Guidance Statement 10.5.2 – Legal and Ethical Issues Related to Responding to Emergency Situations and Resuscitation – Consent

Statement

This statement does not constitute legal advice.

This statement aims to *summarise* the key legal and ethical points in relation to consent in an emergency and to provide direction to relevant legislation across Australia and New Zealand. It should only be used as a *guide* to these legal and ethical issues. Individuals and/or organisations should obtain legal advice if required for their own jurisdiction.

For consistency, the terms patient/person/principal as used in legislation are interpreted uniformly within this document to refer to the person receiving care (Medical Treatment Planning and Decisions Act 2016 (Vic)).

Summary

This guidance statement provides a summary of the key legal and ethical principles related to consent and relevant legislation governing medical treatment across Australia and New Zealand.

The Australian and New Zealand Committee on Resuscitation (ANZCOR) strongly recommends that rescuers obtain the consent of an individual before administering treatment. If the individual is incapable of providing consent, a rescuer may proceed with urgent treatment to preserve life and health unless an Advance Care Directive (ACD) explicitly prohibits such intervention. If the individual lacks capacity and the treatment proposed is not urgent, the rescuer should seek consent from a substitute decision maker, such as a legally recognised guardian or next of kin, provided they are present and willing to give consent.

ANZCOR further recommends that an ACD should be adhered to, regardless of whether the rescuer personally believes that treatment would be in the individuals' best interests. However, in South

Australia, a rescuer may disregard an ACD if they reasonably believe it does not apply to the specific circumstances or if they have a conscientious objection to following its instructions.

Decisions regarding the withholding or withdrawal of life-sustaining treatment should align with accepted medical practice, be in accordance with ethical standards, and prioritise the best interests of the individual while respecting any legally binding Advance Care Directives.

Health professionals are subject to professional codes of conduct and legal obligations specific to their jurisdiction. They must be fully aware of their responsibilities and perform their duties to the standard expected of a competent professional, considering their training, expertise, and the prevailing legal framework.

1.0 | General Principles

1.1 | Consent for Treatment

- For consent to be valid, the person must have decision-making capacity, the consent must be freely and voluntarily given, and it must be specific to the proposed treatment.
- Before treating a competent person of illness or accident, a rescuer must obtain their consent, otherwise the treatment could constitute ‘medical trespass’ (battery / assault), and the person could recover damages without requirement of proof of injury, causation, or negligence.[1]
- If the person has impaired decision-making capacity the consent of a substitute decision-maker should be obtained whenever possible.
- Every competent adult and the parents or guardians of minors have an over-whelming right to autonomy and self-determination.
- A person has impaired decision-making capacity (and is therefore deemed 'incompetent') if they cannot understand, retain, use, or communicate any information relevant to a healthcare decision.
- If a person has an ACD which defines when incapacity applies; that person will be deemed to lack decision-making capacity when they satisfy any requirement in the directive that specifies when incapacity exists.
- Adults are assumed competent unless they demonstrate impaired decision-making capacity.
- Children are considered to have impaired decision-making capacity until the age of 18. However, under Australian common law, a mature minor may consent to medical treatment if they demonstrate sufficient understanding and intelligence to make the decision.
- In the case of infants or young children, refusal of treatment can be complex. A parent or guardian should decide whether the benefits outweigh the distress caused by the treatment.
- In the absence of a parent or guardian rescuers should assume young children lack decision making capacity and act in their best interests.

1.2 | Treatment without Consent

- There may be circumstances where consent cannot be gained (e.g. if the patient is unconscious or otherwise lacks capacity) but withholding treatment would cause significant harm.
- In these cases, the doctrine of necessity under common law allows treatment without consent. The better legal view is that necessity provides a defence if treatment proceeds in good faith, is reasonable and is in the best interests of the patient.[2 (p347)]
- While treatment normally requires consent, a lack of decision-making capacity should not prevent necessary medical intervention if it is in the patient's best interests.
- The key legal factors determining whether treatment can proceed without consent include:
    - Whether the person lacks decision-making capacity.
    - Whether an advance care directive exists.
    - The degree of urgency of the situation.
    - Whether a substitute decision-maker is available and willing to provide consent.
- If the person is unable to give consent and no substitute decision maker is present, the legal requirement to obtain consent before assistance or treatment is waived under Common Law and Statute law in several circumstances.[3]

2.0 | Common Law (current as of Feb 2025)

Common Law Doctrine of Emergency:

Under the **Common Law doctrine of necessity**, a doctor (and other healthcare professionals) may provide urgent (emergency) treatment to a patient if the doctor acts **reasonably and honestly** believes, on **reasonable grounds**, that the treatment is required to prevent a **serious threat** to the person's life or health. This principle has been affirmed in case law, such as *F v West Berkshire Health Authority* [1989] 2 AC 1, which established that medical treatment without consent is **permissible in emergencies** where a patient is **unable to consent,** and the treatment is **necessary to prevent serious harm.**[3]

Application Beyond Doctors (Other Healthcare Professionals):

At the time of writing, the **law pertaining to healthcare professionals other than doctors has not been explicitly tested in Australian common law.** However, statutory protections and professional guidelines often govern such situations, particularly under **State and Territory health legislation.**[3]

3.0 | Statute Law

Under Statute Law, all Australian states, and territories (including the Australian Capital Territory (ACT) and the Northern Territory (NT)) have specific legislation governing consent for the provision of emergency medical care. However, 'special treatment,' such as fertility-limiting procedures, is not addressed in this guidance statement.

Jurisdiction	Legislation
NSW	Guardianship Act 1987 (NSW), Oct 2014 Children and Young Persons (Care and Protection) Act 1998 (NSW)
QLD	Guardianship and Administration Act 2000, July 2014
SA	Consent to Medical Treatment and Palliative Care Act 1995, July 2014;
VIC	Medical Treatment Planning and Decisions Act 2016 (Vic) March 2018, Guardianship and Administration Act 2019 (Vic)
WA	Guardianship and Administration Act 1990 (WA)
ACT	Guardianship and Management of Property Act 1991, April 2023 (ACT)
NT	Advance Personal Planning Act 2013 (NT)
TAS	Guardianship and Administration Act 1995 (Tas) **Consent to Medical Treatment and Palliative Care Act (Tas) 2016**
NZ	Health and Disability Commissioner Act 1996 (NZ) New Zealand Bill of Rights Act 1990 (NZ)
** Please note – all legislation listed in this table is available online.	

4.0 | Advance Care Directives Refusing Treatment

Competent adults in Australia and New Zealand are legally entitled to refuse any healthcare, including life-sustaining treatment, even if it is considered to be in their best interests.

Substitute decision-makers, such as parents/guardians of minors or legal guardians of incapacitated individuals, can also refuse treatment on behalf of their charge only if it aligns with their best interests.

Advance care directives (ACD) must be completed by a competent adult and cannot be created by others on their behalf. If medical treatment is administered in full knowledge of legally binding refusal of treatment, it may constitute medical trespass.

An ACD (also known as an Advance Health Directive (AHD) or Refusal of Treatment Certificate, depending on jurisdiction) allows a person to refuse specific treatments but is only effective once they lose the decision-making capacity.

Each jurisdiction in Australia and New Zealand has different legal frameworks governing ACDs. ***Importantly, an Advance Care Directive made in one jurisdiction is not necessarily recognised in others.***[2]

In addition to statutory frameworks, common law principles also guide advance care planning in all Australian jurisdictions, particularly in NSW, where no statutory ACDs exist but common law ACDs are legally binding.

Jurisdiction	**Legislation related to Advance Care Directives**
NSW	No statutory ACDs. Only common law ACDs which are legally binding.
QLD	*Powers of Attorney Act* 1998 (Qld)
SA	*Advance Care Directives Act* 2013 (SA)
VIC	*Medical Treatment Planning and Decisions Act* 2016 March 2018 (Vic)
WA	*Guardianship and Administration Act* 1990 (WA)
ACT	*Powers of Attorney Act* 2006. April 2023 (ACT)
NT	*Advance Personal Planning Act* 2013. December 2022 (NT)
TAS	*Guardianship and Administration Act 1995 (Tas)*
NZ	*Health and Disability Commissioner Act 1996 (NZ)* *Protection of Personal and Property Rights Act* 1988 (NZ)
** Please note – all legislation listed in this table is available online.	

5.0 | Australian & New Zealand Legislation (current as of February 2025)

Commonwealth

- *Health Practitioner Regulation National Law Act 2009* (Cth) (Austl.)

Australian Capital Territory

- *Civil Law (Wrongs) Act 2002* (ACT) s 5 (Austl.)
- *Guardianship and Management of Property Act 1991, Nov 2013* (ACT) s32N (Austl.)
- *Powers of Attorney Act* 2006 (ACT) (Austl.)

New South Wales

- *Civil Liability Act 2002* (NSW) ss. 56, 57 (Austl.)
- *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW) No 86 (Austl.)
- *Guardianship Act 1987, Oct 2014* (NSW) s37 (Austl.)

Victoria

- *Wrongs Act 1958* (Vic) 31B (Austl.)
- *Medical Treatment Planning and Decisions Act 2016* (Vic) (Austl.)
- *Voluntary Assisted Dying Act 2017 (Vic)* (Austl.)

South Australia

- *Civil Liability Act 1936* (SA) s. 74 (Austl.)
- *Consent to Medical Treatment and Palliative Care Act 1995,* (SA) (Austl.)
- *Advance Care Directives Act 2013* (SA), s.33 (Austl.)

Queensland

- *Law Reform Act 1995* (Qld), s. 16 (Austl.)
- *Civil Liability Act 2003* (Qld) s. 26 (Austl.)
- *Guardianship and Administration Act 2000*, (Qld) s.63-64 (Austl.)
- *Powers of Attorney Act 1998* (Qld) s.63 (Austl.)
- *Powers of Attorney Act 1998* (Qld) s.34 (Austl.)

Tasmania

- *Guardianship and Administration Act 1995* (Tas) s.40 (Austl.)

Western Australia

- *Civil Liability Act 2002* (WA) Pt 1D (Austl.)
- Guardianship and Administration Act 1990 (WA) (Austl.)

Northern Territory

- *Criminal Code Act 1983* (NT) s.155 (Austl.)
- *Personal Injuries (Liabilities and Damages) Act 2005* (NT) s.8 (Austl.)
- *Advance Personal Planning Act 2013* (NT) s.88 (Austl.)

New Zealand Legislation (current as of August 2023)

- *Crimes Act 1961* (NZ) s151 (NZ)
- *Health and Disability Commissioner Act 1996* (NZ)
- Protection of Personal and Property Rights Act 1988 (NZ)

Abbreviations

Abbreviation	Meaning/Phrase
ACD	Advanced Care Directive
ACT	Australian Capital Territory
AHD	Advanced Health Directive
ANZCOR	Australian and New Zealand Committee on Resuscitation
NT	Northern Territory

References

1. Skene L. Law and Medical Practice, Rights, duties, Claims and Defences. 3rd edition, Australia, LexisNexus, 2008.
2. Kerridge I, Lowe M, McPhee J. Ethics and law for the health professions. 4th Federation Press, Leichhardt NSW, 2013.
3. Dworkin, G. (1993). *The theory and practice of autonomy*. Cambridge University Press.
4. Australian Institute of Health and Welfare. Australia's Children: Australian Institute of Health and Welfare; 2022 [Available from: https://www.aihw.gov.au/reports/children-youth/australias-children/contents/background/introduction.]

Appendix 1: Glossary

- **Advanced Care Plan / Advance directives:** the process of discussing and documenting future health choices, including refusal of treatment.[2 (p377)]
- **Autonomy:** Any person has the right to non-interference when making decisions about themselves.[2 (p62)]
- **Beneficence:** conduct aimed at the good and well-being of others.[2 (p131)]
- **Common Law:** Law that is derived from court judgments that have been passed over the centuries. Common law arose when judges kept records of disputes and the reasons for their judgments.[2 (p62)]
- **Consent:** Ensuring that competent people are able to make autonomous decisions, and that non-competent people are protected from harm.[2 (p328)]

- **Doctrine of precedent:** cases involving the same essential or material facts must be decided in the same way.[2 (p63)] **Duty of care:** a legal duty to take reasonable care not to cause harm to another person that could be reasonably foreseen. Duty of care is breached when:
  - a person is injured because of the action (or inaction) of another person; and
  - it was reasonably foreseeable that such action (or inaction) would result in a risk of injury to the injured person; and
  - the action (or inaction) causing the injury was unreasonable. This means that a reasonable person in the same position would not have acted in that way; and
  - the risk of injury occurring was not an insignificant risk.
- **Duty to Rescue:** an obligation to render assistance to a person in need of emergency care.
- **Ethics:** Ethics is the study of what we *ought* to do and embodies ideas that are universal thereby relevant to all individuals.[2 (p3)]
- **Good Samaritan:** A 'Good Samaritan' is defined in legislation as a person acting without expecting financial or other reward for providing assistance.
- **Jurisdiction:** A country, state, or other area where a particular set of laws or rules must be obeyed
- **Lay person:** An individual who does not have formal medical or legal qualifications but may still be involved in first aid or emergency care.
- **Non-maleficence:** to do no harm.[2 (p131)]
- **Statute Law:** Law that is passed by parliaments.[2 (p61)]
- **Young Child:** A child aged 0 to 12, covering infancy to the end of primary school.[4]
- **Volunteer**: a member of a volunteer organization performing voluntary community work.

Referencing this guideline

When citing the ANZCOR Guidelines we recommend:

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