

Consent by Clients Procedure

SDMS Id Number: P2012/0177-015
Effective From: June 2014
Replaces Doc. No:
Custodian and Review Responsibility: Disability Services Policy and Programs
Contact: Manager, Disability and Community Services
Applies to: People with disability and all services provided or funded, in whole or in part, by Department Health and Human Services
Review Date: June 2017
Keywords: disability, consent
Routine Disclosure: Yes

Approval

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Through	Manager Disability Services Policy and Programs	1300 135 513	27 May 2014
Through	Director Disability and Community Services	1300 135 513	17 June 2014
Cleared by	Deputy Secretary Disability, Housing and Community Services	1300 135 513	17 June 2014

Revision History

Version	Approved by name	Approved by title	Amendment notes
	Name	Position Title	
	Name	Position Title	
	Name	Position Title	

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Introduction

- This document sets out policy procedures to guide organisations supporting or working with people with disabilities to gain informed consent form, or on behalf of, clients.
- The aim of the policy is to provide clear procedures to be followed when considering medical procedures, the use of medication, making financial decisions, negotiating relationship or when designing and implementing individual programs.

Transition to the NDIS

- Until commencement of the Full Scheme NDIS on 1 July 2019 all providers delivering DCS funded specialist disability services and services to NDIS funded participants are required to maintain compliance with DCS policies and procedures.
- Working collaboratively, open communication and information sharing during this transition period are essential. Providers with questions about DCS policies and procedures should contact their DCS Area Office, Community Partnership Team for clarification.
- Existing arrangements relating to Quality and Safety will remain in place for all individuals and NDIS participants until a National Approach is finalised. Eg. providers are required to comply with the *DHHS Quality and Safety Standards Framework for Tasmania's Agency Funded Community Sector* and ensure compliance with the *Tasmanian Disability Services Act (2011)* and *Tasmanian Disability Services Regulations (2015)*. Providers will be notified formally of any change in arrangements relating to quality assurance.

Mandatory Requirements

- This is a Department Health and Human Services (DHHS) wide policy and must not be re-interpreted so that subordinate policies exist. Should discreet operational differences exist, these should be expressed in the form of an operating procedure or protocol.
- The *Tasmanian Disability Services Act 2011* provides the legislative basis for the provision of specialist disability services.
- The Act defines disability as an impairment that:
 - is attributable to a cognitive, intellectual, psychiatric, sensory or physical impairment, or a combination of these, and
 - is permanent or likely to be permanent, and
 - results in a substantial reduction in the capacity of the person to participate in everyday life, and
 - requires continuous significant support services, and
 - may or may not be of a chronic episodic nature.

To be eligible for specialist disability services in Tasmania, a person must:

- have a disability as defined under the Act

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- live permanently in Tasmania
 - be an Australian citizen, or a permanent Australian resident, or a Temporary Protection Visa holder, or a member of a family on a work or study visa sponsored by the Australian Government
 - have a disability that manifests before the age of 65 years.
 - Organisations and some individuals who collect personal information about clients are subject to restrictions on the use of that information by State or Commonwealth privacy regimes. The *Children, Young Persons and Their Families Act 1997* (the CYPTF Act) contains provisions that allow information to be shared about clients between organisations working in collaboration with Gateway Services and Child Protection Services; even where privacy legislation might otherwise prevent it.
- In line with the requirements of the Act (section 50) information-sharing entity means –
- a) a prescribed person; or
 - b) a State Service officer or State Service employee employed in or for the purposes of the Department or another department, within the meaning of the *Administrative Arrangements Act 1990*; or
 - c) a manager of a private medical establishment, within the meaning of the *Hospitals Act 1918* or of an establishment to which a licence under the *Health Service Establishments Act 2006* relates; or
 - d) a controlling authority of an approved hospital, assessment centre, or secure mental health unit, each within the meaning of the *Mental Health Act 1996*; or
 - e) the person in charge of a funded disability services provider; or
 - f) the person in charge of an organisation that receives funding from the Secretary under a funding agreement to provide drug or alcohol treatment services; or
 - g) the person in charge of an organisation that receives a referral from the Secretary or a Community-Based Intake Service, within the meaning of the *Children, Young Persons and Their Families Act 1997*; or
 - h) the Chief Forensic Psychiatrist; or
 - i) any other person, or organisation, prescribed in the regulations
- Consent must be sought from a person with disability before service providers of organisations initiate or implement any planned activity relating to that person.
 - If the person with disability lacks the capacity to give consent, service providers or organisations must proceed in accordance with the Guidelines relating to this policy.
 - **Failure to comply with this policy**, without providing a good reason for doing so, may lead to disciplinary action.
 - Disciplinary action in this context may be a Penalty under the *Tasmanian Disability Services Act 2011* or constitute a breach of your Funding Agreement with Department Health and Human Services (DHHS).

Procedure

To determine capacity to consent, Service Providers must:

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1. Consider all the following factors when deciding whether or not a person has the capacity to consent to a course of action:
 - the knowledge and capabilities of the person (must be determined through formal and informal assessments, direct past experience, file notes and other appropriate documentation)
 - the person's demonstrated ability to make every day decisions
 - the persons communication skills
 - the relative complexity of the current issue requiring a decision.
2. In line with the definition of 'consent', Service Providers must discuss and document the person's demonstrated knowledge and understanding of the following concepts:
 - the issues involved
 - the proposed actions involved
 - likely or possible outcomes
 - the benefits and risks of the proposed action
 - other alternatives
 - the consequences of not giving consent.
3. Confirm the stated reasons given by the person for giving or withholding consent and ensure they are clearly related to the perceived benefits, risks or consequences of the proposed action.
4. Determine whether there are any external pressures acting on the person that may affect their capacity to voluntarily agree or disagree to the proposed action.
5. Always check the complexity of the process of determining a person's capacity to consent is reflecting the seriousness of the issue in question. The more important the issue, the more involved the process should be.
6. Determine if this is a complex situation where there is doubt about whether or not a person has the capacity or ability to consent. If determined, seek advice from the Guardianship and Administration Board.

Consent and Lifestyle Issues

1. Ensure that the matter of consent relates to lifestyle issues and not those issues as relating to consent to medical or financial decisions.
2. Endeavour to gain consent from the person with disability, (taking account of the person's level of understanding), before planning any activity.
3. If a person is unable to provide informed consent about an important issue (e.g. planning a holiday, change of accommodation, personal relationships) Service Providers must ensure that consultation occurs and agreement is reached between the key people involved with that issue (e.g. key service providers, family members, advocates etc.) before any action is taken on the important issue.
4. For day-to-day decision making (e.g. what to eat, choice of activities, when to go to bed) it may be possible to make decisions based on the 'implied consent' of the person with disability. Factors to take into account in this situation would include knowledge of the person, evidence of preferences through

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documentation and discussion with other key people, any initiation of part or all of an action and absence of resistance.

5. Where the proposed activity or issue involves an element of risk support workers must refer to the organisations management and the relevant standard of care/duty of care policies and guidelines for advice.
6. Where the issues are significant and agreement concerning the proposed course of action cannot be obtained through nominated decision makers or responsible persons, consultation and advice must be sought by the organisation from the Guardianship and Administration Board (GAB).

Consent and Medical Treatment

1. Consent must be obtained from the person who will receive the proposed medical treatment or intervention, unless the treatment is urgent or minor. This applies to anyone seeking medical treatment whether they have disability or not.
2. In order to ensure that valid consent for medical procedures are obtained, the following additional requirements must be met:
 - the person understands that they can refuse the treatment
 - the consent is sought only for a specific procedure
 - the person has an understanding of the general nature and effect of the proposed treatment including the likely and foreseeable consequences (risks and benefits)
 - a discussion of alternative treatments has occurred including a comparison of risks and benefits with those of the proposed treatment.
3. Where a person lacks the capacity to consent, either because of age or the nature of their disability treatment can be authorised by the person's 'person responsible'.
4. It is the responsibility of the medical or dental practitioner to obtain consent or other authorisation for any treatment. Failure to do so may constitute an assault and could result in the laying of criminal charges. In most cases there is no question as to the identity of the 'person responsible'. If a dispute arises about who the 'person responsible' is or there is disagreement about appropriate treatment, the Guardian Administration Board (GAB) and the GAB can be contacted on 1300 799 625.
5. It is the responsibility of the 'person responsible' to provide an informed consent. The medical or dental practitioner must explain the nature of the proposed procedure to the 'person responsible' who must in turn decide whether to consent to the proposed treatment.
6. Certain procedures cannot be authorised by the 'person responsible' and require the consent of the Guardian and Administration Board (GAB) and to obtain more information contact the GAB on 1300 799 625.

Consent and Financial Issues

1. The day-to-day management of monies held on behalf of people with disability should be undertaken in accordance with the Disability and Community Services *Management of Client Finances* policy P2010/1092-001.
2. Support staff should, if possible, obtain consent from a person with disability, (taking into account their level of understanding) before planning any use of funds on their behalf.

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3. If the person with disability is unable to provide informed consent about an important financial issue consultation and agreement must occur between the key people involved with that issue (e.g. family members, advocates, key workers, management of the organisation).
4. If a person with disability has or gains (usually by inheritance) a substantial amount of money and lacks capacity, the Guardian and Administration Board (GAB) should be contacted to ascertain whether or not an application for an Administration Order should be made.

Roles and Responsibilities/Delegations

All Staff

- Have an obligation to ensure that where a person with disability is incapable of consenting, their 'person responsible' is informed of the proposed treatment and given a proper opportunity to provide informed consent or otherwise.
- Must inform the 'person responsible' of the contact details of medical/dental practitioners.
- Must share information about clients between organisations working in collaboration with Gateway Services and Child Protection Services; even where privacy legislation might otherwise prevent it. For further clarification see the *Children, Young Persons and Their Families Act 1997* (the CYPTF Act).
- Provide contact details of the 'person responsible' to medical/dental practitioners.
- Inform medical/dental practitioners if the person with disability has no 'person responsible' as some treatments will require consent from the Guardian and Administration Board (GAB).
- Are responsible for ensuring good practice and not only enabling the 'person responsible' to provide informed judgment about consent but actively involving and encouraging the 'person responsible' to participate in the whole process.

Key Definitions

- Consent – In general terms consent is a voluntary agreement to another's proposition, it entails an actual willingness that an act or an infringement of an interest shall occur.
- Express consent – is directly communicated by the spoken or written word.
- Implied consent – is inferred from signs, actions, or facts or by inaction or silence.
- Informed consent – is an agreement to do something or allow something to happen only after all the relevant facts (risks and consequences) are disclosed.

Informed consent is really concerned with the adequacy of information made available to the client, in terms of known risks and consequences and risks that ought to have been known. Failure to provide reasonable information may result in breach of duty of care.

The legal elements of consent, particularly informed consent, are not fixed in legislation: instead they have been established by courts as part of common law.

The essential elements of the law about consent for the purposes of this document are as follows:

- The person who is giving consent must have the intellectual capacity and maturity to understand the situation they are consenting to, the choices that are available and the actual or likely consequences of their decisions (likely risks and benefits).

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- In order for a person to provide informed consent, a person must be given sufficient accurate information about the matter or procedure, and that information must be presented in such a way that a person can fully understand it.
- Any consent must be freely given and must not be obtained by force, threat, deceptive or undue influence.

A person may be able to make decisions and give informed consent in some area of their life but not in others depending on their skills and experience.

- In the specific instance of medical or dental treatment, where a person with disability lacks the capacity to consent, a 'person responsible' can be assigned (under the *Tasmanian Guardianship and Administration Act 1996*) to consent to certain procedures or treatments.
- To qualify as a 'person responsible' the individual must be a family member, close friend or unpaid carer of the person with disability and must maintain a close personal relationship through frequent personal contact and have a personal interest in the welfare of the person with disability, (see section 5 of the Act). A legally appointed guardian can also be the 'person responsible'.
- Under Section 3(1) of the *Guardianship and Administration Act 1996* the following definition of medical and dental treatment is provided:
 - (a) medical treatment includes any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care, normally carried out by, or under the supervision of, a medical practitioner
 - (b) dental treatment includes any dental procedure, operation or examination normally carried out by, or under the supervision of, a dentist.
- The definitions do not include:
 - any non-intrusive examination made for diagnostic purposes, or
 - first aid medical or dental treatment
 - the administration of non-prescription drugs in accordance with recommended dosage levels,
 - any treatment carried out by Allied Health Professionals.

Related Documents/Legislation

- *Tasmanian Disability Services Act 2011*
- *Tasmanian Guardianship and Administration Act 1996*
- *Tasmanian Children, Young Persons and Their Families Act 1997* (the CYPTF Act)
- Department Health and Human Services, Disability and Community Services *Management of Client Finances Policy P2010/1092-001*
- *Administrative Arrangements Act 1990*
- *Hospitals Act 1918*
- *Health Service Establishments Act 2006*
- *Mental Health Act 1996*

Attachments

I. Consent by Clients Guidelines Policy P2010/1089-001

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2. Consent by Clients Definitions

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