

Advance care planning and the law: Victoria

This factsheet gives specific information about advance care planning and Victorian (VIC) law.

Advance care planning documentation

From 12 March 2018, an **Advance Care Directive** is the formal document that is recognised by legislation. It comes into effect if a person loses capacity (cannot make or communicate their decisions). The directive allows the refusal or withdrawal of medical treatment and consent to commencement of future treatments. The directive allows for binding instructional and or values directives.

Until 12 March 2018, a **Refusal of Treatment Certificate** is the formal document recognised by legislation. A refusal of Treatment Certificate remains binding after 12 March 2018 if there is no Advance Care Directive.

Formal requirements for advance care planning documents

Advance Care Directive should be on the recommended form or similar. The form must be witnessed by a medical practitioner and another adult. Each witness and the person must be present at the same time. If the formal requirements are not met, then this means the instructional directive is invalid, however it may be treated as a values directive.

The Refusal of Treatment Certificate must be on the prescribed form and witnessed by a medical practitioner and another adult. If the formal requirements, are not met, it may still be recognised under common law.

Amending or revoking advance care planning documents

From March 2018 a person can amend the original, or prepare a new directive, which will revoke a previous directive. Making an advance health directive will not necessarily revoke a refusal of treatment certificate, although it may, depending on its terms.

Non-statutory advance care planning documents

From March 2018 the advance care directive allows for informal advance care planning documentation, a values directive with general statements about preferences and values. Though non-binding it may be taken into consideration under common law.

Health care professionals' obligations

From 12 March 2018, a health practitioner must give effect to any instructional directive in an advance care directive unless:

- circumstances have changed since the person gave the advance care directive so that the practical effect of the instructional directive would no longer be consistent with the person's preferences and values;
- the delay that would be caused by an application to VCAT as to whether the directive is applicable would result in a significant deterioration of the person's condition

A health care professional must comply with a refusal of treatment certificate. If the person who gave the refusal of treatment certificate no longer suffers from the "current condition", the refusal of treatment certificate will not apply.

Advance care planning in context of mental health

In Victoria, a person receiving treatment under the Mental Health Act 2014 can make a separate Advance Statement in relation to treatment preferences. Alternatively, the Advance Care Directive can include preferences relating to mental health treatment.

Substitute decision-maker

A substitute decision-maker may be nominated by the person, appointed by a tribunal or by default under legislation.

Medical Treatment Decision-maker / agent or attorney

From 12 March 2018 the **Medical Treatment Decision-maker** will be appointed by completing an advance care directive. One or more adults can be appointed into the role, however only one person will have the authority to act at any one time. This will be the first person listed in the appointment who is reasonably available and willing and able to act at the particular time. The person can make decisions relating to refusal / withdrawal of treatment as well as consent for procedures.

Until 12 March 2018, an agent or attorney is appointed by completing the enduring power of attorney (medical treatment) form. A person appointed as an agent before 12 March 2018 will be taken to be appointed Medical treatment decision-maker under the new legislation.

Guardian

A guardian is a person appointed by the Victorian Civil and Administrative Tribunal (VCAT). A guardianship order may be continuing or temporary and may be plenary (full) or limited.

Medical Treatment Decision-maker

From 12 March 2018, a Default Medical Treatment Decision-Maker is the person designated under the law if no guardian, agent, attorney or medical treatment decision-maker appointed.

A person with close continuing relationship:

1. spouse or domestic partner
2. primary carer of the person
3. the first of the following:
 - i. adult child of the person (oldest if more than one)
 - ii. parent of the person (oldest if more than one)
 - iii. adult sibling of the person (oldest if more than one)

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This publication is general in nature and people should seek appropriate professional advice about their specific circumstances, including advance care planning legislation in their State or Territory.



Does the advance care directive apply in other states?

An Advance Care Directive made in Victoria will apply in:

- Northern Territory, however the substitute decision-maker needs to work within the requirements of Northern Territory
- Queensland, if it aligns with the provisions included in the Queensland Advance Health Directive
- South Australia as long as it complies with South Australian law
- Western Australia, if an order is made by the State Administrative Tribunal to recognise the plan

In the Australian Capital Territory, New South Wales and Tasmania there is no law in place to recognise advance care planning documentation from other states. Further advice should be obtained from the Office of the Public Advocate in the relevant state or territory.

Where can I get more information?

Advance Care Planning Australia:

advancecareplanning.org.au

National Advisory Service: 1300 208 582