ELDAC
End of Life Directions for Aged Care

End of life law in Tasmania: An overview for aged care

This factsheet explains key end of life laws in **Tasmania** relevant to decision-making about medical treatment with older people receiving aged care.

The information in this factsheet is an overview only. For detailed information about end of life law in Tasmania visit *End of Life Law in Australia* (https://end-of-life.qut.edu.au/).

All content in this factsheet is sourced from *End of Life Law in Australia*.

Consent to medical treatment

For medical treatment to be lawful, a person must consent to it (except in limited situations, discussed below). Consent to treatment is valid if:

- **the person has decision-making ability to consent,**
- **the person consents freely and voluntarily**, and
- **consent relates to the proposed treatment.**

If treatment is given without consent, a health professional or personal care worker may be liable under civil or criminal law.

In some (limited) situations treatment can be given without consent to a person without decision-making ability. These are:

- Where the treatment is **needed urgently to save the person's life** e.g. in an emergency.
- Where the treatment is **minor or routine health care** and there is no person responsible. The treatment must be necessary to promote the person's health and well being, and the person must not object to it. The treatment must not involve a substantial risk of death, brain damage, paralysis, permanent loss of function or scarring, or extreme pain or distress.
- **Non-intrusive visual examinations for diagnostic purposes, first aid, or administering non-prescription medication** e.g. paracetamol.

For further information and legal requirements visit:

- the *End of Life Law in Australia* Capacity and consent to medical treatment webpage. (https://end-of-life.qut.edu.au/capacity)
- the ELDAC End of Life Law Toolkit factsheet *Minor for minor or routine treatment in aged care*. (https://www.eldac.com.au/Portals/12/Documents/Factsheet/Legal/Consent-for-minor-or-routine-treatment-in-aged-care.pdf)

Decision-making ability

Every adult is presumed to have the ability (capacity) to make their own medical treatment and health care decisions.

A person will have decision-making ability if they can:

- **understand information relevant to the decision,**
- **retain information relevant to the decision** for a sufficient time and consistently **communicate the decision,**
- **use or weigh information** relevant to the decision, and
- **communicate the decision** (whether by speech, gesture or other means).

Reasonable steps must be taken to give the person appropriate support to make and communicate their own decisions (supported decision-making). For example, providing information to the person in a way they can understand e.g. by adjusting language, using visual aids or technology, or delaying treatment to a time where their decision-making is optimal. If the person can decide with support, they will have decision-making ability.

If a person **does not have decision-making ability**, consent can be given:

- in a valid **Advance Care Directive**,
- by a **person responsible**, or
- by the **Tasmanian Civil and Administrative Tribunal** (the Tribunal).

For further information visit the *End of Life Law in Australia* Capacity and consent to medical treatment webpage. (https://end-of-life.qut.edu.au/capacity#statetercap)

Advance Care Directives

An **Advance Care Directive** is an instruction about health care made when a person has decision-making ability, to apply in the future when they do not have ability.

There are two types of Advance Care Directives in Tasmania: **common law Advance Care Directives** (made in writing or orally), and **statutory Advance Care Directives** (made in the prescribed form, orally, or by any other means e.g. audio visual recording). This section relates to statutory Advance Care Directives only.

A **statutory Advance Care Directive has binding and non-binding sections**:

- Treatment refusals or requests to withdraw treatment, including life-sustaining treatment (e.g. CPR or blood transfusions), that are clear and unambiguous are **binding and must be followed**.
- All other directions are **non-binding but should be followed if possible** (e.g. a request to die at home, not in hospital).

An Advance Care Directive can only be followed once the person no longer has decision-making ability.

There are some limited situations where a health practitioner does not have to follow an Advance Care Directive:

- Where the health practitioner believes, on reasonable grounds, that the person did not intend a direction to apply in the particular circumstances, or that it is ambiguous or does not reflect the person's current wishes. However, before refusing to comply, the health practitioner must make reasonable efforts to consult with the person's decision-maker.
- Health care is needed urgently and the health practitioner is not aware that the older person has an Advance Care Directive.

Other situations are discussed at the *End of Life Law in Australia* Advance Care Directives Tasmania webpage. (https://end-of-life.qut.edu.au/advance-care-directives/state-and-territory-laws/tasmania)

Substitute decision-making

If a person **does not have decision-making ability** and there is no Advance Care Directive, or there is a Directive but it does not apply to the treatment situation, consent to medical treatment may be given by a **person responsible** (in order of priority):

- a **guardian** with power to make the decision, appointed by the **Tribunal**, or an **Enduring Guardian** appointed by the person under an Enduring Guardian document.
- the person's **spouse or de facto partner** with a close and continuing relationship with the person.
- an **unpaid carer**.
- a **close family member of the person**, who has a close relationship and frequent personal contact with the person, and a personal interest in the person's welfare. This can be a:
  - a spouse
  - a parent
  - a sibling
  - a child
  - a child of or a parent of, the spouse of the person
  - a grandparent
  - an aunt or uncle
  - an adult of Aboriginal or Torres Strait Islander descent, related to the person according to Aboriginal or Torres Strait Islander kinship rules
  - any other carer or close friend who provides ongoing personal support to the person, whether or not the other person is biologically related to the person. A close friend must have a close personal relationship with the person and a personal interest in the person's welfare.

If no one is available or willing to decide, the **Tribunal** may give consent or appoint a guardian, such as the Public Guardian.

Only a guardian or Enduring Guardian can refuse consent or withdraw consent to treatment. A person responsible does not have power to do this (though withholding consent may have a similar effect to refusing treatment).

A person responsible's decision should be followed unless treatment is futile or non-beneficial (see 'Futile or non-beneficial treatment' below).

For further information visit the *End of Life Law in Australia* Tasmania Treatment decisions webpage. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/tasmania)

Urgent medical treatment

In an emergency, if a **person has decision-making ability**, a health professional or personal care worker must obtain the person's consent to treatment.

If a person with decision-making ability refuses treatment/transfer to hospital for treatment, **their refusal should be respected**. This is the case even if they require life-sustaining treatment and will die without it. It is an **assault to provide treatment when the person has refused it**.

If a person **does not have decision-making ability**, then treatment can be given without consent if it is needed urgently to:

- save the person's life,
- prevent serious damage to health, or
- prevent significant pain or distress.

While not required by law, it is still good practice to obtain a person responsible's consent if possible.

Urgent treatment cannot be provided if it has been lawfully refused by:

- the person, if they have decision-making ability (this may be done verbally), or
- the person, in their valid and applicable Advance Care Directive, and a health professional is aware of the Directive (via a copy or access).

For further information visit the *End of Life Law in Australia* Tasmania Treatment decisions webpage. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/tasmania)

Legal protection for administering pain and symptom relief

Providing pain and symptom relief is a critical component of palliative care. In some cases, **medication may have the unintended effect of hastening the person's death**. If this occurs, the person who provided the medication **will not be liable for the person's death so long as their intention was to relieve pain or symptoms, and not to hasten death**.

This legal protection is known as the **doctrine of double effect**. It applies when:

- the primary intention is to relieve pain and symptoms, not hasten death,
- the medication is prescribed and administered by or at the direction of a doctor caring for the person, and
- the person is near death.

For further information visit the *End of Life Law in Australia* Legal protection for providing pain and symptom relief webpage. (https://end-of-life.qut.edu.au/pain-relief)

Withholding and withdrawing life-sustaining treatment

A person with decision-making ability can refuse medical treatment, including treatment needed to keep them alive. Health professionals must respect a person's refusal and can withhold (not start) or withdraw (stop) life-sustaining treatment, even if this might result in the person's death.

If a **person does not have decision-making ability, a health professional must follow a refusal of life-sustaining treatment by**:

- the person, in their **Advance Care Directive**, or
- a **guardian** or **Enduring Guardian**.

For further information visit the *End of Life Law in Australia* Tasmania Treatment decisions webpage. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/tasmania)

Futile or non-beneficial treatment

Futile or non-beneficial treatment is **treatment which is of no benefit, cannot achieve its purpose, or is not in the person's best interests**. Health professionals decide whether or not treatment is futile on a case-by-case basis.

Health professionals **may withhold or withdraw treatment that is futile or non-beneficial**. They have no obligation to provide treatment that is not in the person's best interests or is inconsistent with good medical practice.

A **person, their family, or person responsible cannot require or demand that futile or non-beneficial treatment be given**. Their consent is not needed to withhold or withdraw it. A request for futile or non-beneficial treatment in an Advance Care Directive need not be followed.

However, it is good medical practice for health professionals to involve a person or their substitute decision-maker in treatment decisions, including when treatment is considered futile.

For further information visit the *End of Life Law in Australia* Tasmania Treatment decisions webpage. (https://end-of-life.qut.edu.au/treatment-decisions/adults/state-and-territory-laws/tasmania)

Learn more about end of life law in Tasmania

For further information visit:

- the ELDAC End of Life Law Toolkit for factsheets, mythbusters and cases studies on each topic above. (https://www.eldac.com.au/Toolkits/End-of-Life-Law)
- *End of Life Law in Australia*, a website to assist the community to navigate end of life law, and to access information about the law in each Australian State and Territory. (https://www.end-of-life.qut.edu.au/)
- End of Life Law for Clinicians, a free online training program for medical practitioners, nurses, and allied and other health professionals about end of life law across Australia. (https://ellc.edu.au)