



# Palliative care when the person does not have decision-making capacity

This fact sheet is about the sections in the *Medical Treatment Planning and Decisions Act 2016* that relate to palliative care.

## 1. Purpose of this document

The definition of medical treatment in the Medical Treatment Planning and Decisions Act includes palliative care.

However, palliative care is treated differently from other forms of medical treatment.

This is because palliative care is for the relief of the patient's suffering. It would be unusual, if not unconscionable, to prevent a person obtaining relief from their pain.

This document examines:

- how palliative care is treated differently in the Act from other medical treatment and where this might not be so apparent
- who consents to palliative care when a person is unable to do so
- the effect of making directives about palliative care
- who should be consulted when decisions about palliative care are made
- the role of family and carers.

## 2. Relevant provisions in the Medical Treatment Planning and Decisions Act

### Principles (s.7)

A person exercising a power or performing a function or duty under the Act must have regard to a number of principles, including:

- a person should be given, in a sensitively communicated and clear and open manner, information about medical treatment or medical research procedure options, including comfort and palliative care, to enable the person to make informed decisions
- a partnership between a person and the person's family and carers and health practitioners is important to achieve the best possible outcomes.

### Definition of medical treatment (s.3)

**Medical treatment** means 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
  - (ii) an approved medicinal cannabis product within the meaning of the *Access to Medicinal Cannabis Act 2016*
- (d) dental treatment
- (e) palliative care.

Medical treatment does not include a medical research procedure.

As indicated, medical treatment *includes* palliative care.

### **Definition of palliative care (s.3)**

Palliative care is then defined to include the following:

- (a) the provision of reasonable medical treatment for the relief of pain, suffering and discomfort
- (b) the reasonable provision of food and water.

## **3. Making decisions about palliative care**

### **Content of Advance Care Directives (s.12)**

Any statement about palliative care in an advance care directive purporting to be an instructional directive will be regarded as a values directive.

It is therefore not possible to make an instructional directive either consenting to or refusing palliative care. It is however possible to communicate preferences and values as the basis on which the person would like any medical treatment decisions, inclusive of palliative care, to be made.

### **Medical treatment decisions which can be made by a medical treatment decision maker (s.57)**

Although medical treatment is defined to include palliative care, section 57 of the Act states that Division 2, Part 4 of the Act (medical treatment decision making process) does not apply to palliative care.

This means that a medical treatment decision maker cannot make a medical treatment decision about palliative care.

However, a medical treatment decision maker can advocate to the health practitioner for the person's preferences and values to be taken into consideration in any decision to administer palliative care.

### **Administering palliative care (s.54)**

If a health practitioner administers palliative care to any person then he or she must:

- (a) have regard to any preferences and values of the person, whether expressed by way of a values directive or otherwise and
- (b) consult with the person's medical treatment decision maker (if any).

## **4. When is a particular type of medical treatment 'palliative care' and when it may be some other type of medical treatment?**

Palliative care is a form of medical treatment, but in some parts of the Act it is treated differently from other forms of medical treatment.

Firstly, palliative care is excluded from the part of the Act which relates to medical treatment decision making process (s.57). Accordingly, a medical treatment decision maker cannot make a medical treatment decision about palliative care whilst being able to make

a medical treatment decision about other forms of medical treatment.

Secondly, a person can make an *instructional* directive about medical treatment but only a *values* directive about palliative care.

It will be important in terms of decision making to work out whether the treatment is palliative care or another form of medical treatment.

### Example 1

Ivy is in the terminal stages of cancer and expected to die within days or weeks. She falls and fractures her neck of femur. It is recommended that Ivy undergo surgery. How would we characterise this surgery?

- Would such surgery be ‘palliative care’ and thus not requiring a medical treatment decision (either in the form of an instructional directive or by a medical treatment decision maker) or
- Would it be medical treatment which would require a medical treatment decision?

It is possible to characterise the surgery as intended to reduce pain and thus palliative care, but also it is a procedure for the restoration of bodily function.

If the surgery is primarily for the purpose of improving comfort and quality of life, we would regard it as palliative care. If it were primarily to restore Ivy’s bodily function when she is expected to die within days or weeks, it would be medical treatment and requiring compliance with an instructional directive or the consent of her medical treatment decision maker. In the absence of both, it would be significant treatment and the consent of the Office of the Public Advocate (OPA) would be sought.

### Example 2

It is suggested that Martin have chemotherapy for his tumour. The chemotherapy is intended to have the effect of reducing the size of the tumour with a view to improving Martin’s comfort but it will not have any curative effect.

- Is this ‘palliative care’ – being the provision of reasonable medical treatment for the relief of pain, suffering and discomfort – thus not requiring a medical treatment decision? or
- Is it treatment for the purpose of restoring or replacing bodily function in the face of disease or injury in the form of prescription pharmaceuticals — thus requiring a medical treatment decision?

In Martin’s case, it seems easier to characterise the treatment as palliative care as it will only restore bodily function temporarily and is primarily to ease his pain.

In relation to both examples a health practitioner would need to consider the purpose of the medical treatment. If the primary purpose for which the medical treatment is proposed (and hopefully the outcome of the medical treatment) is the relief of pain, suffering and discomfort, then it is probably palliative care which is being provided. Conversely, if the primary focus is the restoration of bodily function, then probably it is medical treatment.

The purposes of the treatment and the anticipated outcomes require clarification to determine whether it is medical treatment which requires a medical treatment decision.

## 5. Palliative care in practice

Victoria's end of life and palliative care framework (2016) defines palliative care as follows:

“The term ‘palliative care’ describes an approach to care that improves the quality of life of people and their families who are facing the problems associated with a progressive illness. It does this by preventing and relieving suffering through early identification and assessment, by treating pain and *other physical, psychosocial and spiritual problems* and by *addressing practical issues*.”

Palliative care is based on people's needs rather than diagnosis or possible time of death and is delivered by a range of health and community providers. Palliative care can be provided at the same time as other treatment intended to reverse or resolve particular conditions.”

Palliative care, in this broad sense, provided by a palliative care health practitioner may or may not be *palliative care* as defined in the Act. Again, the distinction is important because a medical treatment decision maker cannot make a medical treatment decision about palliative care but they can make a medical treatment decision about other forms of care provided by palliative care practitioners that constitute medical treatment.

The location of medical treatment, such as in a hospice or palliative care unit, does not determine whether particular medical treatment is palliative care within the meaning of the Act.

## 6. Family opposition to provision of palliative care

Sometimes family members and/or medical treatment decision makers may object to various forms of palliative care. However, if the medical treatment can only be considered palliative care, and not some other form of medical treatment, then the family members and/or medical treatment decision makers do not have legal authority to prevent a health practitioner administering such care.

It is however important to communicate effectively with concerned family members to address their concerns and possible misapprehensions. Family members may think palliative care means giving up on the person or hastening their death as opposed to understanding that the rationale of treatment is for pain relief, and there may no longer be curative or life-sustaining options.

It may be important to advise family members that nothing in the Act requires a health practitioner to administer a futile or non-beneficial medical treatment to a person (s.8).

## 7. Carers are important

One of the principles guiding the end of life and palliative care framework is that carers are important and carers should receive recognition, support and are valued throughout their caring experience and after a person's death.

## 8. Steps for health practitioners providing palliative care

1. Is it palliative care? Or is it some other form of medical treatment?
  - a. If it is palliative care, then the health practitioner may administer such care without seeking consent, but must have regard to:
    - i. an advance care directive and/or
    - ii. consult with the medical treatment decision maker.
  - b. If it is medical treatment (other than palliative care) then the medical treatment decision maker must be asked to make a medical treatment decision (to consent to, or refuse the medical treatment) unless there is a relevant and valid instructional directive in which case the medical treatment decision (consent or refusal) of the person should be given effect to.
2. What if the medical treatment can be described as both palliative care **and** some other form of medical treatment? As discussed above, health practitioners will need to give careful consideration as to how to describe the purpose of the treatment in order to establish whether it is 'palliative care' or some other form of medical treatment.
3. Communication is critical — do the medical treatment decision maker and family members understand what palliative care means (legally, medically)?
4. Health practitioners need to be sure of their clinical position and the law. Despite objections of a medical treatment decision maker, or others, a health practitioner should feel confident to provide palliative care. Their duty is to their patient.
5. As with other types of medical treatment, a medical treatment decision maker could request a second opinion as to the clinical recommendation. It may be helpful to suggest this.
6. An application can be made to the Victorian Civil and Administrative Tribunal by a medical treatment decision maker or health practitioner for directions or an advisory opinion on any matter or question relating to an advance care directive or the medical treatment of the person.

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