

# 9. Consent for patients being treated under the *Mental Health Act 2007*

## 9.1. What is the purpose of the *Mental Health Act*?

The *Mental Health Act* provides the legislative framework for the voluntary and involuntary treatment of persons with a mental illness or mental condition in NSW.

The principles for care and treatment of patients under the *Mental Health Act* require Health Practitioners to make every effort to take into account the patient's views and wishes about their treatment, obtain patient consent for treatment and recovery plans and to support patients who lack the capacity to consent to understand those plans.

The Act provides for an authorised medical officer to make a range of decisions about a person detained in a mental health facility.

## 9.2. Who is an authorised medical officer?

An authorised medical officer of a mental health facility is the medical superintendent of the mental health facility (appointed under section 111 of the Act) or a medical officer, nominated by the medical superintendent who is attached to the mental health facility.

## 9.3. What is a mental health facility?

Under the *Mental Health Act*, a person assessed as mentally ill or mentally disordered may be taken to a declared mental health facility for assessment. If the person also requires treatment for a non-mental health illness or condition, the person can be detained in a non-mental health facility. Otherwise, the detention of a person in a non-declared mental health facility may be illegal.

The *Mental Health Act* allows the Secretary of the Ministry of Health to declare any facility to be a declared mental health facility. There are currently three classes of declared mental health facility; mental health emergency assessment class, mental health assessment and inpatient treatment class and community or health care agency class.

### Further guidance

- NSW Health website - [Declared mental health facilities](#)

## 9.4. What are the categories of patients under the *Mental Health Act* relevant to obtaining consent?

There are six distinct categories of patients who may be treated in a mental health facility under the mental health legislation (including the *Mental Health Act* and the *Mental Health (Forensic Provisions) Act 1990 (NSW)*):

1. *Voluntary patients*: patients who have voluntarily been admitted to a mental health facility.
2. *Mentally disordered persons*: patients who are detained for short periods of time, as their behaviour is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary.
3. *Assessable persons*: persons who are detained in a facility under the Act but who have not yet been the subject of a mental health inquiry conducted by the Mental Health Review Tribunal (MHRT)
4. *Involuntary patients*: patients who have been ordered to be detained following a mental health inquiry conducted by the MHRT. Involuntary patients also include forensic and correctional patients who have been re-classified by the MHRT as an involuntary patient.
5. *Forensic patients*: Under the *Mental Health (Forensic Provisions) Act*, a forensic patient is a person who:
  - is found not guilty of a criminal offence due to mental illness, or
  - is ordered to be detained and they are unfit to be tried before a criminal court, and/or
  - is subject to a limiting term in respect of an offence (a limiting term is the best estimate of what the court would have imposed if the person had been subject to a standard criminal trial in respect of an offence); and/or
  - is subject to an extension order under a limiting term.

A forensic patient may or may not have a current mental illness or cognitive impairment. Whether or not the forensic patient has a mental illness impacts on who can provide substitute consent to surgical treatment and in what circumstances.

6. *Correctional patients*: persons who are inmates in a correctional facility who are transferred to a mental health facility on order of the Health Secretary under section 55 of the *Mental Health (Forensic Provisions) Act* in order to receive mental health treatment. A correctional patient may not necessarily have a mental illness. Whether or not the correctional patient has a mental illness impacts on who can provide substitute consent to surgical treatment and in what circumstances.

## 9.5. When do the provisions of the *Mental Health Act* apply for obtaining consent for medical treatment?

The *Mental Health Act* consent provisions apply to both voluntary and involuntary detained patients and cover both mental health treatment and other more general medical and dental treatment, including surgery. In relation to forensic patients, the *Mental Health (Forensic Provisions) Act* also stipulates that the Mental Health Review Tribunal has powers to make orders for a forensic patient's care and treatment.

Where a patient is detained in a mental health facility under the *Mental Health Act* the authorised medical officer of the mental health facility can authorise the giving of any non-surgical treatment (including any medication) the officer deems fit.

While an authorised medical officer can authorise the giving of medical treatment to a detained patient, all reasonable attempts should be made to obtain the consent of the patient. However, certain types of treatment require additional consent processes, such as surgical treatment and electro-convulsive therapy (ECT).

Where a patient is a voluntary mental health patient, the patient's consent must be obtained for any treatment. If the patient lacks capacity, consent can be given in accordance with the *Guardianship Act*. This is the case even where the patient is in a declared mental health facility – the Person Responsible can give consent for most mental health and non-mental health related medical treatment where the person lacks capacity. However, certain types of treatment such as ECT, require additional consent processes.

### Further guidance

- *Mental Health Act (2007) Guidebook*

## 9.6. What is the process for obtaining consent for voluntary patients with capacity?

In accordance with the general law of consent, if a patient is a voluntary mental health patient, the patient's consent is required before any mental health treatment or general medical and dental treatment is provided.

## 9.7. What is the process for obtaining consent for voluntary patients without capacity?

When a voluntary patient lacks the capacity to consent (due to mental illness or otherwise), to medical, surgical or dental treatment the substitute consent provisions of the *Guardianship Act* will apply (see section 7.7). However, ECT can only be given with the voluntary patient's consent.

## 9.8. What is the process for obtaining consent to medical treatment for assessable patients?

An authorised medical officer can authorise the giving of any treatment (including medication) to a person detained in a mental health facility, including an assessable person, under section 84 of the *Mental Health Act*. However, all reasonable efforts should be made to obtain the patient's consent.

However, the other provisions of the *Mental Health Act* relating to surgical treatment (including Special Medical Treatment), do not apply to assessable persons. As such, if an assessable person requires surgery and lacks the capacity to consent, consent must be obtained in accordance with the *Guardianship Act*.

## 9.9. What is the process for obtaining consent to medical treatment for involuntary patients (including forensic patients and correctional patients who suffer from a mental illness)?

The process for obtaining consent for involuntary patients varies depending on whether they have capacity to consent and the category of treatment concerned being either:

- general medical and dental treatment (non-surgical);
- surgical treatment (emergency or non-emergency);
- ECT and Special Medical Treatment.

### 9.9.1. Medical treatment

Where a patient is detained under the *Mental Health Act* section 84 allows the authorised medical officer of the mental health facility to authorise the giving of any non-surgical treatment (including any medication) the officer thinks fit. However, all reasonable efforts should be made to obtain the patient's consent.

### 9.9.2. Surgical treatment

It is important to note that the surgical provisions under Chapter 4 Part 3 of the *Mental Health Act* apply to both involuntary patients (including forensic and correctional patients who have a mental illness) who have the capacity to consent to treatment as well those that do not have capacity. These provisions apply to all surgical treatment except Special Medical Treatment within the meaning of the *Mental Health Act*.

#### Emergency surgery

An authorised medical officer under the *Mental Health Act* or the Secretary of Ministry of Health (or delegate) may consent to emergency surgery on behalf of an involuntary patient, if, in the authorised medical officer's or Secretary's opinion the patient is:

- incapable of giving consent, or is capable of giving consent and refuses to do so, or neither gives nor refuses consent; and
- the surgery is necessary, as a matter of urgency, in order to save the life of the patient or to prevent serious damage to the health of the patient or to prevent the patient from suffering or continuing to suffer significant pain or distress.

Any such consent should be in writing and signed. The authorised medical officer must notify the MHRT and the patients' Designated Carer and Principal Care Provider of the emergency surgery as soon as practicable after becoming aware of the performance of the emergency surgery.

### **Non-emergency surgery**

Prior to lodging an application for non-emergency surgery, the authorised medical officer must provide 14 days (timeframe may be reduced if there is some urgency) notice to an involuntary patient's Designated Carer and Principal Care Provider (if the Principal Care Provider is not the Designated Carer) of the intention to seek consent for the surgery. The response of the Designated Carer or Principal Care Provider, as well as the provision of consent by the patient, determines whether the application will be to the MHRT or the Secretary.

### **Non-emergency surgery – Consent by Secretary of Ministry of Health (or delegate)**

The authorised medical officer can only apply to the Secretary for consent if the patient's Designated Carer has agreed to this in writing, otherwise, the application must be made to the MHRT. The Secretary may only consent to the performance of the surgical operation if they are of the opinion that:

- the patient is incapable of giving consent to the operation, and
- it is desirable, having regard to the interests of the patient, to perform the surgical operation on the patient.

The Secretary of the Ministry of Health cannot consent to surgery on an involuntary patient, where the patient has capacity but has not provided consent to the operation. In such a case, consent must be sought from the MHRT.

### **Non-emergency surgery – Consent by the Mental Health Review Tribunal**

The authorised medical officer *must* apply to the MHRT for consent to the performance of a surgical operation on an involuntary patient if:

- none of the patient's Designated Carers have consented to the surgical operation, and/or
- the patient has capacity but refuses to consent.

The MHRT can only consent to the surgery if they consider that the patient is:

- incapable of giving consent, or
- is capable of giving consent but refuses to give that consent, or
- neither gives nor refuses to give that consent

AND

- it is desirable, having regard to the interests of the patient, to perform the surgical operation on the patient.

## **9.10. Who provides consent to treatment for a forensic or correctional patient not suffering from a mental illness?**

### **General medical and dental treatment (non-surgical)**

All reasonable efforts should be made to obtain the patient's consent to general medical and dental treatment. In addition, the authorised medical officer may authorise the giving of, any non-surgical treatment (including any medication) the officer thinks fit.

### **Emergency and non-emergency surgery**

The requirements for surgical treatment of a forensic or correctional patient who is not suffering from a mental illness are the same as with involuntary patients requiring surgery (see 9.11 above) except with respect to the requirements concerning the patient's capacity.

For forensic and correctional patients without a mental illness, consent to surgery (emergency or non-emergency) may only be granted where, in the opinion of the authorised medical officer or Secretary (emergency surgery) or the MHRT (non-emergency surgery), the patient is incapable of consenting.

### Further guidance

- [Mental Health Review Tribunal Civil Hearing Kit \(Section 7\)](#)

## 9.11. Electro-convulsive therapy

### 9.11.1. Who can administer electro-convulsive therapy (ECT)?

ECT may only be administered by a Medical Practitioner at a mental health facility or other place approved by the Secretary of Health in accordance with the *Mental Health Act*.

### 9.11.2. Is a patient able to consent to ECT themselves?

A patient may consent to ECT themselves if:

- they are a voluntary patient, and
- they are 16 years or over, and
- they are capable of giving informed consent in accordance with the requirements set out under section 91 of the *Mental Health Act*.

If the patient satisfies the above criteria then ECT can only be administered if in addition, at least two Medical Practitioners, at least one of whom is a psychiatrist, complete a certificate (See *Mental Health Regulation 2019, Schedule 1 Form 5 Information and Consent – Electro Convulsive Therapy*) to certify that they have:

- considered the clinical condition of the patient, the history of treatment and any appropriate alternatives, and
- certified in writing that in the opinion of the Medical Practitioner ECT is a reasonable and proper treatment to be administered to the patient and is necessary or desirable for their safety or welfare.

### 9.11.3. What if the authorised medical officer is not sure whether the patient has the capacity to give informed consent to ECT?

If capacity of the voluntary patient is uncertain, an application may be made to the MHRT for an ECT Consent Inquiry pursuant to section 93(3) to determine whether the patient is capable of giving consent and has given that consent. If a voluntary patient lacks capacity, no substituted decision maker can consent on their behalf.

### 9.11.4. What are the requirements for informed consent for ECT under section 91 of the *Mental Health Act*?

A person is taken to have given informed consent to the administration of ECT if the person gives a free, voluntary and written consent after information is provided in accordance with the requirements of section 91 as follows:

- (a) a fair explanation must be made to the person of the techniques or procedures to be followed, including identification and explanation of any technique or procedure about which there is not enough data to recommend it as recognised treatment or to reliably predict the outcome of its performance
- (b) a full description must be given, without exaggeration or concealment, to the person of any possible discomforts and risks of the treatment (including possible loss of memory)
- (c) a full description must be given to the person of any expected benefits of the treatment,

- (d) a full disclosure must be made, without exaggeration or concealment, to the person of any appropriate alternative treatments that would be advantageous to the person
- (e) an offer must be made to the person to answer any inquiries concerning the procedures or any part of them
- (f) the person must be given notice that the person is free to refuse or to withdraw consent and to discontinue the procedures or any part of them at any time
- (g) a full disclosure must be made to the person of any financial relationship between the person proposing the administration of the treatment or the administering Medical Practitioner, or both, and the facility in which it is proposed to administer the treatment
- (h) the person must be given notice of their right to obtain legal and medical advice and to be represented before giving consent
- (i) any question relating to the techniques or procedures to be followed that is asked by the person must have been answered and the answers must appear to have been understood by the person
- (j) a form setting out the steps in this subsection is to be given to the person and an oral explanation of the matters dealt with in the form is to be given to the person in a language with which the person is familiar.

### Further guidance

- Schedule 1 Form 5 - [Information and Consent – Electro-Convulsive Therapy](#)
- [NSW Health Mental Health Review Tribunal](#)

### 9.11.5. Who may consent to ECT on behalf of involuntary patients or patients under 16 years of age?

ECT treatment cannot be given to involuntary patients (including forensic patients, correctional patients and any persons detained in a mental health facility) or persons under 16 without the approval of the MHRT.

An application to the MHRT may be made by the authorised medical officer for an *ECT Administration Inquiry* along with a certificate by two Medical Practitioners, at least one of whom is a psychiatrist. If the patient is under 16-years-old at least one of the medical certificates must be from a psychiatrist with expertise in the treatment of children or adolescents.

The authorised medical officer must do everything reasonably practicable to give notice in writing to the Designated Carer(s) and the Principal Care Provider of the person.

### Further guidance

- [NSW Health Mental Health Review Tribunal](#)

## 9.12. Special Medical Treatment – *Mental Health Act*

### 9.12.1. What is Special Medical Treatment under the *Mental Health Act*?

Special Medical Treatment is any treatment, procedure, operation or examination that is intended, or is reasonably likely, to have the effect of rendering a patient permanently infertile.

### 9.12.2. Can Special Medical Treatment be provided to a patient in an emergency?

Special Medical Treatment may only be provided to a patient (voluntary or involuntary) who is 16 years or over in an emergency where:

- the person carrying out the treatment is a Medical Practitioner, and
- the Medical Practitioner providing the treatment is of the opinion that the Special Medical Treatment is necessary, as a matter of urgency, in order to save the patient's life, or prevent serious damage to the patient's health.

### 9.12.3. When can the Mental Health Review Tribunal consent to Special Medical Treatment on an involuntary patient (including a forensic or correctional patient)?

If Special Medical Treatment is recommended for an involuntary patient (16 years or over) an authorised medical officer may apply to the MHRT for consent.

The MHRT may only consent to the carrying out of Special Medical Treatment (other than prescribed Special Medical Treatment) on a patient if:

- the patient is over the age of 16 years, and
- the MHRT is satisfied that the Special Medical Treatment is necessary to prevent serious damage to the health of the patient.

Special considerations apply to applications for prescribed Special Medical Treatment (see section 103(3) *Mental Health Act*).

Before lodging an application with the MHRT, an authorised medical officer must provide 14 days' notice of the proposed treatment to the patient's Designated Carer(s) and the Principal Care Provider unless the authorised medical officer is of the opinion that the urgency of the circumstances requires an earlier determination, or the person notified does not object.

#### Further guidance

- Mental Health Review Tribunal, *Civil Hearing Kit Surgery or Medical Treatment*