

Chapter Five

Medical treatment in approved hospitals

The principle of self-determination

The principle of self-determination is fundamental in Australian health law and explicitly acknowledges the right of a competent adult person to consent or refuse medical treatment. A capable adult patient has an absolute right to refuse medical treatment for reasons which are rational, irrational, unknown or even non-existent. The key issues when treating people with mental illnesses are whether they have capacity to consent to medical treatment, and therefore the absolute right to refuse consent to treatment, and the problems associated with fluctuating capacity. This chapter explains the ways in which a valid consent can be given and the concept of capacity to consent to treatment. It also considers the role of the Guardianship and Administration Board, and the concept of enduring guardianship as a way in which a person with fluctuating capacity can ensure that their wishes are complied with as far as possible.

The lawful provision of medical treatment

There are three ways in which medical treatment can be carried out lawfully in approved hospitals:

- with the patient's informed consent; or
- if the treatment is authorised under the [Guardianship and Administration Act 1995](#); or
- if the treatment is authorised by the Guardianship and Administration Board in accordance with [section 32](#) of the *Mental Health Act*.

1. Treatment given with the person's informed consent

[Section 33](#) of the *Mental Health Act 1996* defines informed consent. A patient is taken to have given informed consent to medical treatment if, and only if:

- the patient is, in the opinion of the medical practitioner who is responsible for the patient's treatment, mentally capable of understanding the general nature and effect of the proposed treatment;
- the patient, after being given the information required under [section 33\(2\)](#) (see below), freely and voluntarily consents to the proposed treatment; and
- the patient has not withdrawn the consent.

Provision of information – [section 33\(2\)](#)

The Act states that the medical practitioner who is responsible for a patient's medical treatment must give the patient:

- a clear explanation of the proposed treatment; and
- a description, without concealment or distortion, of the benefits and disadvantages of the treatment, including a statement of the risk of adverse consequences; and
- a description of alternative forms of treatment that may be available and their benefits and disadvantages; and

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- clear answers to any questions asked by the patient; and
- a reasonable opportunity to obtain independent medical or other advice.

This may mean that the person should be referred for a second opinion if they have concerns about the proposed treatment.

Information that is understandable

There is little point in providing a patient with detailed information about the proposed treatment, its benefits and side effects and the alternatives, if the person cannot understand the information. Mental Health Services practitioners may need to check that the information they give is in plain English and as free from jargon if possible. For people whose first language is a language other than English, the Translating and Interpreting Service (TIS) should be contacted to ensure that the patient has the best possible opportunity to understand the information being provided. The telephone number for TIS is 131 450, and they provide a 24 hour seven day a week service in more than 100 languages. For more information, see the guidelines on TIS and other services in [Chapter 11](#).

Capacity and mental illness

It is important to emphasise that a person can have capacity to consent or refuse treatment even if they have a mental illness. Also, a person with a mental illness may have a fluctuating capacity. That is, at certain times they may be clearly able to consent to treatment or refuse treatment, and at other times (perhaps during an acute phase of an illness) they may not be able to consent to treatment. A person in this situation may wish to appoint an enduring guardian – some one who can act on their behalf (according to the guidelines set by them when they are well) and who can make decisions about their treatment when they are acutely unwell. The Guardianship and Administration Board has a Fact Sheet on Enduring Guardianship, and this can be obtained from the Board on (03) 6233 3085 or via their web page (www.justice.tas.gov.au).

The presumption of capacity

The test for the treating medical practitioner to consider is whether the person is mentally capable of understanding the general nature and effect of the treatment. There is a general presumption of a person's capacity, and so if a practitioner is unsure whether a person who is purporting to consent or refuse treatment has capacity to consent or not, the matter should be referred to the Board. If the Board finds that the person has capacity, they may make an order under [section 32](#) (see below). Alternatively if, following a hearing, they determine that the person lacks capacity, then the Board can seek the consent of the person responsible (if appropriate) or provide substitute consent. (It should be noted that if the person responsible refuses to provide consent to treatment on behalf of the person, an interested person (such as a health professional) can apply to the Board to review the decision.)

A case in point: In re C

The English case, *In re C*, (which is also authoritative in Australia) demonstrates the point that a person suffering from a mental illness can have capacity to refuse medical treatment. Mr C was 68 and of Jamaican origin. While serving a sentence of imprisonment he was admitted to a psychiatric hospital after having been diagnosed with schizophrenia. The doctors considered that unless Mr C had his foot

amputated below the knee there was an 85% chance that he would die. Mr C refused the treatment saying he would rather 'die with two feet than live with one.' Despite pressure on Mr C by a resident psychiatrist, he did not yield and the surgeon refused to carry out the procedure without his written consent. Mr C agreed to less drastic measures and in less than a month the 85% chance of death had been averted. Mr C subsequently sought an undertaking from the hospital that his leg would not be amputated at some time in the future without his written consent. The hospital refused to give such an undertaking and Mr C applied for an injunction to force the authorities to respect his right to refuse treatment now and in the future.

It was not disputed that Mr C had a mental illness and that his capacity was reduced by his mental illness. Mr Justice Thorpe commented on the effect of Mr C's illness, saying, 'he was not always easy to understand and the grandiose delusions were manifest, but there was no sign of inappropriate emotional expression. His rejection of amputation seemed to result from sincerely held conviction. He had a certain dignity of manner that I respect.' The judge also determined that although Mr C's general capacity was impaired by schizophrenia, 'it has not been established that he does not sufficiently understand the nature, purpose and effects of the treatment he refuses. Indeed, I am satisfied that he has understood and retained the relevant treatment information, that in his own way he has believed it, and that in the same fashion he has arrived at a clear choice.'

The judge recognised that although Mr C had a mental illness, he could nevertheless give a valid consent to treatment, and so his refusal to consent to medical treatment for his gangrenous leg was valid. Mr C's capacity to consent was the crucial issue in question. See *In re C* [1994] 1 WLR 290. For more information on capacity to consent to medical treatment contact the Guardianship and Administration Board on telephone (03) 6233 3085.

2. Consent in accordance with the [Guardianship and Administration Act 1995](#)

The *Guardianship and Administration Act 1995* sets up a framework for substituted consent. This is perhaps best explained by the Guardianship and Administration Board's Fact Sheet on Consent to Medical and Dental Treatment which is included below.

The Guardianship and Administration Act 1995 ensures that a person with a disability who cannot give legal consent for medical or dental treatment is assisted in obtaining appropriate treatment.

The scheme of the Act

The *Guardianship and Administration Act 1995* provides a flexible statutory system for the authorisation and approval of medical and dental treatment for persons with a disability who are incapable of giving informed consent to treatment. The essential elements of the legislation are:

- It is now unlawful to carry out medical or dental treatment on a person with a disability who is incapable of consenting to the proposed treatment unless either:
 - (a) a substitute consent for the treatment has been given; or
 - (b) the circumstances are such that consent is not legally required eg emergency situations.

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- In most cases where a substitute consent is needed it can be provided by another adult person identified in the Act as the person responsible;
- If the proposed medical or dental treatment is classified as special treatment, only the Guardianship and Administration Board can consent;
- Some medical or dental treatment will not require consent. Urgent treatment and some minor treatment such as non-intrusive examinations are examples.

When does the legislation apply?

The new medical and dental treatment provisions are not restricted to persons under guardianship and apply to both children and adults. However, the Act only applies if:

- the person has a disability; and
- is incapable of consenting to the carrying out of the proposed treatment.

Disability is defined in the Act. Briefly it means an inability to perform an activity in a normal way however caused eg by absence or loss of mental, psychological, physiological or anatomical function.

A person lacks capacity to consent to medical or dental treatment if he or she is:

- incapable of understanding the general nature and effect of the proposed treatment; or
- incapable of communicating a consent or refusal to the proposed treatment.

However, there is a strong legal presumption of mental capacity which is not easily displaced. A person may have the capacity to consent to some minor medical treatment but not be competent to consent to more serious or controversial treatment eg sterilisation. The words 'understand the general nature and effect' include likely or reasonably foreseeable consequences but not risks that are remote or problematic.

Defining the substitute decision maker

For most medical or dental treatment a particular person will be able to give a valid consent to the proposed treatment. This person is called the person responsible. The Board can also consent to medical or dental treatment for persons with a disability who are incompetent. In most cases however the consent of the Board will be unnecessary and only required in a number of limited cases.

Consent of the person responsible

The person responsible concept recognises that in the past a relative or carer in fact provided substitute consent. That consent is now legally valid in most treatment situations. In fact, the person responsible can now legally consent to all forms of medical and dental treatment except those classified as special. There are some situations where an application should be made to the Board. These are covered in guidelines issued by the Board from time to time and are set out in the 'Summary guide to medical or dental treatment' (included at the end of this chapter). Consequently it will rarely be necessary to make an application to the Board for consent.

The person responsible in a given situation is defined in the legislation and described in detail following.

Who is the person responsible?

Person responsible is defined in section 4 of the Guardianship and Administration Act to mean:

- In relation to a person under 18 years *either*:
 - (a) if that person has a spouse, the spouse; or
 - (b) in all other cases the child's parent (unless they are a ward of the State).
- In relation to an adult, one of the following in priority order ie *if there is no-one in the first category, go to the second and so on*:
 - (a) a guardian provided the guardian has been granted power to give consent to medical or dental treatment;
 - (b) a spouse or partner where there is a close and continuing relationship;
 - (c) a carer where the carer provides or arranges for domestic services and support on a regular basis and is unpaid; or
 - (d) a close personal friend or close relative where there is both a close personal relationship through frequent personal contact and personal interest in the person's welfare, on an unpaid basis.

Consent of the Guardianship and Administration Board

The consent of the Board to medical or dental treatment is mandatory in only three situations:

- where the proposed treatment has been classified as special treatment. It is a criminal offence to carry out special treatment upon a person covered by the legislation without the Board's consent.

The most likely application for the Board's consent in this category will be for sterilisation operations. The Board in conjunction with its interstate counterparts has issued special guidelines and protocols relevant to applications for sterilisation and these are available from the Board. Additional guidelines relevant to the other special treatments will be issued by the Board as the need arises.

The list of special treatments is set out in the summary guide included at the end of this chapter.

- where there is no person responsible and the proposed treatment is one which may not be carried out on a person without consent.

These treatments include the administration of drugs of addiction, electro convulsive therapy (ECT), treatment that involves substantial risk and dental treatment intended or likely to result in the removal of all or a substantial number of teeth.

A full description of the excluded treatments is set out in the summary guide.

- for mental illness, where the person has refused or failed or is likely to refuse or fail to undergo treatment (see below).

There are other situations where applications should be made to the Board although its approval is not mandatory. The Board has issued guidelines specifying the situations in which its approval to the proposed treatment should be obtained. These include disputes about treatment, treatment involving significant risks or controversial treatment.

Consent must be in person's best interests

Any consent to medical or dental treatment given by a substitute decision maker must be in the person's best interest. Matters which must be taken into account by the person responsible or the Board before giving consent to treatment are:

- the wishes of the person;
- the likely consequences if the treatment is not carried out;
- any alternative treatments that may be available;
- the nature and degree of any significant risks; and
- that the treatment is carried out to promote or maintain the well-being of the person.

Usually consent to medical treatment by the person responsible must be in writing. If the situation is urgent the consent may be given orally. Written confirmation of consent must however be given as soon as possible.

Medical or dental treatment not requiring consent

The legislation recognises that there are some situations where a substitute consent is not possible or is not needed. There are three categories:

- **Trivial or minor treatment**

Some minor treatment is excluded from the definition of medical and dental treatment:

- (a) non-intrusive examinations of ears, eyes, nose and throat for diagnostic purposes;
- (b) first aid; or
- (c) the administration of non-prescription drugs.

Full details are set out in the summary guide.

- **Where there is no person responsible**

Despite the expanded definition of person responsible there will be situations where there is no relative or carer or friend available to make a decision about medical treatment. In such cases it is possible to carry out the medical or dental treatment without consent if the following conditions are satisfied:

- (a) the doctor certifies in writing in the patient's clinical record that:
 - (i) the treatment is necessary and will most successfully promote the patient's health and well being
 - (ii) the patient does not object to the treatment; and
- (b) the proposed treatment does not include one of the excluded treatments listed in the regulations.

- **Urgent medical or dental treatment**

Substitute consent is not necessary where the treatment is urgent. In addition to treatment to save life or prevent serious injury to health, including mental health, treatment that prevents the person suffering or continuing to suffer significant pain or distress may also be given without consent. Note that the patient must have a disability and be incapable of consent. If the Board is approached and informed that a procedure will be carried out under section 40, it will urge caution and try to investigate the circumstances. If in doubt, the applicant's doctor will be encouraged to apply for the appointment of the public guardian to consider the consent and lifestyle issues.

Applying to the Board for consent

It is easy to apply for consent for medical or dental treatment. A special printed form is used, and is available from the Board.

Before filling in the form, we strongly suggest telephoning the Board to discuss whether consent is necessary and if so who is the appropriate person to provide consent. After the form is lodged at the Board, a hearing date will be set as soon as possible.

3. Treatment authorised by the Guardianship and Administration Board under section 32 of the *Mental Health Act*

The previous two sections have explained that generally speaking, treatment can only be given with the informed consent of the person, or in accordance with the *Guardianship and Administration Act* (or *GAA*). The *GAA* sets up a framework of substituted consent, whereby some treatments do not require consent, and in others an alternative consent giver (such as the person responsible) is identified. In most situations, (like *In re C*, above) if a person has capacity to refuse treatment, then to provide treatment against their wishes would constitute an assault against them, and the practitioner would potentially be legally liable for that act. [Section 32](#) of the *Mental Health Act* provides a limited exception to this general rule.

Section 32 gives the Guardianship and Administration Board (the Board) power to authorise medical treatment for a person with a mental illness notwithstanding the fact that the person has refused consent to the treatment. That is, if a person has refused or failed or is likely to refuse or fail to undergo treatment, the Guardianship and Administration Board may be able to provide a substitute consent for the treatment.

Pre-conditions for [section 32](#) to apply

Section 32 will only apply where the following three factors are met:

- the person must have a mental illness that is amenable to medical treatment. This means that section 32 will not apply if, for example, the person's mental illness will not be assisted by medical treatment. It will also not apply in situations like *In re C*, where the person has a mental illness but refuses or is likely to refuse medical treatment for a co-existing physical illness;
- in addition, a medical practitioner must have recommended medical treatment for the illness and the person must have refused or failed, or be likely to refuse or fail to undergo the treatment; and
- finally, the Board must reach the view that the person should be given the treatment in his or her own interests or for the protection of others.

In these circumstances, the Board may make an order authorising the giving of medical treatment for a period specified in the order. The consequence of the order is that medical treatment may be given to the person notwithstanding the absence or refusal of consent to the treatment.

The definition of medical treatment

It should be noted that the definition of medical treatment is limited for the purposes of section 32. It does not include special treatment ie:

- sterilisation;
- termination of pregnancy;
- removal of non-regenerative tissue for transplantation;
- drugs of addiction used for more than 10 days in 30, except when used to treat cancer or palliative care of a terminally ill patient;
- aversives – mechanical, chemical or physical; or
- psychosurgery and some other neurological procedures.

ECT is *NOT* a special treatment and so the Board could make an order for its use. The Board could also make an order that certain medications must be taken to treat a person's mental illness in circumstances where it is in the person's own interest to take the medication or where the medication should be given for the protection of others.

Emergency orders

The Board has the power to make emergency orders, and an emergency order can be made over the telephone. However, it is only in exceptional circumstances that an Emergency Order will be made without a hearing, as the Board has recently received legal advice that it is not required to hold a hearing giving the usual 10 days notice to all the parties in an emergency situation. By holding a hearing, the Board can ensure the views of all interested parties are adequately considered, and that the best possible decisions are made.

For further information contact:

Guardianship and Administration Board
Ground floor, 99 Bathurst Street, Hobart, 7000
GPO Box 1307, Hobart 7001
Telephone: (03) 6233 3085
Facsimile: (03) 6233 4509
email: guardianship@justice.tas.gov.au
web site: access via <http://justice.tas.gov.au>

Summary guide to medical and dental consent

Treatment	Includes	Who can consent
Urgent	Necessary to: <ul style="list-style-type: none"> • save the person's life; • prevent serious damage to health; • prevent or alleviate significant pain or distress (GAA section 40 defining urgent medical or dental treatment).	No consent needed
Minor	<ul style="list-style-type: none"> • Any non-intrusive examination made for diagnostic purposes; • First-aid medical or dental treatment; • The administration of non-prescription drugs which are normally self-administered. (GAA section 3(1) in the definition of medical or dental treatment).	No consent needed
General	All medical and dental treatment (except those listed as special).	Person responsible can consent
	If there is no person responsible and the treatment: <ul style="list-style-type: none"> • is not special treatment; • is necessary and will most successfully promote the person's health and wellbeing; • is not objected to by the person; and • <i>does not include any of the treatments listed in the following section.</i> 	No consent needed
	If the proposed treatment is one of the following: <ul style="list-style-type: none"> • the ongoing administration of drugs primarily to control the conduct of a person; • Electro Convulsive Therapy (ECT); • the administration of most drugs of addiction, except where associated with surgery or the treatment of cancer or palliative care (except as listed under Special Treatment); • any treatment that involves a substantial risk of death, brain damage, paralysis, permanent loss of function of any organ or limb, permanent and disfiguring scarring or extreme pain or distress; • any treatment resulting in the removal of all or a substantial number of teeth (GAA section 39(1), sections 41(1) and (2); and Regulation 70)	Person responsible can consent, or where there is no person responsible, only the Guardianship Board may consent.
Disputed, at risk or experimental	<ul style="list-style-type: none"> • if there is a dispute about treatment, for example between: <ol style="list-style-type: none"> (a) the person and a doctor or dentist; (b) the person responsible and other relatives or friends; or (c) where the proposed treatment involves significant risk being a high risk/benefit ratio or a greater than normally expected risk; or • the treatment is experimental treatment (including any new treatment which has not yet gained the support of a substantial number of doctors or dentists specialising in the area) (GAA section 44(3), Guidelines on Medical Consents).	Person responsible can consent but an application should be made to the Guardianship Board for consent; or if there is no person responsible, only the Guardianship Board may consent
Special	<ul style="list-style-type: none"> • sterilisation; • termination of pregnancy; • removal of non-regenerative tissue for transplantation; • drugs of addiction used for more than 10 days in 30, except when used to treat cancer or palliative care of a terminally ill patient; • aversives – mechanical, chemical or physical; • psychosurgery and some other neurological procedures (GAA section 3, section 39(1); and Regulation 6).	Only the Guardianship Board may consent
For mental illness	<ul style="list-style-type: none"> • The Board can authorise medical treatment for a person with a mental illness where the person has refused or failed, or is likely to refuse or fail, to undergo the treatment. (MHA section 32).	Only the Guardianship Board may consent

Key
points

Medical treatment in approved hospitals

- Medical treatment in approved hospitals can only be carried out:
 - (a) with the patient's informed consent;
 - (b) if it is authorised under the [Guardianship & Administration Act 1995](#); or
 - (c) if it is authorised by the Guardianship Board under [section 32](#) of the *Mental Health Act*.

The patient's informed consent

- Informed consent is defined in [section 33](#) of the *Mental Health Act*.
 - (a) Consent will only be informed if:
 - (i) the person is mentally capable of understanding the general nature and effect of the proposed treatment;
 - (ii) the person has been given full information before deciding, including:
 - a clear explanation of the proposed treatment; and
 - the benefits and disadvantages and risk of adverse consequences; and
 - advice on alternative forms of treatment and their merits; and
 - clear answers to any questions asked; and
 - the opportunity to obtain independent advice.
 - (iii) the patient freely and voluntarily consents to the proposed treatment; and
 - (iv) the patient has not withdrawn consent.
 - (b) Information must be understandable - use the Translating and Interpreter Service – **131 450**.
 - (c) There is a strong presumption of capacity which is hard to displace.
 - Note: (i) a person can have a mental illness and have capacity; and
 - (ii) a person with a mental illness may have a fluctuating capacity.

Consent in accordance with the *Guardianship and Administration Act*

- The *Guardianship and Administration Act* ensures that a person with a disability who cannot give legal consent for medical or dental treatment is assisted in obtaining appropriate treatment.
- The Act only applies if:
 - (a) the person has a disability; and
 - (b) is incapable of consenting to the carrying out of the proposed treatment.
 - (i) Disability includes intellectual disability, mental illness, brain damage, dementia and so on.
 - (ii) Incapacity means the person is:
 - incapable of understanding the general nature and effect of the proposed treatment; or
 - incapable of communicating a consent or refusal to consent to the proposed treatment.
- Medical or dental treatment cannot be carried out unless either:
 - (a) substitute consent for the treatment has been given; or
 - (b) the circumstances are such that consent is not legally required.

- Substitute consent:
 - (a) In most cases a substitute consent can be provided by the person responsible;
 - (b) however only the Board can consent to special treatment eg sterilisation (ECT is not special treatment);
 - (c) the Board may be the appropriate substitute decision maker in cases of dispute, or high risk treatment or where there is no person responsible.
- Medical treatment may not require consent eg:
 - (a) emergency treatment but exercise caution and consult the Board before providing treatment;
 - (b) some minor or trivial medical treatment;
 - (c) where there is no person responsible and the patient does not object to the proposed treatment and the treatment will promote the patient's health and well being. Note: some treatments are excluded eg ECT.
- If in doubt, contact the Board. After hours service is available.
- It is unlawful to carry out medical or dental treatment on a person with a disability and who is incapable of consenting without the authority given by the *Guardianship and Administration Act*.

Treatment authorised by the Guardianship and Administration Board under section 32 of the Mental Health Act

- Applies when:
 - (a) the person has a mental illness amenable to medical treatment;
 - (b) their treating medical practitioner has recommended medical treatment for the illness;
 - (c) the person has refused or failed, or is likely to refuse or fail to undergo the treatment;
 - (d) the Board reaches the view that the person should be given the treatment in his or her own interests or for the protection of others.
- If these conditions are met, the Guardianship and Administration Board can make an order authorising treatment for the period of time specified in the order.
- Section 32 does not apply to special treatment such as sterilisation.
 - (a) ECT is not a special treatment.

For more information

Contact the Guardianship and Administration Board

Telephone: (03) 6233 3085

Facsimile: (03) 6233 4509

email: guardianship@justice.tas.gov.au

web site: <http://www.justice.tas.gov.au>

Consent to medical treatment in psychiatry

