



## Australian law at the end of life: An overview

The law at end of life is complex and often difficult to understand, particularly in Australia where laws differ between states and territories. This brochure gives an overview of fundamental concepts relating to the law at end of life in Australia. It is based on information from [End of Life Law in Australia](#), a website created by the Australian Centre for Health Law Research, Queensland University of Technology.

### Capacity and consent to treatment

Every adult has the right to decide what is or is not done to their bodies. So for medical treatment to be lawful, a person must consent to it. If that treatment is given without consent, the doctor (or whoever provides it) may be civilly and criminally liable. An exception to this is if the treatment was provided in an emergency.

Consent to treatment is only valid if the person has 'capacity' or is 'competent' to consent. The consent must be given freely and voluntarily, and it must relate to the proposed treatment. The person must be able to understand the nature and effect of the treatment, use and weigh information to make a decision, and communicate that decision.

A person without those abilities, due for example, to dementia, intellectual disability or mental illness, will lack capacity for medical decision-making and will not be able to make medical treatment decisions themselves. In that situation, there are three ways in which decisions can be made by or for them:

- Before they lost capacity, the person may have made an Advance Directive which provides directions about medical treatment;
- A substitute decision-maker can make the decision, generally based on what they believe the person would have wanted and their best interests; or
- A Tribunal or the Supreme Court can provide consent or make a treatment decision.

### Adults and end of life decision-making

#### Advance Directives

An Advance Directive is an instruction that a person makes now in the event that they might lose capacity in the future to make decisions about their medical treatment or health care. There are two types of Advance Directives: common law Advance Directives governed by the common law (i.e. decisions made by the Courts), and Statutory Advance Directives governed by State and Territory legislation.

Advance Directives can be used to communicate specific instructions about types of treatment, including to request or refuse treatment (e.g. refusing a blood transfusion or CPR), or general wishes (e.g. wanting to die at home, not in

hospital). Some Advance Directives can also be used to appoint a substitute decision-maker. Generally, doctors must follow a valid and applicable Advance Directive (including a directive that refuses life-sustaining treatment) and may be liable under civil and criminal law if they do not.

#### Guardianship and substitute decision-making

If a person cannot make their own decision about medical treatment and they do not have an Advance Directive, someone has to decide for them. For adults, guardianship legislation in each State and Territory allows someone else (e.g. a spouse, family member or friend, or a statutory body, such as the Public Guardian or a Court or Tribunal) to be the 'substitute decision-maker' for medical treatment.

#### Withholding and withdrawing life-sustaining treatment from adults

It is lawful for a competent adult to make their own decisions to refuse or accept medical treatment, even if the decision they make results in their death. Doctors must respect those decisions to refuse treatment, and, if directed to do so doctors can legally withhold (not start treatment) or withdraw (stop treatment already started) life-sustaining treatment from adults, even if this might result in the patient's death. It can also be lawful for a substitute decision-maker to ask that life-sustaining treatment be withheld or withdrawn from someone who no longer can decide on treatment for themselves.

Patients, families and substitute decision-makers cannot generally demand treatment which doctors consider to be 'futile' (for example, if they believe it would not be beneficial to the patient).

#### Children and end of life decision-making

Consent is required before medical treatment can be provided to a child under the age of 18, unless it is an emergency or a blood transfusion is required. Upon reaching 18 (and 16 in South Australia) that person will be able to make their own decisions about medical treatment.

Generally, when a child is under 18, the child's parents can consent to or refuse medical treatment for their child. However some adolescents may be able to make their own medical decisions. This is the case if they have 'sufficient understanding and intelligence to understand fully' the

proposed medical treatment and its effects (this is sometimes referred to as being 'Gillick-competent').

The paramount consideration of parents (and courts) when making treatment decisions is what is in the child's best interests. Parents and *Gillick*-competent adolescents are able to refuse life-sustaining medical treatment, provided it is in the child's best interests.

## Palliative care

Palliative care refers to treatment given to a person with a life-limiting illness, who may be experiencing pain and suffering, to maintain or improve their comfort. In some cases, palliative medication may be given to a patient to relieve pain and suffering, but may have the unintended effect of hastening the patient's death. If this occurs, the person who provided the medication (usually a doctor or nurse) will not be liable for the patient's death so long as their intention was to relieve the suffering, and not to hasten death.

This legal protection forms part of the common law in Australia, and is sometimes known as the 'doctrine of double effect'. Some Australian States and Territories have incorporated this doctrine into legislation.

## Organ and tissue donation

Families and friends of patients at the end of life, or who have recently died, may be asked to consider donating the deceased's organs and tissues for transplantation into another person. Consent is needed for organ and tissue donation. In Australia, adults with decision-making capacity have the option to record in advance their consent or refusal to donate on the Australian Organ Donation Register. However, the deceased's family will also be asked to provide consent to donation, even if the person has already recorded their consent on the Register. Where there is a dispute or resistance to organ donation among family members, removal of organs or tissue will not occur, even if the potential donor had expressed a wish to donate, or had registered their consent.

## Euthanasia and assisted suicide

Euthanasia is a deliberate, intentional act of one person to end the life of another person, to relieve that person's suffering. Assisted suicide occurs where a person intentionally kills him or herself with the assistance of another (e.g. a doctor, family member or friend).

Both euthanasia and assisted suicide are illegal in all Australian States and Territories, and may result in a person being charged with murder, manslaughter or assisting suicide. These acts are legal in some countries, but whether or not it is lawful for Australians to accompany a person to travel overseas to receive assistance to die has not yet been decided in Australia.

A doctor does not euthanise or unlawfully kill a patient by withholding or withdrawing life-sustaining treatment where the treatment was lawfully refused either by the patient or their substitute decision-maker, or where the doctor considers the treatment is inappropriate (for example, if it is futile or burdensome). Providing palliative care which ultimately hastens death is not euthanasia or assisted suicide, so long as the doctor's intention in giving the palliative care was to reduce pain and suffering, not cause or hasten death. It is also lawful for a patient to refuse food and drink (either naturally or through artificial measures such as a tube) even if that results in death.

## About End of Life Law in Australia

[End of Life Law in Australia](#) provides accurate, practical and relevant information to assist the community to navigate the challenging legal issues that can arise with end of life decision-making. It is designed to be used by patients, families, health and legal practitioners, the media, policymakers and the broader community to access information about Australian laws relating to death, dying and decision-making at the end of life.

This website was developed by the Australian Centre for Health Law Research, Faculty of Law, Queensland University of Technology, Brisbane, Australia. The Centre is a specialist research group which undertakes research into complex problems and emerging challenges in the fields of health law, ethics, technology, governance and public policy.

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