Office of the Public Advocate

November 2020
Ph: 1300 309 337
publicadvocate.vic.gov.au

Can your adult patient consent?

Download the app.

Explanatory notes

1. Emergency treatment

Medical treatment that is necessary, as a matter of urgency to save the person's life, or prevent serious damage to the person's health, or prevent the person from suffering or continuing to suffer significant pain or distress.

2. Decision-making capacity

The patient is able to understand the information relevant to 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, and is able to communicate their decision in some way.

3. Directive or certificate refusing treatment

Treatment must not proceed if:

- there is a valid refusal of medical treatment certificate, made prior to 12 March 2018 in accordance with the *Medical Treatment Act 1988*
- the patient has refused the particular medical treatment in an instructional directive (in a valid advance care directive) in accordance with the *Medical Treatment Planning and Decisions Act 2016*.

  (Note: In their instructional directive, the patient may have consented to the treatment).

A health practitioner must make reasonable efforts in the circumstances to ascertain if the person has an advance care directive (See overleaf for when a health practitioner can refuse to comply with a directive).

4. Medical treatment decision maker

The first person in the list below who is reasonably available, and willing and able, to make the decision is the patient's medical treatment decision maker:

- a medical treatment decision maker appointed by the patient
- a guardian appointed by VCAT to make decisions about medical treatment
- The first of the following people who is in a close and continuing relationship with the patient. If more than one relative is first on this list, it is the eldest:
  - the patient's spouse or domestic partner
  - the patient's primary carer (not a paid service provider)
  - an adult child of the patient
  - a parent of the patient
  - an adult sibling of the patient.

Legal appointments made prior to 12 March 2018 are recognised. (See more overleaf).

5. Notifications to the Public Advocate

Health practitioners must notify the Public Advocate if:

- the medical treatment decision maker of a patient refuses significant treatment and
- the health practitioner reasonably believes that the preferences and values of the patient are not known, or are unable to be known or inferred.

Complete s.62 form on the Office of the Public Advocate (OPA) website: **publicadvocate.vic.gov.au**

6. Significant treatment

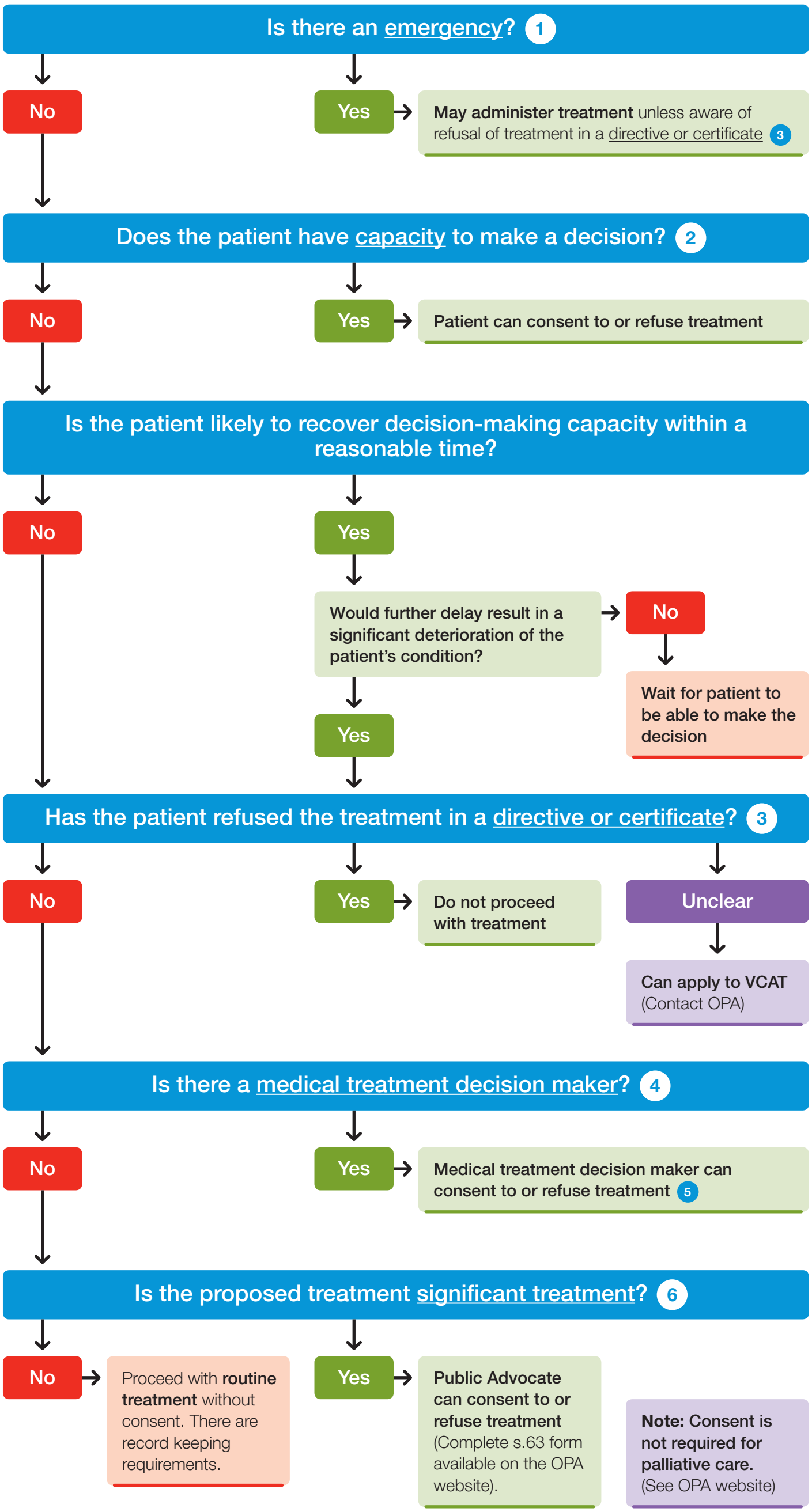
Medical treatment that involves any of the following:

- a significant degree of bodily intrusion
- a significant risk to the person
- significant side effects
- significant distress to the person.

See the OPA website for clinical guidelines.

Note:

- If a person is a compulsory patient under the *Mental Health Act 2014*, that Act applies.
- There are different consent processes for medical research procedures (see the OPA website) and 'special medical procedures' (see overleaf).



Refusing to comply with an instructional directive

A health practitioner should make an application to VCAT if they believe:

- circumstances have changed since the patient made their instructional directive and
- this means that the practical effect of the instructional directive would no longer be consistent with their preferences and values.

If the health practitioner reasonably believes that the delay in making the application would result in a significant deterioration of the patient's condition, the health practitioner may refuse to comply with the instructional directive. This means the patient's medical treatment decision maker (or the Public Advocate) makes the decision, unless emergency treatment is required.

The medical treatment decision maker

If a patient is unable to make a medical treatment decision, their medical treatment decision maker can do this on their behalf.

A patient's medical treatment decision maker must make the decision they reasonably believe is the decision the patient would have made. The Act sets out how they do this. They can consent to or refuse the commencement, or continuation, of treatment.

A health practitioner can disclose health information about the patient to their medical treatment decision maker where it is relevant to a medical treatment decision they will make.

The Act specifies a list of people who can be a patient's medical treatment decision maker. (See overleaf for hierarchy).

Legal appointments made prior to the commencement of the Act are recognised. This means the patient may have appointed their medical treatment decision maker in an:

- enduring power of attorney (medical treatment) made before 12 March 2018
- enduring power of attorney appointing an attorney for personal matters made between 1 September 2015 and 11 March 2018
- enduring power of guardianship appointing an enduring guardian with healthcare powers made before 1 September 2015.

Note: Valid appointments in other states and territories are recognised in Victoria.

Significant and routine treatment

Under the Act, if it is not an emergency, a health practitioner must seek consent from the Public Advocate to provide significant treatment to a patient who:

- does not have decision-making capacity for the medical treatment decision and
- does not have:
  - a medical treatment decision maker or
  - an advance care directive with a relevant instructional directive.

See the Office of the Public Advocate (OPA) website for clinical guidelines about what constitutes significant treatment.

In making a significant treatment decision on behalf of the patient, the delegate of the Public Advocate must follow the process set out in the Act.

Routine treatment is any treatment that is not significant treatment under the Act. A health practitioner can administer routine treatment without consent if there is no medical treatment decision maker. If they do so, the health practitioner will need to set out in the patient's clinical records the details of:

- the health practitioner's attempts to locate an advance care directive and a medical treatment decision maker
- the exact nature of the routine treatment and the reason for the decision to administer it.

Record-keeping

A health practitioner needs to record on the patient's clinical records the reasons they were satisfied the patient did not have decision-making capacity, and their attempts to locate an advance care directive and a medical treatment decision maker.

Acting in good faith

A health practitioner who, in good faith and without negligence, reasonably believes they have complied with the medical consent process set out in the Act, is not guilty of an offence or liable for unprofessional conduct or professional misconduct.

Special medical procedures

Only VCAT can consent to a special medical procedure for a patient who does not have decision-making capacity for the decision.

A special medical procedure is:

- any procedure that is intended, or is reasonably likely, to have the effect of rendering the patient permanently infertile
- termination of pregnancy or
- any removal of tissue for the purposes of transplantation to another person.

More information

Contact the OPA Advice Service on 1300 309 337 for more information or at **www.publicadvocate.vic.gov.au**

Office of the Public Advocate

April 2019

Medical decision-making

www.publicadvocate.vic.gov.au

poster + inside

Health practitioners need a patient's consent before providing medical treatment.

The *Medical Treatment Planning and Decisions Act 2016* sets out steps for health practitioners to follow when a patient is unable to consent. See flowchart overleaf for these steps.

The Act applies to health practitioners

The Act commenced on 12 March 2018 and applies to all registered health practitioners in the following professions:

- medical
- dental
- physiotherapy
- occupational therapy
- chiropractic
- pharmacy
- optometry
- podiatry
- psychology
- nursing and midwifery
- medical radiation practice
- osteopathy
- Chinese medicine
- Aboriginal and Torres Strait Islander health practice.

In addition, the Act applies to the following, who are also health practitioners under the Act:

- paramedics
- non-emergency patient transport staff.

Medical treatment

Medical treatment is treatment by a health practitioner that is for one or more of the purposes listed below and for one of the forms of treatment listed below.

Purpose	Treatment
• diagnosing a physical or mental condition • preventing disease • restoring or replacing bodily function in the face of disease or injury • improving comfort and quality of life.	• treatment with physical or surgical therapy • treatment for mental illness • treatment with prescription pharmaceuticals • dental treatment • palliative care.

Emergency treatment

Consent is not needed in an emergency.

Emergency treatment must not proceed if the health practitioner is aware that the patient has refused the particular treatment in an instructional directive within an advance care directive, or there is a relevant refusal of medical treatment certificate made before 12 March 2018.

In an emergency, a health practitioner is not required to search for an advance care directive that is not readily available.

Note: A patient with decision-making capacity may refuse emergency treatment, but the health practitioner would need assurance that the person understood their circumstances.

Assessing whether to offer treatment

Health practitioners assess whether to offer a particular medical treatment, and whether a particular treatment is futile or non-beneficial.

Advance care directives

A person is able to make a legal document called an advance care directive. It can include an instructional directive with legally binding instructions to health practitioners about future treatment. If the patient currently does not have decision-making capacity to make a medical treatment decision, and previously made a relevant instructional directive, the directive takes effect as if they had consented to, or refused, the treatment.

A patient's advance care directive must not include any instructions that are unlawful or would require an unlawful act to be performed, or that, if given effect to, would cause a health practitioner to contravene a professional standard or code of conduct.

In addition to an instructional directive, an advance care directive can include a values directive which documents the person's values and preferences for future medical treatment. It is considered by their medical treatment decision maker when making a decision on their behalf.

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