

Medical Decision Making and Advance Care Planning

By Anne Howard, Solicitor and Claudia Hirst, Legal Counsel

Introduction

The *Medical Treatment Planning and Decisions Bill 2016* (Vic) passed the Legislative Assembly on 24 November 2016 and received Royal Assent on 29 November 2016.

The *Medical Treatment Planning and Decisions Act 2016* (Vic) (the **Act**) is set to commence on the earliest of a day to be proclaimed or 12 March 2018.

Background

The main objective of the Act is to ensure that people's preferences and values direct decisions about their treatment and care even if they lose capacity to make decisions. The Act will achieve this by establishing a comprehensive new legislative framework for medical treatment decision making for people who do not have capacity and by giving statutory recognition to advance care directives in Victoria.

Some of the key aspects of the new Act are outlined below.

Refusal of medical treatment

The Act will repeal the *Medical Treatment Act 1988* (Vic) and consequently the ability to complete a refusal of treatment certificate under that Act. Instead the right of a competent patient to refuse medical treatment will be exercised by making an advance care directive (discussed in detail below) and the decision to refuse treatment on behalf of an incompetent patient will be exercised by the person's medical treatment decision maker under the Act.

However, a refusal of treatment certificate in force under the *Medical Treatment Act 1988* (Vic) immediately before the repeal of that Act (that date being 12 March 2018) will remain in force until such time as it is revoked or otherwise ceases to have effect in accordance with that Act.

Advance Care Directives

Under the Act, a person with decision making capacity (including a child) will be allowed to make an advance care directive.



An advanced care directive is a document that sets out a person's binding instructions or preferences and values in relation to the medical treatment of that person in the event that the person loses decision making capacity.

An advance care directive may contain either or both of the following:

- an instructional directive (which allows a person to provide binding instructions about their future medical treatment, including whether they consent or refuse to consent to treatment (including 'special procedures' as defined in the *Guardianship and Administration Act 1986* (Vic)); or
- a values directive (which allows a person to describe their preferences and values in relation to future medical treatment that must then be taken into account by their medical decision maker).

Unlike a refusal of treatment certificate under the *Medical Treatment Act 1988* (Vic), an advance care directive will not be restricted to treatment for a current condition.

For an advance care directive to be valid it must be written in English, include the full name, date of birth and address of the person giving it, be signed by the person giving it and witnessed and certified by two adults, both of whom must certify that at the time of signing the document, the person giving the advance care directive appeared to have decision making capacity in relation to each statement in the

March 2017 Edition

directive. In addition, at least one of the witnesses must be either a registered health practitioner or a person who is authorised by law to take affidavits, including a legal practitioner (sections 16 and 17 of the Act).

Section 50 of the Act requires health practitioners to make reasonable efforts to ascertain whether a person has an advance care directive and to give effect to it, or if it is a values directive, take it into account when making a decision regarding treatment. Failure to comply with this requirement will amount to unprofessional conduct.

Where there is uncertainty as to the validity, meaning or effect of an advance care directive or any other matter in relation to an advance care directive, an eligible applicant may apply to VCAT for an order, revoking, varying or suspending the directive or declaring the directive to be valid. An 'eligible applicant' is defined to include a health practitioner or the medical treatment decision maker of the person (see section 22 of the Act).

Medical treatment decision makers

The Act will repeal Part 4A (except provisions relating to 'special procedures') of the *Guardianship and Administration Act 1986* (Vic), which includes section 37 (Person Responsible). Section 37 will be replaced by the medical treatment decision maker hierarchy set out in section 55 of the Act.

Under section 55 of the Act, if a patient is clinically assessed as not competent to make a 'medical treatment decision', then legally the person's 'medical treatment decision maker' will be the first person listed in section 55 of the Act who is responsible for the patient and who, in the circumstances, is reasonably available and willing and able to make the medical treatment decision. 'Medical treatment decision' is defined to mean a decision to consent to or refuse the commencement or continuation of medical treatment.

The first person listed in section 55 of the Act is a person appointed by the patient under section 26 of the Act to be the patient's medical treatment decision maker. The hierarchy also includes other decision makers such as existing enduring powers of attorney (medical treatment), VCAT appointed guardians and the patient's relatives.

Where a medical treatment decision maker refuses 'significant treatment' (as defined in the Act) on

behalf of a person whose preferences and values are unknown, the treating health practitioner must notify the Public Advocate (section 62 of the Act).

The Act will also remove references to 'health' in the *Powers of Attorney Act 2014* (Vic). The effect of this amendment will be that the *Powers of Attorney Act 2014* (Vic) will only govern substitute decision making for financial and lifestyle decisions and the Act will govern substitute decision makers for medical treatment decisions.

However, an enduring power of attorney (medical treatment) or an enduring power of attorney with power to make medical treatment decisions in force under the *Powers of Attorney Act 2014* (Vic) immediately before the commencement of the Act (that date being 12 March 2018) will still remain in force until such time as they are revoked or otherwise cease to have effect in accordance with the *Powers of Attorney Act 2014* (Vic).

Emergency Treatment

The Act contains a similar provision to section 42A of the *Guardianship and Administration Act 1986* (Vic) in relation to emergency medical treatment. Section 53 of the Act provides that medical treatment can be performed without consent where the health practitioner believes on reasonable grounds that the medical treatment is necessary, as a matter of urgency to save the person's life, prevent serious damage to the person's health or prevent the person from suffering or continuing to suffer significant pain or distress.

However, medical treatment cannot be performed where the health practitioner is aware that the person has refused the particular medical treatment, whether by way of an instructional directive or a legally valid and informed refusal of treatment by or under another form of informed consent. This obligation does not, however, require the health practitioner to search for an advance care directive that is not readily available if the circumstances set out in section 53 of the Act apply.

Treatment where there is no medical treatment decision maker

Under section 63 of the Act, where there is no medical treatment decision maker for a person and a health practitioner has been unable to locate an advance care directive for that person, then routine medical treatment may be performed without

March 2017 Edition

consent. However, if the medical treatment is significant treatment, the medical treatment may only be performed if the Public Advocate consents.

'Routine treatment' is defined to mean any medical treatment other than 'significant treatment'.

Issues for implementation

The implementation of the Act will take place over the next twelve months.

We note the Department of Health and Human Services is currently developing educational material and workshops to support health services and aged care providers to understand their obligations under the Act.

Health services and aged care providers will need to review consent and refusal of treatment policies and train staff on the recognition and use of the instructional and values advance care directives and the status of medical treatment decision makers.

*If you have any questions arising out of this article, please contact **Anne Howard** on (03) 9865 1311 or email anne.howard@healthlegal.com.au.*