Te Kaunihera Rata o Aotearoa
Medical Council of New Zealand

FEBRUARY 2019 www.mcnz.org.nz

Information, choice of treatment and informed consent

- **Informed consent is an interactive process between a doctor and a patient to help the patient gain an understanding about their condition and to make an informed decision about their care. It is more than completing paper work about a patient.**
- **Under the Code of Health and Disability Services Consumers' Rights, every patient has the right to make an informed choice and to give informed consent except if the patient is not competent to do so.**
- **You must convey information to a patient in a form, language and manner that helps the patient understand the information given, and to do so openly and honestly.**

Background

1. Trust is a vital element in the patient-doctor relationship. 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 any treatment or advice. The doctor needs to inform the patient about the potential risks and benefits of the options available and support the patient to make an informed choice.

2. Informed consent is an interactive process between a doctor and patient where the patient gains an understanding of their condition and how that should be managed. It is more than signing a form and completing paper work — it includes assessing any expected risks, side effects, benefits and costs to the patient (if any) of each option. Work in partnership with the patient (and involve their family/whānau/caregivers where possible) and support the patient to take as active a role as possible in decisions about their care.

3. Doctors have a statutory obligation to comply with the Code of Health and Disability Services Consumers' Rights (the Code). Under the Code, every patient has the right to make an informed choice and to give informed consent, except in certain circumstances. In addition, several pieces of legislation determine how consent should be handled and these requirements can override the requirements of the Code. This statement has been written to inform doctors of the standards of practice that are expected of them in meeting their legal obligations.

4. This statement may be used by the Health Practitioners Disciplinary Tribunal, the Council and the Health and Disability Commissioner as a standard by which a doctor's conduct is measured.

Understanding your obligations under the Code of Health and Disability Services Consumers' Rights

5. Under Right 4(5) of the Code, patients have the right to co-operation amongst providers to ensure quality and continuity of services. Good communication between all parties involved in the informed consent process is essential.

The right to be fully informed

6. Under Right 5 of the Code, you must convey information to the patient in a form, language and manner that enables the patient to understand the information given (including any advice or proposed treatment). This means you should do your best to help your patient to understand any information you provide to them. Where necessary and reasonably practicable this includes arranging a competent interpreter.[1] You should also ensure that the environment enables you and the patient to communicate *'openly, honestly,* and *effectively'*.[2]

7. 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 Code states patients are entitled to:

   (a) an explanation of their 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.

8. Before providing information about treatment options, you should make sure that you are aware of all the reasonable alternatives.

9. The Code places emphasis on taking "reasonable actions in the circumstances".[3] In some circumstances, you may not have all the information readily available and another practitioner will need to share the responsibility. It is important to explain this shared-input to the patient.

10. You must keep clear and accurate patient records that document information given to patients, any specific concerns or requests expressed during the discussion, and any decisions made.[4] The Medical Council recognises that every aspect of a consultation cannot realistically be noted in the patient's record. As a result, we recommend you adopt written consultation protocols that specify what information including pamphlets and brochures will be given in a specific type of consultation (e.g. all patients experiencing migraines). You do not need to spend unnecessary time writing extensive notes. Instead, you can note in the patient records that the protocols were fulfilled and only outline any exceptions to the protocol. If the patient is referred or requests a copy of their record, you should include a copy of the protocols.

11. You must ensure that a decision not to consent is noted in the patient's health record, with a summary of the information given to the patient. If you are concerned that a patient is making a decision that you consider is unwise for them, you should explain your concerns clearly and outline the possible consequences of their decision. However, you must not put pressure on a patient to act on your advice against their wishes.

12. In most situations, treatment should not proceed unless the patient has received all the relevant information and you have determined that the patient has an adequate understanding of that information. You should be aware that the patient may have a different understanding from you of the risks of harm and potential benefits. With more complex treatments, you must ensure the patient is given sufficient time to reflect and consider the options before making a decision on the treatment they wish to pursue.[5]

[1] When an interpreter is used to assist in obtaining the patient's informed consent you should note this in the records, along with the interpreter's name and status (professional interpreter, family member etc.) and, if possible, include a note signed by the interpreter to certify that they believe the patient understands the information provided.

[2] Right 5(2) of the Code.

[3] Clause 3(1) of the Code.

[4] Paragraph 5 of *Good medical practice.*

[5] This might include allowing time (at the request of the patient) to consult with their family/whānau/caregivers. See also HDC opinion 08HDC 20258 where the Commissioner commented that it is not good practice to provide patients with information about surgical choices the evening before an operation, particularly where the procedure is not urgent, as this does not allow adequate time for reflection.

13. If a patient informs you that they waive their right to be informed, you should write this decision in the patient record. You should tell the patient how they can inform you if they change their mind, and also give the patient opportunities to change their mind. Information provided should reflect the context in which it is discussed and:

    (a) there are some circumstances where you might decide, in the absence of a refusal by the patient, to delay the provision of information because you believe that providing it at that time may result in harm to the patient;

    (b) if the patient declines information about invasive procedures, you should consider insisting that the patient listen to sufficient detail, especially where major surgery carrying high risks is proposed[6];

    (c) in the case of other treatments, if the risk is high, you may insist on providing information even though the patient does not want it, or may decline to treat the patient unless they accept it;

    (d) in less risky cases, you may be justified in withholding or generalising information if the patient states that he or she does not want to hear it and providing the information may cause them emotional harm.

Informed choice and consent

14. If you are the doctor who is providing treatment or advice, then you are responsible for ensuring the patient makes an informed choice and consents before initiating treatment. This includes any care provided by telehealth.[7]

15. If you delegate the provision of treatment or advice to another doctor, you must make sure the person you delegate to:

    (a) is sufficiently skilled and qualified in the relevant area of medicine;

    (b) has sufficient knowledge of the proposed intervention, and understands the risks involved and the potential benefits;

    (c) is sufficiently informed of the patient's needs and their clinical information (including their clinical history, test results and diagnosis);

    (d) understands and agrees that they will contact you for further advice or information if necessary; and

    (e) is clear about which doctor is responsible for obtaining informed consent from the patient and ensuring that the patient has made an informed decision.

16. When deciding whether it is appropriate to delegate, you should consider:

    (a) the nature of the intervention, including its risks and complexity;

    (b) the level of uncertainty surrounding the outcome of the intervention;

    (c) your existing relationship with the patient and any relationship your patient has with the person to whom you are considering delegating;

    (d) any concerns you anticipate the patient may have; and

    (e) whether the patient or anyone else who is involved in the decision has enough time and information to make a decision, and/or to express their views.

17. A doctor should only manage aspects of the informed consent process for which they are competent.[8]

18. The patient must have the opportunity to consider and discuss the relevant information with the treating doctor.[9] Where appropriate, involve the patient's family/whānau/caregivers in the discussion. You should only proceed after the patient has made an informed choice and given informed consent, with the exceptions in paragraphs 24-27. Under Right 7 of the Code, a patient has the right to refuse services or withdraw consent at any time, reflecting self-determination.

[6] In a case involving Dr John Harman (55/Med06/37D), the Health Practitioners Disciplinary Tribunal found that "[this case] involved significant procedures, and the patient needed to have a full understanding of what was involved. ...[A] statement by a patient that they do not want to hear the details does not obviate the obligation that the surgeon has to properly inform."

[7] Refer to Council's statement on *Telehealth*.

[8] In the case of interns, their role in the informed consent process is addressed in 'Prevocational training' (https://www.mcnz.org.nz/maintain-registration/prevocational-training-pgy1-pgy2-and-nzrex-requirements/).

[9] *Rogers v Whitaker* (1992) 175 CLR 479. 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 nearly blind in her right eye when the decision was made to operate on it. The patient subsequently developed complications in her left eye (the good eye) which led to a complete loss of sight but was not informed before her surgery about the 1:14,000 chance of blindness (sympathetic ophthalmia). 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 (almost blind in the eye to be operated on) gave a greater emphasis to the risk of possible blindness.

19. You should obtain separate written consent for research (see paragraphs 35-36), experimental procedures, general or regional anaesthesia, blood transfusion or any procedure with a significant risk of adverse effects.

20. You should pay careful attention to the process of informed choice and consent when a proposed treatment is expensive or in any way innovative. If a patient is choosing between evidence-based medicine and innovative treatments for which there is no scientific evidence, you should attempt to present to the patient a clear and balanced summary of the scientific information available.[10]

21. While the Code of Rights outlines the general requirements for informed choice and consent, several pieces of legislation determine how consent should be handled in specific circumstances. These pieces of law can override the requirements of the Code and are discussed in the appendix.

Time and resource constraints

22. Time pressures and/or limited resources can make it difficult to give patients as much information or support to make a decision as you, or they need. To help, you should consider:

    (a) the role other members of the clinical and care team might play, for example in gathering and giving information and answering questions before or after your contact with the patient.

    (b) what other sources of information and support are available to the patient (and to any family/whānau/caregivers supporting the patient). For example, patient information leaflets or support groups for people with specific conditions.

23. You must ensure patients with additional needs, such as those with disabilities or for whom English is not their first language, have the time, support and any reasonable adjustments they need to make a decision about their care and treatment.

When a patient is not competent to give informed consent

24. 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.

25. In some circumstances it may not be possible to obtain the patient's informed consent. For example, the patient may be a young child, be unconscious, suffer dementia or have an intellectual disability. In such cases, you should try 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 you may provide a service in the best interests of a patient without receiving consent (refer to paragraphs 26-27).[11]

26. 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.

[10] See also the Council's statement on *Doctors and CAM (complementary and alternative medicine)*. Specific standards also apply when providing cosmetic treatments. Refer to the Council's statement on *Cosmetic procedures* for more information. Refer also to HDC case 09HDC01870.

[11] 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 paragraphs 71-72 and the New Zealand Medical Association position statements on *Advanced Directive* and *Persistent Vegetative State*.

27. If you have not been able to ascertain the patient's views and no suitable person is available to give advice and the delay will not be harmful, it is wise to seek a second opinion from an experienced colleague before providing care. You should document this colleague's views in the patient's notes.

28. In the situation where a patient has diminished competence you are required, under Right 7(3) of the Code, to obtain consent from the patient for the aspects of the treatment that the patient understands and to follow the guidance in paragraphs 24-27 for the rest of the treatment.

29. Patients not competent to give informed consent are still entitled to information about the procedure as outlined in paragraphs 6-13.

When a patient is anaesthetised

30. There may be occasions when the clinical presentation of an anaesthetised patient is such that it warrants further investigation or intervention which the patient has not consented for. Good clinical judgement is needed as to whether to proceed, or to defer that additional investigation/intervention until you have discussed it with the patient and obtained the patient's consent. You should discuss any unexpected intraoperative findings with a peer, a clinical head or your Chief Medical Officer, and must document any advice you are given. You must also document your discussion(s) with the patient including any decisions that are made about proceeding with or deferring the additional investigation or intervention.

Consent of minors

31. The Code of Rights 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.

32. Children of or over the age of 16 are considered legal adults.[12] People under 16 years of age are not automatically prohibited from consenting to medical, surgical or dental procedures so judgement of the patient's competence to make an informed choice and give informed consent is needed in each instance.[13] 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.

33. You should assess a child's competency and form an opinion on 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[14].

Declaration or order from the Court

34. Occasionally, when a patient is unable or refuse to consent to treatment, there may not be consensus between the doctor and the patient (or the patient's family). In such cases, you should ensure that patients and their families/whānau are given the time, information and supportive resources they need to work these issues through and seek advice from peer groups, senior medical staff or an ethics committee before proceeding. Where disagreement between different parties is likely to impact on the patient's health, you may need to seek authorisation from the High Court (and may need to obtain legal advice on that). Examples are:

    (a) a blood transfusion or caesarean section to save life; or

    (b) termination of treatment to allow the patient to die peacefully, for example patients in permanent vegetative states; or

    (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 the patient's physical or mental

[12] Care of Children Act 2004, section 36.

[13] The common law approach to judging the competence of a minor to consent, is informed by *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (House of Lords).

[14] Section 36 of the Care of Children Act 2004 states that children over the age of 16 years can give consent 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 36 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 New Zealand courts. This is consistent with the approach taken by the Code.

health; or

(d) a dispute between parents based on religion or beliefs about the treatment to be provided to a child.

Informed choice and consent in treatment that is part of research

35. 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. 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, you must renew the patient's informed consent.

36. If the treatment is part of research, it is the responsibility of the investigating doctor to take all reasonable steps to enable the patient to understand the full implications of the treatment, especially the uncertainties. Written consent from a patient is required for research.

Informed choice and consent in treatment that is part of education[15]

37. Obtain consent before involving medical students in the care of patients. Inform the patient about the extent of the involvement of the student and the student's experience.

38. You must also obtain the patient's consent if an observer attends the consultation. This is especially important if sensitive issues are discussed and/or intimate examinations are conducted. Inform the patient about the observer's role and what is expected of the observer.

Advance directives

39. An advance directive is an oral or written instruction that outlines or describes the patient's wishes in a specific situation. Under Right 7(5) of the Code, 'Every consumer may use an advance directive in accordance with the common law'. If a patient has an advance directive, you are obliged to follow it unless there is reason to question its validity.[16]

Removal of body parts

40. 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.

41. Under Right 7(10) no 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 except:

    (a) with the informed consent of the consumer; or

    (b) for the purpose of research that has received the approval of an ethics committee; or

    (c) for the purposes of a professionally recognised quality assurance programme; an external audit of services; or an external evaluation of services.

Immunisation and screening for potential disease

42. You have a special duty of care when enrolling an asymptomatic person into immunisation or screening programmes. This includes making the person aware of the limitations of screening and the uncertainties, in particular the chance of false positive and false negative results. Before obtaining consent you should explain, or give information to the patient that explains:

    (a) the purpose of the screening or immunisation,

    (b) the risks and uncertainties,

    (c) any significant medical, social or financial implications of the condition for which the screening or immunisation is done and, follow up plans, including availability of counselling and support services.

[15] See also Council's statement on *When another person is present during the consultation.*

[16] See also the section on 'Advance directives' in *Good medical practice and Cole's medical practice in New Zealand.*

Appendix 1

43. In most circumstances you are required to obtain informed consent as outlined in the Code. However, there are a number of express statutory provisions that allow you to proceed without obtaining informed consent.

44. However, while the law may remove the requirement to obtain informed consent before performing a health care procedure, the patient's right to communication and information remains. You should still explain the healthcare procedure in enough detail to ensure your patient understands its purpose, proposed benefits and possible risks.

The following list contains examples of relevant legislation and case law. This is provided as general information. You are advised to seek legal advice should you be concerned about a specific legal issue.

Bill of Rights Act 1990

45. The Bill of Rights Act outlines general expectations based on a number of fundamental rights and freedoms. Where these expectations are in conflict with specific legislation, such as the Code of Rights, that specific law generally has precedence.

46. Under section 8, no person shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

47. Section 9 states everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

48. Under sections 10 and 11 of this Act, every person has the right not to be subjected to medical or scientific experimentation without that person's consent; and has the right to refuse to undergo medical treatment.

Health Practitioners Competence Assurance Act 2003

49. Under the Health Practitioners Competence Assurance Act 2003, the Medical Council can require a doctor to submit him or herself for a medical examination if the Council believes the doctor may be unable to perform the functions required to practise medicine because of a physical or mental condition.

Mental Health (Compulsory Assessment and Treatment) Act 1992

50. A person may lose the right to give informed consent and be required to undertake psychiatric assessment and treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

51. Under section 8A any person can apply to the Director of Area Mental Health Services to have another person assessed. That application must be accompanied by a medical certificate from a registered doctor.

52. Compulsory assessment and treatment is only undertaken by an appropriately qualified doctor or psychiatrist who has been approved by the Director of Area Mental Health Services.

Health Act 1956

53. Under section 70(1)(e), a Medical Officer of Health can require a person to report themselves or submit themselves for medical examination at specified times and places for the purpose of preventing the outbreak or spread of any infectious disease.

54. Under section 70(1)(h), a Medical Officer of Health can also forbid a person to leave the health district or the place in which he or she is isolated or quarantined until the person has been medically examined and found to be free from infectious disease, and until the person has undergone any preventive treatment prescribed by the Officer.

55. Under section 74, a doctor who believes a patient is suffering from a notifiable disease or from any sickness of which the symptoms create a reasonable suspicion that it is a notifiable disease must immediately notify:

- the occupier of the premises;
- and every person nursing or in immediate attendance on the patient; and
- the Medical Officer of Health; and in some cases;
- the local authority of the district.

56. Under section 125, any person authorised by the Minister of Health may at reasonable times enter a public school or child-care centre and examine the children. Consent from the children or parents may not be necessary.

57. If that authorised person believes there are reasons to be concerned about the welfare of the child, of any condition which in his or her opinion is affecting the health or normal development of the child, or of any disease or defect from which in his or her opinion the child may be suffering, that person has the power to notify the parent or guardian of any such child, whom he or she reasonably believes to be concerned with the welfare of the child. Consent from the child or parent is not necessary.

58. Under sections 112L and 112M, you must tell a woman about the national cervical screening programme the first time you take a specimen from her for the purpose of a screening test, or perform a colposcopic procedure. You must also tell her about the importance of having regular screening tests; the objectives of the screening programme; who has access to information on the programme's register; and how that information might be used. For colposcopic procedures you must also tell the woman that she will be automatically enrolled on the programme, but may withdraw at any time.

59. Section 112ZB of the Act also states that you must make health information and specimens available to a national cervical screening programme evaluator, but the evaluator is bound by strict confidentiality rules to ensure that the patient's privacy is protected.

Armed Forces Discipline Act 1971

60. If a doctor or a competent advisor believes that a person subject to this Act needs medical treatment of some type because that person may otherwise threaten the health or operational efficiency of others in the Armed Forces, that person can be ordered to undergo treatment without the right to provide consent.

61. Under section 72(2), an individual subject to this order has the right to a second opinion before any treatment is undertaken.

Substance Addiction (Compulsory Assessment and Treatment) Act 2017

62. The Act outlines the process involved for receiving compulsory treatment where someone has a severe substance addiction. Under section 36, a patient must accept the treatment properly given under the Act, and must comply with every lawful direction from or on behalf of the responsible clinician or the manager of the treatment centre where the patient is detained.

Criminal Investigations (Bodily Samples) Act 1995

63. Under section 5, a constable may request that a bodily sample be taken without consent from a suspect for the purpose of a criminal investigation into an indictable offence if this is in accordance with a suspect compulsion order or a juvenile compulsion order.

64. The Act further outlines specific procedures to be undertaken when obtaining consent for the taking of buccal and bodily samples during a criminal investigation and where a compulsion order has not been issued. These procedures must be undertaken by a Police constable.

65. Under section 39, a commissioned officer of the Police may also issue a Databank Compulsion Notice requiring a person to give a bodily sample if the person has previously been convicted of a relevant offence.

Land Transport Act 1998

66. Section 18 states that if a doctor has attended or is consulted by a person who holds a driver's licence and the doctor considers that the mental or physical condition of the licence holder is such that, in the interests of public safety, the licence holder:

- should not be permitted to drive motor vehicles of a specified class or classes; or
- should only be permitted to drive motor vehicles subject to such limitations as may be warranted by the mental or physical condition of the licence holder; and
- considers that the licence holder is likely to drive;

then the doctor must inform the New Zealand Transport Agency of their opinion and the grounds for it.

67. Sections 72 and 73 set out the circumstances where a person must allow a blood specimen to be taken by a medical practitioner or medical officer. In summary, a blood specimen may be required and the person must permit it to be taken in situations including: failure or refusal to undergo an evidential breath alcohol test; if breath testing equipment is not available or a test cannot be carried out; after an arrest where the Police believe the person has committed a drink or drug driving offence; after unsatisfactory completion of a drug impairment test; or if a person is in a hospital or doctor's surgery in relation to a motor vehicle incident, even if the person is unconscious or unable to consent.

Criminal Procedure (Mentally Impaired Persons) Act 2003

68. Under section 38, a person may be subject to a health assessment without giving consent if ordered by the Court. This applies before or during a trial or while the defendant is awaiting sentencing and when an assessment report would assist the Court in determining:

- whether the person is unfit to stand trial; or
- whether the person is insane under section 23 of the Crimes Act 1961; or
- the type and length of sentence; or
- the nature of any requirement or condition the Court may impose as part of, or as a condition of, any sentence or order.

Corrections Act 2004

69. Section 75(2) states that the standard of health care that is available to prisoners in a prison must be reasonably equivalent to the standard of health care available to the public.

70. Section 124 states that a prison officer may require a prisoner to submit to any procedure for the purpose of detecting whether or not the prisoner has used drugs, consumed alcohol, or both. However, no procedure may be prescribed that requires a prisoner to supply a sample of his or her blood.

Protection of Personal and Property Rights Act 1988

71. A court can appoint a welfare guardian to make and implement decisions for another person. Under section 18, a welfare guardian's first and paramount consideration when exercising their powers shall be the promotion and protection of the welfare and best interests of the person for whom they are acting. A welfare guardian shall not have power to:

(a) refuse consent to the administering to that person of any standard medical treatment or procedure intended to save that person's life or to prevent serious damage to that person's health; or

(b) consent to the administering to that person of electro-convulsive treatment; or

(c) consent to the performance on that person of any surgery or other treatment designed to destroy any part of the brain or any brain function for the purpose of changing that person's behaviour; or

(d) consent to that person taking part in any medical experiment other than one to be conducted for the purpose of saving that person's life or of preventing serious damage to that person's health.

72. Under section 98, a person (the donor) may also appoint another person as an attorney under an enduring power, either generally or for specific matters. The attorney can only authorise action in relation to the donor's personal care and welfare if the donor is mentally incapable and is subject to the same restrictions outlined in paragraph 71 of this statement. The court may also make a personal order for specific matters.

Contraception, Sterilisation, Abortion Act 1977

73. Section 4 allows a parent, a guardian or a person who has custody or care of a "mentally subnormal" female (as defined by the Act) to administer contraception if it is considered in the female's best interests.

74. Under section 7, no one may consent to the performance of sterilisation on another person just because the person is considered too young to consent on his or her own behalf.

Care of Children Act 2004

75. Section 36 states that children over the age of 16 years can give consent, and refuse to consent, as if they were of full age to any medical, surgical or dental treatment or procedure performed by a professionally qualified person for the child's benefit.

76. Section 36 goes on to say that where consent by another person on behalf of a child is necessary, that consent may be given:

    (a) by a guardian of the child; or

    (b) if there is no guardian in New Zealand or no guardian of that kind can be found with reasonable diligence or is capable of giving consent, by a person in New Zealand who has been acting in the place of a parent; or

    (c) if there is no person in New Zealand who has been so acting, or if no person of that kind can be found with reasonable diligence or is capable of giving consent, by a District Court Judge or the chief executive.

77. Section 37 states that except by leave of a High Court judge, no civil, criminal, or disciplinary proceedings may be brought against a person in respect of the administration by a health practitioner of any blood transfusion to a person under the age of 18 years by reason of the lack of consent of a person whose consent is required by law.

78. Section 38 specifies that a female child may consent to any medical or surgical procedure for the purpose of an abortion by a person professionally qualified to carry it out; or refuse her consent to have an abortion, and her consent or refusal to consent shall have the same effect as if she were of full age. This section overrides section 36.

Oranga Tamariki Act 1989 / Children's and Young People's Well-being Act 1989

79. Sections 49-52 state that the Court may require a child to attend a medical examination by a registered doctor if there are reasonable grounds for suspecting that a child or young person is suffering ill-treatment, abuse, neglect, deprivation, or serious harm. The Court may restrict the nature of the medical examination that may be carried out and the procedures used to carry out the examination.

80. Section 53(2) states a social worker may, with the consent of any parent or guardian of the child or young person, arrange for any child or young person to whom this section applies to be medically examined by a registered doctor.

81. Under section 53(3) a social worker who has not obtained informed consent from the parents after making reasonable efforts to do so can require the child or young person to be medically examined by a registered doctor.

82. Guardians appointed under sections 139–142 of this Act are given the power to consent on behalf of the child, under section 149.

83. Sections 178 and 333 state that the Court can order a child or young person (respectively) subject to this Act to attend for a medical, psychiatric, or psychological examination for the purpose of its proceedings.

84. Section 196 allows a lawyer acting on behalf of a child subject to this Act to give consent on behalf of the child for the child's doctor to disclose any protected information obtained in the doctor-patient relationship.

Case Law

- 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)
- 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 v Whitaker* (1992) 175 CLR 479
- *Montgomery v Lanarkshire Health Board* [2015] UKSC 11
- Re Harman, Health Practitioners Disciplinary Tribunal, 55/Med06/37D, May 2007
- HDC Case 08/08813: This opinion focuses on Ms A's right to make an informed choice about the surgical services she received, and the adequacy of Dr B's documentation. The Commissioner stated: "Notwithstanding Dr B's assessment of Ms A's best interests, there was no legal justification for her to drill Ms A's ovaries without her informed consent. This was not an emergency situation. The decision whether to proceed with this treatment option was Ms A's alone to make".

- HDC Case 09/00795: The Commissioner stated that although the standard of care was appropriate, a gastrointestinal and hepatobiliary surgeon breached Right (6)(1)(b) because of the failure to discuss the specific risk of device failure and the additional cost in that event, at the time that a repeat of an oncological treatment was discussed. This was information that a reasonable patient in those circumstances would expect to receive.
- HDC Case 08/20258: It was held that a urological surgeon had a duty to inform the patient that he had had limited experience with robotic-assisted laparoscopic surgery. He also had a duty to inform the patient of the length of time he had previously taken to carry out robotic-assisted laparoscopic surgery, that the risks of complications increased if time taken for the surgery was prolonged, and what those risks were.
- 15HDC01925 – Insertion of intrauterine device without consent: A patient was referred to the gynaecologist for assessment and management of heavy menstrual bleeding and post-coital bleeding. A diagnostic hysteroscopy, dilatation and curettage, an endometrial biopsy and insertion of a Mirena were recommended. However, the patient had declined a Mirena insertion on a previous occasion, and had not consent to have a Mirena inserted on this occasion. Despite this, the gynaecologist inserted the Mirena as he considered that to be the patient's best interests. The gynaecologist was referred for disciplinary action. The Tribunal concluded that the gynaecologist's conduct warranted disciplinary sanction and that he had acted in a patronising and paternalistic manner.
- 16HDC00877 – Informed consent for the use of human products: An orthopaedic surgeon had intended to use an allograft (donated material) for a neck surgery as this was his standard practice even though there were other options available. The Commissioner considered that the use of the allograft was information a reasonable patient would expect to receive to make an informed choice and to give informed consent. By failing to inform the patient of his intention to use an allograft and to document his discussions, the orthopaedic surgeon breached Right 4(2), Right 6(1) and Right 7(1) of the Code.

Other relevant resources

- ***Good medical practice***
- ***Cole's medical practice in New Zealand***
- ***Maintenance and retention of patient records***
- ***Disclosure of harm following an adverse event***
- ***Safe practice in an environment of resource limitation***
- ***Doctors and CAM (complementary and alternative medicine)***
- ***Cosmetic procedures***
- ***Advertising***
- ***Telehealth***
- ***When another person is present during the consultation***
- **Health Information Privacy Code 1994 incorporating amendments and including revised commentary – available from www.privacy.org.nz/health-information-privacy-code/**

February 2019

This statement is scheduled for review by February 2024. Legislative changes may make the statement obsolete before this review date. The contents of this statement supersede any inconsistencies in earlier versions of the statement.