

Applying for consent to surgery or special medical treatment

Information to help you apply and prepare for a Tribunal hearing

Background Information

Note: Sections in brackets refer to the *Mental Health Act 2007*.

Consent to surgery and other medical treatments

The steps involved in obtaining consent to surgery, or to other medical treatments, depend on the nature of the treatment, and whether or not there is an emergency.

This document gives some information on:

- non-surgical medical treatment;
- emergency surgery;
- non-emergency surgery; and
- special medical treatment.

What is surgery under the Mental Health Act?

The Mental Health Act defines a surgical operation as:

a surgical procedure, a series of related surgical operations or surgical procedures, and the administration of an anaesthetic for the purpose of medical investigation.

Examples of surgical operations include cholecystectomy, repair of inguinal hernia, and procedures requiring a general anaesthetic or a local anaesthetic. Termination of pregnancy is also considered to be a surgical operation.

Non-surgical medical treatment

The Authorised Medical Officer of a mental health facility may give or authorise treatment (including any medication) to any person detained in hospital under the Act (s84). However any such treatment should relate to the management of the person's mental illness.

If the patient is a voluntary patient, he or she might be capable of consenting to the proposed treatment. However, if the voluntary patient is not capable of giving his or her own consent, the patient's 'person responsible' as defined in the *Guardianship Act, 1987* might be able to give consent. In other cases, it may be necessary to approach the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) to seek consent.

Emergency surgery

If a patient requires emergency surgery, an Authorised Medical Officer or the Secretary of the Ministry of Health (or delegate) may consent to the surgical operation (s99).

The test is whether, in the opinion of the Authorised Medical Officer or the Secretary of the Ministry of Health, **it is necessary as a matter of urgency to perform a surgical operation on the patient in order to save the patient's life or to prevent serious damage to the patient's health or to prevent the patient from suffering or continuing to suffer significant pain or distress.** The provisions for emergency surgery apply, with some slight variations, to involuntary, forensic patients and correctional patients.

The Authorised Medical Officer must notify the designated carer(s) and principal care provider and the Tribunal as soon as practicable after becoming aware of the emergency surgical operation.

See Attachment 1 — Notification to Designated Carer(s) and principal care provider of Emergency Surgery and Attachment 2 — Notice to Tribunal of Emergency Surgery.

Non-emergency surgery

If the surgery is not an emergency and a voluntary or involuntary patient can and has given informed consent, the surgery may proceed on the basis of that consent.

An Authorised Medical Officer may apply to the Tribunal or to the Secretary of the Ministry of Health (or delegate) where there is uncertainty about whether or not a patient is capable of giving informed consent, or has given that consent. This applies, with some slight variations, to involuntary, forensic and correctional patients.

If a **voluntary patient** is not capable of consenting to his or her surgery, then the provisions of Part 5 of the Guardianship Act apply and consent should be sought from the patient's 'person responsible' or the Guardianship Division of NCAT.

If an **involuntary patient** is incapable of giving consent an Authorised Medical Officer may, depending on the views of the designated carer(s), apply to either the Tribunal or the Secretary of the Ministry of Health for consent to perform a surgical operation.

The Secretary of the Ministry of Health has delegated the function of consenting to surgery to nominated senior officers within the Ministry of Health. To obtain consent from the Secretary's delegate contact the Mental Health and Drug and Alcohol Office by telephone on 9391 9953 or by fax on 9391 9041.

How to apply for consent for surgery

Step 1: Notify the Designated Carer(s)

The Authorised Medical Officer must notify the patient's 'designated carer(s)' (see definition below) of the intention to seek consent for the proposed surgery. The response of the designated carer(s) determines whether the application will be to the Tribunal or to the Secretary of the Ministry of Health.

At least 14 days must elapse after the notice is given to the designated carer(s) before the Authorised Medical Officer may apply to the Tribunal or the Secretary for consent. However, an application may be made sooner if the Authorised Medical Officer:

- is of the opinion that the urgency of the circumstances requires an earlier determination; or
- the person notified indicates that the person does not object.

The Authorised Medical Officer is not required to give notice if the 'designated carer(s)' cannot be identified following reasonable inquiries.

Step 2: Assess the response of the designated carer(s) at the end of the 14 day period

What happens next depends on how the **designated** carer(s) responds.

If:

- the **designated** carer(s) indicates in writing that they support the proposed surgery,

then the Authorised Medical Officer should seek consent from the delegate of the Secretary of the Ministry of Health by contacting the Mental Health and Drug and Alcohol Office by telephone on 9391 9953 or by fax on 9391 9041.

If:

- the **designated** carer(s) agree but does not put it in writing; or
- the **designated** carer(s) disagrees; or
- the **designated** carer(s) is unsure; or
- the **designated** carer(s) does not respond within 14 days; or
- there is no **designated** carer,

then the Authorised Medical Officer should apply to the Mental Health Review Tribunal for consent.

Who is a 'designated carer'? (s71)

The designated carer is defined in the Act as:

- the guardian; or
- the parent (if the patient is a child under the age of 14); or
- the person nominated by the patient as designated carer; or
- if the person does not have a guardian, is not a child, or has not made a nomination:
 - the spouse (where the relationship is close and continuing); or
 - someone who is primarily responsible for providing support or care on an unpaid basis; or
 - a close friend or relative - being a person who has a close personal relationship with the patient through frequent personal contact and a personal interest in the patient's welfare on an unpaid basis. (if a patient is an Aboriginal person or a Torres Strait Islander 'relative' includes a person who is part of the extended family or kin of the patient according to the indigenous kinship system of the patient's culture)

Note: A designated carer is not necessarily the next of kin.

Please note: The Tribunal and the Secretary of the Ministry of Health have no legal authority to hear the application until 14 days have elapsed after written notification is provided to the designated carer unless the Authorised Medical Officer is of the opinion that the urgency of the circumstances requires an earlier determination or the person notified indicates that the person does not object (s101 (5)).

What does the Tribunal decide?

The Tribunal decides whether the surgery is desirable, having regard to the interests of the patient.

Flowchart

There is a summary of the above points in the flowchart in Attachment 5.

Special medical treatment

Special medical treatment is a treatment, procedure, operation or examination that is intended, or is reasonably likely, to have the effect of rendering the person permanently infertile.

A medical practitioner may carry out special medical treatment on a patient (other than a child) if:

- of the opinion that it is necessary, as a matter of urgency, to carry out the treatment on the patient in order to save the patient's life, or to prevent serious damage to the patient's health; or
- the Tribunal consents to the carrying out of the treatment (s102).

The regulations may also declare other treatments to be Special Medical Treatments and these are 'Prescribed Special Medical Treatments'.

How to apply for consent to carry out special medical treatment

Step 1: Notify the designated carer(s)

The Authorised Medical Officer must notify the patient's 'designated carer(s)' (as defined on page 4) of the intention to seek consent for the special medical treatment.

The Authorised Medical Officer is not required to give that notice if the 'designated carer(s)' cannot be identified following reasonable inquiries.

At least 14 days must elapse after the notice is given to the designated carer(s) before the Authorised Medical Officer may apply to the Tribunal for consent. However, application may be made sooner if the Authorised Medical Officer:

- is of the opinion that the urgency of the circumstances requires an earlier determination; or
- the person(s) notified agrees.

Step 2: Apply to the Tribunal

The Authorised Medical Officer must apply to the Mental Health Review Tribunal for consent.

Please note: The Tribunal has no legal authority to hear the application until 14 days have elapsed after written notification is provided to the designated carer(s) unless the Authorised Medical Officer is of the opinion that the urgency of the circumstances requires an earlier determination or the person notified agrees (s103(5)).

What does the Tribunal decide?

The Tribunal may consent to the carrying out of special medical treatment if satisfied that the treatment is necessary to prevent serious damage to the patient's health.

If the treatment is a 'prescribed special medical treatment', the Tribunal must be satisfied that:

- the treatment is the only or most appropriate way of treating the patient, and is manifestly in the best interests of the patient; and
- that any relevant guidelines from the National Health and Medical Research Council have or will be complied with.

The Tribunal may not give consent to the carrying out of special medical treatment if the patient is under the age of 16 years.

How to apply to the Tribunal

As soon as you are aware that you will need to apply to the Tribunal for consent to a surgical procedure, or to a special medical treatment, you should start making the necessary arrangements. You can make a tentative booking with the Tribunal before the end of the 14 day notice to the designated carer(s), to ensure that the preferred time slot will be available. Some of the larger mental health facilities have a Tribunal Clerk, or someone who is responsible for organising applications to the Tribunal. If this is the case you should contact them directly and they will apply to the Tribunal on your behalf.

If there is no Tribunal clerk at your site you will need to contact the Tribunal directly. To book a hearing for an individual patient you will need to fax an application form to the Tribunal (fax number 9817 4543). Application forms are available on the MHRT website (www.mhrt.nsw.gov.au) or by phoning 9816 5955.

The Tribunal has a roster of when panels visit mental health facilities in the Sydney, Illawarra, Central Coast and Newcastle regions. For example, the Tribunal may send a panel to your venue on the second and fourth Tuesday of every month. If you need to have a hearing before the next panel is due to visit, please contact the Tribunal so that alternative arrangements can be made.

For applications in relation to termination of pregnancy, it is advisable to give the Tribunal 10 working days' notice to allow appropriate hearing arrangements to be made.

If your application is urgent you should phone the Tribunal after faxing the application form and ask to speak to a Senior Registry Officer to confirm receipt of the fax and to make arrangements for the hearing.

What to do before the hearing

Preparation for the hearing

The applicant or delegate should:

- Ensure that the designated carer(s) has been notified and 14 days have elapsed.
- Organise and prepare reports and necessary documentation.
- Inform the person of the application and the reasons for it.
- Explain the hearing process to the person and inform them of the hearing date and time.
- Encourage the attendance of the person at the hearing.
- If the person is unable to attend, encourage his or her participation by video conference or by telephone.
- Inform the patient's designated carer(s) and other key people of the hearing and encourage them to attend unless the patient objects.
- If family members are unable to attend, facilitate alternative means for family and friends to participate in the hearing, e.g. by telephone.
- Organise an interpreter for the person or family members where necessary.
- Ensure that an appropriate level of security is arranged, if necessary.

Who should come to the hearing

- The person concerned (wearing street clothes if possible).
- The person's designated carer(s), principal care provider, family, friends and support persons.
- Everyone who has prepared a written report for the Tribunal.
- The treating psychiatrist/doctor.
- Other involved professionals, for example the primary nurse, social worker.

If family or friends are unable to come to the hearing, they may still make their views known by writing to the Tribunal before the hearing. It might also be practicable for the Tribunal to hear their views by telephone or video.

Reports and documents required

The Tribunal needs to see the following reports and documents before the hearing:

- A completed application form.
- A copy of the current Tribunal's order.
- Report from the doctor proposing surgery or special medical treatment.
- Report from treating psychiatrist.
- Report from other involved professionals, for example specialist, nursing or social worker report.
- Evidence of notification to designated carer(s) (where appropriate) and any response.
- Submissions from the patient, his or her designated carer(s), principal care provider, family and friends.
- Copy of recent clinical notes or other relevant documents from the person's file.

You should prepare the reports in advance of the hearing, and give them to the Tribunal at least three days before the hearing. The Tribunal will refer to the reports during the hearing. For this reason, the authors of reports should be available to come to the hearing to answer any questions arising from the reports. Sometimes the Tribunal arranges for the authors of reports to talk with Tribunal members by telephone or over a video link.

Report style

Reports should:

- Be written in plain and simple English and avoid where possible the use of medical or technical jargon.
- Provide, as appropriate, a full and frank description of the patient's circumstances (see note below).
- Avoid comments that could be interpreted as judgmental.
- Address the specific issues that the *Mental Health Act 2007* requires the Tribunal to consider.
- Identify clearly the sources of the author's information. These sources may be direct personal observations of the author of the report, or may be information obtained from file notes or other professionals involved in the person's care.

Medical records

The law allows patients and their representatives to inspect or have access to the patient's medical records (s156). However, it is possible to ask the Tribunal to order that medical records not be disclosed for some good cause. This might happen, for example, if the treating medical practitioner believes that disclosure of the information may be harmful.

If you consider that there is a need for a preliminary hearing to discuss the disclosure of medical records, you should phone the Tribunal to arrange this well before the scheduled hearing.

Authorised Medical Officer's or Psychiatrist's Report

- Background information relating to the patient's history and medical history.
- Reasons for the application, including the desirability of the surgery having regard to the interests of the patient.
- The nature of the proposed surgery or special medical treatment.
- The results of medical investigations considered appropriate before the surgery or special medical treatment.
- Possible contra-indications and risks of the surgery or special medical treatment.
- Details of notice given to designated carer(s), principal care provider, relatives, and their viewpoints.
- Details of the patient's ability or willingness to give consent.
- Details of efforts made to obtain the patient's informed consent to their treatment and recovery plan; the ongoing monitoring of their capacity to consent and efforts to support them to understand those plans if they lack capacity.
- Details of discussion with the patient concerning the application for surgery or special medical treatment.
- Efforts to explain the procedure to the patient, including the possible risks and expected benefits, and alternative treatments available.
- Confirmation that contents of the report has been discussed with the patient, including the patient's viewpoint.

Other reports

Additional reports can be provided by health care professionals involved in the care of the patient, for example, primary nurses, social worker, or occupational therapist.

What to do after the hearing

The Tribunal will provide the applicant with a copy of any orders made.

The applicant or other appropriate health care professional should:

- Explain the nature and effect of the order to the patient and his or her designated carer(s), principal care provider and family, and be prepared to answer any questions they might have.
- Inform the patient of his or her appeal rights.

You might find it helpful to refer the patient to the Mental Health Advocacy Service for further information (phone 9745 4277).

Attachments

The following attachments are available by clicking on the following links:

1. [Notification to designated carer\(s\) and principal care provider of Emergency Surgery](#)
2. [Notice to Tribunal of Emergency Surgery](#)
- 3 (a). [Notification to designated carer\(s\) of proposed surgical operation](#)
- 3 (b). [Decision of designated carer\(s\) in respect of proposed surgical operation](#)
- 3 (c). [Notification to principal care provider of proposed surgical operation](#)
4. [Notification to designated carer\(s\) and principal care provider of proposed special medical treatment](#)
5. [Flowchart — summary of procedures.](#)