

Managing disputes about medical treatment decision-making

End of life decision-making can be challenging for everyone involved in a person's care, and sometimes disagreements can arise. This factsheet explores what legal and other avenues are available to manage conflict that arises in aged care about medical treatment decision-making. It focuses on managing disputes between health professionals (or aged care workers) and a person (or their families). It does not address disputes between health professionals or aged care workers.

Clarifying the law

This factsheet discusses:

- How disputes can be resolved within aged care
- If a dispute cannot be resolved, what legal avenues are available
- The role of guardianship bodies, tribunals and courts in medical treatment disputes

Medical treatment disputes in aged care

As a person nears the end of their life, disagreements sometimes occur about their medical treatment. In aged care, these disputes generally arise when there is **disagreement between an aged care worker (or health professional) and a person (or, if the person lacks capacity, their family or substitute decision-maker) about a treatment decision.**

Examples include:

- An aged care worker believes a resident's family or substitute decision-maker is making treatment decisions contrary to the resident's preferences or best interests.
- Conflict with residents or families about types and doses of medication.
- Disputes about hospital transfers, or when medical treatment should be provided.
- Disputes about provision of palliative medication or care.
- Demands from families for treatment to be provided, even if it would be futile or non-beneficial for the person.
- Disputes between family members about who is the person's substitute decision-maker. Learn more about who may be a person's substitute decision-maker by reading the ELDAC factsheet on *Substitute decision-making*. (<https://www.eldac.com.au/tabid/4982/Default.aspx>)

Managing disputes in aged care

Communication about treatment

Communication with the person and their family about future treatment and care, including the person's values and preferences, is essential.

Early, proactive communication can avoid future conflict, and ensure the person's preferences and needs are met.

This can occur by residents, families, aged care workers and health professionals meeting early, preferably when the person enters aged care, to discuss Advance Care Planning.

For practical tips on how to undertake Advance Care Planning with a person visit *Advance Care Planning Australia*.

(<https://www.advancecareplanning.org.au/>)

The person can also choose to record their **treatment decisions and preferences in an Advance Care Directive**. Learn more by reading the *ELDAC Advance Care Directives factsheet*. (<https://www.eldac.com.au/tabid/4968/Default.aspx>)

It is important for aged care workers and health professionals **to involve the person, and their family (provided the person consents) or, if the person lacks capacity, their family or substitute decision-maker in all discussions about the person's care and treatment**. This is particularly important for conversations about withholding and withdrawing life-sustaining treatment or futile treatment. This can achieve consensus about treatment, and allows any problems to be addressed as early as possible.

Wherever end of life conflicts occur, they need to be managed in a timely manner which focuses on the ... best outcome for the patient. Delays and protracted discussions with family may defer decision-making for the patient and prolong the patient's discomfort, distress or pain in the dying phase of their illness.

Executive Summary, *NSW Health Conflict Resolution in End of Life Settings Final Working Group Report*, 2010. (<https://www.health.nsw.gov.au/patients/acp/Publications/conflict-resolution.pdf>)

Preventing disputes

Disputes can also be avoided by aged care organisations and workers:

- **Providing information to residents and their families about palliative care and end of life decision-making**, and the role and obligations of substitute decision-makers.
- **Providing education for staff on recognising a person's deterioration** so appropriate and timely palliative and end of life care can be provided, and families or substitute decision-makers advised.
- **Obtaining the person's medication orders, prescriptions and instructions from the person's GP early** to enable timely access to and administration of end of life care and treatment.
- **Respecting the person's treatment decision**. Remember that it is lawful for a person with capacity to refuse to go to hospital or to receive life-sustaining treatment even if it will result in death.
- **Knowing what the law says about providing treatment** by reading the following ELDAC Legal Toolkit factsheets:
 - Capacity and consent to treatment
 - Advance Care Directives
 - Substitute decision-making
 - Withholding and withdrawing life-sustaining medical treatment
 - Medication for pain and symptom relief for people with a life-limiting illness
 - Futile or non-beneficial treatment
 - Emergency treatment.

What to do if a dispute arises

When a dispute arises, **early resolution can prevent it from escalating. In most situations it is rare for the legal system to become involved**. Most conflict can be managed within the aged care setting by **applying your aged care organisation's complaints or disputes management policies and procedures**.

It is important to **know what those policies or procedures say** so that you can take appropriate action if a dispute arises. This includes knowing who is responsible at each point of the process, relevant timeframes for reporting and addressing complaints, and what documentation must be completed.

Most organisations will require an **aged care worker to advise their Manager as soon as possible about the dispute**. In most cases a Manager will determine the appropriate course of action, based on the nature of the dispute. This action may include:

- Meeting with the aged care worker to obtain information about the dispute;
- Asking an aged care worker to complete a complaint, incident or feedback form outlining the issues; and/or
- Arranging an informal meeting or case conference with the resident or their family to discuss the issues. A formal conference may be arranged for more serious disputes.

Every situation is different, so the action taken will depend on the circumstances, the severity of the issue, and the nature of the medical treatment or care.

When a dispute cannot be resolved, a Manager may advise their Senior Manager or CEO, or seek advice from a lawyer or their State or Territory's guardianship body (i.e. the Public Advocate or Public Guardian).

Practice tip

If you are a GP involved in a dispute, you can also seek advice from your medical insurer or medical defence organisation.

Aged Care Complaints Commissioner

In some cases where there is a dispute a complaint may be made to the **Aged Care Complaints Commissioner**. (<https://www.agedcarequality.gov.au/making-complaint/complaints-process>).

The Complaints Commissioner is responsible for dealing with complaints about Australian Government funded aged care services. The Complaints Commissioner provides a free service for anyone to raise concerns about the quality of care or services delivered. All complaints are taken seriously and they can be made openly, confidentially or anonymously.

Disputes and the legal system

If a dispute cannot be resolved within the aged care system, the legal system may become involved, including guardianship bodies, or courts and tribunals.

What is the role of guardianship bodies?

Guardianship bodies (such as the Public Advocate or Public Guardian) are independent statutory bodies in each State and Territory. They have powers relating to end of life decision-making for people who lack capacity, and dispute resolution. Aged care workers or health professionals may contact guardianship bodies when:

- a dispute about treatment for a person who lacks capacity cannot be resolved internally;
- they disagree with a decision of a substitute decision-maker;
- there is no substitute decision-maker appointed or available; or
- there is a disagreement about who is the appropriate substitute decision-maker, or a conflict between joint substitute decision-makers.

The powers of guardianship bodies in the States and Territories vary, but they may be able to provide advice about dispute resolution options; mediate disputes; apply to a court or tribunal to be appointed as guardian (if no one else is available or appropriate); or make a treatment decision (in limited circumstances only).

Guardianship laws and the powers of guardianship bodies differ across Australia. Learn more about the law in your State or Territory at *End of Life Law in Australia* (<https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws>), or visit the guardianship bodies' websites using the links on the *ELDAC Legal Toolkit Managing disputes resources page* (<https://www.eldac.com.au/tabid/5285/Default.aspx>).

What can be done if a dispute remains unresolved?

If a treatment dispute remains unresolved, a health professional, aged care worker, the person, their family or substitute decision-maker may apply to a State or Territory tribunal or the Supreme Court for an order.

There is no legal requirement to refer an unresolved dispute to a tribunal or court. However, it is good practice to seek legal advice about this when appropriate (e.g. from an aged care facility's lawyer), and also to tell family or substitute decision-makers about this option.

How do tribunals and courts address medical treatment disputes?

State and Territory tribunals

Tribunals in each State and Territory have powers to decide medical treatment disputes involving adults who lack capacity. These tribunals are like courts but are designed to be quicker, cheaper and easier to use.

The powers of tribunals vary, but they may include:

- deciding whether life-sustaining treatment should be withheld or withdrawn;
- consenting or refusing consent to medical treatment;
- appointing or revoking the appointment of substitute decision-makers; or
- deciding whether or not a person has decision-making capacity.

In making decisions, tribunals must consider a range of factors outlined in State or Territory guardianship and medical treatment legislation. This generally includes the person's best interests, and what the person would have wanted for themselves.

The laws about tribunals and their powers differ across Australia. Learn more about the law in your State or Territory at *End of Life Law in Australia* (<https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws>), or visit the tribunals' websites using the links on the *ELDAC Legal Toolkit Managing disputes resources page* (<https://www.eldac.com.au/tabid/5285/Default.aspx>).

The Supreme Court

The Supreme Court in each State and Territory has broad powers to resolve disputes about medical treatment, and to confirm whether or not providing, withholding or withdrawing treatment would be lawful.

Practice tip

Generally cases are brought before the courts by aged care services rather than individual health professionals or aged care workers. Before instigating court proceedings, legal advice should be sought.

When making a decision a Supreme Court must consider the person's best interests. There are no established criteria for determining this, but the courts will consider factors including:

- medical evidence regarding the person's diagnosis, prognosis and treatment options;
- whether the requested treatment is overly burdensome (so that the burdens of treatment outweigh any possible benefits);
- views and wishes of the person about treatment (and, to a lesser extent, views of the person's family); and
- quality of life of the person if they receive treatment (which the courts have considered particularly when the person has significant cognitive impairment).

In most cases, the courts have agreed with medical opinion about whether or not providing life-sustaining treatment was in the person's best interests. However, this is not always the case.

Key points to remember

1. Most disagreements about medical treatment can be resolved through good communication and timely dispute resolution processes within aged care settings.
2. When a dispute cannot be resolved within aged care, advice or assistance may be sought from State and Territory guardianship bodies such as the Public Advocate or Public Guardian.
3. State and Territory tribunals are able to hear disputes about end of life medical treatment. Their powers, the orders they may make, and how they make decisions vary depending on the guardianship and medical treatment legislation of the State or Territory.
4. The State and Territory Supreme Courts also have powers to resolve disputes about medical treatment at the end of life. When making a decision for adults who lack capacity, the Courts' paramount consideration is the person's best interests.

Myth-busters: Managing disputes

Myth: When there is a medical treatment dispute with a resident or their family, a court or tribunal must be involved.

No. *The legal system rarely becomes involved in disputes relating to aged care as most conflict is able to be resolved through communication,*

and following internal dispute and conflict management policies and processes. If a medical treatment dispute cannot be resolved, the aged care organisation or health professional can seek legal advice, or contact their State or Territory guardianship body (i.e. the Public Advocate or Public Guardian) for information and advice.