



Medical Council of New Zealand

Information and consent

Medical practitioners have a statutory obligation to abide by the Code of Health and Disability Services Consumers' Rights. Under this code every patient has the right to make an informed choice and to give informed consent, except in certain circumstances. The intention of this statement is to give guidance about current legal requirements.

Doctors must ensure that a decision not to consent, or to withhold consent is noted in the patient's health record, with a summary of information given to the patient.

Background

1. Trust is a vital element in the patient-doctor relationship and for trust to exist, patients and doctors must believe that the other party is honest and willing to provide all necessary information that may influence the treatment or advice. The doctor needs to inform the patient about the potential risks and benefits of the proposed treatment and let the patient know that his or her welfare is the paramount concern.
2. Informed consent is an interactive process between a doctor and patient where the patient gains an understanding of what is involved in receiving a proposed procedure or treatment and, free from coercion, gives agreement.

The right to be fully informed

3. Under Right 5 of the Code of Health and Disability Services Consumers' Rights ('the Code') information must be conveyed to the patient in a form, language and manner that ensures the patient understands the treatment or advice. Doctors should also ensure that the environment enables the patient to communicate '*openly, honestly, and effectively*'.ⁱ
4. Right 6 of the Code states that every consumer has '*the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive*'. Specifically, the Codeⁱⁱ states patients are entitled to:
 - (a) an explanation of his or her condition; and
 - (b) an explanation of the options available, including an assessment of the expected risks, side effects, benefits, and costs of each option; and
 - (c) advice of the estimated time within which the services will be provided; and
 - (d) notification of any proposed participation in teaching or research, including whether the research requires and has received ethical approval; and
 - (e) any other information required by legal, professional, ethical, and other relevant standards; and
 - (f) the results of tests; and
 - (g) the results of procedures.

The Medical Council notes that the Code places emphasis on what can be reasonably required 'in the individual circumstances of the patient' and recommends that doctors recognise this when providing a health care procedure. In some circumstances one doctor will

not have all the information readily available and another practitioner will share the responsibility.

5. The Medical Council recognises that every aspect of a consultation cannot realistically be noted in the patient's record. However Council also recognises the importance of full and detailed records. As a result Council recommends that doctors adopt written consultation protocols that specify what information in the form of discussion, publications and questions will be given in a specific type of consultation (e.g. all patients experiencing migraines). The doctor does not spend unnecessary time writing extensive notes. Instead, the doctor notes in the patient record that the protocols were fulfilled and only outlines any exceptions to the protocol. Please note that a copy of any protocols will need to be included in the patient record if the patient is referred or requests a copy of his or her record.

Informed consent ⁱⁱⁱ

6. The doctor who is providing treatment or advice is responsible for obtaining informed consent from the patient before initiating treatment. In a hospital setting, it is Council's position that obtaining informed consent is a skill best learned by the house surgeon observing consultants and experienced registrars in the clinical setting. Doctors on probationary registration should not take informed consent where they do not feel competent to do so.
7. The patient must have the opportunity to consider and discuss the relevant information with the doctor.^{iv} The doctor can only proceed after the patient has given informed consent, with the exceptions in clauses 11-12. Under Right 7 of the Code, a patient has the right to refuse services or withdraw consent at any time, reflecting self-determination.
8. A patient may waive the right to discuss details of the treatment. Doctors should write this decision in the record and give the patient opportunities to change his or her mind.
9. In general, separate written consent is required for research, experimental procedures, general or regional anaesthesia, blood transfusion or any procedure with a significant risk of adverse effects.
10. If a patient is choosing between evidence-based medicine and innovative treatments for which there is no scientific evidence, the doctor should attempt to present to the patient a clear and balanced summary of the information available.

When a patient is not competent to give informed consent

11. In some circumstances informed consent is not possible. For example, the patient may be a young child, be unconscious, suffer dementia or have an intellectual disability. Reasonable effort should be made to contact a legal guardian or an appropriate person who is in the position to grant consent on behalf of the patient. The only individuals who are entitled to grant consent on behalf of a patient are legal guardians (welfare guardians under the Protection of Personal Property Rights Act, or parents/guardians under the Guardianship Act), or someone with enduring powers of attorney. In certain circumstances a doctor may provide a service in the best interests of a patient without receiving consent (refer to clause 13).^v
12. Under the Code every consumer is presumed competent to make an informed choice and give informed consent. There must be reasonable grounds for believing that the individual consumer is not competent.

13. Under Right 7 (4) of the Code,
- if the patient is not competent to make an informed choice and give informed consent; and
 - no person entitled to consent on behalf of the patient is available, a doctor may provide services without obtaining the informed consent of the patient when:
 - (a) it is in the best interests of the patient; and
 - (b) reasonable steps have been taken to ascertain the views of the patient; and either
 - (c) the provider believes, on reasonable grounds, that the provision of the service is consistent with the informed choice that the patient would have made if he or she were competent; or
 - (d) if the patient's views have not been ascertained, the provider takes into account the views of other suitable people who are interested in the welfare of the patient and available to advise the provider.
14. In the situation where a patient has diminished competence, a doctor, under Right 7(3) of the Code, is required to obtain consent from the patient for the aspects of the treatment that the patient understands and to follow the guidance in clause 11 for the rest of the treatment. If no suitable person is available, the provider is wise to have written agreement of a medical practitioner with experience in the particular problem.

Consent of minors

15. The Code does not specify an age for consent and makes a presumption that *every* consumer of health services is competent to make an informed choice and give informed consent, unless there are reasonable grounds for believing that the consumer is not competent.
16. Children over the age of 16 are considered legal adults (s 25 of the Guardianship Act 1968). People under 16 years of age are not automatically prohibited from consenting to medical, surgical or dental procedures so judgement is needed in each instance. The Act states that a female of any age has the right to consent or refuse to give consent to any medical or surgical procedure for the purpose of terminating her pregnancy.
17. A doctor must assess a child's competency to decide whether he or she is able to give informed consent. Generally, a competent child is one who is able to understand the nature, purpose and possible consequences of the proposed investigation or treatment, as well as the consequences of non-treatment.^{vi}

Declaration or order from the Court

18. Occasionally, when people are unable or refuse to consent to treatment, a legal opinion should be sought with a view to seeking authority from the High Court. Such cases are:
- (a) a blood transfusion or caesarean section to save life,
 - (b) termination of treatment to allow the patient to die peacefully, for example patients in permanent vegetative states and
 - (c) sterilisation of a patient who is unable to consent but for whom the family and other carers, supported by medical opinion, request the operation to enhance the quality of life of the patient or prevent deterioration in his or her physical or mental health.

Informed choice and consent in treatment that is part of research

19. All research must be approved by an accredited ethics committee before patients are invited to participate and give consent to involvement in the study. There is special responsibility when a proposal includes investigative research or a trial of treatment. Within the health professions there is an ethical duty to share knowledge and to teach and learn throughout a practitioner's career. Nevertheless, under Right 9 of the Code informed consent is necessary whenever a patient participates in research. If any form of the research is changed or amended once informed consent has been obtained the doctor must renew the patient's informed consent.
20. If the treatment is part of research, it is the responsibility of the investigating doctor to ensure the patient understands the full implications of the treatment, especially the uncertainties. Written consent from a patient is required for research under normal circumstances.

Informed choice and consent in treatment that is part of education

21. Consent should be obtained for involvement of trainees in the care of patients. The patient should be informed about the extent of the involvement of the trainee and the trainee's experience.

Removal of body parts

22. Under Right 7(9) every patient has the right to make the decision about the return or disposal of any body parts or substances removed or obtained in the course of a health care procedure.
23. Under Right 7(10) any body parts or bodily substances removed or obtained in the course of a health care procedure or after death may be stored, preserved, or utilised only after appropriate informed consent has been obtained.

Screening for potential disease

24. Doctors have a special duty of care when enrolling an apparently healthy asymptomatic person in screening programmes, to make him or her aware of the limitations of screening and the uncertainties, in particular the chance of false positive and false negative results. Before obtaining consent the doctor should explain, or give information to the patient that explains:
 - the purpose of the screening,
 - the uncertainties,
 - any significant medical, social or financial implications of the condition for which the screening is done and,
 - follow up plans, including availability of counselling and support services.^{vii}

Standards expected of doctors

25. The standard for informed consent is that of a reasonable patient (Rogers vs Whitaker 1992), and failure to fulfil requirements may be considered as medical misconduct. All doctors must become familiar, and comply, with the Code of Health and Disability Services Consumers' Rights.

The Medical Council of New Zealand has issued guidelines on legislative requirements about patient rights and consent. A copy is available from Council's website www.mcnz.org.nz or by contacting Council on ph: 04 384 7635

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Footnotes

- ⁱ Right 5(2), Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996
- ⁱⁱ Right 6, Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996
- ⁱⁱⁱ Please note that several pieces of legislation determine how consent should be handled. The Mental Health (Compulsory Assessment and Treatment) Act 1992, the Tuberculosis Act 1948, the Guardianship Act 1968 and the Health Act 1956 all determine situations where statutory consent requirements override the HDC Code.
- ^{iv} *Roger vs Whitaker*. This is an Australian case that has caused some confusion about the level of risk disclosure doctors are expected to discuss with the patient. In this case the patient was already blind in one eye when the decision to operate on the other eye was made. The patient was not informed about the 1:14,000 chance of blindness as a possible result of the operation. The doctor was found to have breached his duty of care for not disclosing a risk of 1:14,000 because the **patient's circumstances** (already blind in the other eye) gave a greater emphasis to the risk of possible blindness.
- ^v Please note that individuals holding enduring powers of attorney or who are welfare guardians do not have the legal ability to refuse consent for lifesaving treatment and cannot make decisions regarding medical experimentation or ECT. Refer to the New Zealand Medical Association policies *Advanced Directives* and *Persistent Vegetative State*.
- ^{vi} Section 25 of the Guardianship Act 1968 states that children over the age of 16 years can give consent to any medical, surgical or dental procedure as if they are adults. It is not clear whether parental consent is always necessary for medical treatment or procedures for persons under 16 years. Section 25 does not automatically prohibit persons under 16 years from consenting to medical, surgical or dental procedures.
- In the absence of clear legislative direction it is likely that the principles set out in **Gillick**, namely that parental consent is not always necessary for medical procedures or treatment for persons under 16 years will be followed by NZ Courts. This is consistent with the approach taken by the Code. Where a child is not competent to consent section 25(3) sets out those persons who may give consent on behalf of the child.
- ^{vii} Seeking Patients Consent: the ethical considerations, General Medical Council

Case Law

- Re Stubbs, Medical Practitioners Disciplinary Tribunal, 99/54/C, March 2000.
- *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402
- *Roger vs Whitaker* (1992) 175 CLR 479
- The following HDC opinions are available on the HDC website www.hdc.org.nz: 99HDC02212, 98HDC13693 & 00HDC06794

Reference

- Inquiry into the provision of chest physiotherapy treatment provided to pre-term babies at National Women's Hospital between April 1993 and December 1994 (the Cull Report)