

## Medical Treatment Planning and Decisions Act 2016 (Vic)

### Key points

- Appointments of medical treatment decision makers and advanced care directives replace medical powers of attorney and refusal of medical treatment certificates from 12 March 2018.
- Medical power of attorneys entered into before 12 March 2018 are taken to be appointments of medical decision makers.
- Any refusal of treatment certificates created before 12 March 2018 under the Medical Treatment Act will continue in force.
- Specific capacity tests and witnessing requirements are in the legislation.

The Medical Treatment Planning and Decisions Act 2016 (Vic) (the Act) came into force on 12 March 2018. It changes medical treatment laws, in particular the way people can manage their medical treatment decisions if they lose capacity. It replaces the use of medical powers of attorney and refusal of medical treatment certificates with appointments of **medical treatment decision makers** and **advanced care directives**.

Practitioners who draw wills and powers of attorney, and practice in elder law should read and understand this new legislation and be able to advise their clients about it.

### Medical treatment decision maker

The Act sets out who can be a medical treatment decision maker for someone who has lost capacity. It allows a person to appoint a medical treatment decision maker but if they fail to do so, VCAT can appoint someone or there is a hierarchy list of relatives who can make decisions (section 55).

### Appointment of a medical treatment decision maker

The appointment of a medical treatment decision maker must be in writing with non-prescribed forms available on the [Office of Public Advocate website](#). Section 28 sets out the requirements, most notably that the document must be witnessed by two adult witnesses in the presence of each other, one of whom must be a medical practitioner or someone authorised to take affidavits. The authorised medical decision maker cannot be a witness. A medical treatment decision maker can access health information about the patient relevant to the medical treatment decision (section 94).

## Support Person

The Act allows for the appointment of a support person who is authorised to support the person in making a medical treatment decision, communicate the decision that has been made and represent the person's interests (section 32). Only one person can be appointed in this role (section 31) and the formal requirements for the written authority are the same as those set out above for the appointment of a medical decision maker (section 33). Support persons can access health information about the patient relevant to the medical treatment decision (section 94).

## Advance Care Directives

The Act allows people to prepare advanced care directives while they have capacity (section 12). The directives can refer to specific treatment (instructional directives) or can specify general values and preferences of the person (values directives). A directive must be in writing and be signed by the person and witnessed by two adults, one of whom must be a medical practitioner.

## Capacity

The appointments and directives under the Act can only be made by a person if they have decision-making capacity. The test for capacity is set out in section 4. The person must be able to:

- understand the information relevant to the decision and the effect of the decision
- retain that information to the extent necessary to make the decision
- use or weigh that information as part of the process of making the decision
- communicate the decision as well as their views and needs as to the decision in some way, including by speech, gestures or other means.

This test is a general statement of what is required for assessing capacity and is similar to the test for testamentary capacity although the information relevant to making the decision is different. For more information on testamentary decision making see our practice risk guide [Weatherproofing wills and estates](#).

## Special Processes

There is a specific process set out in the Act whereby the advance care directives and authority of the appointed medical decision maker might not apply. These include:

- circumstances have changed (section 51)
- emergency treatment (section 53)
- palliative care (section 54)
- if the person is likely to recover decision-making capacity (section 59)
- compulsory patients (section 55(5))
- medical research (Part 5).

## Transitional Issues

The Act repeals the Medical Treatment Act 1988 (Vic) but any refusal of treatment certificates created under the Medical Treatment Act will continue in force. Any appointments under an enduring power of attorney (medical treatment) will be taken to be an appointment of a medical decision maker (section 102). Any person given power to make medical treatment decisions by powers of attorney made under the Powers of Attorney Act 2014 (Vic) will be taken to be medical treatment decision makers.

## Risk Management

The risks in acting in this area include:

- not properly assessing a person's capacity to appoint a medical treatment decision maker or a support person
- not properly explaining to role of a medical treatment decision maker or support person so the client makes an inappropriate appointment
- not complying with the signing and witnessing requirements.

Practitioners who practice in this area need to:

- become familiar with the new legislation and the material on the Office of Public Advocate's website
- update their precedent documents, letters, checklists and any policies about witnessing documents and testing for capacity
- give clients clear advice about what medical treatment decision makers and support people can do and the principles set out in section 7 of the Act.
- consider not preparing advanced care directives as these should be prepared in consultation with the client's medical practitioner.

## Further Information

The [Office of Public Advocate website](#) has comprehensive information for both practitioners and their clients about the Act.

The [Values and preferences for further medical treatment](#) article in the May 2018 issue of the Law Institute Journal page 27.

The Act can be found on [Austlii here](#).

The Department of Health and Human services website [health.vic](#) contains more information and standard forms.