

Understanding Substitute Decision-Making (VIC)



Your right to make your own decisions

At Opal HealthCare, we recognise the importance of encouraging older Australians to be as physically, socially, and emotionally autonomous as possible.

That's why we safeguard and support your right to make decisions about your care and services. If you lack the capacity to make certain decisions in your own best interest, it's important you have the right support, and a substitute decision-maker to make decisions on your behalf.

This resource will support you or someone you care about, to appoint a substitute decision-maker.

It's intended for general information only and doesn't constitute legal or financial advice. We recommend you consider your personal circumstances and seek professional advice, if needed.





What does it mean to have capacity? It means you can...

- Understand the nature and effect of your decisions about the matter.
- Freely and voluntarily make decisions about the matter.
- Communicate your decision in a way that can be understood.

Registered Supporters

You may wish to consider appointing and registering a trusted family member or friend as a 'Supporter' to help you to make decisions.

The Supporter's role is to help you understand options, access information and communicate your decisions if you would like them to, but unlike substitute decision-makers, **they can't make decisions on your behalf.**

Supporters can only act with your consent and always in your best interest. Supporters do not replace authorised decision-makers. Supporters must be registered with My Aged Care.

Guiding Principles

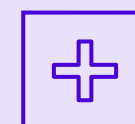
- The presumption is that you have capacity to make your own decisions and that substitute decision-making is a last resort.
- Your age, disabilities, appearance or behaviour are not indicators of whether or not you can make your own decisions.
- A substitute decision-maker may make decisions about the matters for which they were appointed but not others.
- Medical practitioners provide advice and support in assessing capacity, but they do not make decisions.
- Substitute decision-makers must always act in your best interest and take into account your views and wishes, be these expressed verbally, in writing or via any other way of communication.

What type of decision needs to be made?



Legal and financial decisions

An **Enduring Power of Attorney** document appoints an **Attorney** to make legal and financial decisions on your behalf.



Personal decisions

An **Enduring Power of Attorney** document appoints an **Attorney** to make personal decisions on your behalf.



Medical treatment decisions

If you cannot consent to medical treatment, an appointed **Medical Treatment Decision Maker** can make these decisions on your behalf.

An EPOA **cannot** make medical decisions unless they are also your **Medical Treatment Decision Maker.**



Substitute decision-making for legal, financial and personal matters

Enduring Power of Attorney (EPOA)

An Enduring Power of Attorney (EPOA) is a **legal document** that appoints a trusted person to make **legal, financial and/or personal decisions** on your behalf if you lose capacity to make these types of decisions for yourself.

- The arrangement comes into effect on the date you specify in the document or immediately upon loss of capacity.
- An EPOA must be appointed by you while you still have capacity to appoint one. If you no longer have capacity to appoint one, only a tribunal can appoint one for you.
- More than one EPOA can be appointed.

Who can be an EPOA?



A trusted person (or persons) legally appointed by you.

OR

A person (or persons) appointed for you by a court or tribunal.



A family member, next of kin, health professional or representative under the Aged Care Act **cannot** act as your EPOA unless they have been legally appointed by you with an authorising document or by a tribunal.

Appointing an EPOA yourself

If you have capacity to do so, you can appoint anyone you choose over the age of 18 years to assist you with legal, financial and personal decisions.

- An EPOA can be a **relative or friend** and doesn't need to be a solicitor or professional.
- You can appoint **the same person** to make financial and personal decisions, or you can appoint **different people** to make legal, financial and personal decisions.
- You can appoint **multiple people** to the same role.
- You can appoint **alternative attorneys** to step in if your preferred attorney is unable to carry out their responsibilities for any reason.



What decision-making powers does your EPOA have?

You can decide what decision-making powers you want your EPOA(s) to have and when you want the powers to start. You can stipulate any instructions you wish including requiring your EPOA to obtain an independent capacity assessment to determine if powers are triggered.



Substitute decision-making for medical treatment decisions



What is a medical treatment decision-maker?

A medical treatment decision-maker is a person (or persons) you appoint to legally make medical decisions for you, if you are unable to make these medical decisions for yourself.

An appointed medical treatment decision-maker has the powers set out in the Medical Treatment Planning and Decisions Act (2016), subject to any limitations or conditions you specify in your document of appointment.

If you have appointed an EPOA for personal matters as well as a medical treatment decision-maker, the medical treatment decision-maker makes all decisions relating to medical treatment.



What happens if no medical treatment decision-maker is appointed?

If you have not appointed a medical treatment decision-maker and there is no EPOA or guardian appointed, then the decision is made by the first person in a hierarchy of people specified in the Act who is reasonably willing and able to make the decision and is in a close and continuing relationship with you. These include partners, parents, siblings and children and unpaid carers.

Next steps

1. You must select a person (or persons) to be your EPOA while you have capacity.
2. Discuss your wishes and request with the person you hope to appoint as your EPOA.
3. Download and complete the relevant EPOA appointment form from publicadvocate.vic.gov.au
 - Short form to appoint an attorney and up to two alternative attorneys.
 - Long form to appoint more attorneys, or more alternative attorneys.
4. The form must be signed by you – and the person you appoint – in the presence of eligible witnesses.
 - * Two adult witnesses are required, and one must be a person authorised to witness affidavits such as a Justice of the Peace, lawyer or doctor. Relatives, the appointee EPOA and accommodation provider cannot be a witness.
5. Store your document securely and ensure that your Care Community has a copy.
6. Remember that the Power of Attorney only takes effect when you decide or when you lose capacity to make legal, financial and personal decisions for yourself.

Contact a private solicitor to assist you with the forms or call the Public Advocate on **1300 309 337** and request an appointment. You can also access this service via publicadvocate.vic.gov.au

What happens if you lose capacity before you have appointed an Enduring Power of Attorney?

If you have lost capacity and have **not** appointed an EPOA, the only option is for a trusted person to apply to **Victorian Civil and Administrative Tribunal (VCAT)** to appoint a person to manage your legal, financial and personal affairs.

What orders can VCAT make?



Appoint an Administrator to manage your financial affairs.

VCAT may appoint a family member, friend or trusted professional if one is available. If **no** family member or friend is willing or able to take on the role of Administrator, VCAT will appoint a **State Trustee**.

AND/OR



Appoint a Guardian to manage your personal affairs.

VCAT will appoint a family member or friend who is willing and able to take on the role of Guardian. If **no** family member or friend is willing or able to take on the role of Guardian, then the **Public Advocate** can be appointed to manage all or part of your personal affairs.

OR



VCAT may decide that you still have capacity and can either appoint your own EPOA or make legal, financial and personal decisions for yourself.



What sort of decisions can Court or tribunal-appointed decision-makers make on your behalf?

If you have lost capacity to appoint an EPOA, a tribunal may appoint an **Administrator** to make financial decisions on your behalf and a **Guardian** to make personal decisions on your behalf.

Powers of court or tribunal-appointed decision-makers

	Legal and Financial	Personal	Health
Administrators	✓	✗	✗
Guardians	✗	✓	✓ *

*If a medical treatment decision-maker has been appointed, the medical treatment decision-maker has priority in making decisions relating to medical treatment.

If you believe that someone has lost capacity to make decisions for themselves, you should discuss this with the General Manager in the Care Community or contact VCAT directly on 1300 018 228.





Frequently asked questions

Q.

Who can assess a resident's capacity to make decisions?

A.

To safeguard the rights of our residents to make autonomous decisions, Opal HealthCare will involve a medical practitioner such as a general practitioner (GP) or geriatrician to make a determination when capacity is in question.

What's the difference between a Power of Attorney (POA) and an Enduring Power of Attorney (EPOA)?

A Power of Attorney is valid only while a person has capacity. A Power of Attorney ceases when a person loses capacity. An Enduring Power of Attorney remains in place even when a person loses capacity to make decisions.

Q.

What's the difference between a Registered Supporter and a Substitute Decision-Maker?

A.

A Registered Supporter is a close family member or friend chosen by you to help you to make your own decisions. Registered Supporters need to be registered with My Aged Care. The Supporter's role is to help you understand options, access information and communicate your decisions if you would like them to, but **not to make decisions on your behalf**.

Only an authorised substitute decision-maker legally appointed by you can make a decision on your behalf. If a Registered Supporter is also an authorised substitute decision-maker, they should support you to make decisions, and only step in and make a decision on your behalf if you are unable to assess the information and make an informed decision for yourself.

Can I appoint more than one EPOA?

If you have appointed more than one EPOA, you can specify if you want decisions to be made jointly (all decision-makers must agree for a decision to be binding) or if you are satisfied for decisions to be made by any one of the appointed decision-makers (severally). You can also appoint an alternative substitute decision-maker so that if the first is unwilling or unable to act (or relinquishes their role), the second person may step in to assume their responsibility.

Can I revoke or change an EPOA?

Yes. As long as you still have capacity, you can revoke any appointment you have made by informing the previously appointed EPOA in writing that you wish to terminate their appointment. You should let any relevant bodies know (such as banks) that you have terminated their appointment and destroy the appointment document. Appointing a new EPOA does not automatically cancel an existing EPOA. The appointing document must clearly state that it revokes previous appointments.

Q.

Can I appoint more than one medical treatment decision-maker?

A.

You cannot appoint more than one medical treatment decision-maker.

You can also appoint alternative decision-makers to step in if the first is unwilling or unable to act (or relinquishes their role).

Can I revoke a medical treatment decision-maker?

Yes. As long as you still have capacity, you can revoke any appointment you have made. You should inform your medical treatment decision-maker that their appointment has been revoked, as well as other relevant parties who may be affected by the revocation, such as your doctor or hospital.

What's the difference between a medical treatment decision-maker and an Advance Care Directive?

A medical treatment decision-maker is a person with legal authority to make medical treatment decisions on your behalf, if you lose capacity to make these decisions for yourself. An Advance Care Directive sets out your values and preferences for medical treatment, which can guide the medical treatment decision-maker in their decisions.





Contacts

State Trustees VIC

Phone: 1300 138 672

Email: generalenquiries@statetrustees.com.au

Website: statetrustees.com.au

Office of the Public Advocate (OPA)

Phone: 1300 309 337

Website: publicadvocate.vic.gov.au

Victorian Civil and Administrative Tribunal (VCAT)

Phone: 1300 018 228

Website: vcat.vic.gov.au

Older Persons Advocacy Network (OPAN)

Phone: 1800 700 600

Website: opan.org.au

Aged Care Quality and Safety Commission

Phone: 1800 951 822

Email: info@agedcarequality.gov.au

Website: agedcarequality.gov.au

National Accreditation Authority for Translators and Interpreters

Phone: 1300 557 470

Email: info@naati.com.au

Website: naati.com.au

Resources

For a comprehensive range of resources to help you navigate substitute decision-making, please visit:

opalhealthcare.com.au/welcome/substitute-decision-making

