

# Can your adult patient **CONSENT**?

Is there an **EMERGENCY**?

No

Yes

## EMERGENCY TREATMENT

Emergency treatment is urgent treatment required to save the life of a person; prevent serious damage to the person's health; or to prevent the person suffering or continuing to suffer significant pain or distress. A practitioner does not require consent to proceed with emergency treatment (for a person who lacks capacity). However, if there is a Refusal of Treatment Certificate, treatment must not proceed.

**PROCEED WITH TREATMENT**

Does the person have **CAPACITY** to make a decision?

No

Yes

## CAPACITY

The patient is able to understand their medical condition, treatment options, and any risks and benefits associated with the treatment alternatives to enable them to make an informed decision. Sometimes a qualified person may be required to make a capacity assessment (e.g. neuropsychological, psychiatric, gerontological). Capacity may be impaired by, for example mental illness, dementia, an acquired brain injury or an intellectual disability.

**PATIENT CAN REFUSE OR CONSENT TO TREATMENT**

Is there a **REFUSAL OF MEDICAL TREATMENT** certificate?

No

Yes

## REFUSAL OF MEDICAL TREATMENT

Treatment must not proceed if a person has completed a valid Refusal of Medical Treatment certificate in accordance with the Medical Treatment Act 1988.

**DO NOT PROCEED WITH TREATMENT**

Is there a **PERSON RESPONSIBLE** to consent?

## PERSON RESPONSIBLE

Where a patient is unable to consent to treatment, the practitioner can obtain consent from the person responsible in the following order:

1. An agent - appointed with enduring powers of attorney (medical treatment)
2. A person appointed by VCAT to make decisions about proposed treatment
3. A guardian - appointed by VCAT with health care powers
4. An enduring guardian - appointed with health care powers
5. A person appointed by the patient in writing to make medical and dental treatment decisions including the proposed treatment
6. The spouse or domestic partner
7. The primary carer, including Centrelink paid carers but excluding all other paid carers
8. The patient's nearest relative over the age of 18: a. son or daughter, b. father or mother, c. brother or sister, d. grandfather or grandmother, e. grandson or granddaughter, f. uncle or aunt, g. nephew or niece. (Where two relatives are in the same position, the elder will be the person responsible.)

See fact sheet *Medical/dental treatment for patients who cannot consent*.

Make a **SECTION 42K** application to the **Office of the Public Advocate**

## NO PERSON RESPONSIBLE (42K FORM)

Practitioner is unable to identify or contact a *person responsible* and believes the treatment is in the best interests of the patient. Practitioner must complete a section 42K notice (see our website) and fax to the Office of the Public Advocate advice service prior to undertaking the treatment.

Do they **CONSENT** to the treatment?

Yes

No

Submit a **SECTION 42M** form to the *Person Responsible* and the Office of the Public Advocate

## PERSON RESPONSIBLE REFUSES CONSENT (42M FORM)

*Practitioner believes treatment is in the best interests of the patient but the person responsible does not consent. Practitioner must complete a section 42M form - Statement of intent of registered practitioner to provide medical or dental treatment (see our website) - and submit copy to the person responsible and the Office. The person responsible has 7 days to make an application to VCAT regarding the treatment. The practitioner may seek advice from the Office where they have concerns about delaying treatment.*

**PROCEED WITH TREATMENT**



Office of the Public Advocate

For more information on medical consent, refusal of medical treatment, powers of attorney and guardianship see our website [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au) or contact our advice service 1300 309 337.

Endorsed by AMA, ACEM, AASW, ANF (Victorian Branches)

03/11

## Enduring power of attorney (medical treatment)

This enduring power of attorney is given on the

*Print date here* \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_,

*Print your full name here* by \_\_\_\_\_

*Print your address here* of \_\_\_\_\_

under Section 5A of the *Medical Treatment Act 1988*.

*Cross out the following option if you also wish to appoint an alternate agent.*

*Print the full name of your agent here* 1. I appoint \_\_\_\_\_

*Print your agent's address here* of \_\_\_\_\_  
to be my agent.

Or

*Cross out the following option if you do not wish to appoint an alternate agent.*

*Print the full name of your agent here* 1. I appoint \_\_\_\_\_

*Print your agent's address here* of \_\_\_\_\_  
to be my agent

*Print the full name of your alternate agent here* and \_\_\_\_\_

*Print your alternate agent's address here* of \_\_\_\_\_  
to be my alternate agent.

2. I authorise my agent or, if applicable, my alternate agent, to make decisions about medical treatment on my behalf.

3. I revoke all other enduring powers of attorney (medical treatment) previously given by me.

*Sign your name here* Signed, sealed and delivered by: \_\_\_\_\_

*Print your witnesses' names here* We \_\_\_\_\_

*Print your name here* each believe that \_\_\_\_\_

in making this enduring power of attorney (medical treatment) is of sound mind and understands the import of this document. Witnessed by:

*Witnesses sign here* \_\_\_\_\_

*Person authorised to witness statutory declarations*

*Other witness*

*Name of witnesses* \_\_\_\_\_

*Addresses of witnesses* \_\_\_\_\_



# Guardianship

*Making personal and lifestyle decisions for an adult with a decision-making disability*

## What is guardianship and how does it operate?

Guardianship is the appointment of a person (a 'guardian') to make decisions for an adult with a disability (the 'represented person') when they are unable to do so.

All adults over the age of 18 years, regardless of disability, are entitled to make their own decisions. This is the case unless, when they were competent, they appointed a person to be their guardian under the enduring power of guardianship and have now lost capacity to make the types of decisions they appointed the enduring guardian to make for them.

Alternatively, a guardianship order can be obtained by making an application for guardianship to the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT).

VCAT hears the matter and, if necessary, appoints a guardian to make specific types of decisions.

The guardian makes decisions about the represented person's lifestyle, such as where they live and who can have access to them, according to the terms of the order.

The guardian's decisions have the same legal force as if the person had made them themselves.

## When is guardianship needed?

It is often mistakenly assumed that the parents or carers of people with

disabilities are their guardians. People with disabilities should be encouraged and supported to make decisions for themselves.

Guardianship is needed, however, when:

- a person who has a disability is at risk because they cannot make decisions about their own personal and lifestyle affairs, such as where they will live
- a decision needs to be made on their behalf.

A guardian may be appointed when there is unresolved conflict between a person with a disability and a service provider, family and friends, or in cases of self-neglect.

## Who appoints a guardian?

VCAT appoints a guardian. It must be satisfied that the represented person:

- has a disability
- cannot make reasonable personal and lifestyle decisions because of that disability
- needs to make decisions, and there is no less restrictive way of making the decisions other than to appoint a guardian
- needs someone to act in their best interests.

## Who can be a guardian?

VCAT can appoint an individual(s), usually a relative or friend, as guardian. VCAT seeks to appoint a guardian who is familiar with the represented person's values and

beliefs, likes and dislikes. VCAT must be assured that the guardian will act in the represented person's best interests.

When deciding who to appoint, VCAT must take into account the wishes of the represented person, so far as they can be ascertained, as well as family members and interested parties.

If there is no one available or there is a need for an independent person because of disagreement between family or friends about what is best for the represented person, the Public Advocate can be appointed.

## What decisions can a guardian make?

The types of decisions an appointed guardian can make depend on the order (or decision) made by VCAT.

A limited order specifies the type of personal and lifestyle decisions the guardian can make. These may include decisions about accommodation, medical and dental treatment and other health care, or access to services.

A plenary order allows the guardian to make all lifestyle decisions, subject to the following exception:

## Medical and dental treatment

The 'person responsible' can consent to medical and dental treatment (a guardian may be the person responsible). Refer to OPA's fact sheet *Medical/Dental Treatment for Patients Who Cannot Consent* for further information.



It is not necessary to apply for a guardian to make such decisions if there is already an appropriate person responsible (for example, a close family member or unpaid carer).

If a person has appointed an agent under an enduring power of attorney (medical treatment), or if VCAT has appointed another person to make decisions in relation to proposed treatment, they would then take precedence over a guardian as 'person responsible'.

### What decisions can't a guardian make?

A guardian cannot make decisions about the represented person's finances. For further information, see OPA's *Administration* fact sheet.

A guardian cannot make a decision about a 'special procedure', such as termination of a pregnancy or a procedure leading to permanent infertility. An application must be made to VCAT for these decisions, and only VCAT can consent to special procedures.

### What are the responsibilities of a guardian?

A guardian must make decisions that are in the best interests of the represented person. This means they:

- protect the represented person from abuse, exploitation and neglect
- consider the represented person's wishes
- advocate for the represented person
- encourage the represented person to make their own decisions where possible.

### What is the application process?

To apply for a guardian, an application form is available from VCAT. This can be requested via telephone, mail, or downloaded from the VCAT website at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). A link to the form is also available from OPA's website at [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au)

It is suggested that you call OPA's Advice Service on 1300 309 337 to discuss whether guardianship is necessary, and what supporting material is required for the application.

After receiving the form, VCAT will set a hearing date. Urgent applications will be heard as soon as possible. Most other applications will be heard within 30 days.

### VCAT hearings

VCAT is less formal than a court. If a person cannot travel to a hearing, VCAT may agree to accept evidence over the phone.

VCAT is not bound by legal rules of evidence and does not have to use formal legal processes. However, hearings must comply with the principles of natural justice (i.e. be fair and unbiased).

Legal representation at VCAT is not necessary, although people attending hearings may ask VCAT to allow them to use a lawyer.

### Emergency orders

OPA and VCAT have a 24-hour emergency service. If VCAT considers that a matter is urgent (where there is significant risk to the person's life), a temporary order can be made for up to 21 days. The order can be extended a further 21 days. Before the end of the order,

VCAT must hold a hearing to determine whether guardianship is needed.

### Duration of an order

An order may last for a maximum of three years. All orders are reassessed by VCAT within three years and can be cancelled if no longer needed.

If the represented person dies, the order ends.

### Rehearings

If someone believes VCAT has made a wrong decision, they may apply for a rehearing within 28 days of the original decision.

### Interstate orders

It is possible to register Victorian guardianship orders in other states, and for interstate orders to be registered in Victoria. For further information, contact OPA.

### Safeguards

Guardians are accountable to VCAT for the decisions they make. The following safeguards help to ensure that guardians act in the best interests of the represented person:

- guardians can ask VCAT for advice at any time
- on appointment, private guardians can contact OPA for information and support on private guardianship
- any person who believes that a guardian is not acting in the best interests of a represented person can apply to VCAT for a reassessment
- if the Public Advocate has been appointed the guardian, complaints can be made to OPA. Contact OPA for further information.



## Administration

*Making financial and legal decisions for an adult with a decision-making disability*

### What is administration, and how does it operate?

Administration is the appointment of a person (an 'administrator') to make financial and legal decisions for an adult with a disability (the 'represented person') when they are unable to do so.

All adults over the age of 18 years, regardless of disability, are entitled to make their own decisions. This is the case unless, when they were competent, they appointed a person to manage their legal and financial affairs under an enduring power of attorney (financial) and have now lost capacity.

Alternatively, an administration order can be obtained through the legal system commencing with an application for administration submitted to the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT).

VCAT hears the matter and, if necessary, appoints an administrator to make decisions about the represented person's financial and legal affairs.

The administrator's decisions have the same legal force as if the person had made them themselves.

### When is administration needed?

Administration is needed when:

- a person who has a disability is at risk because they cannot manage their own financial and legal affairs

- a decision needs to be made on their behalf.

### What decisions can an administrator make?

An administrator can only make financial and legal decisions for the represented person, such as managing their banking, paying bills or selling property.

An administrator cannot make personal and lifestyle decisions such as where a person lives, or what health care they may need. An administrator's role is to ensure the represented person lives within their means.

### Who appoints an administrator?

VCAT appoints an administrator. It must be satisfied that the represented person:

- has a disability
- cannot make reasonable financial and legal decisions because of that disability
- needs to make a decision and there is no less restrictive way of making the decision other than appointing an administrator
- needs someone to act in their best interests.

### Who can be an administrator?

VCAT can appoint an individual such as a relative, friend, solicitor, or accountant; or an organisation

such as State Trustees Limited or a private trustee company. VCAT is required to appoint an administrator who can competently manage the represented person's affairs, and will act in their best interests.

When deciding who to appoint, VCAT must take into account the wishes of the represented person, so far as they can be ascertained, as well as family members and interested parties.

If there is no one available or there is a disagreement between family or friends about what is best for the represented person, an independent administrator can be appointed.

### What are the responsibilities of an administrator?

An administrator must make decisions that:

- protect the represented person from abuse, exploitation and neglect
- are in the best interests of the represented person
- take into account the represented person's wishes
- encourage the represented person to make their own decisions, where possible.



An administrator's financial interests must not conflict with those of the represented person.

### What is the application process?

To apply for an administrator, an application form is available from VCAT. This can be requested via telephone, mail, or downloaded from the VCAT website at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). A link to the form is also available from OPA's website at [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au)

It is suggested that you call OPA's Advice Service on 1300 309 337 to discuss whether administration is necessary, and what supporting material is required for the application.

After receiving the application, VCAT will set a hearing date.

Urgent applications will be heard as soon as possible. Most other applications will be heard within 30 days.

### VCAT hearings

VCAT is less formal than a court, and tries to help people feel comfortable and relaxed.

If a person cannot travel to a hearing, VCAT may agree to accept evidence over the phone.

VCAT is not bound by legal rules of evidence and does not have to use formal legal processes. However, hearings must comply with the principles of natural justice (i.e. be fair and unbiased).

Legal representation at VCAT is not necessary, although people

attending hearings may ask VCAT to allow them to use a lawyer.

### Emergency orders

OPA and VCAT have a 24-hour emergency service. If VCAT considers that a matter is urgent, a temporary administration order can be made for up to 21 days. The order can be extended a further 21 days.

Before the end of the order, VCAT must hold a hearing to determine whether administration is needed.

### Duration of an order

An order may last for a maximum of three years. All orders are reassessed by VCAT within three years and can be cancelled if no longer needed.

If the represented person dies, the order ends.

### Rehearings

If someone believes VCAT has made a wrong decision, they may apply for a rehearing within 28 days of the decision being made.

### Interstate orders

It is possible to register Victorian administration orders in other states, and for interstate orders to be registered in Victoria.

For further information, contact OPA.

### Safeguards

The following safeguards help to ensure that administrators act in the best interests of the represented person:

- administrators can ask VCAT for advice at any time
- private administrators must regularly lodge an account of the represented person's finances for examination, as directed by VCAT
- administrators cannot invest money in real estate or securities, apart from authorised trustee investments, without the approval of VCAT
- any person who believes that an administrator is not acting in the best interests of a represented person can apply to VCAT for a reassessment.





# Refusal of Medical Treatment

You, or someone appointed to represent you, can refuse medical treatment for a current medical condition by signing a Refusal of Treatment Certificate (the Certificate).

However, neither you, nor someone appointed to represent you, can use the Certificate to refuse palliative care: that is, reasonable pain relief, or food and water whilst you are still able to eat and drink.

## 1. Signing as a competent person

You can sign a Certificate if you are over 18 years of age and have the capacity to understand the decision you are making.

### How does it work?

- You sign and have witnessed a Refusal of Treatment Certificate: Competent Person form.
- You specify the type of treatment you wish to refuse.
- Your treating doctor can only provide treatment according to the terms of the Certificate.

## Requirements to sign

To sign you must:

- have been given sufficient information about your condition
- understand this information
- understand what you are doing by signing the Certificate

- make the decision voluntarily (advice can be given, but you must not be coerced).

A doctor and one other person must witness the signing and be satisfied that these requirements have been met.

## 2. Signing the Certificate as your agent or guardian

Someone appointed to represent you can refuse medical treatment on your behalf. This can be your:

- Agent, appointed by you under an enduring power of attorney (medical treatment); or
- Guardian, appointed by the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT).

### How does it work?

- The agent or guardian signs and has witnessed a Refusal of Treatment Certificate: agent or guardian of incompetent person form.
- They specify the type of treatment they wish to refuse.
- The treating doctor can only provide treatment according to the terms of the Certificate.

## Requirements to sign

To sign, an agent or guardian must:

- have been given sufficient information about your condition
- understand this information
- understand what they are doing in signing the Certificate
- make the decision voluntarily (advice can be given, but they must not be coerced)
- be convinced that either –
- the medical treatment would cause you unreasonable distress, or
- there are reasonable grounds for believing you would, after serious consideration, have considered the treatment unwarranted.

## Where to get Refusal of Treatment Certificates

Certificates are usually available from Medical Directors or Chief Executives of hospitals and nursing homes.

They can also be obtained from the Office of the Public Advocate (OPA), downloaded from [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au), or obtained from the Victorian Hospitals Association on (03) 9696 2799.



## Registration of Refusal of Treatment Certificates

Most Certificates will be signed in hospitals or other institutions, but you can sign them at home.

The doctor who witnesses the Certificate, or the manager of the hospital or institution, must give a copy of the Certificate to VCAT within seven days.

## Can I change my mind??

If you are competent, the Certificate can easily be cancelled at any time by signing a Notice of Cancellation form.

## Safeguards

Anyone who has a genuine interest in your welfare can ask VCAT to consider the actions of the agent or guardian. VCAT can suspend or cancel an enduring power of attorney (medical treatment) or a guardianship order if an agent or guardian is not acting in your best interests.

If this happens, then any Certificate signed by the agent or guardian is also cancelled. VCAT will send a written notice confirming this to the hospital or your home. If you are not at home, VCAT will also notify your treating doctor.

Any beneficiary of your will or estate, who uses undue influence or acts deceptively to obtain a Certificate, will lose their entitlements under your will.

A Certificate cannot be used to aid and abet you to commit suicide. This would be an offence under the

*Crimes Act 1958*, and could result in imprisonment.

Contact OPA for advice and further information.

## Medical Practitioners

It is illegal for medical practitioners to continue to treat you if they know that there is a valid Certificate in force.

A medical practitioner who, in good faith, refuse to provide treatment in accordance with a Certificate is protected from legal action.

## Further information

For further information visit [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au) or contact the OPA Advice Service.





# Medical/Dental Treatment for Patients Who Cannot Consent

## The person responsible

### Why is consent important?

Registered doctors and dentists (practitioners) cannot treat a patient without valid agreement (consent) from the patient to undertake the treatment.

A person over the age of 18 years can consent to treatment if they can understand the practitioner's information about the proposed treatment and can make an informed decision. If a person lacks this capacity to understand, another person must make decisions on their behalf.

### When is consent not needed?

Consent is not needed in a medical or dental emergency, where treatment is needed to:

- save life
- prevent serious damage to the patient's health
- prevent suffering from significant pain or distress.

Consent is also not required when the treatment is minor, such as for:

- a visual examination of the patient's mouth
- providing first aid
- administering a prescribed drug within recommended dosages.

### The person responsible

If a patient cannot consent to their own treatment, the practitioner can obtain consent from the 'person responsible'.

### Who can be the person responsible?

The *Guardianship and Administration Act 1986* provides the following list detailing who can be the person responsible, from the first listed in the order below. The person must be available and willing to make medical and dental treatment decisions on behalf of the patient:

1. An agent appointed by the patient under enduring power of attorney (medical treatment).
2. A person appointed by the Victorian Civil and Administrative Tribunal (VCAT) to make decisions about the proposed treatment.
3. A guardian appointed by VCAT to make decisions about medical/dental treatment.
4. An enduring guardian appointed by the patient to make decisions about medical/dental treatment.
5. A person appointed by the patient, in writing, to make decisions about medical/dental treatment including the proposed treatment.
6. The patient's spouse or domestic partner.
7. The person's primary carer, including carers in receipt of a Centrelink Carer's payment but excluding paid carers or service providers.
8. The patient's nearest relative over the age of 18 years, in the following order listed:

- a. son or daughter
- b. father or mother
- c. brother or sister (including adopted and half siblings)
- d. grandfather or grandmother
- e. grandson or granddaughter
- f. uncle or aunt
- g. nephew or niece

Note: Where there are two relatives in the same position (for example, a brother and sister) the elder will be the person responsible.

### When can a person responsible make decisions?

A person responsible can give consent when the patient is unable to consent because they cannot understand the nature or effect of the proposed treatment, or cannot communicate their consent.

### Responsibilities of the person responsible

The person responsible must make decisions that are in the best interests of the patient. This means considering:

- What are the patient's wishes?
- What are the wishes of the patient's family?
- What is the proposed treatment?
- Are there any risks?
- Are there alternative treatments?
- What is the likely consequence of not undertaking the treatment?



### Where can the person responsible get advice?

The person responsible can contact OPA's Advice Service on 1300 309 337. They can also apply to VCAT to get advice about any proposed medical and dental treatment or the exercise of their powers.

### What happens when the person responsible withholds consent?

The practitioner cannot provide treatment where the person responsible withholds consent.

If the practitioner believes that the treatment is in the best interests of the patient and wishes to proceed, they must, within three days of consent being withheld, give the person responsible and OPA a notice. The notice advises that the person responsible can apply to VCAT if they want to prevent the treatment from proceeding.

If the person responsible does nothing, the practitioner can provide the treatment. If the person responsible makes an application to VCAT, they must explain their objection to the treatment. VCAT will then decide whether the treatment can proceed.

### Decisions a responsible person cannot make

There are some restrictions on the power of the person responsible to give consent.

If the patient is likely to be able to consent to treatment in a reasonable time, the person responsible can only consent to treatment:

- where the failure to treat would result in a significant deterioration

of the patient's condition

- the treatment is not against the wishes of the patient.

The person responsible cannot consent to the following special procedures:

- those likely to lead to infertility
- termination of pregnancy
- removal of tissue for transplant.

Before any of these special procedures can be carried out, an application must be made to VCAT for a decision.

The person responsible cannot refuse treatment on the patient's behalf under the *Medical Treatment Act 1988*. See the fact sheet *Refusal of Medical Treatment* from OPA for more information.

A person responsible may not be able to make decisions when an adult is an involuntary patient under the *Mental Health Act 1986*, and is unable to consent to non-psychiatric medical treatment. In this case, the Mental Health Act provides for a different list of individuals who can consent, from the first listed in the order below:

1. An agent appointed by the patient with enduring power of attorney (medical treatment)
2. A person appointed by VCAT to make decisions about the proposed treatment
3. A guardian appointed by VCAT to make decisions about medical/dental treatment.
4. An enduring guardian appointed by the patient to make decisions about medical/dental treatment.
5. The authorised psychiatrist.

### What happens if there is no person responsible?

If the practitioner believes the treatment is in the best interests of the patient, but there is no person responsible or they cannot be found, the practitioner can proceed to treat the patient. The practitioner must first submit a form under Section 42K of the Guardianship and Administration Act to OPA. The form sets out:

- the proposed treatment
- why the practitioner believes the treatment to be in the best interests of the patient
- the efforts made to locate the person responsible.

If the legislative requirements are met, the treatment can proceed. For Section 42K forms, visit [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au) or call OPA's Advice Service on 1300 309 337.

- Community Visitors Program
- Independent Third Person Program
- Community Guardianship Program
- Corrections Independent Support Officers Program.