



A Guide to Decision-Making in Health Care.



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Foreword

The Victorian Association of Health and Extended Care (VAHEC), Russell Kennedy and Palliative Care Victoria are proud to offer this Guide to Health Decision-Making in Aged Care to our members, clients and organisations in the health and aged care sectors.

Australia's ageing population means that the need for development in this area of law is essential. Issues in relation to capacity to give consent, the need for substitute decision-makers, and the lack of clarity in relation to the law in some areas means that information packs, such as this one, are a vital tool for service providers who face these issues on a daily basis.

We recommend that this guide is used as a tool for providing information about options. It is a guide, and not a substitute for legal advice. Residents or patients, family members and carers are advised to seek legal advice when preparing documents and appointing other people to make decisions on their behalf. Service providers are advised to seek legal advice in developing policies to support lawful decision-making about health care.

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Introduction



Making decisions about health care can be confusing and complex. This is even more so when decisions are required by people who are frail with age or become incapacitated by illness or accident. This is a short guide to the legal framework for decision-making about health care for people in these circumstances.

Consent

The fundamental principles that underlie the relationship between health practitioners and their patients are: personal autonomy, bodily integrity and respect for the individual and their dignity. The practice of seeking consent is one element of the ethical principle of respect for autonomy. It is professionally unethical to neglect to seek a person's consent. There are legal consequences for the provision of medical treatment (other than in an emergency) in the absence of consent.

The legal concept of consent requires that the consent is valid or effective. Consent in the context of health care must be:

- given by a competent person
- given voluntarily
- an informed consent

To provide an informed consent, patients must have knowledge about the choices they face. Commonly, the patient must be told the diagnosis, the nature of the proposed treatment, the risks and benefits of the procedure, the available alternative procedures including the risks and benefits of those alternatives, and the consequences of not having the suggested treatment.

If the decision making process is free of coercion and undue influence, a patient who receives sufficient information concerning the possible risks and side effects of proposed treatment and alternative approaches, and who possesses sufficient competence and intelligence to comprehend the information, may make a voluntary choice whether or not to participate in the proposed treatment.

Competence

Competence concerns a medical assessment of the patient's capacity or ability to understand and make a decision. Particularly this requires the patient to actually understand information about their treatment, any alternatives to the treatment and the consequences of that treatment decision. The patient should, after careful consideration of these issues, make a decision about treatment that is reasonable.

Capacity

Capacity is determined by whether a person can understand and appreciate information. A person may lack capacity where he or she is unable to comprehend and retain the information which is relevant to the decision that is to be made, especially as to the likely consequences of the treatment and he or she is unable to use the information and weigh it in the balance as part of the process of arriving at a decision.

Summary

In summary, consent to medical treatment is valid where a person:

- understands in simple language what the medical treatment is, what it involves and why it is being proposed;
- understands the main benefits, any risks and any alternatives;
- understands in broad terms what will be the consequences of not receiving the proposed treatment;
- retains the information for long enough to make an effective decision; and
- makes a reasonable and voluntary choice.



Legal Framework

The following legislation governs health decision-making in the context of health and aged care services.

Medical Treatment Act

In summary, the Medical Treatment Act 1988 (MTA):

- provides for the right of patients to refuse medical treatment;
- establishes procedures to clearly indicate a decision to refuse treatment; and
- enables an appointed agent to make decisions on behalf of a person who is incompetent.

The MTA provides that medical treatment for a current condition can be refused by a patient who is able to make their own decisions or their agent or guardian when they are unable to make decisions about health care. Palliative care however cannot be refused. The MTA provides definitions of medical treatment and palliative care.

Guardianship and Administration Act

In summary the Guardianship and Administration Act 1986 (GAA) provides for a range of substitute decision makers for a person who has a disability and who is unable to make reasonable decisions themselves.

Under section 3 of the GAA, 'disability' means intellectual impairment, mental disorder, brain injury, physical disability or dementia. The GAA provides for:

- the appointment by the Victorian Civil and Administrative Tribunal (the Tribunal) of
 - administrators (to handle financial and legal affairs); and
 - guardians (to make decisions, for example health care and accommodation)
- the appointment by a person of an enduring guardian to make decisions on their behalf when they become unable to make decisions themselves
- a person responsible with authority to make medical and dental decisions on behalf of a person with a disability and who is unable to provide consent.

Mental Health Act

The objects of the Mental Health Act 1986 seek to protect the rights, privacy, dignity and self-respect of people receiving care and treatment for a mental disorder. The principles are designed to ensure that high quality treatment and care are provided in a way that best meet the needs of the person and involves them in decisions about their treatment.

This Act provides for the involuntary treatment of people with a mental illness. A psychiatrist must examine the person and if satisfied that certain criteria under the Act are met, the person can be made an involuntary patient. This means that the psychiatrist will make decisions about treatment for the person.

The five criteria that must be satisfied are: the person appears to be mentally ill, the person requires immediate treatment for the mental illness; treatment is required for their health and safety or for members of the public; the person refuses or is unable to consent and there is no less restrictive manner of the person receiving adequate treatment.

The Mental Health Review Board hears appeals and reviews decisions about involuntary patients.

For the purposes of involuntary admission, instruments completed under the GAA, the MTA, or any other law, do not apply. It is the refusal of consent of the person receiving treatment that is applicable, not the consent of their guardian or agent.

Health Records Act

The purpose of the Health Records Act 2001 is to protect the privacy of personal health information by establishing standards for the use, collection and disclosure of health information. It also gives a person a right of access to his or her own health records.

A person may authorise someone else to be given access to their health information. The authorisation must be in writing and by a person who has the capacity to make the authorisation.

The Act provides that a person is incapable of making a request or accessing their health information when unable to understand the general nature and effect of accessing the health information or communicating the request despite reasonable assistance to do so.

When a person is incapable and the information is necessary for the lawful functions or duties of someone who is an authorised representative, the authorised representative may access the information. An authorised representative is a guardian, someone who holds an enduring power of attorney, an administrator, an agent under the MTA, or a person responsible under the GAA.

A request for access to health information by an authorised representative may be refused when access to the information by the authorised representative may prejudice the health or safety of the person.



Planning

Planning for Future Decision-Making

A person who is able to make decisions for themselves can also plan for the future. There are two options available for planning ahead for decision-making about health care.

1. A refusal of treatment certificate for a current condition (under the MTA)
2. Appointment of a person to make decisions on their behalf if they become incompetent by:
 - i. Enduring Power of Attorney (Medical Treatment) (under the MTA)
 - ii. Enduring Guardian (under the GAA)

Refusal of Treatment Certificate

The authority for a refusal of treatment certificate is provided under the MTA. The policy foundation of the MTA is found at the beginning of the Act where the principles are outlined. The principles recognise:

- a patient's right to refuse treatment;
- need for protection of treating staff who act in good faith relying on the wishes of patients;
- the difficult environment in which decisions are made; and
- a change of focus from cure to treatment.

Under the MTA a person may refuse medical treatment for a current condition but may not refuse palliative care.

“**Medical treatment**” means the carrying out of an operation, the administration of a drug or other like substance, or any other medical procedure but does not include palliative care.

“**Palliative care**” means the provision of reasonable medical procedures for the relief of pain, suffering and discomfort or the reasonable provision of food and water.

Medical treatment or palliative care?

The question of what comprises “medical treatment” that can be refused and what comprises “palliative care” that cannot be refused has been considered by the Supreme Court of Victoria.

This case concerned a woman known as BWV who was diagnosed with Pick's disease, a form of dementia. BWV was unable to make medical treatment decisions for herself.

The Victorian Civil and Administrative Tribunal had appointed the Public Advocate as her guardian. The Public Advocate sought a declaration from the Supreme Court of Victoria on the meaning of medical treatment under the MTA and whether the artificial nutrition and hydration provided to BWV through a percutaneous endoscopic gastrostomy (PEG) tube could be refused.

Justice Stuart Morris reached the firm conclusion that artificial nutrition and hydration through a tube constituted medical treatment, could be refused and was not palliative care. He stated that the use of a PEG for artificial nutrition and hydration, or for that matter any form of artificial feeding is a medical procedure (as it) involves protocols and skills which draw from and depend upon medical knowledge.

The Judge found that the expression “palliative care”, standing alone, means care, not to treat or cure a patient, but to alleviate pain or suffering when a patient is dying. He went on to say that palliative care extends to care for the relatives of the dying patient.

The BWV case is regarded as giving greater certainty to health practitioners, their patients, and carers.

What is necessary for a valid refusal of treatment certificate?

A medical practitioner and another person must be satisfied as to the following:

- Patient has clearly expressed or indicated his or her view to refuse medical treatment.
The expression or indication of wishes by the patient can be in writing, orally or with whatever assistance is needed.
- Treatment is for a current condition.
Condition requiring treatment is the same as that in the refusal of treatment certificate or at least is a condition caused by that condition.
- Decision made voluntarily. It must be voluntary without inducement or coercion.
- Patient is fully informed about their current condition.
Sufficient information must be provided about the condition for the patient to be able to make a decision about whether or not to refuse treatment generally or treatment of a particular kind. The patient must understand this information.

Appointment by the person of a substitute decision maker

A person may appoint someone else to make decisions on their behalf if they become incompetent.

This may occur by the appointment of an:

- i. Enduring Power of Attorney (Medical Treatment) (under the MTA)
- ii. Enduring Guardian (under the GAA)

Enduring Power of Attorney Medical Treatment

Under the MTA a person who is competent may appoint an agent to refuse medical treatment on their behalf if they become incompetent to make the decision themselves.

The appointment is only valid after the person becomes unable to make decisions about medical treatment themselves.

For the refusal of medical treatment the agent must be satisfied:

- Medical treatment would cause unreasonable distress to the patient; or
- There are reasonable grounds for believing the patient, if competent, would consider treatment unwarranted.

For the Enduring Power of Attorney (Medical Treatment) the decision-maker must have sufficient information about the nature of the current condition that would have enabled the patient, if they were competent, to decide whether or not to refuse treatment for that condition.

Isaac is a 76 year old retiree. He has advanced emphysema and is on continuous oxygen. He lives at home and is cared for by his wife, aged 77.

Both Isaac and his wife are competent and Isaac has decided that as his condition worsens, he wants to make it clear to his health care professionals that he does not wish to be kept alive on a respirator or have any other interventions to prolong his life, including when he becomes incompetent to make his own decisions.

What are Isaac's options?

Isaac may execute a refusal of treatment certificate for his current condition of emphysema. and/or

Under an enduring power of attorney (medical treatment) Isaac may appoint his wife (or someone else) as his agent to make a decision when he becomes incompetent. The agent can only refuse treatment that would cause unreasonable distress to Isaac; or where the agent reasonably believes Isaac would consider the treatment unwarranted.

Planning CONTINUED

Enduring Guardian

Under the GAA, a person who is competent may appoint an Enduring Guardian (and an alternative) to make decisions on their behalf if they become incompetent to make decisions themselves. The person may nominate the areas of life where the guardian has the authority for making decisions.

The appointment becomes valid when the person is unable to make decisions themselves.

When authorized to make decisions about health care, a guardian is able to consent to or withhold consent to medical and dental treatment. While there is some overlap with the authorities, an Enduring Power of Attorney (Medical Treatment) will take precedence over an Enduring Guardian in decisions about health care. However the refusal of medical treatment can only occur under the authority of the MTA.

Person's best interests or the decision the person would have made?

The principles of the GAA establish that wherever possible a guardian must act in the person's best interests and in consultation with them, taking into account their wishes wherever possible. An Enduring Power of Attorney (Medical Treatment) may be revoked if the Tribunal is satisfied that refusal of medical treatment is not in the circumstances in the person's best interests.

Kathleen is a 89 year old woman who is in the early stages of dementia.

She is competent and is generally in excellent physical condition. She has six children and lives with two of her daughters. Kathleen is concerned about people she doesn't know making decisions in relation to her care as her dementia worsens and would prefer for one of her daughters to be responsible for the decision-making when she becomes incompetent.

What are Kathleen's options?

Kathleen can appoint one of her daughters (as well as an alternative) as an enduring guardian to make lifestyle decisions on her behalf when she becomes incompetent.

Decision Making



When a person is not able to make their own decisions

In the absence of a person appointed to act under an Enduring Power of Attorney (Medical Treatment) and an Enduring Guardian, the GAA provides two further options.

Person Responsible

The GAA allows a person responsible to make medical and dental treatment decisions on behalf of a person with a disability who is incapable of giving consent. The Act provides assistance for determining when a person is incapable of giving consent. This occurs when the person:

- is incapable of understanding the general nature and effect of the proposed procedure or treatment; or
- is incapable of indicating whether or not he or she consents or does not consent to the carrying out of the proposed procedure or treatment.

The substitute decision-maker is the first person on the list of persons responsible, being:

- a person appointed as an agent holding an Enduring Power of Attorney Medical Treatment;
- a person appointed by the Tribunal to make decisions in relation to the proposed treatment;
- a person appointed under a guardianship order to make decisions in relation to the proposed treatment;
- a person appointed as an enduring guardian with authority to make decisions in relation to the proposed treatment;
- the patient's spouse or domestic partner;
- the patient's primary carer ; or
- the patient's nearest relative.

If the person is likely to be capable within a reasonable time and they object.

Guardians appointed by the Tribunal

Any person may apply to the Guardianship List of the Tribunal for the appointment of a guardian to make personal and lifestyle decisions, such as health care and accommodation for a person who is an adult who is unable to make his or her own decisions.

The Tribunal will make an appointment only when the person: has a disability; is unable to make reasonable decisions because of that disability, decisions need to be made and there is no less restrictive way to do this; and it is in the person's best interests.

The Tribunal will require evidence that the appointment of a guardian is the only reasonable way of dealing with the person's immediate needs and that the legal authority of a guardian is required.



Not For Resuscitation

Law in Victoria

Health practitioners have an ethical and legal duty to provide treatment that is of benefit to patients whilst minimising harm.

The duty of health practitioners is to provide a health benefit to patients. This includes a duty of care to take reasonable care of a patient. This duty is breached when an action or lack of action is unreasonable and results in harm. Along with a duty of care is a presumption that all reasonable efforts will be made to revive a patient. It is unlikely to be reasonable to revive a patient in a terminal phase of illness or where the burdens of the treatment outweigh the benefit.

Any deliberate act or omission which has the intent of ending or shortening life, is illegal - an offence under the Crimes Act. The law in Victoria makes no exception for acts or omissions in respect of treatment of patients with terminal illness.

Context

In cases where the quality of a patient's life is extremely poor either because of extreme frailty or they are in the terminal phase of an illness, it is not unusual for a not for resuscitation order to be considered. Considerations of this nature concern attempts to resuscitate a patient that follow a cardiac arrest and the health benefit that may flow from such attempts.

The Australian Medical Association Policy Statement Care of Severely and Terminally Ill Patients 1997 states:

While doctors have an ethical obligation to preserve health, death should be allowed to occur with dignity and comfort when death is inevitable and when treatment which might prolong life appears futile. Under such circumstances, the AMA believes that withholding or withdrawing treatment, or refraining from resuscitation procedures, may be in the patient's best interests.

A Not for Resuscitation order is based on clinical judgment and is therefore a clinical decision. Doctors are guided by policy and their own clinical judgment, but are also subject to any existing common law (judge made law) or statutory responsibilities.

It is a decision to be made by a health practitioner in consultation with the patient, and with the patient's consent, their family and carers and anyone else the patient nominates. It must take into account the diagnosis, prognosis and the quality of life of the patient and any other circumstances of the patient's condition before leading to an assessment that active or intrusive treatments are not warranted.

The question for clinical judgment is whether the treatment is worthwhile. Following consultation with the patient, their family and carers, clinicians may make a decision that in the event of a cardiac arrest the patient will not be resuscitated or attempts to resuscitate will be limited to certain interventions. Although a NFR may be in place on-going duties to provide care continue.

Clinical considerations are:

- Particular to the patient including the diagnosis and prognosis
- Part of care plan and discussed with patient
- Patient is in the terminal phase of illness or suffers extreme frailty
- Likely clinical outcome, including the likelihood of successfully restarting the patient's heart and breathing
- Weighing the likely health benefit against the burden of treatment

To ensure appropriate and lawful decision-making, service providers should develop clear policy and procedures. Such a policy should outline:

- a process for arriving at a decision
- rationale for the decision
- process for involving patients
- process for consulting with spouse, domestic partner, family and carers
- process for consulting with multidisciplinary health team
- procedure for documenting decision
- review of the decision
- staff training
- regular audit and review of policy

Refusal of Treatment Certificate

Competent Person

We certify that we are satisfied -

- (a) that (name of patient)
has clearly expressed or indicated a decision, in relation to a current condition, to refuse –
*medical treatment generally; or
*medical treatment, being
(specify particular kind of medical treatment);
- (b) that the patient's decision is made voluntarily and without inducement or compulsion;
- (c) that the patient has been informed about the nature of his/her current condition to an extent which is reasonably sufficient to enable him/her to make a decision about whether or not to refuse medical treatment generally or of a particular kind (as the case requires) and that he/she has appeared to understand that information; and
- (d) that the patient is of sound mind and has attained the age of 18 years.

DATED

SIGNED (Registered Medical Practitioner)

SIGNED (Another Person)

Patient's current condition

The patient's current condition is:

(Describe condition)
.....

DATED

SIGNED (To be signed by the same Registered Medical Practitioner)

Verification to be completed by patient, if physically able to do so.

In relation to my current condition, I refuse -

- *medical treatment generally; or
*medical treatment, being
(specify particular kind of medical treatment);

I give the following instructions as to palliative care.....

DATED

SIGNED (Patient)

NOTE:

“Medical treatment” means the carrying out of -

- (a) an operation; or
- (b) the administration of a drug or other like substance; or
- (c) any other medical procedure - but does not include palliative care.

“Palliative care” includes -

- (a) the provision of reasonable medical procedures for the relief of pain, suffering and discomfort; or
- (b) the reasonable provision of food and water.

The refusal of palliative care is not covered by the Medical Treatment Act 1988.

Appointment of Enduring Guardian

MEDICAL TREATMENT

1. I
appoint to be my guardian.

2. I authorise my guardian if, and only to the extent that, I subsequently become unable by reason of a disability to make reasonable judgments in respect of any matters relating to my personal circumstances, to exercise the powers of a guardian under section 24 of the Guardianship and Administration Act 1986, being all the powers that a parent may exercise in respect of his or her child, including -
- to decide where I am to live, whether permanently or temporarily;
 - to decide with whom I am to live;
 - to decide whether I should or should not be permitted to work and, if
 - so - the nature or type of work; and
- for whom I am to work; and
- matters related thereto; and
 - to consent to any health care that is in my best interests;
 - to restrict visitors to such extent as may be necessary in my best interests and to prohibit visits by any person if my guardian reasonably believes that visits by that person would have an adverse effect on me.

(Delete any powers you do not wish your guardian to exercise. If you do not delete any powers, you will be deemed to have authorised your guardian to exercise the full powers of a guardian under section 24 of the Guardianship and Administration Act 1986.)

but subject to the following limitations:

(List any limitations you wish to place on your guardian's powers)

3. I require my guardian to take into account the following wishes in exercising, or in relation to the exercise of, the powers conferred by this appointment -

(State wishes to be taken into account)

4. I, appoint (if applicable)
to be my alternative guardian in place of, and with the same powers as, my guardian appointed under paragraph 1 if that person is incapable of acting as my guardian or is absent for a period.

This is an appointment of an enduring guardian made under Division 5A of Part 4 of the Guardianship and Administration Act 1986.

.....
(Signature of Appointer)

.....
(Date)

Note: An enduring guardian will be able to make decisions on your behalf on all health care and lifestyle matters you empower your enduring guardian to make. If you give your enduring guardian power to make decisions about your health care, your enduring guardian will be able to consent or withhold consent to medical or dental treatment on your behalf.

If your enduring guardian withholds consent to proposed medical or dental treatment, a practitioner may only provide the treatment if the practitioner believes on reasonable grounds that it is in your best interests to do so and if the practitioner gives your enduring guardian the opportunity to refer the matter to the Victorian Civil and Administrative Tribunal (the Tribunal) for determination.

If you wish to appoint a person who can, unless the Tribunal otherwise determines, refuse medical treatment on your behalf, you will need to appoint a person as your agent under the Medical Treatment Act 1988. If you are considering appointing an agent under the Medical Treatment Act 1988 -

- you should ensure that you understand the rights and powers which an appointment under the Medical Treatment Act 1988 confers on your agent; and
- you may wish to appoint the same person as your agent under the Medical Treatment Act 1988 as the person you appoint as your enduring guardian, although you may choose a different person for each role; and

If you appoint or have already appointed a person as your agent under the Medical Treatment Act 1988 and another person as your enduring guardian -

- the decision of your agent under the Medical Treatment Act 1988 will have priority over the decision of your enduring guardian in relation to any proposed medical treatment; and
- your agent under the Medical Treatment Act 1988 will be able to refuse to consent to medical treatment on your behalf in all circumstances regardless of any consent to the treatment that your enduring guardian may give or wish to give.

ACCEPTANCE OF APPOINTMENT

I,,
(insert name, address and occupation of proposed guardian)

accept appointment as a guardian under this instrument and undertake to exercise the powers conferred honestly and in accordance with the provisions of the Guardianship and Administration Act 1986.

.....
(Signature of Proposed Guardian)

.....
(Date)

I,,
(insert name, address and occupation of proposed alternative guardian)

accept appointment as an alternative guardian under this instrument and undertake to exercise the powers conferred honestly and in accordance with the provisions of the Guardianship and Administration Act 1986.

.....
(Signature of Proposed Alternative Guardian)

.....
(Date)

CERTIFICATE OF WITNESSES

We,,
..... certify -
(insert names, addresses and occupations of at least 2 witnesses)

- that the appointor, the proposed guardian and the proposed alternative guardian (if any) have signed this instrument freely and voluntarily in our presence; and
- that the appointor, the proposed guardian and the proposed alternative guardian (if any) appeared to understand the effect of this instrument.

.....
(Signature of Witness Authorised to Witness the signing of Statutory Declarations)

.....
(Date)

.....
(Signature of Other Witness)

.....
(Date)

Enduring Power of Attorney

MEDICAL TREATMENT

This Enduring Power of Attorney is given on the *day of* 20

by of
(under section 5A of the Medical Treatment Act 1988.)

1. **I appoint**
of to be my agent.

and
of to be my alternate agent.
*(*delete whichever is inapplicable.)*

2. **I Authorise** my agent or, if applicable, my alternate agent, to make decisions about medical treatment on my behalf.

3. **I Revoke** all other enduring powers of attorney (medical treatment) previously given by me.

SIGNED SEALED AND DELIVERED BY

We
(names of witnesses)

each believe that in making this enduring power of attorney (medical treatment) is of sound mind and understands the import of this document.

Witnessed by:

(1) (2)
(signature of witnesses)

(1) (2)
(names of witnesses)

(1) (2)
(addresses of witnesses)

NOTE:

At least one of the witnesses must to be a person authorised by law to take and receive statutory declarations.

Glossary

Capacity	is the ability of a person to make a decision to give or refuse consent.
Competent	a person is competent when they have the capacity to make a decision to give or refuse consent.
Consent	is the agreement of a person to accept treatment when they understand the nature and purpose of the treatment.
Enduring guardian	a person appoints an enduring guardian (most often a friend or relative) to make life style decisions on their behalf when they are unable to make decisions themselves.
Enduring Power of Attorney	a person appoints someone else to make decisions on his or her behalf that concern his or her property or affairs, including financial affairs. The power of attorney does not authorise the making of decisions about health or medical treatment.
Enduring Power of Attorney (Medical Treatment)	a person appoints an agent to make decisions (including refusal) about medical treatment on their behalf for when they become unable to make decisions themselves. The appointment is called an Enduring Power of Attorney (Medical Treatment).
Guardian	is appointed by Guardianship List of the Tribunal to make decisions on behalf of a person with a disability who is unable to make reasonable judgments and is in need of a guardian to make decisions about for example, health care and accommodation.
Incompetent	a person is incompetent when they do not have the capacity to make a decision to give or refuse consent.
Person Responsible	the guardianship legislation authorises a person called a “person responsible” to consent to the carrying out of medical and dental treatment.
Tribunal	Victorian Civil and Administrative Tribunal.

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