
Changes to advance care directives — Medical Treatment Planning and Decisions Act 2016 (Vic)

Felicity Iredale *RUSSELL KENNEDY LAWYERS*

Abstract

The law surrounding advance care directives and the associated obligations on health practitioners are set to change in Victoria in March 2018 with the introduction of the Medical Treatment Planning and Decisions Act 2016 (Vic) (the Act).

Introduction

The Act was passed by the Victorian Parliament on 24 November 2016 and will come into effect on 12 March 2018. The Act repeals the Medical Treatment Act 1988 (Vic) (1988 Act) and moves towards a scheme of patient-centred care, enabling a person to create legally binding advance care directives and appoint medical treatment decision-makers and support persons.

The Act applies to all health practitioners and makes several important changes to their obligations. It also institutes many significant changes to the current law on medical treatment decision-making.

Singular definition of “medical treatment” established by the Act

The Act creates a singular definition of “medical treatment” as:¹

any of the following treatments of a person by a health practitioner for the purposes of diagnosing a physical or mental condition, preventing disease, restoring or replacing bodily function in the face of disease or injury or improving comfort and quality of life —

- (a) treatment with physical or surgical therapy;
- (b) treatment for mental illness;
- (c) treatment with —
 - (i) prescription pharmaceuticals; or
 - (ii) an approved medicinal cannabis product within the meaning of the **Access to Medicinal Cannabis Act 2016**;
- (d) dental treatment;
- (e) palliative care —
but does not include a medical research procedure ...

This new definition consolidates the various definitions of “medical treatment” in Victoria. Despite the definition above, advance care directives can dictate whether the person consents to or refuses medical research procedures (discussed below).²

Advance care directives

Under the current law, refusal-of-treatment certificates made in accordance with the 1988 Act are the closest thing to advance care directives. The Act broadens the scope of directives a person can give in relation to medical treatment. A refusal-of-treatment certificate and any appointment made under the 1988 Act will remain valid.³

An advance care directive under the Act can be in any form but must contain certain information to be valid; for example, it must be in writing and include personal details. It must also be witnessed by two people, with one being a medical practitioner.⁴ Advance care directives apply once a person loses capacity to make a medical treatment decision and continue to apply until it expires (contained in the document) or is revoked in accordance with the Act.⁵

Children are also able to make advance care directives, but there is a presumption that they do not automatically have the capacity. This presumption can be reversed where a medical practitioner or psychologist can attest to the child’s decision-making capacity.⁶

The Act provides for advance care directives made interstate to be recognised in Victoria — however, only as values directives (discussed below).⁷ To be recognised or partially recognised, the out-of-state advance care directive must comply with the requirements of the state or territory in which it was made.

There are two types of advance care directives: instructional directives and values directives.

Instructional directives

An instructional directive allows people to provide binding instructions about their future treatment.⁸ In an instructional directive, a person may refuse or consent to treatment, in addition to planning future treatment. A health practitioner must comply with a refusal of treatment in an instructional directive.⁹ However, an instructional directive does not allow a person to demand treatment.¹⁰ To be valid, an instructional directive must

be explicitly stated on the document. Any statement in an advance care directive that is not clearly identified as an instructional directive will be treated as a values directive.¹¹

Values directives

Values directives include a person's preferences and the values they would like to be taken into account in any medical treatment decision to be made on their behalf, including (but not limited to) a statement of medical treatment outcomes that they regard as acceptable.¹² A health practitioner must give effect to a values directive as far as reasonably possible, but cannot rely solely on a values directive to administer treatment and must turn to a medical treatment decision-maker if there is no relevant instructional directive.¹³

Medical treatment decision-makers and changes to power of attorney laws

Under the Act, a person may appoint one or several medical treatment decision-makers who will have the power to make medical treatment decisions a person would make themselves if they had capacity.¹⁴ Only one medical treatment decision-maker holds the power to make decisions at any one time, and where there are multiple decision-makers, the first decision-maker listed maintains the power.

The Act streamlines medical decision-making by amending and repealing other legislations to ensure that, once the Act is in effect, it will provide the only process for medical treatment decision-making for a person without capacity. A pre-existing agent appointed as an enduring power of attorney or guardian under the 1988 Act or Power of Attorney Act 2014 (Vic) (POA Act) that is in force will be adopted as an appointment of a medical treatment decision-maker under the Act, with authority to make decisions to the extent that the person was previously entitled to do so.¹⁵

A person will no longer have the authority to appoint a medical power of attorney under the POA Act as the word "health" will be removed. However, financial or lifestyle powers of attorney will remain under the POA Act. The Act does not restrict or prevent the role of powers of attorney and medical treatment decision-makers from being the same person, but the roles can be appointed to different people.

If a person has not appointed a medical decision-maker, the Act provides that the first person with a "close and continuing" relationship with the person will be the decision-maker. This will be the person's spouse or domestic partner, primary carer, child, parent or sibling.¹⁶ The Office of the Public Advocate will be the decision-maker of last resort for significant treatment.¹⁷

Appointment of support persons under the Act

The Act also allows for the appointment of a support person. A support person does not have the power to make decisions, but will be able to access medical records relevant to a decision, assist the person to make their own decisions and have a role in ensuring the person's decisions are implemented.¹⁸ A support person may also be appointed as the medical decision-maker.

Exceptions under the Act — medical research, special procedures and palliative care

The Act specifies the course of action in regard to medical research procedures on individuals without capacity. It sets out the necessity for medical practitioners to take reasonable steps to verify if an advance care directive exists and whether there is a medical decision-maker.¹⁹ If an instructional directive exists, the medical practitioner must comply with it, or otherwise seek consent from the medical decision-maker. Further, where treatment is pursued without consent or the relevant authorisation, the medical practitioner commits an offence.²⁰ However, the Act provides limited circumstances where a medical research procedure can be carried out on a patient without consent.²¹

The Act will continue to exclude "special procedures" (for example, termination of pregnancy or procedures likely to result in infertility) from the medical decision-making process, unless a person within their instructional directive refuses a special procedure. The performance of a special procedure on a person without capacity still requires a health practitioner to apply to the Victorian Civil and Administrative Tribunal (VCAT) under the Guardianship and Administration Act 1986 (Vic). However, a person may refuse a special procedure in an instructional directive.

Previously, the 1988 Act restricted palliative care from the medical treatment decision-making process and this has been retained. The Act provides that a person with capacity may refuse palliative care or make a values directive in regard to palliative care. However, a medical treatment decision-maker cannot refuse palliative care on behalf of a person as a health practitioner may administer palliative care to any person without decision-making capacity despite any decision of that person's medical treatment decision-maker.²² Despite this, any health practitioner's decision should be made with regard to any values directive and in consultation with the person's medical treatment decision-maker.

What does the Act mean for health practitioners and health services?

The Act applies to all health practitioners under the National Law and paramedics, not just medical practitioners. A medical treatment decision under the Act must be made any time a health practitioner offers to administer a course of treatment.

If a person does not have capacity, a health practitioner must make reasonable efforts in the circumstances to locate an advance care directive and a medical treatment decision-maker.²³ Failure to do so will amount to unprofessional conduct.²⁴ It should however be noted that there are exceptions for treatment that is urgently required to save a person's life or prevent serious pain or distress.²⁵

If an advance care directive is located or a medical treatment decision is made, the health practitioner must act in accordance with it or will have engaged in unprofessional conduct.²⁶ However, nothing requires a health practitioner to provide treatment or care they consider non-beneficial for a person.²⁷

The Act requires health practitioners to notify the Office of the Public Advocate if a medical treatment decision-maker refuses treatment on behalf of a person whose preferences and values cannot be inferred. The Office of the Public Advocate must review the decision and notify VCAT if it considers it unreasonable.²⁸ The Act also creates an obligation for health services to take reasonable steps to ascertain whether a person at the service has made an advance care directive, and if so, to place a copy of this on the person's record.²⁹

VCAT's jurisdiction under the Act

VCAT will have jurisdiction to administer and enforce the Act. VCAT's powers are broad and relate, but are not limited, to the following matters:

- validity of advance care directives (s 22);
- validity of the appointment of medical treatment decision-makers and support persons (s 43);
- authority of decision-makers to make medical treatment decisions (s 66);
- unreasonableness of decisions to refuse treatment (s 67); and
- disputes regarding medical research procedures (s 82).

Conclusion

In preparation for the introduction of the Act, the Department of Health is working in conjunction with the Office of the Public Advocate as part of an implementation advisory group to develop a plan to prepare stakeholders for the introduction of the Act in March 2018.

The plan will include the development of education material and provision of workshops to assist consumers and health providers understand their rights and obligations under the Act.

The need for clear guidance and education for health practitioners and organisations is vital as the Act drastically changes the current landscape for advance care directives and substituted decision-making. While the Act will hopefully mean there is more clarity and certainty with respect to a person's medical treatment outcomes and decisions, it places a higher burden on the health care sector.

The changes will see health professionals placed with the responsibility to locate an advance care directive or medical treatment decision-maker prior to medical treatment being administered, and subsequently ensure any directive or decision is complied with. These changes result in a greater burden to ensure valid consent is given by patients. Similarly, health services, particularly hospitals and aged care providers, will be required to maintain complete and accessible registers of advance care directives and details of appointed decision-makers to ensure health professionals can comply with their obligations under the Act.



Felicity Iredale
Lawyer
Russell Kennedy Lawyers
firedale@rk.com.au
www.rk.com.au

Footnotes

1. Medical Treatment Planning and Decisions Act 2016 (Vic), s 3(1).
2. Above n 1, s 9.
3. Above n 1, s 102(1).
4. For formal requirements of advance care directives, see above n 1, Pt 2.
5. Above n 1, ss 19 and 20.
6. Above n 1, s 13.
7. Above n 1, s 95.
8. Above n 1, s 6.
9. Above n 1, s 12(1).
10. Above n 1, s 8.
11. Above n 1, s 12(3).
12. Above n 1, s 6(2).
13. Above n 1, s 4.
14. Above n 1, s 26.
15. Above n 1, ss 102(2) and 103.
16. Above n 1, s 55(3).
17. Above n 1, s 63.

18. Above n 1, s 31.
19. Above n 1, s 73(1).
20. Above n 1, ss 84 and 85.
21. Above n 1, s 80.
22. Above n 1, s 54.
23. Above n 1, s 50(1).
24. Above n 1, s 50(2).
25. Above n 1, s 53(1).
26. Above n 1, s 60.
27. Above n 1, ss 53(1) and 8(2).
28. Above n 1, s 62.
29. Above n 1, s 98(1).