



# Decision Making and Consent Guidelines

Document name	Decision Making and Consent Guidelines
Policy	Decision Making and Consent Policy
Version number	1.0
Approval date	January 2016
Policy manual	Lifestyle Policy and Practice Manual
Approved by	Deputy Secretary ADHC, FACS
Summary	The Decision Making and Consent Guidelines affirms the rights of people to make decisions that affect them and to receive support when they want or need it to make decisions.
Replaces document	New Guidelines
Authoring unit	Contemporary Residential Options Directorate
Applies to	People who are being supported in ADHC operated and ADHC funded non-government disability support services.
Review date	2017

## Version control

The first and final version of a document is Version 1.0.

The subsequent final version of the first revision of a document becomes Version 1.1.

Each subsequent revision of the final document increases by 0.1, for example version 1.2, version 1.3 etc.

## Revision history

Version	Amendment date	Amendment notes
V1.0	January 2016	New Guidelines

# Table of contents

<b>1</b>	<b>Guidelines .....</b>	<b>4</b>
<b>2</b>	<b>Capacity.....</b>	<b>4</b>
<b>3</b>	<b>Decision making .....</b>	<b>5</b>
<b>4</b>	<b>Consent .....</b>	<b>9</b>
<b>5</b>	<b>Making decisions about services.....</b>	<b>10</b>
<b>6</b>	<b>Information and privacy .....</b>	<b>10</b>
<b>7</b>	<b>Medical and dental treatment in accommodation support services .....</b>	<b>11</b>
<b>8</b>	<b>Behaviour support.....</b>	<b>13</b>
<b>9</b>	<b>Consent and sexual relationships.....</b>	<b>13</b>
<b>10</b>	<b>Marriage and living in a de facto relationship .....</b>	<b>14</b>
<b>11</b>	<b>Financial management in accommodation support services .....</b>	<b>14</b>
<b>12</b>	<b>Consent to inform family if a person is abused, assaulted or neglected.....</b>	<b>16</b>
<b>13</b>	<b>Forensic procedures .....</b>	<b>16</b>
<b>14</b>	<b>Legally Appointed Decision Makers .....</b>	<b>18</b>
<b>15</b>	<b>Definitions .....</b>	<b>19</b>
<b>16</b>	<b>Policy and Practice Unit Contact Details .....</b>	<b>26</b>

# 1 Guidelines

The Guidelines refer to supporting people with disability to exercise their rights and entitlements to make decisions and choices about things that affect them in a range of situations.

The Guidelines are for use in Family and Community Services (FACS), Ageing, Disability and Home Care (ADHC), operated disability support services, and can be referenced by other agencies and providers.

These Guidelines introduce a number of aspects of decision making, capacity and consent. They also examine ways of supporting people to make their own decisions, when consent is required, how to support people to provide informed consent, and when input from a legally appointed decision maker is needed.

Decision making and consent is a key component of Lifestyle Planning. The associated Lifestyle Planning Guidelines and Person-Centred Thinking tools in the Lifestyle Policy and Practice Manual are useful references for supporting decision making and consent.

## 2 Capacity

### 2.1 Definition of capacity

Under the law people are presumed, in the first instance, to have the capacity to make their own decisions. The Capacity Toolkit <sup>1</sup> (the Toolkit) defines capacity as the ability 'to make decisions about things that affect daily life'. The Toolkit states that:

Generally, when a person has capacity to make a particular decision they can:

- understand the facts and choices involved
- weigh up the consequences, and
- communicate the decision.

Some people may need support to exercise their capacity to make decisions that affect them, and to increase their decision making skills and confidence.

Capacity is unique to each individual and situation, and should not be assessed simply on the basis of a type of disability or a one-off assessment. A person has capacity to consent if she or he is able to understand the general

---

<sup>1</sup> Department of Justice, Capacity Toolkit:  
[http://www.diversityservices.justice.nsw.gov.au/divserv/ds\\_capacity\\_tool.html](http://www.diversityservices.justice.nsw.gov.au/divserv/ds_capacity_tool.html)

nature and effect of a particular decision or action, and can communicate an intention to consent (or refuse consent) to the decision or action.

## 2.2 Factors that influence a person's capacity

Capacity can be affected by a range of things including health, mood, time of day, setting, and relationship with the person seeking consent. The person may not have previously had opportunities to make decisions, or express their preferences in a way that others understand.

A person's decision making skills, confidence and capacity can be enhanced by improving communication systems, supporting the person to understand the decision making process, and providing opportunities to practice making decisions.

## 2.3 Tools to support decision making capacity

Using the person's Communication Profile, Decision Making Profile and Agreement, Communication Expressive and Receptive Profiles and other tools and templates from the Lifestyle Policy and Practice manual (Tools and templates)<sup>2</sup> will provide information to support the person and optimise their decision making capacity.

When a person has been unable to make a decision even with support, a legally appointed guardian with the specific decision making function will be required to make particular decisions.

The Capacity Toolkit (see Other Resources) is a resource that can be referred to whenever there are questions about a person's capacity to make decisions, particularly about those with life changing consequences.

# 3 Decision making

In their dealings with the people they support, service providers and their workers have a role in ensuring that the rights of people with disability to make decisions that affect their lives are upheld.

People make decisions every day about matters of varying importance. Those decisions that have serious consequences for the person require consent, for example, finances, receiving services, information and privacy, medical and dental treatment, risk management, behaviour support and relationships. Other decisions about what to wear, watch on television or eat for lunch, still require

---

<sup>2</sup> Lifestyle Planning Tools: [http://www.adhc.nsw.gov.au/publications/policies/policies\\_a-z/?result\\_237652\\_result\\_page=L](http://www.adhc.nsw.gov.au/publications/policies/policies_a-z/?result_237652_result_page=L)

the person's agreement, but this can be obtained through a less formal process.

The way we approach different decisions may depend on a range of factors including how we make decisions (our decision making style), the significance of a decision, perception of consequences and our emotional state at the time of facing a decision. We may put more thought or effort into a critical decision, or we may act on impulse. Either way, decision making is a skill that is learnt and the outcomes of decisions can help people grow, improve decision making, and increase their capacity to participate in community life.

### 3.1 Supported decision making

People and their interests are at the centre of supported decision making in keeping with their rights under the United Nations Convention on the Rights of Persons with Disabilities (the UN Convention) and the *Disability Inclusion Act, 2014 (NSW)* (the Act).

Supported decision making is a relationship between a person with disability (the decision maker) and the person they choose to assist them with a particular decision (the supporter). A person may have more than one supporter, depending on the type of decision and how they prefer to be supported.

Some people may want additional support for decisions. They might ask for assistance, or need an offer of assistance if they appear to be having difficulty making a decision. This support can include practical help to find and access information, explore options, and consider consequences.

People with disability can experience barriers to decision making including communication (giving and receiving information), understanding information, other people's perceptions of their ability to make decisions, and equal access to information in a format the person understands. Supported decision making can help to overcome these barriers.

The Supported Decision Making Framework<sup>3</sup> provides person-centred resources to support and build the capacity of people to make decisions in their own lives, and help to determine who provides consent when it is required (see Other Resources). Refer to these resources for information about the different roles and steps in supported decision making.

### 3.2 Why support people with their decision making

The decisions we make shape the life we lead and who we are as people. When we make decisions for ourselves, we feel more in control and we make

---

<sup>3</sup> 'My life, my decision – A handbook for decision makers'; 'Supported Decision Making – A handbook for supporters'; 'Supported Decision Making – A handbook for facilitators'.

choices that are meaningful to us. When people with disability need support to make decisions, and they receive it, they have the opportunity to experience the same sense of control and meaning for themselves.

### 3.3 Dignity of risk

People have a right to make decisions that affect their own lives that others may believe are risky or unwise. These decisions can provide opportunities for new experiences and to learn from positive outcomes and mistakes. Supported decision making upholds the person's views and decisions, and this is particularly important where there is disagreement about the person's decision among a person's support network.

Where support workers or managers are concerned about the risks associated with a decision, the focus is on understanding and accepting or managing the risks, not changing the person's decision. The Risk and Safety Policy and Procedures (Health and Wellbeing Policy and Practice Manual Volume 3) provide guidance about supporting people to make decisions that involve risk.

### 3.4 Vested interest and conflicts of interest

A person involved in the supported decision making process may have a vested interest, that is, a personal or private reason for wanting something to be done or to happen. This may include a conflict of interest, that is, they may gain some advantage, or avoid some disadvantage, from a particular decision.

Vested or conflicts of interest can occur throughout the decision making process, from identifying a decision to acting on it. Conflicts of interest can occur between a person and the supporters they choose, such as a family member or friend, if the outcome of the decision is likely to have an impact (positive or negative) on the supporter.

Conflicts of interest may also occur between the person and support workers. A person's goal might be in conflict with a support worker's values and beliefs, or create additional duties for the support worker. As the person's values and interests are primary, a support worker must put their own values and interests aside and not influence the person in their decision making.

Refer to the Supported Decision Making resources for information on identifying and managing conflicts of interest (Other resources).

### 3.5 Supporter and facilitator roles in supported decision making

In supported decision making, the person chooses who they want to support them or to facilitate supported decision making. People should be encouraged to seek support from natural supporters, such as family and friends, where it is appropriate.

Some people won't have natural supports in their life, or sometimes the matter requiring a decision will result in disagreement with their other supporters. For example a person may not wish to discuss intimate relationships or drinking alcohol with their parents, who would usually support them with decision making. Similarly the person may want their parents to be supporters but because the decision involves some risk, wants a facilitator to help keep the decision making on track.

Sometimes the person may choose a support worker to be their supporter or facilitator. Being a supporter or facilitator is different to being a support worker. Where a person chooses a support worker as their supporter or facilitator, these differences should be discussed with the person to make sure the roles do not become confused. The support worker can also help the person to identify other possible supports for future decisions.

There is no requirement for support workers to take on the role of supporter or facilitator. Support workers should speak with their line manager if they have any questions or concerns about being involved in supported decision making especially if the person has asked the support worker to be a supporter or facilitator.

Refer to the Supported Decision Making resources (Other Resources) for information about the roles of supporter and facilitator.

### 3.6 Critical decisions

Critical decisions have significant immediate and long term consequences, and may therefore require more information and consideration for the person to make an informed choice. These include decisions in relation to where to live and with whom, medication and health, education and employment, and major financial decisions.

When making a critical decision the person should have the support required from trusted family or friends, and/or other supporters of their choice, to be fully informed and supported. The person may also want or need information and advice from specialists about health, financial or legal matters.

Workers involved in supporting the person must document the process to demonstrate how any decisions were reached.

### 3.7 Documenting decisions

Recording decisions and the decision making process will depend on the issue and the service provided. For instance, household routines, day programs and recreational activities are documented as part of Lifestyle Planning. Lifestyle Plan goals are recorded in the person's Action Plan. Decisions about health, such as treatments or therapy services, are documented in the My Health and Wellbeing Plan.



Good records assist in understanding how decisions were made by the person for future reference, and can also act as a reflection of what worked or didn't work. These documents are legal records of how a duty of care is met during the provision of support to the person.

The Lifestyle Planning resources include a number of Person Centred Thinking tools that can be used for documenting decisions, such as the Decision Making Agreement, Important to/for and the Learning Log.

See also the Records Management Procedures for Accommodation Support Services 2015.

## 4 Consent

Consent in this policy refers to the permission given by a person or legally appointed guardian concerning services, finances, relationships, medical and dental treatment, behaviour support and forensic procedures. For consent to be valid it must be voluntary, informed, specific and current. Consent by legally appointed decision makers can only be given on matters for which they have been authorised to give consent. More information about this can be found in section 14 of these Guidelines – Legally Appointed Decision Makers.

### 4.1 Voluntary consent

A person must be free to exercise genuine choice about whether to give or withhold consent. This means they haven't been pressured or coerced into make a decision, and they have all the information they need in a format they understand. Voluntary consent requires that the person is not affected by medications, other drugs or alcohol when making the decision.

### 4.2 Informed consent

A person's capacity to make decisions will vary depending on the type of decision or its complexity, or how the person is feeling on the day. The way information is provided to a person will also affect his or her capacity to make decisions. Choices must be offered in a way that the person understands, for example by using images or signing.

If it is required, support must be provided for the person to communicate their consent. A current Decision Making Profile (see Lifestyle Policy and Practice Manual, Tools and templates) will assist in documenting and communicating the person's preferred decision making style and the support they need.

### 4.3 Specific consent

Consent must be sought for matters separately and for each occasion that it is relevant. For example, if a person requires medical treatment, the health

practitioner will need to obtain consent each time they provide treatment such as prescribing medication, ordering tests or performing a procedure.

## 4.4 Current consent

Consent must be established each time it is required. It cannot be assumed to remain the same indefinitely, or as the person's circumstances change. People and guardians are entitled to change their minds and revoke consent at a later time.

# 5 Making decisions about services

People will face many choices about the services that are available to them. When faced with a range of options, they may require support to decide and consent to the service, and provider of their choice. People may not want to receive all their formal supports from specialist disability services, and this should be reflected in the person's Lifestyle Plan.

Genuine choices about support can only be made when people have had the opportunity to experience and consider a range of options. Person Centred Thinking tools (see Lifestyle Planning Policy, Tools and templates) can be used to explore the person's interests and goals. From here, the person can develop an Action Plan to assist with decision making about the supports that will help to achieve some of their goals.

# 6 Information and privacy

People have a right to privacy and to make informed choices about what information is collected about them and how this is used. The *Privacy and Personal Information Protection Act 1998 (NSW)* and the *Health Records and Information Privacy Act 2002 (NSW)* regulate the practices of FACS funded non-government disability support services when collecting, storing, using and disclosing person and health information. These laws have privacy principles that tell us:

- what information we can collect and how we can collect it.
- how we store and protect personal and health information.
- how people can find out what information we hold about them and if it is correct.
- how we can use and disclose information including special protection for health and other sensitive information.
- how people can complain about breaches of their privacy.

The ADHC Privacy Management Plan<sup>4</sup> provides guidance to workers on how to ensure appropriate management of information, and protecting the privacy of people they support.

## 7 Medical and dental treatment in accommodation support services

People should be encouraged and supported to choose their health care providers. People may have particular preferences about where they receive treatment, such as a health service or other professional of a particular gender or from a particular cultural background. The person's preferences are documented in their My Health and Wellbeing Plan.

People must be supported to provide consent to treatment wherever possible. Support workers will assist to enable communication between people they support and treating practitioners. The person's Communication Profile is used to record and share the best way to support the person, so they can receive and give information that is understood.

The ADHC Health Planning Procedures and Guidelines (in the Health and Wellbeing Policy and Practice Manual Volume 1) also provide information about supporting people when they access medical and health services. The NSW Council for Intellectual Disability has easy read fact sheets about health, mental health, surgery and mental health<sup>5</sup>.

From the age of 14 years a person can give consent to medical treatment, provided the doctor or health professional has determined they have capacity<sup>6</sup>. Where the person is unable to give consent, a parent can provide consent for a child up to 16 years of age.

If the person is 16 years or over, and does not understand the issue and the treatment, the *NSW Guardianship Act 1987* determines who can give consent (see 7.1 Person responsible, below).

### 7.1 Person responsible

Where a person is 16 years or over, and it has been determined that the person does not have the capacity to provide consent for medical or dental treatment, a 'person responsible' can give or withhold consent. The term 'person responsible' is defined in the *Guardianship Act 1987* (see Definitions

---

<sup>4</sup> [https://www.adhc.nsw.gov.au/\\_data/assets/file/0004/234580/Privacy\\_Management\\_Plan\\_Jan2013.pdf](https://www.adhc.nsw.gov.au/_data/assets/file/0004/234580/Privacy_Management_Plan_Jan2013.pdf)

<sup>5</sup> NSW Council for Intellectual Disability <http://www.nswcid.org.au/health/ee-health-pages/easy-fact-sheets.html>

<sup>6</sup> Young people and the law: [http://www.lawstuff.org.au/nsw\\_law/topics/medical](http://www.lawstuff.org.au/nsw_law/topics/medical)

table in Section 15). More information is available from the NSW Civil and Administrative Tribunal (NCAT) factsheet<sup>7</sup>.

The 'person responsible' has authority to consent on behalf of a person who is incapable of providing consent to only Minor and Major medical and dental treatment (the NCAT website has details of Minor and Major treatments<sup>8</sup>).

The doctor or dentist has responsibility to assess a person's capacity to consent to medical or dental treatment, and to obtain consent before the treatment is performed or medication is administered. The support worker may assist the doctor or dentist by providing information about the person that can help the practitioner in making his or her assessment. If the person is unable to make a decision about receiving treatment, the support worker may assist the practitioner by providing contact details of the 'person responsible', or the legally appointed guardian with the medical or dental consent function.

Alternatively, the support worker may arrange for the 'person responsible' to attend medical or dental appointments or to be available to discuss the decision about treatment with the practitioner.

Consent is not required for the following:

- Non-intrusive examinations for the purpose of making a diagnosis.
- First Aid.
- Urgent treatment to save life or alleviate pain or distress.

Notwithstanding any of the above, the support worker will keep the 'person responsible' informed about appointments or examinations and any health issues facing the person.

If the person does not have a 'person responsible' or a guardian, then an application should be made by the doctor or dentist to the NCAT Guardianship Division for consent to treat the person using the Guardianship Division's application form (see Tools and templates). Consent must be obtained before the treatment is given.

If a person is objecting to either Minor or Major treatment, a 'person responsible' cannot override a person's objections. A guardian may be appointed with the authority to override the person's objection if:

- The person lacks understanding of what the treatment involves, and why it is being proposed; and
- The treatment is clearly in the best interests of the person.

---

<sup>7</sup> NCAT Person responsible factsheet:

[http://www.ncat.nsw.gov.au/Pages/guardianship/publications\\_resources/gd\\_fact\\_sheets.aspx](http://www.ncat.nsw.gov.au/Pages/guardianship/publications_resources/gd_fact_sheets.aspx)

<sup>8</sup> <http://www.ncat.nsw.gov.au/Pages/guardianship/guardianship.aspx>

Requests for consent to treatment that override a person's objections must be in writing to the NCAT. The consent to such treatment must also be in writing.

The NSW Council for Intellectual Disability has easy read Medical and Dental Treatment Fact sheets and Checklists<sup>9</sup>.

## 8 Behaviour support

The ADHC Behaviour Support Policy (March 2012) outlines the requirements for consent for general behaviour support strategies<sup>10</sup>.

The Behaviour Support Policy also outlines additional mandatory authorisation and consent requirements for the use of Restricted Practices<sup>11</sup>.

All staff should familiarise themselves with the requirements of this policy, accessible through the following link:

[http://www.adhc.nsw.gov.au/publications/policies/policies\\_a-z/?result\\_237652\\_result\\_page=B](http://www.adhc.nsw.gov.au/publications/policies/policies_a-z/?result_237652_result_page=B)

See Other Resources for links to online ELMO e-learning modules for Restrictive Practices and Positive Behaviour Support.

## 9 Consent and sexual relationships

A person has the legal right to consent to a sexual relationship if both partners are of legal age (legal age of consent is 16 years for both males and females whether heterosexual or homosexual), providing that the person has given free and informed consent.

Consent, as it relates to a person with disability consenting to a sexual relationship, is the permission or agreement given by the person to the relationship, as long as both partners are of legal age. To give valid consent the person must understand what they are physically consenting to, for example, petting, kissing or penetration.

The person must also understand the sexual nature of the touching, as opposed to non-sexual touching associated with washing or receiving medical treatment. Additionally, the consent given by the person must be given freely and the person must understand and be able to exercise the right to refuse a sexual relationship.

---

<sup>9</sup> NSW Council for Intellectual Disability: <http://www.nswcid.org.au/>

<sup>10</sup> Behaviour Support Policy (March 2012), Section 2.6.

<sup>11</sup> Behaviour Support Policy (March 2012), Section 3

A sexual relationship is a crime under Section 66F of the *Crimes Act 1900 (NSW)* if:

- the other person is a disability worker supervising the person; and/or
- the other person intends to take advantage of or sexually exploit the person, and knows the person has an intellectual disability.

It is the responsibility of support workers to inform and educate people they work with, who wish to engage in a sexual relationship, if support is needed.

Guidance on these issues is provided in the Sexuality and Relationships Guidelines (in the Lifestyle Planning manual) or on the Family Planning NSW website <http://www.fpnsw.org.au> or by telephoning the Family Planning health line on 1300 658 886.

## 10 Marriage and living in a de facto relationship

Consent, as it relates to a person with disability agreeing to marry or live in a de facto relationship, is the permission or agreement given by the person to the relationship.

A person has the right to consent to marry if the nature and effect of the marriage ceremony is understood and the members of the couple are aged 18 years or over, provided that the person has given free and informed consent. The *Marriage Act 1961*<sup>12</sup> states that a marriage is void where a 'party was mentally incapable of understanding the nature and effect of the marriage ceremony'.

For consent to be valid, the person must understand what she or he is consenting to, for example, living with another person, having a sexual relationship with that person, and being financially interdependent.

It is the responsibility of a person legally authorised to perform a marriage ceremony (such as a Civil Celebrant or Ministers of recognised religious denominations) to determine whether a person has capacity to give consent to marry.

## 11 Financial management in accommodation support services

Under Article 12 of the UN Convention, 'all appropriate and effective measures must be taken to ensure the equal right of persons with disabilities to own or

---

<sup>12</sup> *Marriage Act 1961* (Commonwealth): <http://www.comlaw.gov.au/Details/C2013C00164>

inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and ...ensure that persons with disabilities are not arbitrarily deprived of their property”.

People who can manage their own finances are encouraged to do so, with input from natural supports if required. Principle 3 of *the Disability Inclusion Act 2014 (NSW)* supports this by stating that “people with disability have the right to participate in and contribute to social and economic life and should be supported to develop and enhance their skills and experience”.

People should also have access to independent advice about major financial matters such as inheritances, trust funds and making a will.

Consent is required where a person needs support from someone else to manage or handle their finances. In situations where the person has an appointed Financial Manager they should still be involved as much as possible in their finances within their capacity, and have access to supports to enable this.

Annual budgets are prepared by the support worker or appointed Financial Manager, with the person and family (if the person wishes) as part of Lifestyle Planning. The budget contains information on planned and unplanned expenditures for people who are being supported to manage their own finances.

An application to the New South Wales Civil and Administrative Tribunal (NCAT) Guardianship Division for financial management is made when:

- supported decision making does not provide sufficient safeguarding of the person’s financial interests, and/or
- there is an ongoing conflict of interest with a family member which cannot be informally resolved, and/or
- where there is no family member to informally support a person to manage their finances and assets, and/or
- there are substantial assets, such that the person would benefit from legal financial management, and/or
- the person is at risk of exploitation
- **AND** all attempts at supported decision making and managing identified risks have not resolved the need for formal support regarding financial matters.

If the case manager or support worker believes that any of these factors exist they should refer the matter to their line manager. The relevant line manager or more senior manager should make an application to the NCAT Guardianship Division to appoint a financial manager.

## 12 Consent to inform family if a person is abused, assaulted or neglected

Family members should be informed about any incident of abuse of a person as long as the person can and does consent to them being so informed. In this case the person must have the capacity to give or withhold consent as described in these Guidelines under sections 2 (Capacity) and 4 (Consent).

The person, or their legally appointed guardian who has been appointed for the purposes of decision making, can refuse consent to their family being informed of an incident of abuse. Consideration is given to the potential impact on the person who has been abused, and any investigation, before a decision is made.

A decision not to inform the family does not preclude ADHC's abuse, neglect and incident reporting protocols within ADHC operated accommodation support services. Workers are still required to follow the reporting requirements outlined in the ADHC Abuse and Neglect Procedures; the Incident Reporting and Management Guidelines for Ageing and Disability Direct Services, and other relevant policies, procedures and guidelines.

ADHC funded non-government disability support services should follow their own abuse, neglect and reporting protocols.

## 13 Forensic procedures

Where it is suspected that a crime has been committed, police will investigate. Their investigation can include forensic procedures<sup>13</sup>, which involve the collection of certain types of physical evidence.

---

<sup>13</sup> *Crimes (Forensic Procedures) Act 2009*

'Forensic procedure' means:

- a) an intimate forensic procedure, or
- b) a non-intimate forensic procedure,

but does not include

- c) repealed
- d) any intrusion into a person's body cavities except the mouth, or
- e) the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken

**Note:** Paragraph (e) makes it clear that the Act only applies to samples taken for forensic purposes and not to samples taken purely to establish the identity of a person.

For the definition of the terms 'intimate forensic procedure' and 'non-intimate forensic procedure' please refer to Section 15 of these Guideline.



## 13.1 For suspects

If NSW Police is investigating a crime and wish a person who is a suspect in the investigation to submit to a 'forensic procedure' (as defined by the Crimes (Forensic Procedures) Act), only a Magistrate or an authorised officer can provide consent when the individual is an 'incapable person'. 'Incapable person' is defined in Section 3 of the *Crimes (Forensic Procedures) Act, 2000*, to mean an adult who is:

- incapable of understanding the general nature and effect of a forensic procedure, or
- incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.

NSW Police is to be alerted to the fact that a person may be an 'incapable person' under the *Crimes (Forensic Procedures) Act* if the person is detained by NSW Police or asked to attend the police station for the purposes of undergoing a forensic procedure.

ADHC staff cannot provide consent for a forensic procedure to be performed on a person who is a suspect in the investigation of a crime.

Any person with intellectual disability is entitled to access specific legal supports. Free specialist legal advice and representation is available through the Intellectual Disability Rights Service (see Other Resources). Where a person comes into contact with police as a suspect or victim in a crime, ADHC staff should contact the Intellectual Disability Rights Service for advice on how to proceed.

## 13.2 For victims

When a person is a victim of a crime and the NSW Police wish the person to submit to a 'forensic procedure', the person or a legally appointed guardian with the appropriate forensic consent function, will give or withhold consent to undergo the procedure. It should be noted that a victim may withdraw or give consent at any time. For example a victim may initially decline to participate in a forensic procedure and then later give consent.

It is important that an appropriately trained person (for example a psychologist or counselor) discusses the nature of the forensic procedure and collection of evidence with the person, so that she or he can make an informed choice. The person may choose to have a trusted family member, friend or other supporter with them during such discussions. The person's Communication Profile may be used to help the person understand what is being proposed.

## 14 Legally Appointed Decision Makers

People are provided with appropriate and adequate support to make their own decisions. Where the person has not been able to reach a decision even with support, a legally appointed guardian may be required. In these circumstances, an application is made to the NCAT Guardianship Division to request the appointment of a guardian or financial manager for the person under the *Guardianship Act, 1987*<sup>14</sup>.

Guardians are appointed to make decisions in certain areas of a person's life outlined in the guardianship order, and are generally only appointed for a limited time. Decisions can be about accommodation, services, medical and dental treatment and contact with others. Financial managers are appointed to make decisions about finances and assets.

The formal appointment of a guardian or financial manager is made as a last resort. In the first instance the NCAT will seek to appoint a family member or significant other in the person's life, with oversight and support from the Public Guardian. If no one suitable is available, the Public Guardian or Public Trustee is appointed.

A person who has a legally appointed guardian with a specific function, or a financial manager, is to be represented by that person whenever a decision is required. A legally appointed guardian with a specific function may only decide for a person on the function defined by the Guardianship Order.

If support workers are unclear about the need to refer to a legally appointed guardian for a decision, they should check the person's file for details of the guardian's function and contact the guardian to discuss. If there is no legally appointed guardian, support workers should contact the NCAT Guardianship Division for advice about applying for the appointment of a guardian.

If workers are concerned that the support given with decisions by the family or a guardian are not in the person's best interests, they should refer the matter to a line manager who will assess the need for a review by the NCAT Guardianship Division.

---

<sup>14</sup> NCAT application forms and factsheets: <http://www.ncat.nsw.gov.au/Pages/guardianship/guardianship.aspx>

# 15 Definitions

There are some key words which are important for support workers to understand in the context of decision making and consent.

Abuse	<p>All forms of maltreatment of adults with disability and violation of their individual rights. 'Abuse' refers to sexual assault, physical, emotional, financial and systemic abuse, domestic violence, constraints and restrictive practices, and to neglect.</p> <p>Refer to the ADHC Abuse and Neglect Policy and Procedures and Guidelines.</p> <p>The policy and procedures concerning the abuse of children and young people are contained in the document: Child Protection Guidelines; What ADHC staff need to know about child protection, 2014<sup>15</sup></p>
Adult	<p>A person who is 18 years or older is considered to be an adult.</p> <p>For the purpose of making a guardianship order, or for giving medical or dental consents, the NSW Civil and Administrative Tribunal (NCAT) Guardianship Division regards anyone aged 16 years or over as an adult.</p>
Authorised officer	<p>Defined in the Crimes (Forensic Procedures) Act 2000 as:</p> <ul style="list-style-type: none"> <li>• Magistrate or Children's Magistrate; or</li> <li>• Registrar of a Local Court; or</li> <li>• An employee of the New South Wales Attorney General's Department authorised by the New South Wales Attorney General as an authorised officer for the purposes of this Act either personally or as the holder of a specified title.</li> </ul>
Carers	<p>Family members, parents, partners, significant others, friends or neighbours who provide care on an unpaid basis. These are sometimes described as 'those within the person's circle of support'.</p>

<sup>15</sup> [http://www.adhc.nsw.gov.au/data/assets/file/0019/232732/ADHC\\_Child\\_Protection\\_Guidelines.pdf](http://www.adhc.nsw.gov.au/data/assets/file/0019/232732/ADHC_Child_Protection_Guidelines.pdf)

Case Manager	In ADHC, case managers work with the person and the person's family to identify the person's strengths and needs, and to design an individually tailored plan of support. The case manager then negotiates, coordinates and monitors the delivery of support based on the plan.
Child	A person who is under 16 years of age.  Parents and guardians of people under 16 years have the right to make decisions for them but the child should be involved in decisions that affect them, in an age-appropriate way. For exceptions, refer to Section 2 (Capacity) of these Guidelines
Consent	Consent refers to the permission given by a person. For consent to be valid it must be voluntary, informed, specific and current. A person must be free to exercise genuine choice about whether to give or withhold consent. Consent must be given without coercion or threat and with sufficient time to understand the request and, if appropriate, take advice.  Consent must be established each time it is required. A person who has given consent to a specific matter may change her or his mind and subsequently revoke consent.  In certain circumstances, consent may also be provided by a legally appointed guardian on behalf of the person. Consent for medical or dental treatment may be given by a person responsible.
Critical Decision	These decisions relate to vital or essential issues in a person's life such as particular medical and dental treatments, certain behaviour support and intervention practices, legal issues, accommodation choices or service delivery decisions. They are decisions which have potentially long term or serious impacts on the person's life including health, lifestyle and financial outcomes.
Family	In the context of this policy 'family' refers to any person who is a relative or friend having a close and continuing relationship with a person, and who has a personal interest in the welfare of the person.
Financial Manager	Financial managers with the authority to make decisions about the finances of a person who lacks capacity to make such decisions are appointed by the NSW Civil and

	<p>Administrative Tribunal (NCAT) Guardianship Division, the Supreme Court or a Magistrate.</p> <p>If a person is found to be incapable of managing her or his finances the preference is for a family member to be appointed to manage the person’s finances, with oversight from the NSW Trustee and Guardian. As a last resort, the NSW Trustee and Guardian is appointed to provide financial management services directly to a person, where there is no other person available.</p>
<p>Forensic Procedures<sup>16</sup> - Intimate</p>	<p>These are intrusive procedures requiring consent from the person (if the person is a victim of crime and is capable of providing it) or a legally appointed guardian with the appropriate function, or an order from a Magistrate or authorised officer (if the person is a suspect in a crime) including:</p> <ul style="list-style-type: none"> <li>• an external examination of a person’s <a href="#">private parts</a>,<sup>17</sup>,</li> <li>• the carrying out on a person of an <a href="#">other-administered buccal swab</a>,</li> <li>• the taking from a person of a <a href="#">sample</a> of the person’s blood,</li> <li>• the taking from a person of a sample of the person’s pubic hair,</li> <li>• the taking from a person of a sample of any matter, by swab or washing, from the person’s private parts,</li> <li>• the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from the person’s private parts,</li> <li>• the taking from a person of a dental impression,</li> <li>• the taking of a photograph of the person’s private parts,</li> <li>• the taking from a person of an impression or cast of a wound from the person’s private parts.</li> </ul>
<p>Forensic Procedures –</p>	<p>These are less intrusive procedures requiring consent from the person (if the person is a victim of crime and is capable of providing it) or a legally appointed guardian with the</p>

<sup>16</sup> Taken from Part 1, section 3 of the *Crimes (Forensic Procedures) Act 2000* No 59

<sup>17</sup> "Private parts" means a person’s genital area, anal area or buttocks, and, in the case of a female or [transgender person](#) who identifies as a female, includes the person’s breasts.

Non- Intimate	<p>appropriate function, or an order from a Magistrate or authorised officer (if the person is a suspect in a crime) including:</p> <ul style="list-style-type: none"> <li>• an external examination of a part of a person’s body, other than the person’s <u>private parts</u>, that requires touching of the body or removal of clothing.</li> <li>• the carrying out on a person of a <u>self-administered buccal swab</u>.</li> <li>• the taking from a person of a <u>sample</u> of the person’s hair, other than pubic hair.</li> <li>• the taking from a person of a sample (such as a nail clipping) of the person’s nails or of matter from under the person’s nails.</li> <li>• the taking from a person of a sample of any matter, by swab or washing, from any external part of the person’s body, other than the person’s private parts.</li> <li>• the taking from a person of a sample of any matter, by vacuum suction, scraping or lifting by tape, from any external part of the person’s body, other than the person’s private parts.</li> <li>• the taking from a person of the person’s hand print, finger print, foot print or toe print.</li> <li>• the taking of a photograph of a part of a person’s body, other than the person’s private parts.</li> <li>• the taking from a person of an impression or cast of a wound from a part of the person’s body, other than the person’s private parts.</li> <li>• the taking of measurement of a person’s body or any part of a person’s body (other than the person’s private parts) whether or not involving the marking of the person’s body.</li> </ul>
Guardian <sup>18</sup>	<ul style="list-style-type: none"> <li>• Guardians are appointed by the NCAT Guardianship Division or the Supreme Court to make one or more decisions on behalf of another person about matters relating to health and lifestyle.</li> </ul>

<sup>18</sup> Office of the Public Guardian fact sheets:  
[http://www.publicguardian.justice.nsw.gov.au/Pages/publicguardian/pg\\_publications/pg\\_factsheets/pg\\_factsheets.aspx](http://www.publicguardian.justice.nsw.gov.au/Pages/publicguardian/pg_publications/pg_factsheets/pg_factsheets.aspx)

	<ul style="list-style-type: none"> <li>• Where there is a need to assist the person who lacks capacity to make lifestyle or health decisions, the NCAT Guardianship Division will appoint a private individual (sometimes known as a 'private guardian') to be the guardian wherever possible.</li> <li>• When there is no available, willing or suitable private individual, the Public Guardian will be appointed as the guardian of last resort. The guardianship order authorises the guardian to exercise a specific decision making function that is time limited. Private guardians and the Public Guardian have the equal authority to act according to a Guardianship Order.</li> <li>• An enduring guardian is another form of guardianship appointment and is chosen by an individual to make lifestyle and health care decisions should the individual lose capacity to make her or his own decisions at some time in the future. The appointment is not time limited and is only reviewed by the Guardianship Tribunal on request. Individuals cannot choose the Public Guardian as an enduring guardian.</li> </ul>
Guardianship Order	<p>The NSW Civil and Administrative Tribunal (NCAT) Guardianship Division can appoint a guardian with specified functions detailed in a written order. Functions determined under such an order can include but are not limited to:</p> <ul style="list-style-type: none"> <li>• Accommodation - to decide where a person should live. Sometimes the Guardian can also authorise others, including members of the NSW Police Service and/or the NSW Ambulance Services to take the person from their present location to accommodation consented to by the guardian, keep the person at that accommodation and bring the person back to that accommodation if they leave.</li> <li>• Health care - to decide what health services a person should receive.</li> <li>• Medical and Dental treatment - to provide or withhold consent to medical and dental treatment, including the use of medication as part of a Behaviour Support Plan.</li> <li>• Services - to authorise others to provide personal services to the person, and decide which agencies should provide services.</li> <li>• Restrictive practices - to decide about the use of restrictive practices, usually in the context of behaviour</li> </ul>

	<p>intervention and support.</p> <ul style="list-style-type: none"> <li>• Access - to decide who should have access to a person and under what conditions.</li> <li>• Advocacy - to advocate on behalf of a person (this is only occasionally a function in itself, but is implicit in other functions).</li> <li>• Legal services - to make decisions about legal services for the person, such as arranging for legal advice to be given and other supports.</li> <li>• Forensic – is required when a medical examination is purely for the gathering of evidence. There are two aspects to this function - consent to gather the evidence and, consent to release the evidence.</li> </ul> <p>Guardians are appointed with a specific function and for the period of time specified in the order. The order is reviewed near the end of that period, at which time the NCAT Guardianship Division will decide to continue, vary or dismiss the order. There may be more than one guardian for a person, each with a different function, or there may be joint guardians with the same function.</p>
<p>Manager or Senior Manager</p>	<p>The designated manager of an individual service, including a large residential centre, or the next line manager in the organisation's structure.</p>
<p>Natural supports</p>	<p>Natural supports are relationships that occur in everyday life. They include family, friends and other trusted people, neighbours, acquaintances, and people with shared interests. Natural supports enhance a sense of security and quality of life for people.</p>
<p>New South Wales Civil and Administrative Tribunal (NCAT) Guardianship Division</p>	<p>When the <i>Civil and Administrative Tribunal Act 2013</i> came into force on 1 January 2014, it established the New South Wales Civil and Administrative Tribunal (NCAT). The Guardianship Division of NCAT exercises jurisdiction set out in the <i>Guardianship Act 1987</i>.</p> <p>One of its functions is to determine applications for guardianship and financial management orders. It can appoint a guardian for a person aged 16 years or over who is incapable of making health, finance or lifestyle decisions independently. It will not usually appoint a guardian for day to day lifestyle decisions if informal decision making is working well and there is no need for a formal guardianship</p>



	<p>order.</p> <p>The Guardianship Division also provides or withholds consent for people to receive medical or dental treatment in certain circumstances (see the 'NCAT Guardianship Division Information for Applicants, Application for consent to medical and dental treatment' in Tools and templates).</p>
Lifestyle Plan	<p>A Lifestyle Plan is developed with the person and others who are important in the person's life. It belongs to the person and tells others about the person's lifestyle priorities and goals, and focuses on the person's strengths.</p>
Person	<p>The person with disability who receives ADHC operated or ADHC funded non-government disability support services.</p>
Person Responsible	<p>A person responsible is <u>not</u> necessarily the person's next of kin.</p> <p>The <i>Guardianship Act 1987</i> has a hierarchy of people who can be the person responsible. They are:</p> <ol style="list-style-type: none"> <li>1. A guardian (including an enduring guardian) who has the function of consenting to medical and dental treatments.</li> </ol> <p>If no-one as specified in item 1:</p> <ol style="list-style-type: none"> <li>2. A spouse or de facto spouse or partner where there is a close, continuing relationship.</li> </ol> <p>If no-one as specified in item 1 and 2:</p> <ol style="list-style-type: none"> <li>3. A carer who provides or arranges for domestic support on a regular basis and is unpaid. The Carer Allowance is not considered payment in this context. If the person is in residential care (i.e. receiving accommodation supports and not living with family or a carer), then the carer before the person went into residential care.</li> </ol> <p>If no-one as specified in item 1, 2 and 3:</p> <ol style="list-style-type: none"> <li>4. A close personal friend or close relative where there is both a close personal relationship, frequent personal contact and a personal interest in the patient's welfare, on an unpaid basis. The person next in the hierarchy may become the <i>person responsible</i> if: <ul style="list-style-type: none"> <li>• a person responsible declines in writing to exercise the function, or</li> <li>• a medical practitioner or other qualified person certifies in writing that the person responsible is not</li> </ul> </li> </ol>

	capable of carrying out their functions <sup>19</sup> .
Support Worker	A paid supporter who is the person's primary contact. The support worker is responsible for supporting the person to participate in daily activities, stay healthy and safe, and to pursue the goals and aspirations identified in the person's Lifestyle Plan.
Young Person	A person who is 16 or 17 years old.  For the purpose of making a guardianship order, or for giving medical or dental consents, the NSW Civil and Administrative Tribunal (NCAT) Guardianship Division regards anyone aged 16 years or over as an adult.

## 16 Policy and Practice Unit contact details

You can get advice and support about this Policy from the Policy and Practice Unit, Contemporary Residential Options Directorate.

Policy and Practice, Service Improvement  
 Contemporary Residential Options Directorate  
 ADHC  
[policyandpracticefeedback@facs.nsw.gov.au](mailto:policyandpracticefeedback@facs.nsw.gov.au)

If you are reviewing a printed version of this document, please refer to the Intranet to confirm that you are reviewing the most recent version of the Policy. Following any subsequent reviews and approval this policy will be uploaded to the internet/and/or intranet and all previous versions removed.

---

<sup>19</sup> Taken from NCAT Person responsible fact sheet:  
[http://www.ncat.nsw.gov.au/Pages/guardianship/publications\\_resources/gd\\_fact\\_sheets.aspx](http://www.ncat.nsw.gov.au/Pages/guardianship/publications_resources/gd_fact_sheets.aspx)