Futile or non-beneficial treatment

Where medical treatment is considered to be futile, non-beneficial or not in a person's best interests, a decision may be made to withhold or withdraw it. However people may disagree about what futility means and when treatment is non-beneficial. This can make these decisions complex. This factsheet explains key legal principles about futile or non-beneficial treatment.

Clarifying the law

This factsheet explains:

- What futile or non-beneficial treatment is
- Who decides if treatment is futile or non-beneficial, and how
- When a decision to withhold or withdraw futile or non-beneficial treatment can be made
- Health professionals' legal obligations regarding futile non-beneficial treatment

What is futile or non-beneficial treatment?

People disagree about what futile or non-beneficial treatment means. It is often used to describe treatment which:

- is of no benefit,
- cannot achieve its purpose, or
- is not in the person's best interests.

An example of futile or non-beneficial treatment is providing cardiopulmonary resuscitation to someone who will not respond to it.

Futile or non-beneficial treatment is not formally defined in law.

Examples of futile or non-beneficial treatment

There are different types of futile or non-beneficial treatment. One is **physiological futility, where treatment will not provide any physiological benefit to the person**. An example is where an aged care resident close to death is receiving palliative care, and is so medically compromised that cardiopulmonary resuscitation will not work if that person suffers a cardiac arrest.

More common is where **treatment might possibly work but doctors believe it is not worth providing**. For example, treating the person would be burdensome with a low prospect of success, or bring only limited improvement in the person's quality of life.

Who decides if treatment is futile or non-beneficial and how do they decide?

Who decides if treatment is futile or non-beneficial?

A decision that treatment is futile or non-beneficial is generally made by the person's treating doctor. But it is good practice for health professionals to first discuss this with the person or their substitute decision-maker (when the person lacks capacity). Discussion will help to:

- find out a person's wishes or the substitute decision-maker's understanding of the person's wishes,
- communicate the risks and benefits of continued treatment,
- explain why the medical team believe treatment is futile or non-beneficial, and
- come to a shared view about the options.

In some cases, such as when there is a treatment dispute, **the Supreme Court or a State or Territory Tribunal may be asked to decide if treatment is futile or non-beneficial.** However, the courts have usually agreed with medical assessments about futility.

How is futility determined?

There is no easy answer to this question, and **no set rules to decide if life-sustaining treatment is futile or non-beneficial**. Instead, it is generally determined by health professionals on a case-by-case basis. Factors that are usually considered include:

- treatment goals, and the likelihood they will be achieved by providing treatment,
- risks and benefits of further treatment,
- treatment alternatives, and
- the person's prognosis, quality of life, and preferences about palliative care and dying.

When the courts have been asked to decide whether or not treatment should be provided they have **decided based on the person's best interests, taking into account similar factors to those above**. The courts have also stated that the interests of others (including health organisations or systems) and resources are not relevant.

When is it lawful to withhold or withdraw futile or non-beneficial treatment?

It is **lawful in each State and Territory (except Queensland) for a health professional to withhold or withdraw treatment that is futile or non-beneficial**.

In Queensland, where an adult lacks capacity, consent from a substitute decision-maker is required to withhold or withdraw life-sustaining treatment. This is so even if the treatment is futile or non-beneficial.

This issue is complex, and health professionals may wish to refer to *End of Life Law in Australia* for further information. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/queensland#QLDfutile)

Where treatment may be futile or non-beneficial, State and Territory guardianship and medical treatment decision-making laws about withholding and withdrawing treatment can also apply. Again, this law is complex and it is important to check the law in your State and Territory (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws). These laws are also discussed in the Legal Toolkit factsheet *Withholding and withdrawing life-sustaining medical treatment*. (https://www.eldac.com.au/tabid/4988/Default.aspx)

Does a health professional have to provide futile or non-beneficial treatment?

No obligation to treat

Health professionals generally have **no obligation to provide futile or non-beneficial treatment** when it would **not be in the person's best interests**, or it is **inconsistent with good medical practice**.

A person and/or their substitute decision-maker **cannot require or demand that a health professional give futile or non-beneficial treatment**. An Advance Care Directive also cannot require that futile or non-beneficial treatment be given.

Consent

A health professional **does not need to obtain consent** from a person or their substitute decision-maker to withhold or withdraw futile or non-beneficial treatment.

However, as a matter of good medical practice, a person or their substitute decision-maker should always be involved in treatment decision-making, including when health professionals think treatment is futile or non-beneficial.

The law in **Queensland is different when a person lacks capacity**. As noted above, the consent of the person's substitute decision-maker is needed.

Disputes about futile or non-beneficial treatment

Different views about when treatment is futile or non-beneficial can sometimes lead to disputes. Find out more about how to resolve disputes in this kind of situation by reading the ELDAC Legal Toolkit factsheet *Managing Disputes about Medical Treatment Decision-Making*. (https://www.eldac.com.au/tabid/5282/Default.aspx)

Key points to remember

1. Futile or non-beneficial treatment is not defined in law, but is often used to describe treatment which is of no benefit, cannot achieve its purpose, or is not in the person's best interests.
2. Health professionals generally decide whether particular treatment for a person is futile or non-beneficial. When courts or tribunals are asked to review these matters, they have nearly always agreed with clinical assessments of futility.
3. There are no universally accepted rules for deciding if treatment is futile or non-beneficial but a range of factors relating to the person, their treatment and condition, treatment risks and benefits, and quality of life will be considered.
4. When hearing a dispute about whether treatment should be provided, courts will decide this on the basis of the person's best interests. Treatment that is futile or non-beneficial will not be in the person's best interests.
5. It is generally lawful to withhold or withdraw treatment that is futile or non-beneficial.
6. A health professional has no duty to provide treatment that is demanded if it is futile or non-beneficial, nor to obtain consent to withhold or withdraw it. However, the law in Queensland is different. There, if the person lacks decision-making capacity, a substitute decision-maker's consent is required to withhold or withdraw futile or non-beneficial treatment.

Myth-busters: Futile and non-beneficial treatment

Myth 1: A health professional must provide life-sustaining treatment to a person if the person's family insists that treatment be provided

No. *A health professional generally has no legal obligation to provide treatment they consider to be futile, non-beneficial or not in a person's best interests. This is so, even if family members or substitute decision-makers insist that the treatment be provided.*

The law is different though in Queensland where an adult lacks capacity. In this case, consent from a substitute decision-maker is required to withhold or withdraw life-sustaining treatment. This issue is complex, and health professionals may wish to refer to ***End of Life Law in Australia*** (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/queensland#QLDfutile) *or obtain their own legal advice on this issue.*

It is always good practice to try to reach a shared decision with the person or their substitute decision-maker about withdrawing or withholding life-sustaining treatment.

Myth 2: Courts will not support a health professional who does not want to provide futile or non-beneficial treatment

Courts and tribunals have generally supported medical assessments of futility when these matters are litigated. This is especially so when the health professionals have consulted other health professionals, acted in accordance with guidelines, and engaged in discussions with individuals and their families.

Myth 3: A health professional or residential aged care facility does not have to provide vaccinations (for example, influenza vaccinations) to residents of these facilities because that would be futile or non-beneficial treatment

No. *Whether or not treatment is futile or non-beneficial can be decided only on a case-by-case basis. This is because it depends on an individual person's needs and whether they would benefit from the treatment (including an assessment of the treatment's benefits and risks). Because of this, it is not possible to make global assessments about futile or non-beneficial treatment for people living in residential aged care facilities.*