Treatment) Refusal of hospital transfer is discussed in the *Urgent Medical Treatment* factsheet. (https://www.eldac.com.au/Toolkits/End-of-Life-Law/Urgent-Medical-Treatment)

Can a person have capacity for some decisions but not others?

Some medical treatment decisions are more complex than others. A **person may have capacity to make a simple decision about medical treatment but not a more complex one**.

For serious decisions, such as refusing medication which may be necessary to keep a person alive, the process of understanding, retaining and weighing the information (and risks involved) will be more complex than for more minor decisions, such as consenting to a blood test.

Can a person's capacity change over time?

A person's **capacity to make a decision can also change over time**. For example, a person in aged care may have *fluctuating capacity* because of delirium, some forms of dementia or mental illness.

Capacity will be judged at the time a treatment decision is required. A person may be able to make a decision at one time of day, but not at another time on the same day.

It is important to remember that a person does not lack capacity just because they have a medical condition, mental illness or intellectual disability. They can make their own treatment decisions so long as they meet the test for decision-making capacity.

'Capacity is decision specific so even if you have been diagnosed with dementia, you may still have capacity to make all or at least some of your own decisions, especially if you have been diagnosed with early dementia.

Decision-making capacity may fluctuate over time and depend on the context such as the time of day, location, noise, stress or anxiety levels, medication, or infection'.

Dementia and your legal rights, Alzheimer's Australia, 2016

Key points to remember

1. A person with capacity must give valid consent before medical treatment can be lawfully provided to them. Treating without consent could lead to civil or criminal liability, except in some limited circumstances.
2. Consent to treatment is valid only when the person has capacity, gives consent freely and voluntarily, and the consent relates to the proposed treatment.
3. An adult is presumed to have capacity to consent to medical treatment, unless it can be proved that they do not.
4. A person will have capacity for a medical treatment decision if they are able to comprehend and retain the information needed to make the decision, and can use and weigh that information when deciding.
5. An adult with capacity can make decisions that others disagree with, including to refuse life-sustaining treatment, or not to be transferred to hospital.
6. A person's capacity should be assessed at the time a treatment decision is needed. A person may have capacity for some decisions but not others, and their capacity to make a decision can change over time.

Mythbusters: Capacity and Consent to Medical Treatment

Myth 1: An adult who makes an unusual decision about medical treatment (for example, refusing to go to hospital even though they are having a heart attack and know they might die) lacks decision-making capacity.

No. *An adult is presumed to have capacity to make decisions. An adult with capacity is legally entitled to make decisions that others disagree with. However, a decision that a health professional regards as an unwise or unusual decision may be a prompt for clinicians to check the person's capacity.*

Myth 2: A man with pneumonia and early-stage dementia refuses antibiotics and may die if he does not take them. He cannot decide to refuse this treatment because his dementia means he lacks capacity to consent.

No. *A diagnosis of dementia does not of itself mean that a person lacks capacity (although it may prompt an assessment of capacity). If the person has capacity despite their dementia, they are able to lawfully refuse life-sustaining treatment at that time (even if it will result in death).*

Myth 3: A person must prove that they have decision-making capacity, otherwise they cannot make medical treatment decisions.

No. *The law 'presumes' that a person has capacity unless there is reason to believe they do not. If a family member advises that an aged care resident does not have capacity, the residential aged care facility should take steps to be satisfied of this. This could be done, for example, through a capacity assessment conducted by a medical practitioner with expertise in assessing capacity.*

A person is able to make their own treatment decisions and provide valid consent so long as they meet the legal test for decision-making capacity in their State or Territory. Access the legal test for capacity in your State and Territory at ***End of Life Law in Australia.*** (https://end-of-life.qut.edu.au/capacity#statetercap)