

CONSENT TO MEDICAL AND DENTAL TREATMENT FOR PEOPLE WITH IMPAIRED DECISION-MAKING CAPACITY

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Advance Care Directives Act 2013

Consent to Medical Treatment & Palliative Care Act 1995

WHY IS CONSENT IMPORTANT?

A person cannot receive medical treatment without consent. People over 16 years of age can consent to their own medical treatment as long as they have the decision-making capacity to do so. Decision-making capacity is presumed unless there is evidence to prove otherwise.

Section 4(2) of the *Consent to Medical Treatment and Palliative Care Act 1995* (‘the Consent Act’) states that a person will be taken to have impaired decision-making capacity in respect of a particular decision if they are not capable of:

- understanding any information that may be relevant to the decision (including information relating to the consequences of making a particular decision); or
- retaining such information; or
- using such information in the course of making the decision; or
- communicating his or her decision in any manner; or
- the person is, by reason of being comatose or otherwise unconscious, unable to make a particular decision about his or her medical treatment.

In addition to this section 4(3) of the Consent Act:

- a person will not be taken to be incapable of understanding information merely because the person is not able to understand matters of a technical or trivial nature;
- a person will not be taken to be incapable of retaining information merely because the person can only retain the information for a limited time;
- a person may fluctuate between having impaired decision-making capacity and full decision-making capacity;
- a person's decision-making capacity will not be taken to be impaired merely because a decision made by the person results, or may result, in an adverse outcome for the person.

CONSENT FOR ADULTS WITH IMPAIRED DECISION- MAKING CAPACITY

The health practitioner is responsible for informing the person about the treatment and obtaining consent. Where a person is assessed as not being able to give consent for a particular treatment, consent must be sought from a substitute decision maker who can be:

- A substitute decision-maker appointed under an advance care directive or
- A person responsible as defined in Section 14 of the Act.

WHO IS A “PERSON RESPONSIBLE”?

A “person responsible” is defined in the Consent Act in the following hierarchical order :

- (a) a guardian appointed by the South Australian Civil and Administrative Tribunal (‘the Tribunal’), or formerly by the Guardianship Board, to make health care decisions, and who is available and willing to make a decision;
- (b) an adult domestic partner or “prescribed relative” with a close and continuing relationship with the person (that is an adult related to the patient by blood, marriage, adoption or Aboriginal kinship/ marriage) who is available and willing to make a decision about consent;
- (c) an adult friend who has a close and continuing relationship with the person and is available and willing to make the decision;



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The Public Advocate is an independent statutory officer accountable to the South Australian Parliament

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- (d) someone charged with the person's ongoing day to day care and well-being (such as a Director of Care in aged or supported care) who is available and willing to make the decision.

If there is no substitute decision maker or person responsible available, as a last resort an application can be made to the Tribunal for consent. An application to the Tribunal can be made by a prescribed relative of the person; a medical practitioner proposing to give the treatment; or any other person who the Tribunal is satisfied has a proper interest in the matter.

SUBSTITUTE DECISION MAKING

A decision of a person responsible, to give or refuse to give, consent for health care must, (as far as is reasonably practical), reflect the decision that the person would have made in the circumstances if the person's capacity to make the decision had not been impaired (Section 14C, the Consent Act). This is called substitute decision-making - making decisions while 'standing in the shoes' of the person. If the person has made an advance care directive, the substitute decision-maker must follow any directions that the person has written in that document.

The substitute decision maker or person responsible should ask the health practitioner about the proposed treatment; what it is, whether there are any risks or alternative treatments, what are the likely outcomes of the treatment and the likely consequences of not undertaking the treatment. It is important to consider whether the treatment will be of benefit to the person with impaired decision-making capacity and how it will affect the person's quality of life.

EMERGENCY TREATMENT

Pursuant to section 13 of the Consent Act, a medical practitioner may lawfully administer medical treatment to a person if;

- (a) The person is incapable of consenting (whether or not the person has impaired decision-making capacity in respect to a particular decision); and
- (b) the medical practitioner who administers the treatment is of the opinion that the treatment is necessary to meet an imminent risk to life or health and that opinion is supported by the written opinion of another medical practitioner who has personally examined the patient and
- (c) the patient (if over 16 years of age) has not, to the best of the practitioner's knowledge, refused to consent to the treatment and
- (d) the medical practitioner proposing to administer the treatment has made, or has caused to be made, reasonable enquiries to ascertain whether the patient (if he/she is over 18 years of age) has given an advance care directive.

(A supporting opinion (as in b) is not necessary if in the circumstances of the case it is not practicable to obtain this opinion. Inquiries (as in d) need not be made if in the circumstances of the case it is not reasonably practical to do so.)

If the medical practitioner who is proposing to give the medical treatment is aware that the person has given an advance care directive and a substitute decision-maker has been appointed to make health decisions for the person and is available, the medical practitioner must, if at all possible, take steps to get the substitute decision maker's consent (Section 13 (3), the Consent Act).

CONSENT FOR MINORS

Section 12 of the Consent Act outlines arrangements for administration of medical treatment to minors. In summary, if the patient is a child (under 16 years of age) a parent or guardian of the child can decide what medical treatment should be administered. The child can provide his or her own consent if the

practitioner is of the opinion that the child can understand the nature, consequences and risks of the proposed treatment. This opinion must be supported by the written opinion of at least one other practitioner who has personally examined the child.

In the case of emergency treatment, section 13(5) states that if the parent or guardian of the child is available, then consent must be sought from them. If the parent or guardian refuses consent, but the treatment is deemed to be in the best interests of the child's health and wellbeing, then a practitioner may administer the treatment, despite the refusal of the parent or guardian.

A parent of a child includes a step-parent and an adult who acts in *loco parentis* in relation to a child (Section 4).

CARE OF THE TERMINALLY ILL

End of life decisions are those decisions which are made when a person is in the terminal phase of a terminal illness. The Consent Act, section 17(2), provides that a medical practitioner responsible for the treatment or care of a patient in the terminal phase of a terminal illness, or a person participating in the treatment or care of the patient under the medical practitioner's supervision is not under any duty to use, or continue to use, life sustaining measures in treating the patient:

- if that treatment would only prolong the patient's life in a declining state without any real prospect of recovery; or
- if the patient is in a persistent vegetative state

This applies whether or not the patient or his/her representative has requested that these measures are used or continued. A medical practitioner must, if the patient or the patient's representative directs, withdraw life sustaining measures from the patient.

PRESCRIBED TREATMENT

Prescribed medical treatment for a person with impaired decision making capacity can only be authorised by the Tribunal (under the *Guardianship and Administration Act 1993*). **Sterilisation** and **termination of pregnancy** are prescribed treatments. *See Information Sheet 10: Prescribed Medical Treatment.*

There are different requirements for consent for prescribed psychiatric treatment under the *Mental Health Act 2009*. **Electroconvulsive therapy (ECT)** and **psychosurgery** are prescribed psychiatric treatments. *See Information sheet 16: Prescribed Psychiatric Treatment.*

DISPUTE RESOLUTION

Where decisions cannot be made, problems arise with decisions made under an Advance Care Directive, or there are concerns about the decisions of a person responsible, advice can be sought from the Office of the Public Advocate.

The Office of the Public Advocate has authority under Section 45 of the *Advance Care Directives Act 2013* and Section 18C of the Consent Act to mediate health care disputes for both adults and children, including mental health disputes. This is a 24hr service (emergency matters only after hours).

As a last resort, an application can be made to the Tribunal, to hear and determine health care disputes, including mental health matters, for both adults and children. *See Information Sheet 27: Dispute Resolution Service.*