

Medical decision making

Applies from 12 March 2018

Advance care directives

A person is able to make a legal document called an advance care directive. It can include an instructional directive with legally binding instructions to health practitioners about future treatment. If the patient currently does not have decision-making capacity to make a medical treatment decision, and previously made a relevant instructional directive, the directive takes effect as if they had consented to, or refused, the treatment.

A patient's advance care directive must not include any instructions that are unlawful or would require an unlawful act to be performed or that, if given effect to, would cause a health practitioner to contravene a professional standard or code of conduct.

In addition to an instructional directive, an advance care directive can include a values directive which documents the person's values and preferences for future medical treatment. It is considered by their medical treatment decision maker when making a decision on their behalf.

Refusing to comply with an instructional directive

A health practitioner should make an application to the Victorian Civil and Administrative Tribunal (VCAT) if they believe:

- circumstances have changed since the patient made their instructional directive and
- this means that the practical effect of the instructional directive would no longer be consistent with their preferences and values.

If a health practitioner reasonably believes that the delay in making the application would result in a significant deterioration of the patient's condition, they may refuse to comply with the instructional directive. This means the patient's medical treatment decision maker (or the Public Advocate) makes the decision, unless emergency treatment is required.

Palliative care

A health practitioner is able to administer palliative care to a patient who does not have decision-making capacity for that care, despite any decision of their medical treatment decision maker (or any statement in an advance care directive). However, the health practitioner must have regard to the patient's expressed preferences and values and must consult with their medical treatment decision maker, if any.

Futile treatment

Health practitioners assess whether or not to offer a particular medical treatment, and whether a particular treatment is futile or non-beneficial.

Significant and routine treatment

A health practitioner must seek consent from the Public Advocate to provide significant treatment to a patient who:

- does not have decision making capacity for the medical treatment decision and
- does not have:
 - a medical treatment decision maker or
 - an advance care directive with a relevant instructional directive.

See the Office of the Public Advocate (OPA) website for clinical guidelines about what constitutes significant treatment.

Routine treatment is any treatment that is not significant treatment under the Act. A health practitioner can administer routine treatment without consent if there is no medical treatment decision maker. If they do so, the health practitioner will need to set out in the patient's clinical records the details of:

- the health practitioner's attempts to locate an advance care directive and a medical treatment decision maker
- the exact nature of the routine treatment and the reason for the decision to administer it.

Notifications to the Public Advocate

A health practitioner must notify the Public Advocate if:

- the medical treatment decision maker of a patient refuses significant treatment and
- the health practitioner reasonably believes that the preferences and values of the patient are not known, or are unable to be known or inferred.

The health practitioner then awaits the response of the Public Advocate.

Special medical procedures

Only VCAT can consent to a special medical procedure for a patient who does not have decision-making capacity for the decision.

A special medical procedure is:

- any procedure that is intended, or is reasonably likely, to have the effect of rendering the patient permanently infertile
- termination of pregnancy or
- any removal of tissue for the purposes of transplantation to another person.

More information

For more information about the Medical Treatment Planning and Decisions Act, visit the OPA website from 12 March 2018 at www.publicadvocate.vic.gov.au

Health practitioners need a patient's consent before providing medical treatment.

New laws commencing on 12 March 2018, set out steps for health practitioners to follow when a patient is unable to consent. (See flowchart overleaf explaining the steps under the new *Medical Treatment Planning and Decisions Act 2016*).

The Act applies to health practitioners

The Act applies to all registered health practitioners in the following professions:

- medical
- dental
- physiotherapy
- occupational therapy
- chiropractic
- pharmacy
- optometry
- podiatry
- psychology
- nursing and midwifery
- medical radiation practice
- osteopathy
- Chinese medicine
- Aboriginal and Torres Strait Islander health practice.

In addition, the Act applies to the following, who are also health practitioners under the Act:

- paramedics
- non-emergency patient transport staff.

Medical treatment

Medical treatment is treatment by a health practitioner that is for one or more of the purposes and one of the forms of treatment listed below.

Purpose	Treatment
<ul style="list-style-type: none"> • diagnosing a physical or mental condition • preventing disease • restoring or replacing bodily function in the face of disease or injury • improving comfort and quality of life. 	<ul style="list-style-type: none"> • treatment with physical or surgical therapy • treatment for mental illness • treatment with <ul style="list-style-type: none"> – prescription pharmaceuticals – an approved medicinal cannabis product • dental treatment • palliative care.

Emergency treatment

Consent is not needed in an emergency.

Emergency treatment must not proceed if the health practitioner is aware that the patient has refused the particular treatment in an instructional directive (one kind of advance care directive), or there is a relevant refusal of medical treatment certificate made before 12 March 2018.

In an emergency, a health practitioner is not required to search for an advance care directive that is not readily available.

Recovery within a reasonable time

If the patient is likely to recover decision-making capacity for the medical treatment decision within a reasonable time, the health practitioner should wait for the patient to be able to make the decision, unless a further delay would result in a significant deterioration of the patient's condition.

Record-keeping

A health practitioner needs to record on the patient's clinical records the reasons they were satisfied the patient did not have decision-making capacity.

The medical treatment decision maker

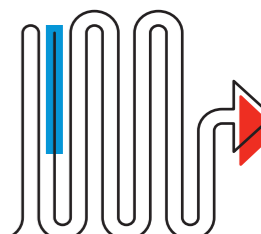
If a patient is unable to make a medical treatment decision, their medical treatment decision maker can do this on their behalf.

The Act specifies a list of people who can be a patient's medical treatment decision maker. (See flowchart for hierarchy).

A health practitioner can disclose health information about the patient to their medical treatment decision maker where it is relevant to a medical treatment decision they will make.

A patient's medical treatment decision maker must make the decision they reasonably believe is the decision the patient would have made. The Act sets out how they do this.

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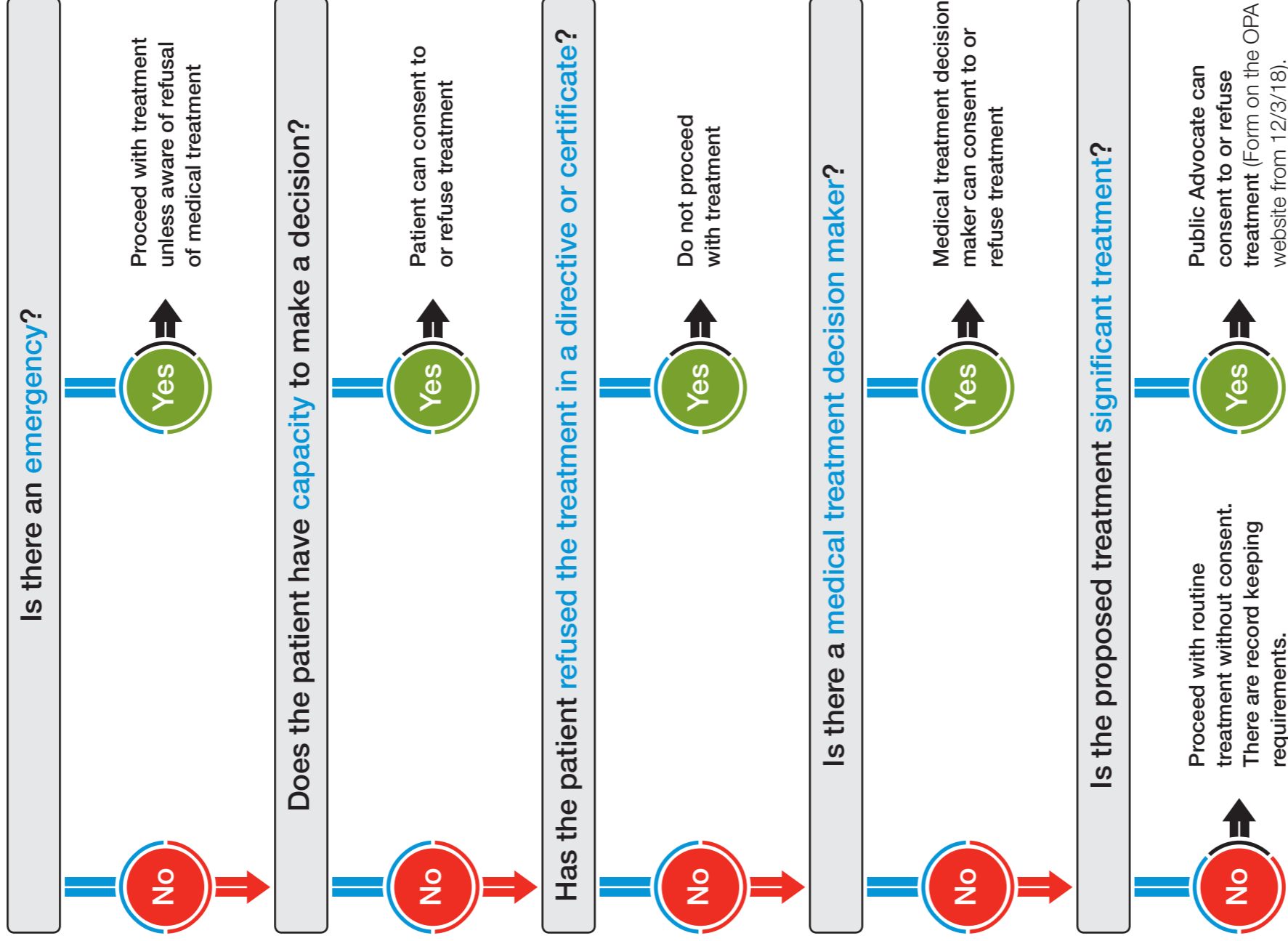
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Can your adult patient consent?

Process from 12 March 2018

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Emergency treatment

Medical treatment that is necessary as a matter of urgency to save the person's life, prevent serious damage to the person's health, or prevent the person from suffering or continuing to suffer significant pain or distress. A health practitioner may administer emergency treatment to a patient without consent, unless they are aware that the patient has refused the treatment in a directive or certificate (see below).

Decision-making capacity

The patient is able to understand the information relevant to the decision, retain that information to the extent necessary to make the decision, use or weigh that information as part of the process of making the decision, and communicate their decision in some way. Sometimes a relevant specialist may be required to make a capacity assessment.

Directive or certificate refusing treatment

Treatment must not proceed if:

- there is a valid refusal of medical treatment certificate made prior to 12 March 2018 in accordance with the *Medical Treatment Act 1988*
 - the patient has refused the particular medical treatment in an instructional directive (in an advance care directive) in accordance with the Medical Treatment Planning and Decisions Act.
- A health practitioner must make reasonable efforts in the circumstances to ascertain if the person has an advance care directive. There are some circumstances where they can refuse to comply with a directive.

Significant treatment

Medical treatment that involves any of the following:

- a significant degree of bodily intrusion
- a significant risk to the person
- significant side effects
- significant distress to the person.

See the OPA website for clinical guidelines.

Medical treatment decision

A decision to consent to, or refuse the commencement or continuation of, treatment.

Appointed medical treatment decision makers

A patient may have appointed someone under the Medical Treatment Planning and Decisions Act. Legal appointments made prior to the commencement of the Act are recognised. This means they may also have appointed them in an:

- enduring power of attorney (medical treatment) made before 12 March 2018
- enduring power of attorney appointing an attorney for personal matters made between 1 September 2015 and 11 March 2018
- enduring power of guardianship appointing an enduring guardian with healthcare powers made before 1 September 2015.

Note: Valid appointments in other Australian states and territories are recognised in Victoria.

Medical treatment decision maker

Where a patient is unable to consent to treatment, consent can be obtained from the medical treatment decision maker in the following order.

1. A medical treatment decision maker appointed by the patient
2. A guardian appointed by VCAT to make decisions about medical treatment
3. The first of the following people who is in a close and continuing relationship with the patient. If more than one, the eldest.
 - a. the patient's spouse or domestic partner
 - b. the patient's primary carer (an adult who is in a care relationship with the person and has principal responsibility for the person's care)
 - c. an adult child of the patient
 - d. a parent of the patient
 - e. an adult sibling of the patient.

The person needs to be reasonably available, and willing and able, to make the decision.

Note: * If a person is a compulsory patient under the *Mental Health Act 2014*, that Act applies.
** There is a different consent process for medical research procedures.