ACT Government | Canberra Health Services

FOI19-19

[redacted]

Dear [redacted]

Freedom of Information Request: FOI19/19

I refer to your application under section 30 of the *Freedom of Information Act 2016* (the Act), received by Canberra Health Services on 8 April 2019 in which you sought access to:

"...documents related to allegations of a vaginal examination allegedly performed without consent reference RM116774. Scope of hospital complaint FOI anonymous complaint RM116774:

•The initial response by Canberra Health Services to complaint RM116774 about a vaginal examination allegedly performed without consent in the birthing suites at the Centenary Hospital lodged on 7 February 2019;
•Briefings prepared for the Minister for Health and Wellbeing from February 2019 related to procedures performed at the Centenary Hospital for Women and Children. This includes all types of written briefs including question time briefs as well as notes of verbal briefings given to the Minister;
•The communications strategy prepared in response to a Canberra Times article published on 11 March concerning a submission to Legislative Assembly Inquiry into maternity services and related documents. This includes draft strategies and feedback from the Minister's office and Canberra Health Services managers about draft strategies;
•Communications between the Minister for Health and Wellbeing, the Minister's office and the CEO of Canberra Health Services regarding the Canberra Times Article of 11 March 2019 and a Canberra Health Services media release of 13 March. This includes notes taken during telephone conversations between the Minister for Health and Wellbeing as well as draft versions of the media release and correspondence with the Minister, minister's office and Canberra Health Services Management;
•Communications between the Minister for Health and Wellbeing, her office, the CEO of Canberra Health Services and external bodies including the Health Care Consumers Association of Australia regarding the Canberra Times article of 11 March,

•Documents related to a staff meeting on 12 March 2019 to discuss the issues raised in the Canberra Times article of 11 March 2019. This includes agenda, minutes and other related documents."

As the Principle Officer of Canberra Health Services, I am authorised to make a decision on access or amendment to government information in the possession or control of Canberra Health Services.

Canberra Health Services was required to provide a decision on your access application by 31 May 2019.

Decision on access

Searches were completed for relevant documents and 22 documents were identified that fall within the scope of your request

I have included as Attachment A to this decision the schedule of relevant documents. This provides a description of each document that falls within the scope of your request and the access decision for each of those documents.

I have decided to grant access in full to 19 documents relevant to your request and partial access to three documents. As I consider them to be information that I would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the Act.

I have decided to grant access, under section 50 of the Act, to copies of documents with deletions applied to information that I consider would be contrary to the public interest to disclose.

My access decisions are detailed further in the following statement of reasons and the documents released to you are provided as Attachment B to this letter.

In reaching my access decision, I have taken the following into account:

- The FOI Act;
- The contents of the documents that fall within the scope of your request.

Documents 1, 16 and 17 of the identified documents contain information that I consider, on balance, to be contrary to the public interest to disclose under the test set out in section 17 of the Act as the information contained in these folios is personal information about individuals.

Public Interest Factors Favouring Disclosure
I have identified that there are no factors favouring disclosure of this information under Schedule 2, section 2.1.

Public Interest Factors Favouring Non-Disclosure
The following factors were considered relevant in favour of the non-disclosure of the documents:

- Schedule 2.2(a)(ii) - prejudice the protection of an individual's right to privacy or any other right under the Human Rights ACT 2004.

On balance, the information identified is contrary to the public interest and I have decided not to disclose this information.

Charges

Processing charges are not applicable to this request.

Online publishing – disclosure log

Under section 28 of the Act, ACT Health maintains an online record of access applications called a disclosure log. As your request sought your own personal information, section 28(6) of the Act provides that your access application will not be published in ACT Health's disclosure log.

Ombudsman review

My decision on your access request is a reviewable decision as identified in Schedule 3 of the Act. You have the right to seek Ombudsman review of this outcome under section 73 of the Act within 20 working days from the day that my decision is published in ACT Health's disclosure log, or a longer period allowed by the Ombudsman.

If you wish to request a review of my decision you may write to the Ombudsman at:

The ACT Ombudsman
GPO Box 442
CANBERRA ACT 2601
Via email: ACTFOI@ombudsman.gov.au.

ACT Civil and Administrative Tribunal (ACAT) review

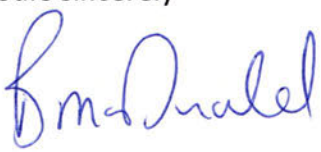
Under section 84 of the Act, if a decision is made under section 82(1) on an Ombudsman review, you may apply to the ACAT for review of the Ombudsman decision.

Further information may be obtained from the ACAT at:

ACT Civil and Administrative Tribunal
Level 4, 1 Moore St
GPO Box 370
Canberra City ACT 2601
Telephone: (02) 6207 1740
http://www.acat.act.gov.au/

If you have any queries concerning Canberra Health Service's processing of your request, or would like further information, please contact the FOI Coordinator on 5124 9829 or email HealthFOI@act.gov.au.

Yours sincerely



Bernadette McDonald
Chief Executive Officer
Canberra Health Service

31 May 2019

ACT Government | Canberra Health Services

FREEDOM OF INFORMATION REQUEST SCHEDULE

Please be aware that under the *Freedom of Information Act 2016*, some of the information provided to you will be released to the public through the ACT Government's Open Access Scheme. The Open Access release status column of the table below indicates what documents are intended for release online through open access.

Personal information or business affairs information will not be made available under this policy. If you think the content of your request would contain such information, please inform the contact officer immediately.

Information about what is published on open access is available online at: http://www.health.act.gov.au/public-information/consumers/freedom-information

NAME	WHAT ARE THE PARAMETERS OF THE REQUEST	File No
[redacted]	Documents related to allegations of a vaginal examination allegedly performed without consent reference RM116774. Scope of hospital complaint FOI anonymous complaint RM116774: •The initial response by Canberra Health Services to complaint RM116774 about a vaginal examination allegedly performed without consent in the birthing suites at the Centenary Hospital lodged on 7 February 2019; •Briefings prepared for the Minister for Health and Wellbeing from February 2019 related to procedures performed at the Centenary Hospital for Women and Children. This includes all types of written briefs including question time briefs as well as notes of verbal briefings given to the Minister; •The communications strategy prepared in response to a Canberra Times article published on 11 March concerning a submission to Legislative Assembly Inquiry into maternity services and related documents. This includes draft strategies and feedback from the Minister's office and Canberra Health Services managers about draft strategies; •Communications between the Minister for Health and Wellbeing, the Minister's office and the CEO of Canberra Health Services regarding the	**FOI19/19**

	Canberra Times Article of 11 March 2019 and a Canberra Health Services media release of 13 March. This includes notes taken during telephone conversations between the Minister for Health and Wellbeing as well as draft versions of the media release and correspondence with the Minister, minister's office and Canberra Health Services Management; •Communications between the Minister for Health and Wellbeing, her office, the CEO of Canberra Health Services and external bodies including the Health Care Consumers Association of Australia regarding the Canberra Times article of 11 March; •Documents related to a staff meeting on 12 March 2019 to discuss the issues raised in the Canberra Times article of 11 March 2019. This includes agenda, minutes and other related documents.	

Ref No	No of Folios	Description	Date	Status	Reason for non-release or deferral	Open Access release status
1.	1-50	Min Brief MCHS19/170 and attachments	6 May 2019	Partial Release	Schedule 2.2(a)(ii)	YES
2.	51-54	Email and attachment –Maternity Statement	12 March 2019	Full Release		YES
3.	55-57	Email and attachment –Draft Maternity Statement	12 March 2019	Full Release		YES
4.	58-60	Email and attachment –Draft media statement re CT story on maternity inquiry submission	12 March 2019	Full Release		YES
5.	61-64	Email and attachment –Draft media statement re CT story on maternity inquiry submission	12 March 2019	Full Release		YES

6.	**65-70**	Email and attachments –For urgent approval: TPs for Minister on maternity inquiry article in CT	12 March 2019	Full Release		YES
7.	**71-73**	Email and attachment –Now in body of email for you with new lines highlighted	12 March 2019	Full Release		YES
8.	**74-76**	Email and attachment –Updated TPs- taking in some of the suggestions from solicitor	12 March 2019	Full Release		YES
9.	**77-81**	Email and attachment –Updated TPs on maternity inquiry	12 March 2019	Full Release		YES
10.	**82-84**	Email and attachment – Draft maternity statement	12 March 2019	Full Release		YES
11.	**85-86**	Email and attachment – updated maternity statement	12 March 2019	Full Release		YES
12.	**87**	Email – Maternity services statement	12 March 2019	Full Release		YES
13.	**88-90**	Email and attachment – All staff message	12 March 2019	Full Release		YES
14.	**91-92**	Email – Letter to the CT Editor	13 March 2019	Full Release		YES
15.	**93-94**	Email and attachment – Letter to the CT Editor	13 March 2019	Full Release		YES
16.	**95-97**	Email – Canberra Health Services Media release – statement on maternity inquiry	12 March 2019	Partial Release	Schedule 2.2(a)(ii)	YES

17.	**98-99**	Email – CT Article 11 March re Maternity service at CHS	11 March 2019	Partial Release	Schedule 2.2(a)(ii)	YES
18.	**100**	Email – Canberra Times article	12 March 2019	Full Release		YES
19.	**101-102**	Email – Canberra Times article	12 March 2019	Full Release		YES
20.	**103-106**	Email – Canberra Times article	12 March 2019	Full Release		YES
21.	**107-108**	Email – Letter to the CT Editor	13 March 2019	Full Release		YES
22.	**109-110**	Email – Letter to the CT Editor	13 March 2019	Full Release		YES
Total No of Docs						
22						

ACT Government

MINISTERIAL BRIEF

Canberra Health Services Directorate

UNCLASSIFIED

To:	Minister for Health and Wellbeing	Tracking No.: MCHS19/170
From:	Bernadette McDonald - Chief Executive Officer	
Subject:	Maternity items for follow up following Minister's Meeting 3 April 2019	
Critical Date:	Not applicable	
Critical Reason:	Not applicable	

- CEO .../.../...

Purpose
To provide you with further information following the Minister's meeting held on 3 April 2019.

Recommendation
That you note the information contained in this brief.

Noted / **Please Discuss**

Meegan Fitzharris MLA ..... MFitz 6/5/19

Minister's Office Feedback

Please provide a further update following HSC work. Thanks.

Background

1. You were previously briefed regarding the consumer feedback related to consent and vaginal examinations received by Canberra Health Services (CHS) at Attachment A.

2. On 3 April 2019, you met with Bernadette McDonald, Chief Executive Officer, CHS and Katrina Bracher, Executive Director Women Youth and Children (WY&C) on matters arising following a media article on 11 March 2019 and 2 April 2019.

3. You requested further information on a number of issues following that meeting.

Issues

4. The WY&C Consumer feedback Audit Report has been finalised at Attachment B. This report is yet to be tabled at the Divisional Quality and Safety Committee.

5. As requested, further information and points of clarification can be found below:

Have there been any reports by staff where they believe consent wasn't obtained?

6. While some staff have raised general concerns regarding consent, a review of Riskman has identified no formal incidents of this nature have been reported.

Involvement of the Health Services Commissioner

7. The Health Services Commissioner visited WY&C to walk around and meet staff during the week of 15 April 2019 as part of a routine familiarisation visit.

8. Additionally, on 8 April 2019 Canberra Health Services received a notification from the ACT Human Rights Commission under section 48 of the *Human Rights Commission Act 2005* (ACT) to commence a commission-initiated consideration into these matters (Attachment C). CHS is currently working through the Commissioner's request.

Provide advice on whether a peer review of maternity services is warranted at this stage

9. WY&C leadership team advises against a peer review at this stage given:

   a. the significant time commitments for frontline staff related to the strategies already underway, including:
      - the planned workshops related to informed consent, and
      - the consultancy that is about to commence related to teamwork and culture.

   b. anticipated recommendations from:
      - the HRC Commission initiated consideration, and
      - the Legislative Assembly Standing Committee Inquiry into Maternity Services in the ACT.

10. A peer review could be considered at a later stage pending the outcome of these current pieces of work.

Outcomes of the facilitated workshop, conducted on 2 April 2019

11. The key outcomes from the workshop with birth suite midwifery team leaders and obstetrics registrars is summarised at Attachment D.

12. The outcomes were discussed at the Maternity Management Meeting on 11 April 2019, where it was decided to distribute more broadly to staff in birthing unit.

Clarify the obligations of midwives to report any incidences of vaginal examinations without consent that they are witness too? And how this is done?

13. Midwives in Australia practice according to the Nursing and Midwifery Board of Australia *Midwives Standards of Practice* 2018 and the *Code of conduct for midwives.*

14. The Canberra Health Services Policy on Consent and Treatment 2016 (Attachment E) outlines the levels of consent and staff responsibility for obtaining consent. The Policy does not specifically mention what to do in relation to staff action if informed consent is questioned. However, if concerns are raised following the procedure regarding informed consent, it is CHS expectation that staff escalate their concerns for investigation. Review of this Policy is about to commence. WY&C will submit this as feedback for inclusion.

15. A Freedom of Information (FOI) request from the Canberra Times on 13 March 2019 regarding the budgeted shifts for midwives at Centenary Hospital's birthing suite for January and February 2019 and the actual number of midwifery shifts for the same period has been finalised. Additionally on the 8 April 2019, CHS received a further FOI request from Mrs Vicki Dunne MLA regarding documents related to allegations of vaginal examinations without consent including: briefings, communication strategy in response to the Canberra Times article on 11 March 2019, communications between the Minister for Health and Wellbeing and the CEO of Canberra Health Services regarding the Canberra Times article on 11 March 2019 and documents related to the staff meeting on 12 March 2019. CHS are currently working through this request.

Financial Implications

16. Not applicable.

Consultation

Internal

17. Not applicable.

Cross Directorate

18. Not applicable.

External

19. Health Services Commissioner.

Benefits/Sensitivities

20. On 4 April 2019, concerns were raised in the Legislative Assembly of confidentiality concerns around some reports that appeared in the media. A motion was moved to establish a Select Committee on Privileges to examine whether a breach of privilege relating to the Standing of Committee on Health, Ageing and Community Services in the release of unauthorised committee documents. Question resolved in the affirmation.

Communications, media and engagement implications

21. There continues to be significant media coverage on demand pressures at Centenary Hospital for Women and Children. As a result it is anticipated there will be media interest. Media dot points will be provided if required.

Signatory Name:	Katrina Bracher Executive Director, Women, Youth and Children	Phone:	47389
Action Officer:	Samantha Lang	Phone:	47431

Attachment

Attachment	Title
Attachment A	MCHS19/114
Attachment B	Consumer Feedback Audit Review
Attachment C	ACT Human Rights Commission notification
Attachment D	Key outcomes of facilitated workshop between Birth Suite Midwifery Team Leaders and Registrars Workshop
Attachment E	CHS Consent and Treatment Policy

A

ACT Government

MINISTERIAL BRIEF

Canberra Health Services Directorate

UNCLASSIFIED

To:	Minister for Health and Wellbeing	Tracking No.: MCHS19/114
From:	Bernadette McDonald, Chief Executive Officer, Canberra Health Services	
Subject:	Maternity Consumer feedback consent review	
Critical Date:	2 April 2019	
Critical Reason:	This issue will be discussed in the Assembly on 2 April	

- CEO 2/4/2019

Purpose
To provide you with information regarding consumer feedback related to consent and vaginal examinations received by Canberra Health Services (CHS).

Recommendation
That you note the information contained in this brief.

Noted / **Please Discuss**

Meegan Fitzharris MLA 3/4/19

Minister's Office Feedback
Please also continue discussions with Health Services Commissioner to engage her advice & assistance, as appropriate

Background

1. On 12 March 2019, following an anonymous submission to the Legislative Assembly Inquiry into Maternity Services in the ACT investigations on 5 March 2019 and a subsequent media article on 11 March 2019, a consumer feedback review was commenced by the division of Women, Youth and Children (WY&C) at Canberra Health Services.

2. A high-level verbal briefing was provided to you on 13 March 2019, prior to the outcomes of the formal review being fully understood. The final report of these cases has yet to be collated. No further Briefing has been provided to date.

Issues

3. The Review is in response to the claim made by an anonymous midwife in submissions to the Legislative Assembly Inquiry into Maternity Services in the ACT that *"Recent consumer feedback highlighting a woman receiving a vaginal examination without her consent"*.

4. The scope of the review by WY&C included all feedback alleging vaginal examinations (VE) without consent from 1 April 2018 to 12 March 2019.

please ensure consumer + staff feedback included.

5. The review identified four cases of consumer feedback that were relevant to the scope of the request. Below is a timeline of the identified cases:

[redacted]

6. The submission referencing consumer feedback on the issue of informed consent for vaginal examination was submitted to the Inquiry into Maternity Services on 5 March 2019. Additionally, there have been two media reports regarding this issue on 11 March 2019 and 2 April 2019. Understandably staff, some women and their families are distressed regarding both the issue and how the service has been portrayed.

7. Following the media reports on 11 March 2019, a woman made contact with WY&C and made a verbal complaint about a VE that she received during her inpatient stay. The Executive Director WY&C spoke directly with the woman concerned and answered her concerns and requested that the woman submit a written complaint. This written complaint has not yet been received. Please confirm this continues to be followed up.

8. The Chief Executive Officer, Canberra Health Services met with Maternity staff on 12 March 2019 and reminded staff that should they witness or believe they have witnessed a case where consent was not obtained in relation to a procedure, they are urged to report this via internal reporting channels.

9. Following the meeting on 12 March 2019, a number of strategies have been developed by WY&C to address the staff concerns and distress, including:

    a. Engage an Organisational Development firm to work with midwifery and medical staff to build and maintain respectful, professional relationships and communications between the professions. The procurement process for this strategy is underway.

    b. Review our informed consent process. CHS will be engaging an external senior and respected midwife and obstetrician supported by legal advice to work with medical and midwifery staff to develop a joint understanding of informed consent. This is currently being organised by the Clinical Director WY&C.

    c. One on one and group debriefing has been made available to all staff. Employee Assistance Program is also available.

    d. As a self-care measure free massages for staff will be made available for an initial period of three months. Yet to be confirmed.

    e. Butchers paper will be placed on the walls in non-patient areas in the Birthing Unit, Birth Centre, Registrars room and outside the Clinical Director, Department of Obstetrics and Gynaecology office to capture any good ideas regarding the above. This is underway.

    f. A facilitated workshop on the development of relationships between the registrars and the Midwives in Birthing Unit on 2 April 2019.

10. Canberra Health Services and the Centenary Hospital for Women and Children take patient consent very seriously and genuinely strive to ensure that women are well informed regarding their care.

Financial Implications

11. Not applicable.

Consultation

Internal

12. Consultation with the Consumer Feedback and Engagement Team (Quality, Safety, Innovation and Improvement Division) has been undertaken.

13. The Canberra Health Services Media team has been working closely with the WY&C Division.

Cross Directorate

14. Not applicable.

External

15. Not applicable.

Work Health and Safety

16. Not applicable

Benefits/Sensitivities

17. Understandably staff, some women and their families are distressed regarding both the issue and how the service has been portrayed.

Communications, media and engagement implications

There continues to be significant media coverage on demand pressures at Centenary Hospital for Women and Children. As a result, it is anticipated there will be media interest. Media dot points will be provided if required.

Signatory Name:	Katrina Bracher	Phone:
Action Officer:	Samantha Lang	Phone:47431

ACT Government | Canberra Health Services

B

Women Youth and Children

Targeted Consumer Feedback

Audit Review

March 2019

ACT Government | Canberra Health Services

Contents

Background

Following an anonymous submission to the Legislative Assembly into Maternity Services in the ACT investigations on 5 March 2019, and a subsequent media article on 11 March 2019, a consumer feedback audit review was commenced by Women Youth and Children (WYC) at Canberra Health Services.

Audit review scope and focus

The audit specifically considered complaints received by the Consumer Feedback Engagement Team (CFET) relevant to any allegations of vaginal examinations performed without consent. It also included one complaint received verbally by the Executive Director, Women Youth and Children's Services.

The scope included all consumer feedback alleging vaginal examinations (VE) without consent from 1 April 2018 to 12 March 2019.

Method and approach

To date, this audit review has followed the following approach:

- CFET provided copies of any consumer feedback, previous investigations and consumer responses that met the criteria to WY&C
- WY&C reviewed each complaint and response again, considering the specific question of informed consent
- The medical teams were consulted
- Information regarding each case was summarised,
- An assessment regarding consent was determined, and
- A final audit report was collated for consideration by the WY&C Quality and Safety Committee.

ACT Government | Canberra Health Services

[redacted]

Discussion

A total of four cases were originally identified within the scope of this audit. Three have been able to be fully investigated. One, being anonymous, has been unable to be investigated in any great detail.

The service became aware of a fifth case, through verbal feedback to the Executive Director of Women Youth and Children, following the media reports in March regarding the issue. This case has been included in the audit. While an extensive discussion with the woman concerned has occurred, and a high level clinical record review has also occurred, the full investigation is pending the written response from the woman.

In summary, there is no substantiated evidence in the documentation available that vaginal examination without consent has occurred in these cases.

Through this audit and in discussions with staff, it is apparent that staff have slightly differing perspectives regarding working definitions of informed consent.

Strict medico-legal definitions, differing professional definitions, current CHS policy definitions and duty of care considerations in emergency situations all contribute to these staff perspectives.

Recommendations

That:

1. The planned strategies to address the staff concerns and differing perspectives are prioritised within WY&C Services, including:
   - Engagement of an external senior midwife and obstetrician, to support the ACT Government Solicitor, to work with medical and midwifery staff in a series of workshops to consolidate a contemporary position on informed consent process within Maternity services.
   - Engagement of an Organisational Development firm to work with midwifery and medical staff to build and maintain respectful, professional relationships and communications between the professions.
   - Continuation of the regular weekly meetings with the Executive and Senior maternity leadership team.
2. The Consumer Feedback Audit Review tabled for discussion and endorsement at the Maternity Quality and Safety meeting and the Women Youth and Children Divisional Quality and Safety meeting.

C

ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

190415132

8 April 2019

Ms Bernadette McDonald
Chief Executive Officer
Canberra Health Services (CHS)
By email: CEOHealth@act.gov.au; DDGclinical@act.gov.au

Dear Ms McDonald

Notification of complaint

I am writing in relation to information brought to the attention of the Health Services Commissioner about the consent process used at the Centenary Hospital for Women and Children (CHWC).

The Commission may, on its own initiative, consider a health service complaint under section 48 of the *Human Rights Commission Act 2005* (ACT). A commission-initiated consideration is conducted, as far as practicable, as if it were a complaint.

I have decided to exercise my power to consider this complaint on my own initiative and commence a commission-initiated consideration.

To assist the Commission's consideration of this matter, please provide the following information:

- Any policy, procedure or guideline relating to informed or implied consent at CHWC;
- The chaperone guideline in use at CHWC, and whether chaperone expectations differ between different units within Canberra Health Services (CHS);
- Any complaint, email or notification received in the past 2 years, relating to allegations of coercion or failure to obtain consent before performing a procedure such as a vaginal examination or use of cardiotocograph (CTG) monitoring at CHWC;
- The scope & findings of any internal investigation conducted into such an allegation;
- The minutes of any meeting held in relation to such an allegation;

I am making this request under section 73 of the *Human Rights Commission Act 2005*.

Level 2, 11 Moore St, Canberra City
GPO Box 158, Canberra ACT 2601
T: (02) 6205 2222 | F: (02) 6207 1034
TTY: (02) 6205 1666
E: human.rights@act.gov.au
W: www.hrc.act.gov.au

Please also note that, under the *Human Rights Commission Act 2005*, the Health Services Commissioner must send a complaint (and all material subsequently obtained) to AHPRA and the relevant National Board if the issues in the complaint relate to a registered health professional and meet the criteria for notification. The Health Services Commissioner and the Boards are obliged to jointly consider complaints and reach agreement as to how matters are to be dealt with.

Deadline for response

To enable the timely resolution of this matter, I would welcome receiving this information by 29 April 2019. **Please note that the Commission would prefer to receive your response electronically.**

Please contact Ingrid Osmond on 6207 5359 if you have any questions about the process for dealing with the complaint, noting that she will be on leave from 18 April to 3 May 2019.

Yours sincerely

Karen Toohey
Health Services Commissioner

D

Key Outcomes from Workshop of Birth Suite Midwifery Team Leaders and Obstetric Registrars held on 2 April 2019

Through engaging in positive and open discussions at this workshop, there was general agreement that the following key points can assist in achieving more effective working relationships and contribute to higher quality care immediately:

- Midwifery Team Leaders and Registrars work as a united team from the start of every shift, doing ward rounds together and frequently sharing information so that a continual, shared understanding of clinical work is maintained.
- Throughout every shift, professionalism and respect are the foundations of how we treat and speak to each other and other staff.
- We have a "step out" approach to manage clinical differences of opinion. Any clinician can ask the others to step out and as soon as practical the staff will leave the room to resolve their different views where they cannot be overheard by women and families.
- Small round-table debriefs involving midwives and doctors to occur after difficult cases. This would have the primary aim of staff supporting each other.
- At the end of every shift, we agree to give each other specific positive feedback, acknowledging the aspects that went well.

We understand that the pressures and stressors that come with seeking to provide the highest quality care to women and babies may at times make achieving all of the points above difficult.
We accept too that people can have bad days.
However, we recognise that our collective striving as best we can to do these things will make a significant difference.

E

Canberra Hospital and Health Services Policy

Consent and Treatment

Contents

Policy Statement

ACT Health staff must obtain a person's valid and informed consent before beginning any clinical activity, treatment or procedure. People have the right to decide whether or not they wish to receive health care and must be actively involved in the decision making process. Performing medical treatment on a person, without their consent amounts to trespass to the person.

When reading this document, note that where the term 'consent' is used, it includes the concepts of 'valid' and 'informed'. When consent is obtained, if it is not both valid and informed, it does not exist.

Consent incorporates three important aspects:

- capacity of the person to make treatment/procedure decisions
- consent provided by the person must be free and voluntary, and
- information provided to the person must cover the procedures to be performed.

Gaining consent includes communication of the benefits, risks and alternatives of treatment, taking into account a person's personal circumstances, beliefs, and priorities including:

- temperament, attitude and level of understanding
- cultural and linguistic diversity
- influences that are non-medical but may have an impact. Examples are:
  - people may have preconceived ideas regarding particular medical conditions or treatments based on previous experiences
  - previous experiences in the health system that effect expectations and may influence decisions
  - lifestyle factors such as family commitments, exercise regimens which a particular treatment might impact and which may influence a decision, and
- communication and/or cognitive difficulties.

Capacity or Competence

An adult is presumed to have the capacity to make decisions about their health care, except where in the consenting clinician's clinical judgement, they do not. Legally, capacity is present if the person is able to understand the nature, effect and consequences of the decision to be made, rationally weigh up the options and understand the implications of his or her decision. The clinician needs to take into consideration individual circumstances, illness and treatment. For example, a mental disorder/illness or drugs may affect a person's capacity to consent in the short or long term.

A person has capacity to make a decision if they can, with assistance if needed, demonstrate all of the following elements:

- understand when a decision about treatment, care or support needs to be made
- understand the facts related to that decision
- understand the main choices available in relation to the decision
- weigh up the consequences of the main choices
- understand how the consequences of the main choices affect them
- on the basis of the above elements, make the decision, and
- communicate the decision they make in whatever way they can.

Note that:

- capacity refers to a particular decision at a particular time and should not be generalised
- if clinically safe, a decision can be delayed until a person regains capacity.

If it is considered that the person does not have capacity to consent, and the decision cannot safely be delayed, then decisions are made in the best interests of the person, in consultation with an appropriate substitute decision maker. Substitute decision maker information is detailed further in Section 4 of this document.

If a clinician is unclear if there is capacity to consent, there is no prescribed clinical test. The circumstances of each individual patient must determine how to proceed. Where a clinician is unsure as to whether the person has the capacity to consent, a second opinion should be sought from another clinician with appropriate expertise and qualifications. Note that there is training and tools provided for clinicians caring for mental disorders and illnesses to assist with determination of capacity.

'Best interests' is a somewhat broad reference. The following should be taken into account when considering what the best interests of a person might be:

- the wishes of the person, so far as they can be ascertained
- what would happen if the procedure/treatment was not carried out
- what alternative treatments are available
- whether the procedure/treatment can be postponed because better treatments may become available, and
- for a transplantation of tissue—the relationship between the 2 people.

Emergencies

In the case of a medical emergency, treatment that is immediately necessary to save a person's life or prevent serious deterioration in their condition, can be provided when the person is not able to provide consent at the time, due to a lack of capacity (e.g. because they are unconscious). Refer to Section 2 of this document for further information.

Documentation of Consent

Consent and the information provided to the person at the time consent is obtained must be documented in the clinical record. It is the responsibility of the health professional performing the treatment, or procedure, to ensure consent is obtained and documented. In instances where capacity is measured and determined as absent, a rationale is required, in addition to an explanation of potential consequences occurring, if that particular course of action was to be pursued. The reasons for the decision should be documented in detail.

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Purpose

To assist health professionals working within ACT Health to meet their professional and legal obligations in seeking and obtaining informed consent from people seeking treatment.

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Scope

This policy document applies to all staff and students across all Divisions, Branches and Units within the ACT Health Directorate.

Compliance with this policy is mandatory.

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Roles & Responsibilities

Executive Directors of Divisions, Branches and Units are responsible for ensuring there are strategies in place relating to consent within their areas for:

- communication
- training and/or orientation
- evaluation and continuous improvement
- compliance.

Managers and Supervisors are responsible for:

- ensuring that staff are able to access, interpret and apply this document and are provided with education related to this policy.

All ACT Health staff who obtain consent should be aware of the:

- principles of consent
- rights of people seeking treatment
- nature of the clinical activity, treatment or procedure the person is being asked to consent to, including the likelihood and degree of possible harm, and
- required consent procedures including rules applying to:
  - emergencies and particular procedures
  - decision-making by substitute decision makers
  - documentation requirements
  - legal and ethical considerations and risks
  - relevant legislation, policies and standards.

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Section 1 – Levels of Consent

The following outlines the different levels of consent which are required for different procedures.

Implied Consent

Implied consent is adequate for minor or routine procedures and is not required to be documented in the clinical record. Implied consent refers to a person indicating their agreement through their actions or by cooperating with the health professional's instructions. For example when a person:

- extends their arm to provide a routine blood sample for testing
- allows a wound dressing to be performed in an acute or community setting

- accepts and swallows medication that is provided, or
- attends an appointment for the purpose of receiving information or advice regarding management of their condition.
- is receiving a procedure where the evidence based risk profile is so low, that it does not warrant obtaining valid informed consent e.g. intravenous line insertion, insertion of a urinary catheter, fine needle aspirate.

Verbal Consent:
Verbal consent is required for non-routine procedures that do not require a significant increase in level of care as a result, and does not carry a significant risk to the patient. The patient's verbal consent should be documented in the clinical record. Verbal consent entails a conversation between the clinician and the patient following the principles of consent in section 2.

Written Consent:
Written consent is the most formal level of consent, and involves a thorough documentation of the consent process as outlined in section 2, usually on an ACT Health approved consent form.
Procedures that require written consent include, but are not limited to:

- Procedures that carry a significant risk to the patient or require a significant increase in level of care as a result
- All surgical procedures, or any procedure requiring sedation or the administration of general anaesthesia
- Any procedure that intentionally puts a high level of stress on thebody (even transiently) eg. a cardiac stress test
- Any procedure that involves, or forseeably may involve the removal of tissue from the patient eg. removal of moles, podiatric nail surgery
- Any other procedure identified by clinical areas or Divisions as requiring formal written consent.

Note:
Consent, whether implied, verbal or written, does not extend to all aspects of a person's treatment. For example, if a person provides consent to a particular surgery, and during that surgery additional procedures were performed which had not been discussed as part of the original consent, it could not be said that there was implied consent to the additional procedures.

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Section 2 –Requirements and documentation

Consent involves a number of interconnected processes, and requires health professionals to:

- provide people with information that will assist them to reach an informed decision about whether or not to consent to the proposed treatment. This must include:
  - a description of the proposed treatment and any potential benefits or any material risks inherent in that procedure, including the possibility that the treatment may be unsuccessful, and of any risks of not undergoing the proposed treatment or procedure.
  - consideration and provision of information in relation to what a reasonable person would want to know and what the particular person being treated would want to know (both subjective and objective).
- ensure the person:

- understands and retains the information
- believes the information (i.e. is not divorced from reality or is unable to comprehend what is being said)
- understands that a choice can be made, and
- is able to reason, make a choice, and convey their decision.

- seek a decision from the person about the proposed treatment. Subject to some specific exemptions (see Section 3 – Substitute Decision Makers for more information), it is always the person's right to determine whether or not to consent to receiving the treatment recommended by the health professional.
- record in the patient's health care record if the person refuses to agree to the proposed treatment, and the circumstances in which consent was refused (refer to Section 6 of this policy)
- thoroughly and accurately record and document the consent process and the person's decision on the consent form and their health care record, including:
  - the person's core identifiers (full name, date of birth and ACT Health medical record number or if no record number, the person's address – please see Patient Identification and Procedure Matching Clinical Procedure). To avoid transcription errors, an ACT Health approved patient identification label must be used to document core identifiers where possible. If the information is hand written, it must be clear and include all of the core identifiers
  - how any communication barriers were addressed
  - any substitute decision maker used if the person doesn't have the capacity to consent
  - the presence of any legal document/s relevant or revocation, e.g. enduring power of attorney, health direction, guardianship order, advance consent direction, etc
  - relevant risks, benefits and alternatives of the treatment or procedure
  - any tools used to support decision-making that have been provided e.g. information sheets
  - any specific wishes or concerns the person may have regarding the proposed clinical activity, treatment or procedure
  - whether the person consents for a student/s to be involved in the procedure
  - date and time when the consent was given
  - the full name, title and signature of the health professional obtaining the consent.
- obtain the person's signature on the consent form as this formalises the process and should be done in all cases, where practicable.

Abbreviations are not to be used on consent documents due to the potential for misinterpretation or misunderstanding.

Some treatments, such as chemotherapy, can involve more than one course of treatment.
In this situation, if consent has been provided, a single consent to treatment form is adequate for the entire course of treatment. However, the consent form must clearly state that consent has been provided for the entire course. In such situations, the consent form and person's health care record should provide information covering:

- elements of the course of treatment and any associated material risk
- alternatives, and
- consequences of withdrawal from treatment at a future date.

A person should be informed that his or her consent can be withdrawn at any time during a course of treatment.

Consent is considered valid until a person's clinical condition has changed, they withdraw their consent or a different procedure is recommended. A change in clinical condition may include:

- improvement or deterioration in the persons condition
- development of new treatment options since consent was given
- progression of the disease which may have changed the recommended treatment regime, or changed the therapeutic goal e.g. from "cure" to "palliative care"
- development of a new condition that may affect the risks associated with the procedure or the type of procedure/treatment offered
- other personal circumstances.

All staff are responsible for ensuring people are aware that information relating to their care will be kept by ACT Health and may be shared with members of the persons treating team as necessary, including their nominated General Practitioner (GP). People have the right to decline to have their information shared at any time. For more information, refer to the *Release or Sharing of Clinical Records or Personal Health Information procedure*.

Responsibility for Obtaining Consent

The health professional that recommends treatment or advises a person to undergo treatment is responsible for providing sufficient and appropriate information and advice to that person.

Where a team of health professionals is involved in the care and treatment of a person, the responsibility for obtaining consent lies with the most senior health professional responsible for providing the treatment or performing the procedure to which they are being asked to consent. When students are to be involved in a clinical procedure, it is the supervisor's responsibility to ensure appropriate consent is obtained. Refer to *Clinical Placement procedure* for more information.

The name of the health professional responsible for obtaining consent must be clearly documented in the person's health care record.

If a health professional delegates the task of gaining consent, they remain responsible for ensuring both that:

- the health professional delegated the task:
  - is able to do so within their scope of practice and is competent to undertake the task, and
  - understands and is capable of informing the consumer of all relevant information including the risks and benefits.
- the consent documentation is properly completed.

Any health professional that has been delegated to perform the consent task must be aware that they have legal and professional responsibilities to:

- provide all necessary and proper information
- assist the patient in making a decision
- obtain consent to treatment.

Delegated health professionals should therefore refuse to undertake the consent process if they do not consider they have sufficient skill or experience to meet these legal and professional responsibilities.

Refusal by a health professional to undertake the consent process on behalf of another person must be respected by the hospital/health service and senior health professional.

Blood Products

Consent for receipt of *identified* blood and/or blood products (including intre-operative cell salvage), as part of their treatment or procedure, must be sought from the person prior to administration. Documented consent for Blood and Blood Products is required under Standard 7 of the National Safety and Quality Health Service Standards.

Significant risks, benefits and other alternative blood management strategies, including the person's right to decline the transfusion must be discussed with the person and documented on the *Blood and Blood Product Prescription and Checklist* and/ or the *Consent to treatment form* available on the ACT Health Clinical Forms register, or electronic equivalent.

Consent should be sought from acute patients who are receiving a single transfusion associated with surgery or some other medical *condition prior to this* episode of transfusion, and documented in the clinical record. Even if it is not expected that the use of blood or *blood products* may be required for a particular procedure, consent should still be sought if it is foreseeable that blood or blood products may be required in the event of a complication associated with the procedure.
Consent should be sought from chronic patients undergoing regular/frequent transfusions at the commencement of their treatment or as their condition evolves and the indication for *transfusion* changes. This consent will remain valid for 12 months unless there is a significant change in the indication or risk profile of transfusion.

A person's decision to decline or withdraw consent to blood and/or blood products, and any known reasons, is to be documented in the clinical record by the treating health professional and *confirmed* in writing by a second health professional.

People who decline treatment with blood transfusion or other blood products should be encouraged to document this decision in an advance care plan (refer to Section 3 of this policy).

In the event of a life saving emergency transfusion when no authorised substitute decision maker is available or legal directive/s present, the transfusion may be administered if the treating medical officer believes that *immediate* action is necessary to resolve the medical emergency. This decision must be documented in the clinical record retrospectively and is made with the best information available at that time.

People on the Elective Surgery Waiting List

Informed consent can be obtained by a Medical Officer, at the time the Admission Booklet (including Request for Admission [RFA] and consent form) is completed. This can occur in the consultant rooms or various ambulatory areas across the health service.

Consent is considered valid until a person's clinical condition has changed, they withdraw their consent or a different procedure is recommended.

Clinical Review of patients on the elective surgery waiting list

People may be clinically reviewed while on the waiting list.

Depending on the expected time and category of surgery, validity of consent and clinical review may occur in the Pre-Admission Clinic, Outpatients Department, Specialist rooms or on admission.

A person may be clinically reviewed by a General Practitioner (GP). However in these cases, if it is necessary to obtain a new consent, the person will need to be referred to Specialist rooms, Pre-Admission Clinic or Outpatients Department where a medical officer will attend the re-consent. If during clinical review it is determined that the person's clinical condition has changed, they withdraw their consent, or a different procedure is recommended, a new consent must be obtained from the person by a medical officer.

If there has been no change in circumstances, the person's consent remains valid.

Evidence of clinical review and any requirement for a new consent is recorded in the person's healthcare record.

Hospital admission for elective surgery – confirmation of consent

If consent was provided by the person prior to their current admission, they are to have their consent reconfirmed by a nurse or medical officer on the ward or in the Surgical Admissions Area. The staff member confirming consent will need to ensure that the person is asked to sign the confirmation of consent part of the Consent to Treatment form as part of this process. For more information see the surgical consent process map at Attachment 1.

If in the process of confirming their consent, a person has questions or concerns regarding the procedure/treatment to be undertaken, the admitting medical officer or their delegate must be contacted to continue the discussion and decide whether the prior consent remains valid or if the person needs a new consent.

In order to ensure informed consent, consent must be given freely and at a time and in a location that people have an opportunity to absorb any information provided to them, and ask any questions they may have. Therefore, people should not be asked or required to give consent in the holding bay, anaesthetic bay or operating rooms. Further to this, the validity of consent may be affected if a person has received medication that alters their decision making capacity at the time of the consent.

Evidence of clinical review and any requirement for a new consent is recorded in the person's healthcare record.

For further information on management of people on the surgery waiting list, please refer to the *Waiting Time and Elective Surgery Access Policy* and its attachment, *Waiting Time and Elective Surgery Access: Managing elective surgery patients in ACT public hospitals.*

Non Elective Surgery

Note that the confirmation of consent process is only applicable to people on the elective surgery waiting list. It does not apply to non elective surgical people or people being treated in imminently or immediately life threatening situations (see section 2 of this policy for more information on treatment in an emergency).

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Section 3 – Treatment in an Emergency

In the case of a *medical* emergency the requirements to obtain consent can differ from the process set out in Section 1 of this Policy. In a medical emergency where a person lacks capacity to consent to the required treatment at the time because of their clinical condition, treatment that is immediately necessary to save the person's life or prevent a serious deterioration in their condition can be provided without consent. This applies only to a person who does not have:

- an over-riding Advance Care Plan or common law directive that is known and immediately available
- a substitute decision maker, Health Attorney or Enduring Power of Attorney with the authority to make treatment decisions and who is immediately available
- an Inpatient Resusitation Plan completed by medical staff to the contrary.

The circumstances that comprise the emergency and the consumer's lack of capacity to consent must be documented in the person's clinical record.

If and when a person becomes competent they should be informed of the treatment/ procedure that has been performed and the reasons for providing it.

In a medical emergency, where a person is competent there is a requirement to obtain informed consent within the necessary time constraints and the persons best interests. Even though in this circumstance consent is implied by the person's presentation and a formal consent form is not required, the medical emergency and communication with the person must be clearly documented in their clinical record.

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Section 4 – Substitute Decision Makers

Where it has been identified that an adult does not have the decision-making capacity to provide consent to treatment or procedures themselves, the following substitute decision makers can provide consent in specific situations:

- an Attorney under an Enduring Power of Attorney
- a Guardian, when appointed
- a Health Attorney
- the Public Advocate of the ACT when appointed guardian, and the
- the Chief Psychiatrist or Community Care Coordinator (where there are issues relating to mental health or mental dysfunction and the consumer is under a Mental Health Order).

To determine who can provide consent as a substitute decision maker refer to the flowchart at Attachment 2.

People with a mental disorder or illness are treated under the *Mental Health Act 2015*. Specific information regarding supported consent, nominated persons and substitute decision makers for people with a mental disorder or illness can be found in section 4 of this document.

If a person resides in another state or territory, any legal documents will reflect the statutory and regulatory requirements of the state or territory of residence. Statutory and regulatory requirements

for the above legal documents can differ between jurisdictions. If a person presents a legal document created outside the ACT, care should be taken to ensure the powers, roles and responsibilities within the document are understood and that that person has been properly delegated the power to make the relevant decision and provide consent on behalf of the patient.

Enduring power of attorney documents validly created in other jurisdictions are taken to be made under and in compliance with ACT legislation due to the mutual recognition provisions under the *Powers of Attorney Act 2006* (ACT). If there is any doubt as to whether or not a legal document is valid or whether the person has been properly delegated the power to make the relevant decision and provide consent, advice can be sought from the ACT Government Solicitor.

A person should not be considered to have impaired decision making capacity because they are thought to be:

- eccentric
- making unwise decisions
- expressing a particular political or religious opinion or sexual preference/orientation
- engaging or have engaged in illegal or immoral conduct, and/or
- taking or have taken drugs, including alcohol.

However, in deciding whether a person has impaired decision-making capacity, any effect of drug-taking of the person must be taken into account. If there is a particular concern about a person's decision making capacity, it should be referred to the treating team for review/assessment. Refer to the information in the Policy Statement section of this document for further information regarding competence.

For any substitute decision maker, evidence of their authority to consent needs to be sighted and confirmation of having done this needs to be documented and a copy of the documentation placed in the person's clinical record.

Telephone Consent

Wherever possible, consent to treatment should be obtained through face-to-face conversation with the substitute decision maker. However, when a person requires treatment, that is not a medical emergency, and consent cannot be obtained from the parent, guardian or other substitute decision maker in person, telephone consent may be provided.

In these situations, another health professional must listen to the telephone consent conversation to corroborate the information given to the substitute decision maker. When the decision maker cannot see the physical condition or affected part or side of the body of the person for themselves, both health professionals must also confirm the information given to the decision maker about the proposed treatment or procedure, including confirmation of the correct site or side.

This information must be documented in the person's clinical record and signed by both health professionals, confirming that consent has been obtained.

Enduring Power of Attorney

In the ACT, the *Powers of Attorney Act 2006*, allows a person (adult) who has decision making capacity to appoint one or more people as an attorney under an Enduring Power of Attorney. In the event that the person no longer has decision making capacity, this provides authority for

the attorney/s to make specified decisions in relation to financial matters, personal care, health care mattersor medical research matters and provide consent on the person's behalf. To provide consent for medical treatments the health section of the Enduring Power of Attorney document must be completed.

A person cannot authorise the attorney to exercise power in relation to special health care matters, including:

- Removal of non-regenerative tissue from the principal while alive for donation to someone else
- Sterilisation of the principal if they are or are reasonably likely to be fertile
- Termination of the persons pregnancy
- Electroconvulsive therapy or psychiatric surgery
- Health care prescribed by regulation.

Enduring attorneys making decisions about medical research matters must follow the process in Part 4.3A of the *Powers of Attorney Act 2006*. This includes considering only medical research projects which are approved by a human research ethics committee acting in accordance with, and compliance with the National Statement of Ethical Conduct in Human Research in force at the time, accessible at www.nhmrc.gov.au.

An attorney under the Enduring Power of Attorney has a right to all the information that the person being treated would have been entitled to if they had decision making capacity.

A person is entitled to have decisions made by an enduring attorney about health care matters and medical research matters, in a way that is in their best interests, respects their rights and freedom of action, and in a way that maintains or promotes their health and wellbeing to the greatest extent possible.

A person's wish in relation to health care matters and medical research matters (including a wish to not participate in the medical treatment or research), and any information provided by their health care provider must be taken into account when an attorney decides what is appropriate in the exercise of power for a health care matter or medical research matter.

A signed and witnessed copy of the Enduring Power of Attorney document must be kept with the person's clinical record.

Health Attorney

A Health Attorney may be appointed by the senior treating doctor or dentist for the purposes of medical consent, as defined in the *Guardianship and Management of Property Act 1991*, if a person has impaired decision making ability, and they do not have:

- an Enduring Power of Attorney for healthcare matters under the *Powers of Attorney Act 2006*, or a law of another state or territory that substantially corresponds to the *Powers of Attorney Act 2006*, and
- there are no Guardianship orders.

Listed in priority order, a health attorney can be:

a) the person's domestic partner
b) a carer for the person (but does not receive remuneration or reward for the care), or
c) a close relative or close friend or the person.

In accordance with the *Guardianship and Management of Property Act 1991* staff are not required to seek the views of more than one Health Attorney.

The use of a Health Attorney must be documented in the clinical record using the *Health Attorney for Consent to Medical Treatment* form available on the Clinical Forms Register. Consent provided by the Health Attorney is valid for six months only.

Public Trustee and Guardian

If a substitute decision maker makes a decision in relation to the health care of a person that the health professional involved in providing treatment to the person, believes on reasonable grounds is not in their best interests, they must contact the Public Trustee and Guardian. Under the *Public Advocate Act 2005* giving information to the Public Trustee and Guardian honestly and without recklessness is protected.

Health professionals must also contact the Public Trustee and Guardian of the ACT to provide or withhold consent in the following circumstances:

- if they become aware that another substitute decision maker exists and objects to the giving of consent, or
- in the absence of a Health Directive, an appointed Health Attorney, Guardian, or Enduring Power of Attorney.

Consent can be obtained by contacting the Office of the Public Advocate during business hours (0900-1630) to obtain an emergency guardianship order. If consent is required outside of business hours, a procedure or treatment may only proceed if it is an emergency, otherwise the procedure or treatment must not proceed until the emergency guardianship order is in place.

The Office of the Public Trustee and Guardian contact is: **02 6207 9800.**

Advanced Care Planning

Advance care planning is a process enabling a person (aged 18 years and over) to express and document their wishes about their future care, in consultation with their health care providers, family and other important people in their lives.

Advance care planning includes:

- appointing a person called an 'attorney' under the *Powers of Attorney Act 2006*. An Advance Care Plan consists of a completed Enduring Power of Attorney (EPA) document, (legal)
- a Statement of Choices (not legal), and/or
- a Health Direction document (legal).

Copies of all advance care planning documents that are sent through the ACT Health, Respecting Patient Choices® program are sent to the ACT public hospitals Medical Records Unit for inclusion on the person's medical record.

For further information please see the Respecting Patient Choices® Advance care planning procedure.

Enduring Power of Attorney

Enduring Power of Attorney is a legal document discussed earlier in this section.

Statement of Choices

The Statement of Choices is designed to guide the enduring attorney/s in the event that the person becomes temporarily or permanently incapable of participating in medical treatment decisions. It is not legally binding, though must be taken into consideration in consent situations.

If the person becomes unable to make decisions about their care or treatment, the information contained in the Statement of Choices will assist the person's chosen attorney(s) and the treating team in discussing healthcare decisions that are in accordance with the person's expressed wishes and choices.

Health Direction

A Health Direction contains instructions that consent to or refuse specified medical treatment or treatment which may occur in the future. Health Directions become effective in situations where a person does not have the capacity to make health care decisions for themselves.

A competent person can make a health direction to refuse or require the withdrawal of medical treatment generally or of a particular kind.

This direction will not be valid if it is inconsistent with an Enduring Power of Attorney for healthcare matters previously given by the person.

It will also be revoked if a person later makes an Enduring Power of Attorney for healthcare matters or the person clearly expresses to a health professional or someone else that it no longer represents their wishes.

A Health Direction is legally binding and must be followed. It does not apply where the consumer has or regains capacity to consent.

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Section 5 – Treatment under the *Mental Health Act 2015*

Persons with a mental disorder or illness are treated according to the *Mental Health Act 2015*. The following information does not apply unless a person is being treated for a mental disorder or illness.

A person with a mental disorder or mental illness can have the decision-making capacity to consent to medical or surgical treatment. The principles of valid informed consent apply; the person can participate in all aspects of their health care and exercise their rights to consent to, or decline health care. The person has the right to be assumed to have decision making capacity unless it has been established by a qualified staff member who has completed the Assessment and Decision-Making training that they do not. The training is provided by the Division of Mental Health, Justice Health and Drug and Alcohol Services (MHJHADS), and is available on Capabiliti.

To establish the person's decision making capacity, staff must consider if the person can understand:

- that a decision needs to be made about their treatment, care or support
- the facts, and
- the main choices available

The person must be able to weigh up the consequences of their decision, understand the consequences and communicate the decision made in whatever way they can.

Refer to the discussion regarding capacity in the policy statement section at the beginning of this document for more information regarding principles used to establish a person's capacity to make decisions. For additional information in relation to the meaning of decision making capacity and the principles associated with this, please refer to sections 7 and 8 of the *Mental Health Act 2015*.

For mental health pathways to consent, please see Attachment 3 of this policy.

Consent and consent discussions must be recorded in the person's clinical record.

Supported Decision Making

A person with a mental disorder or mental illness must always be provided with the opportunity to make decisions about their treatment, care or support to the best of their ability.

A person should not be treated as lacking or having impaired decision making capacity until all practicable steps to support decision making have been exhausted. Staff must promote capacity and facilitate access to services for people by encouraging participation by the person and/or their advocate. Therefore, the person must be:

- verbally advised of their rights under the *Mental Health Act 2015*
- given the Statement of Rights, written information by a health professional, including a statement of the right to obtain a second opinion from an appropriate mental health professional and a statement of the right to obtain legal advice, and
- communicated with in ways they can understand, for example through the use of aided forms of communication (teletypewriter services, communication boards and communication books), and unaided forms of communication (sign language and facial expressions). A person can also request the use of an interpreter, translation services or the use of an independent advocacy service.

For more information please see the Assessment of Decision Making Capacity and Supported Decision Making procedure on ACT Health's Policy Register.

Supported decision making staff training

All clinical staff within MHJHADS must complete training in supported decision making to develop the necessary skills and knowledge to ascertain a person's decision making capacity and to aid them to make a decision if necessary. This training is available as part of the Introduction to the Mental Health Act Training on Capabiliti. In addition to this, key clinical staff are also required to attend face to face training on Supported Decision making and Assessment of Capacity to Consent.

Nominated persons

A person with a mental disorder or mental illness, who has decision-making capacity, may, in writing, nominate someone else to be their nominated person. This will assist clinicians and others to know who to contact for guidance about the person's wishes. The main functions of a nominated person are to:

- help the person by ensuring that their interests are respected should they require treatment, care or support for a mental disorder or mental illness
- assist with supported decision making

- receive information under the *Mental Health Act 2015*, for example, be involved in discussions around ECT or other treatment discussions to provide support to the person
- be consulted about decisions in relation to treatment, care or support.

The nominated person cannot consent on the person's behalf (unless they have that power in another role such as Power of Attorney). The nominated person's name and contacts must be kept with the person's clinical record.

For more information please see the Advance Agreements, Advance Consent Directions and Nominated Persons procedure on ACT Health's Policy Register.

Substitute Decision Makers

If a person is assessed as not having capacity to consent due to their mental disorder or mental illness and cannot attain capacity through supported decision making, the substitute consent provisions of the *Guardianship and Management of Property Act 1991* apply (see Section 3 of this policy) for all general medical or surgical conditions (except for psychiatric treatment or psychiatric surgery).

This means that the person may be treated under:

- a Power of Attorney (excluding ECT or psychiatric surgery)
- a Guardianship Order (excluding ECT or psychiatric surgery), or
- an Advance Consent Direction (this may have a section on agreement to ECT as a treatment of choice).

If the person does not have an Advance Consent Direction, Power of Attorney or a Guardianship Order, they will be treated under the *Guardianship and Management of Property Act 1991*.

Treatment under the Guardianship and Management of Property Act 1991– without a guardianship order

The person may need immediate treatment, in which case the following provisions apply under the *Mental Health Act 2015*:

- A Health Attorney can give consent, initially for up to 21 days.
- If the person remains unable to give consent after 21 days, an application is made to the Tribunal by the treating team and/or another interested party, to extend health attorney consent for eight weeks and consider a guardianship order.

If granted, the person would then be treated under the guardianship order.

Advance Agreements and Advance Consent Directions for a Mental Disorder or Illness

A person with a mental disorder or mental illness who has decision-making capacity may enter into an Advance Agreement and/or an Advance Consent Direction. These documents are agreed, in writing, between the person and their treating team, and apply even in the event that a person lacks capacity. In the event that a person lacks capacity to consent, the treating team must check to see if an advance agreement or an advance consent direction exists.

An Advance Agreement contains information the person considers relevant to their treatment, care or support for the mental disorder or mental illness and any preferences the person may have in relation to help they may need as a result of their mental disorder or mental illness (e.g. who will look after their house, pay their bills) or treatment options or preferences.

An Advance Consent Direction contains the person's main decisions about their care and treatment, for example, a preference for oral medication, though an understanding and agreement that at times they may need injectable medication or details regarding who can access information about their treatment.

A representative of the treating team must ensure that a person with a mental disorder or mental illness is informed about and given the opportunity to enter into an Advance Agreement or Advance Consent Direction and advised that they may have someone with them to assist in entering into an agreement or making a direction.

Treatment will generally be provided in accordance with the preferences expressed in any Advance Agreement or Advance Consent Direction, provided the person continues to consent to any treatment they have consented to in either of these documents and it is safe and appropriate to provide that treatment.

A person may end an Advance Agreement or Advance Consent Direction by telling a member of the treating team verbally or in writing or by making another agreement or direction. Provided the person has decision making capacity, the agreement or direction ends on the day the person's decision to cease the agreement or direction has been made known or any other day nominated by the person.

Even if a Power of Attorney or Guardian has been appointed, if there is an Advance Agreement or an Advance Consent Direction which deals with the relevant issue, consent of the Power of Attorney or Guardian is not required.

Where the person has made an Advance Consent Direction and then makes a Health Direction, the advance consent direction has no effect to the extent that is inconsistent with the health direction.

For more information please see the Advance Agreements, Advance Consent Directions and Nominated Persons procedure on ACT Health's Policy Register.

Psychiatric treatment

If a person who is unable to provide informed consent appears to require psychiatric treatment, an application by the Chief Psychiatrist or their delegate must be made to the ACT Civil and Administrative Tribunal (ACAT) for a Psychiatric Treatment Order. Legal guardians, Health Attorneys and Enduring Power of Attorneys cannot consent to psychiatric treatment on behalf of a consumer, although they should be consulted by the Chief Psychiatrist in determining treatment.

An ACAT Order is required before psychiatric treatments can be provided to consumers who are deemed unable to consent.

Electroconvulsive Therapy (ECT)

Consent to ECT may be voluntary or under an ECT order.

- ECT may be administered to an adult only as provided for in the *Mental Health Act 2015*.
- ECT may be administered to a person who is at least 12 years old but under 18 years old only as provided for in the *Mental Health Act 2015*.
- ECT must not be administered to a person who is under 12 years old.

A consumer for whom ECT is recommended must have the nature and purpose of the therapy explained by a medical officer who will not perform the therapy.

Consent for ECT is mandatory and is to be documented on the Electro-Convulsive Therapy Consent and Prescription form on the CHHS Clinical Forms Register. The consumer's signature on the consent form must be witnessed by a person who has no financial interest in the consumer's affairs. A new consent form is required if the course of ECT goes beyond nine treatments as specified within the *Mental Health Act 2015*.

Consent for ECT may be given or expressly refused in an Advance Consent Direction provided conditions regarding the witnessing of the Advance Consent Direction contained in the legislation are met.

Where emergency ECT is required, the Chief Psychiatrist and a doctor must make an application to the ACT Civil and Administrative Tribunal for an Emergency ECT order.

Involuntary ECT needs to be applied for *through* ACAT by a doctor.

For further information, refer to the ECT procedure on the ACT Health Policy Register and/or the sections on Electroconvulsive therapy in the *Mental Health Act 2015*.

Psychiatric Surgery

This is rare and strictly done on a case by case basis. Please contact the Office of the Chief Psychiatrist for more information and/or refer to provisions on this in the Psychiatric surgery section of the *Mental Health Act 2015*.

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Section 6 – Treatment of Minors

The *Age of Majority Act 1974* identifies that a person attains full age for all purposes of the law when they are 18 years old.

Legally a person can only consent to medical treatment (including examination) if they are an adult (aged 18 years) or if they are mature enough to clearly understand the nature of treatment and any risks involved. Otherwise, a parent or guardian should be asked to consent to treatment on behalf of the child or young person.

An informal carer (acting in place of a parent, e.g. a family friend) may not legally consent to medical treatment on behalf of a child or young person.

Generally, parents have the primary responsibility for providing consent for the child or young person. If two or more people have parental responsibility for the child or young person, each parent may act alone in their decision making capacity and provide consent.

In an emergency situation, the parent with whom the child has presented with can provide consent. In non emergency situations, parents should make long term medical decisions jointly.

Court Orders and Parenting Plans

In the event of a separation between parents of a child or young person, parents may enter into a parenting plan, detailing any agreement as to the parental responsibility of the child, including health related matters.

In the event that a parenting plan cannot be established, the *Family Law Act 1975* affords the court power to make a court order concerning the parental responsibility of a child.

Where there is conflict or confusion between parents, or parents and the child or young person, and/or a medical officer about the validity of the consent, staff should check whether there is a parenting plan or court order in place. In this case the parental consent should be sought and provided in accordance with documentation, and recorded in the clinical record.

In the event that documentation does not provide clear guidance and there is still conflict around consent, the parents, guardian or the child or young person themselves, should be informed that the treatment will be withheld pending discussions with, in order of priority:

- the Health Liaison Officer, Office of Children Youth and Family Support on **6205 3693 (business hours), 1300 556 728 (after hours)** or via healthliaisonchildprotection@act.gov.au (email not to be used in emergency, time limited circumstances)
- the courts (as a last resort). The Office of the Chief Justice of the Supreme Court ACT contact is: 02 6207 1786.

When this situation arises the medical officer should ensure the following staff are made aware:

- Senior treating medical officer
- Clinical Director, and
- Executive Director of the Division.

Protection Orders and Voluntary Care Agreements

For all children or young people subject to a Care and Protection Order or Voluntary Care Agreement, ACT Health staff must contact the Health Liaison Officer, Office of Children Youth and Family Support on **6205 3693 (business hours), 1300 556 728 (after hours)** or via healthliaisonchildprotection@act.gov.au (email not to be used in emergency, time limited circumstances) to obtain clear guidance on whether or not the carer may consent to the medical treatment proposed. Information must be clearly documented in the child or young person's clinical record.

Mature Minor

Where a medical officer is confident that a child or young person understands the nature and consequences of the medical treatment or procedure and consents, they can proceed with the treatment or procedure after gaining consent from the child or young person.

In determining whether a child or young person is capable of providing consent, health professionals need to consider their:

- age and maturity
- ability to fully understand the medical advice being given, and the nature, consequences and implications of the proposed treatment
- potential risks to health, and
- the emotional impact on the child or young person of either accepting or rejecting the advised treatment.

The obligation of the medical officer when obtaining consent is to clearly and thoroughly document all action taken to establish decision-making capacity for consent, all questions asked and answers given and the reasons for the medical officer's decision that the minor is capable of consenting. If appropriate in the circumstances, the medical officer may ask another appropriately qualified medical officer to assess the child or young person to confirm the child or young person's decision making capacity for consent. Staff should be mindful of causing undue distress or barriers to a young person seeking treatment.

Even if a child or young person is considered to be able to make their own treatment decision, a court order may override the decision if it is not in their best interests.

There are some instances where a child or young person is unable to provide consent even if they would ordinarily be considered to be capable of consenting. In particular, the *Transplantation and Anatomy Act 1978* contains exceptions. For example, for the removal of blood from the body of a child, the removal for transplantation of regenerative tissue from the body of a child and the removal for transplantation of non-regenerative tissue from the body of a child, consent is required from the parent and agreement from the child. Additional requirements to obtaining parental consent and agreement from the child also apply for these procedures and are set out in the *Transplantation and Anatomy Act 1978*.

Blood transfusions without parental consent

Pursuant to section 23 of the *Transplantation and Anatomy Act 1978*, where a parent of a child refuses to consent to a blood transfusion for a child or it is not practicable to delay the administration of a blood transfusion until consent of the parent is obtained, a blood transfusion for a child may be administered without parental consent provided:

- at least two medical officers are of the opinion that the child is in danger of dying and that the administration of a blood transfusion to the child is the best means of preventing the death of the child, and
- the medical officer is satisfied that the blood to be transfused is compatible with the blood of the child.

If a blood transfusion is administered to a child without parental consent, the medical officers involved must clearly and thoroughly document:

- the reasons for their view that the child was in danger of dying
- the reasons for their view that the blood transfusion was the best means of preventing the death of the child
- that the blood to be transfused is compatible with the blood of the child
- if the parent refused to provide consent, the discussion which occurred with the parent including all questions asked of the parent and their responses, steps taken to ascertain why the parent refused to consent and the discussion regarding the risks and benefits of the transfusion, and
- if it is not practicable to delay the administration of the blood transfusion until consent can be obtained, the reason why it is not practicable to delay.

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Section 7 – When a person declines information, treatment or withdraws their consent

A person can decline all or part of any care and may withdraw previously given consent at any time, even when this decision differs from health professional recommendations and where the decision to decline care may result in a deterioration in their health or their death. The health professional must discuss the implications of not receiving the recommended care with the person to ensure they have all the relevant information to make a considered decision.

If a person is assessed as competent and declines to sign a written consent form for non-urgent treatment, the health professional should not proceed with treatment, until, or unless, consent has been validly obtained.

The person may be advised to obtain a second opinion from another qualified health professional.

If a person declines recommended diagnostic and therapeutic interventions, particularly when the decision involves potentially life-threatening conditions, this should be clearly documented in the person's health care record.

Where the person continues to decline to receive recommended care, the issue must be reported and escalated through line management. With advice from clinical and legal experts as necessary, the Health Directorate Executive will provide direction to the relevant health professionals and treating teams regarding any further actions to be taken.

When a person declines information in relation to consent and treatment

Some patients will state that they do not want to be burdened with a large amount of information and they would prefer to leave the treatment decision to the health professional. In these circumstances the health professional should encourage the patient to reconsider a wish not to receive information about the treatment proposed. However the patient should not be coerced and if there is a continued reluctance on the patient's part to receive information the health professional should:

- try and determine why the patient does not want to be informed and attempt to address the underlying concern, and
- if the patient feels unable to deal with the matter, ensure that the patient understands, at least broadly, what is involved.

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Section 8 – Aboriginal and Torres Strait Islander Peoples

Staff should be aware that when seeking consent from Aboriginal and Torres Strait Islander peoples, there may be certain cultural practices and sensitivities that need to be considered.

For an individual who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the individual's Aboriginal or Torres Strait Islander cultural and linguistic environment, and their values (including Aboriginal tradition or Island custom) must be taken into account.