

Consent to Medical or Dental Treatment

Why is consent required?

Before a medical or dental practitioner provides treatment to a patient the practitioner must obtain consent for the treatment. The consent is valid if the practitioner has told the patient about:

- the nature of the proposed treatment and its effects; and
- the risks associated with the proposed treatment; and
- alternative treatments (their nature, effects and risks); and
- the impact of not undertaking treatment.

The patient must be able to understand the treatment provided and agree to the proposed treatment before the treatment can be started. The patient has a right to refuse or withhold consent to the proposed treatment.

If the patient cannot understand the nature and effect of the proposed treatment or is unable to communicate whether or not they consent to the proposed treatment, the practitioner may need to seek substitute consent.

If the practitioner reasonably believes that an adult has impaired decision making ability in respect of a medical decision, the practitioner must ascertain if the adult has given an advance care directive (ACD) and obtain a copy. See fact sheet on ACD's

This fact sheet does not apply to treatment for a mental illness.

What is substitute consent?

Where a person or agency other than the patient gives consent for medical or dental treatment, it is called 'substitute consent'. This can only occur in accordance with the legislation or an order of the Tasmanian Civil and Administrative Tribunal - Guardianship Stream (Tribunal).

Who can give substitute consent for medical or dental treatment?

The following people can give substitute consent to treatment:

- the Person Responsible
- a guardian (refer to Fact sheet); and/or
- the Tribunal.

When is consent not needed?

There are some instances where consent or substitute consent to medical or dental treatment is not needed to treat a person who is incapable of giving consent. For example:

- When there is a medical or dental emergency: This means the treatment is needed to save a person's life, to prevent serious damage to the person's health or to prevent the patient suffering from significant pain or distress.
- When the treatment is minor: For example, a visual examination of the person's mouth, eyes, ears or throat, providing first aid or the administration of a non-prescription drug (such as painkillers or an antihistamine) within recommended dosages.

Also, if a person with a disability does not have a 'person responsible' AND is not objecting to treatment, it is lawful to provide treatment to the person if it is 'necessary' treatment and will promote the person's 'health and wellbeing'. A medical practitioner must provide a certificate of these circumstances in the person's clinical records. However, this is not acceptable for 'special treatments' (see below) or 'Regulation 12 treatments' (see below).

What are Regulation 12 treatments?

Regulation 12 treatments are a list of treatments in the *Guardianship and Administration Regulations 2017* (Regulation). The treatments include:

- electroconvulsive therapy (ECT);
- the removal of all or a substantial number of teeth;
- treatment with a drug where the primary purpose is to control the conduct of the person to whom it is given;
- treatment with a drug of addiction other than in association with the treatment of cancer or palliative care of a terminally ill patient; and
- the treatment 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 to the person.

For these particular treatments, treatment should not proceed without the consent of a capable and informed patient, a 'person responsible' or the Tribunal (unless the treatment is needed in a medical or dental emergency - see above).

What is Special Treatment?

Special Treatment is defined under the *Guardianship and Administration Act 1995* as:

- treatment likely to lead to permanent infertility
- termination of pregnancy
- removal of tissue for transplant
- psychosurgery; or
- any treatment involving an aversive stimulus.

Only the Tribunal can give consent to Special Treatment.

When can the Tribunal give consent to medical or dental treatment?

After hearing an application for consent to medical or dental treatment the Tribunal may consent to the proposed treatment if it is satisfied:

- that the treatment is lawful; and
- that the patient does not have capacity to consent; and
- that the treatment is in the patient’s best interests.

The Tribunal must consider:

- the wishes of the patient, if possible; and
- the consequences of not carrying out the treatment; and
- any alternative treatment that may be available; and
- whether the treatment can be postponed until the patient regains the capacity to consent or refuse consent to the treatment themselves; and
- In the case of transplantation of tissue, the relationship between the donor and the donee.

A decision of the Tribunal comes into effect:

- After the 28 day appeal period has expired; or
- If an appeal has been lodged, after the appeal has been set aside, withdrawn or dismissed.

If the need for the treatment is urgent, the Tribunal may give its consent for the treatment to start immediately.

How to make an application to the Tribunal?

Please refer to the application form.

If the application is urgent, a hearing will be scheduled as soon as possible. If it is not urgent, the Tribunal must give ten (10) days’ notice to all interested parties.