

# PG SAQs – Medico-legal series

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|  | Substitute decision making   |
| Application                                | When an <b>adult lacks decision making capacity</b> to consent to medical treatment (see previous document on informed consent)  |
| Current legislation                        | <ul style="list-style-type: none"> <li>Medical Treatment Planning and Decisions Act 2016 (enacted 2018) <ul style="list-style-type: none"> <li>Repeals Medical Treatment Act 1988 (MTA)</li> <li><b>Replaces concept of enduring power of attorney with appointment of medical treatment decision maker</b> (medical powers of attorney made before commencement of Act still valid)</li> <li>Provides for creation of advance care directive (instructional or values)</li> </ul> </li> <li>Powers of Attorney Act 2014</li> <li>Mental Health Act 2014</li> </ul>  |
| Repealed legislation                       | <ul style="list-style-type: none"> <li>MTA</li> <li>Instruments Act 1958</li> <li>Guardianship and Administration Act 1986</li> </ul>  |
| Hierarchy of documents and decision makers | <ol style="list-style-type: none"> <li><i>Does an advance care directive* exist?</i></li> <li><i>Does the ACD appoint a medical treatment decision maker**?</i></li> <li><i>If not the first person who is ready, willing and able (and if more than one the oldest)</i> <ul style="list-style-type: none"> <li><b>Guardian appointed by VCAT</b></li> <li><b>Spouse or domestic partner</b></li> <li><b>Primary carer (not paid carer)</b></li> <li><b>Adult child</b></li> <li><b>Parent</b></li> <li><b>Adult sibling</b></li> </ul> </li> </ol> <p><i>*Similar instruments (such as “refusal of treatment certificate” under repealed legislation) to remain in effect</i></p> <p><i>**Similar appointments (such as “enduring power of attorney” under repealed legislation) to be taken as person’s medical treatment decision maker</i></p> |
| Types of ACD                               | <ul style="list-style-type: none"> <li><b>Instructional</b> – specific consent to or refusal of particular forms of medical treatment</li> <li><b>Values</b> – statement of the person’s values and preferences</li> </ul>   |
| Medical treatment decision maker duties    | <ul style="list-style-type: none"> <li><b>Must make decisions they reasonably believe the patient would have made (stand in their shoes)</b></li> <li>Not what they personally believe to be in the best interests of the patient</li> </ul>   |
| Practitioner duties                        | <ul style="list-style-type: none"> <li>Must make reasonable efforts in the circumstances to ascertain if ACD exists</li> <li>If so to give effect to that directive</li> <li>Not applicable in event of emergency***</li> </ul>  |

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| <b>Practitioner traps</b> | <ul style="list-style-type: none"> <li>• The person nominated in the notes as “next of kin” is not necessarily the medical treatment decision maker</li> <li>• Despite the existence of this document the practitioner is not obliged to provide treatment deemed futile or not in the person’s best interests (obviously complex and requires input from senior staff and lawyers)</li> </ul> |  |
| <b>Specific scenarios</b> | Decision maker refuses significant treatment   | <ul style="list-style-type: none"> <li>• Medical practitioner to make all efforts to ascertain preferences and values of patient</li> <li>• Involve hospital lawyers</li> <li>• May need to notify Public Advocate</li> </ul>  |
|                           | Conflict between family members  | <ul style="list-style-type: none"> <li>• Be aware of the hierarchy and attempt to apply</li> <li>• Involve hospital lawyers</li> <li>• May need to notify Public Advocate</li> </ul>   |
|                           | Emergency case (necessary to save person’s life, prevent serious damage, prevent suffering from significant pain and distress)   | <ul style="list-style-type: none"> <li>• No consent required</li> <li>• Do not need to look for or locate ACD</li> <li>• <b>***If aware ACD exists life-saving treatment cannot be administered even if inaction results in death</b></li> </ul>   |
|                           | The treatment is thought to be futile by the medical team but the medical treatment decision maker is insisting “all be done”  | <ul style="list-style-type: none"> <li>• Back to basics (mention concepts of capacity and substitute decision maker)</li> <li>• Robust assessment and evidence to prove treatment futile</li> <li>• Involvement of senior staff and hospital lawyers</li> <li>• Common sense stuff, organise meeting with all interested parties and attempt to reach consensus</li> </ul> |
|                           | The patient is from interstate   | <ul style="list-style-type: none"> <li>• Valid appointments in other states and territories recognised in Victoria</li> </ul>  |
| <b>Practical remarks</b>  | Documentation <ul style="list-style-type: none"> <li>• Must be in English</li> <li>• Need to site copy</li> </ul> Assistance <ul style="list-style-type: none"> <li>• Involve senior staff if unsure</li> <li>• Hospital legal advisors and MDO’s can always be contacted</li> </ul>   |  |