Australian law at the end of life: An overview

The law at end of life is complex, particularly because Australian laws differ between States and Territories. This brochure gives an overview of the fundamental concepts of end of life law in Australia. It is based on information from *End of Life Law in Australia* (https://end-of-life.qut.edu.au). Visit this website for information specific to your State or Territory.

Capacity and consent to medical treatment

Every adult has the right to decide what is or is not done to their body. For medical treatment to be lawful, a person must consent to it. If that treatment is given without consent, the health professional who provides it may be civilly and criminally liable. An exception to this is if the treatment was provided in an emergency to save the person's life, and it was not possible to obtain consent from the person or their substitute decision-maker.

Consent to treatment is only valid if the person has 'capacity' or is 'competent' to consent. The person's consent must be given freely and voluntarily, and it must relate to the proposed treatment.

Every adult is presumed to have capacity to make their own medical treatment and health care decisions. To have capacity the person must be able to comprehend and retain the information needed to make the decision, including the consequences of the decision; and use and weigh that information as part of their decision-making process.

A person without those abilities, due, for example, to dementia, intellectual disability, acquired brain injury or mental illness will have impaired 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 Care Directive which provides directions about medical treatment;
- A substitute decision-maker can make the decision (primarily based on what they believe the person would have wanted); or
- A tribunal or the Supreme Court can provide consent, or make a treatment decision.

Adults and end of life decision-making

Advance Care Directives

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

Advance Care 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 cardiopulmonary resuscitation), or to communicate values and preferences about care or treatment (e.g. wanting to die at home, not in hospital). Some Advance Care Directives can also be used to appoint a substitute decision-maker. Generally, health professionals must follow a valid and applicable Advance Care Directive (including a Directive that refuses life-sustaining treatment) except in some limited circumstances. They may be liable under civil and criminal law if they do not.

Guardianship and substitute decision-making

If a person cannot make their own medical treatment decision because they have impaired capacity, and they do not have an Advance Care Directive, someone must decide for them. For adults, guardianship legislation in each State and Territory allows someone else (e.g. a spouse, family member or friend; a statutory body such as the Public Guardian or Public Advocate; 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 an adult with capacity to make their own decisions to consent to or refuse medical treatment, even if the decision they make results in their death. Health professionals must respect a person's decision to refuse treatment, and, if directed to do so can legally withhold (not start treatment) or withdraw (stop treatment already started) life-sustaining treatment from adults, even if this might result in the person'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 can no longer make treatment decisions for themselves.

Individuals, families and substitute decision-makers cannot demand treatment that health professionals consider to be futile (e.g. treatment that a health professional believes would not be beneficial to the person). A health professional has no legal obligation to provide such treatment, and generally can withhold or withdraw futile or non-beneficial treatment without consent from an adult or their substitute decision-maker (except in Queensland, where a substitute decision-maker's consent is required).

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 older children 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 children who are *Gillick*-competent are able to refuse life-sustaining medical treatment, provided it is in the child's best interests.

Providing pain and symptom relief

Medication and other forms of pain and symptom relief are often given to a person with a life-limiting illness to maintain or improve their comfort. In some cases, pain and symptom relief may have the unintended effect of hastening the person's death. If this occurs, the person who provided it (usually a doctor or nurse) will not be liable for the person's death so long as their primary intention was to relieve pain or symptoms, and not to hasten death.

This legal protection for providing appropriate pain and symptom relief is part of Australian common law and is known as the doctrine of double effect. Some Australian States and Territories have incorporated double effect into legislation.

Organ donation

Families and friends of people who are dying 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 their consent or refusal to donate on the Australian Organ Donation Register. However, depending on the State or Territory, the deceased's family may be asked to consent to donation, even if the person has already recorded their consent on the Register. In all jurisdictions except Victoria there must also be no objection by the deceased's senior next of kin, or another next of kin to the removal of tissue.

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.

Voluntary assisted dying

Voluntary assisted dying (VAD) refers to the assistance provided to a person with a terminal illness, disease or medical condition by a health practitioner to end their life.

VAD is operating in all Australian States. VAD remains illegal in the Northern Territory and the Australian Capital Territory.

Assisted dying is 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 health professional does not assist dying or unlawfully kill a person by withholding or withdrawing life-sustaining treatment that has been lawfully refused by the person or their substitute decision-maker. This is also the case where the health professional does not provide or withdraws treatment that is futile or burdensome. Providing pain and symptom relief which ultimately hastens a person's death is not VAD, so long as the health professional's primary intention in giving it was to reduce pain or symptoms, not cause or hasten death. It is also lawful for a person 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 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, policy makers and the broader community to access information about Australian laws relating to end of life decision-making.

This website was developed by Professors Ben White and Lindy Willmott, and Penny Neller from the Australian Centre for Health Law Research, Faculty of Business and Law, Queensland University of Technology. *End of Life Law in Australia* is hosted by the Australian Centre for Health Law Research.

ELLC End of Life Law for Clinicians

End of Life Law for Clinicians (ELLC) is a national training program for medical practitioners, nurses, allied and other health professionals, and health professional students about end of life law in clinical practice. It comprises free online training modules and workshops. CPD points may be claimed and certificates of completion are available. Register at ELLC (https://ellc.edu.au). This program is a National Palliative Care Project funded by the Australian Department of Health and Aged Care. For further information about ELLC contact endoflifelaw@qut.edu.au.