



Medical/Dental Treatment for Patients Who Cannot Consent

The person responsible

Why is consent important?

Registered doctors and dentists (practitioners) cannot treat a patient without valid agreement (consent) from the patient to undertake the treatment.

A person over the age of 18 years can consent to treatment if they can understand the practitioner's information about the proposed treatment and can make an informed decision. If a person lacks this capacity to understand, another person must make decisions on their behalf.

When is consent not needed?

Consent is not needed in a medical or dental emergency, where treatment is needed to:

- save life
- prevent serious damage to the patient's health
- prevent suffering from significant pain or distress.

Consent is also not required when the treatment is minor, such as for:

- a visual examination of the patient's mouth
- providing first aid
- administering a prescribed drug within recommended dosages.

The person responsible

If a patient cannot consent to their own treatment, the practitioner can obtain consent from the 'person

responsible'.

Who can be the person responsible?

The *Guardianship and Administration Act 1986* provides the following list detailing who can be the person responsible, from the first listed in the order below. The person must be available and willing to make medical and dental treatment decisions on behalf of the patient:

1. An agent appointed by the patient under enduring power of attorney (medical treatment).
2. A person appointed by the Victorian Civil and Administrative Tribunal (VCAT) to make decisions about the proposed treatment.
3. A guardian appointed by VCAT to make decisions about medical/dental treatment.
4. An enduring guardian appointed by the patient to make decisions about medical/dental treatment.
5. A person appointed by the patient, in writing, to make decisions about medical/dental treatment including the proposed treatment.
6. The patient's spouse or domestic partner.
7. The person's primary carer, including carers in receipt of a Centrelink Carer's payment but excluding paid carers or service providers.

8. The patient's nearest relative over the age of 18 years, in the following order listed:

- a. son or daughter
- b. father or mother
- c. brother or sister (including adopted and half siblings)
- d. grandfather or grandmother
- e. grandson or granddaughter
- f. uncle or aunt
- g. nephew or niece

Note: Where there are two relatives in the same position (for example, a brother and sister) the elder will be the person responsible.

When can a person responsible make decisions?

A person responsible can give consent when the patient is unable to consent because they cannot understand the nature or effect of the proposed treatment, or cannot communicate their consent.

Responsibilities of the person responsible

The person responsible must make decisions that are in the best interests of the patient. This means considering:

- What are the patient's wishes?
- What are the wishes of the patient's family?
- What is the proposed treatment?



- Are there any risks?
- Are there alternative treatments?
- What is the likely consequence of not undertaking the treatment?

Where can the person responsible get advice?

The person responsible can contact OPA's Advice Service on 1300 309 337. They can also apply to VCAT to get advice about any proposed medical and dental treatment or the exercise of their powers.

What happens when the person responsible withholds consent?

The practitioner cannot provide treatment where the person responsible withholds consent.

If the practitioner believes that the treatment is in the best interests of the patient and wishes to proceed, they must, within three days of consent being withheld, give the person responsible and OPA a notice. The notice advises that the person responsible can apply to VCAT if they want to prevent the treatment from proceeding.

If the person responsible does nothing, the practitioner can provide the treatment. If the person responsible makes an application to VCAT, they must explain their objection to the treatment. VCAT will then decide whether the treatment can proceed.

Decisions a responsible person cannot make

There are some restrictions on the power of the person responsible to give consent.

If the patient is likely to be able to consent to treatment in a reasonable

time, the person responsible can only consent to treatment:

- where the failure to treat would result in a significant deterioration of the patient's condition
- the treatment is not against the wishes of the patient.

The person responsible cannot consent to the following special procedures:

- those likely to lead to infertility
- termination of pregnancy
- removal of tissue for transplant.

Before any of these special procedures can be carried out, an application must be made to VCAT for a decision.

The person responsible cannot refuse treatment on the patient's behalf under the *Medical Treatment Act 1988*. See the fact sheet *Refusal of Medical Treatment* from OPA for more information.

A person responsible may not be able to make decisions when an adult is an involuntary patient under the *Mental Health Act 1986*, and is unable to consent to non-psychiatric medical treatment. In this case, the Mental Health Act provides for a different list of individuals who can consent, from the first listed in the order below:

1. An agent appointed by the patient with enduring power of attorney (medical treatment)
2. A person appointed by VCAT to make decisions about the proposed treatment
3. A guardian appointed by VCAT to make decisions about medical/dental treatment.
4. An enduring guardian appointed by the patient to make decisions

about medical/dental treatment.

5. The authorised psychiatrist.

What happens if there is no person responsible?

If the practitioner believes the treatment is in the best interests of the patient, but there is no person responsible or they cannot be found, the practitioner can proceed to treat the patient. The practitioner must first submit a form under Section 42K of the Guardianship and Administration Act to OPA. The form sets out:

- the proposed treatment
- why the practitioner believes the treatment to be in the best interests of the patient
- the efforts made to locate the person responsible.

If the legislative requirements are met, the treatment can proceed. For Section 42K forms, visit www.publicadvocate.vic.gov.au or call OPA's Advice Service on 1300 309 337.