

Fact Sheet 1:

Informed consent for consumers who are not competent



Health and disability services can be provided to a consumer only if that consumer makes an informed choice and gives informed consent, unless a statute, the common law, or any other provision of the Code, provides otherwise.

Under the Code, every consumer must be presumed to be competent to make an informed choice and give informed consent, unless there are reasonable grounds for believing that the consumer is not competent (Right 7(2)).

If a consumer has diminished competence, he or she still has the right to make informed choices and give informed consent based on his or her level of competence. For example, the fact that a consumer has an intellectual impairment does not necessarily mean he or she is incompetent to consent to all health and disability services. The level of competence necessary to consent to treatment that has a high degree of risk or complexity, or may have serious consequences for the consumer, will usually be different from the level of competence required to consent to minor, low-risk procedures.

Informed consent and consumers who are not competent

Services may still be provided to consumers who are not competent to make an informed choice and consent to those services (for example, a person with severe dementia, or a person who is unconscious) provided certain requirements are met.

Advance directives

A consumer who at the time of treatment is not competent to make an informed choice or give informed consent may have set out his or her views regarding particular services in an advance directive prior to receiving treatment.

An advance directive is a written or oral directive by which a consumer sets out his or her choices regarding possible future healthcare services. An advance directive is intended to be used in situations where the consumer is not competent to give informed consent.

In an advance directive, consumers may indicate in advance their objection to, or prohibition of, treatments that would otherwise be provided. They may also specify the type of treatment they would wish to undergo should they become incompetent. A "Do Not Resuscitate" (DNR) order is a type of advance directive (see *Fact Sheet 2: Do Not Resuscitate (DNR) Orders*).

An advance directive can be made only by a consumer who is competent at the time the advanced directive is signed — it cannot be made by a consumer’s guardian, enduring power of attorney, parent, family member, or clinician on behalf of the consumer.¹

There is no special form for an advance directive, and it does not have to be in writing. However, an advance directive may fail if the intent is unclear — for example, if the consumer gave ambiguous or conflicting verbal instructions. Verbal advance directives may also be difficult to prove. If a valid advance directive exists, it is legally binding, and treatment may be either given or not given in accordance with the directive. A clinician may still refuse to give treatment indicated in the advance directive, in situations where the treatment is not clinically indicated or otherwise available, or the treatment demanded is not legally allowed, such as euthanasia, or where treatment is compulsory under legislation such as the Mental Health (Compulsory Assessment and Treatment) Act 1992.

Someone entitled to consent on the consumer’s behalf

If there is no valid advance directive, there may be a person who is legally entitled to consent to services on that consumer’s behalf. The classes of people legally entitled to consent to services on a consumer’s behalf include welfare guardians, enduring powers of attorney for personal care and welfare, and the guardians of children. Family members do not automatically have a right to consent to services on behalf of another family member unless they also fall into one of the classes of people legally entitled to consent, as set out above. The Protection of Personal and Property Rights Act 1988 sets out who may be legally entitled to act on behalf of another.

If there is no one entitled to consent on the consumer’s behalf

Where no valid advance directive applies, and no one legally entitled to consent on the consumer’s behalf is available, services may be provided to a consumer who is not competent to consent to that service only where:

- The proposed services are in the best interests of the consumer; and
- The provider has taken reasonable steps to ascertain the views of the consumer; and either
- If the consumer’s views have been ascertained, the provider believes on reasonable grounds that the provision of those services is consistent with the informed choice the consumer would make if he or she were competent; or
- If the consumer’s views have not been ascertained, the provider has taken into account the views of other suitable persons who are interested in the welfare of the consumer and who are available to advise the provider, for example, family members.

Note: *This information is for educational purposes only, and is not for the purpose of providing legal advice. If you need advice on a specific problem or issue, we recommend that you obtain legal advice.*

¹ See the definition of “Consumer” in Clause 4 of the Code.