

Consent for Psychotropic use in dementia

A guide for prescribers across Australia

Important Facts

1. Doctors and nurse practitioners with prescribing authority have an ethical, legal and professional responsibility to obtain consent for treatment. This includes treatment with psychotropic drugs. No treatment can be undertaken without consent of the patient if they are a competent adult (i.e. a person with capacity to make the decision). Failure to do so could result in legal action for trespass to the person in the form of battery.
2. For **valid consent**, the person must be:
 - competent (have capacity) to make the treatment decision (in this case, psychotropic treatment);
 - acting voluntarily without pressure or duress;
 - provided with enough relevant information about the treatment options, alternatives and material risks, presented in a form that can be understood to enable the person to make the decision.
3. **Capacity** (competence) is the ability to:
 - understand the specific situation, relevant facts or basic information about choices;
 - use reasoned processes to weigh the risks and benefits of the choices;
 - communicate relatively consistent or stable choices;

in relation to the specific decision, namely psychotropic treatment.

NB There are many alternatives to using psychotropics in dementia (see Empowered resources) rendering psychotropics last resort treatment. Psychotropics are of variable efficacy and associated with a wide range of serious and complex adverse outcomes including mortality. These adverse outcomes are often dose-related. This is complex to understand and therefore of

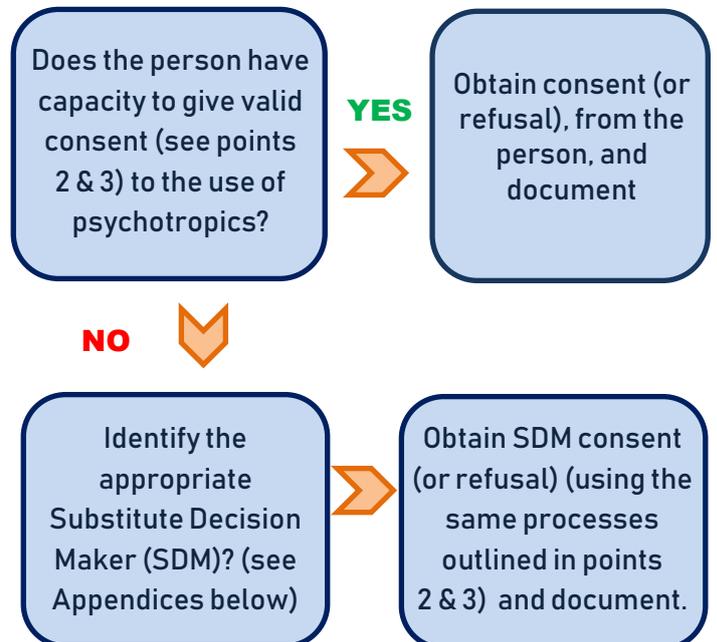


relevance in assessing capacity to understand information. It is also relevant to a substitute decision maker considering the concept of "best interests" (see Appendices below).

ASK YOURSELF: Have I explained everything in a way that is understandable, and can the person repeat their understanding in their own words?

If a practitioner assesses a person as lacking capacity to give consent to treatment, and the treatment is NOT urgent or necessary to save life or prevent serious damage to health, or serious pain or distress, they must seek consent from a **substitute decision-maker (SDM)**. Legislative regimes for SDM across Australia have been developed for adults unable to give a valid consent to their own treatment. SDMs are called different names in different States and Territories. But we will use the term SDM throughout this document (See APPENDICES)

In summary, a recommended practical approach to consent and psychotropic medications is:



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Appendix 1: New South Wales

Summary guide to consent to psychotropics for adults who cannot consent in NSW

Legislation: *Guardianship Act 1987 (NSW)*

Name of Board/Tribunal: *NSW Civil and Administration Tribunal (NCAT)*



CATEGORY	INCLUDES (not limited to)	WHO CAN CONSENT
<p>MINOR</p>	<p>Medications that affect the central nervous system (CNS) (including ALL PSYCHOTROPICS)</p> <ul style="list-style-type: none"> when used for analgesic, antipyretic, antiparkinsonian, antihistaminic, antiemetic, antinauseant or anticonvulsant purposes when such medications are used only once PRN (as and when required) not more than 3 times per month 	<p>Person responsible (see below for definition) can consent if patient not objecting. Under the Act, the hierarchy of people who can be a 'person responsible' (not necessarily the patient's 'next of kin') are:</p> <ul style="list-style-type: none"> an appointed guardian (including an enduring guardian) who has been given the right to consent to medical and dental treatments or, if there is no guardian; the most recent spouse or de facto spouse (including same-sex partner) when the spouse or de facto has a close and continuing relationship with the person or, if there is no spouse or de facto spouse; the unpaid carer or carer at the time the person entered residential care (NB: recipients of a government carer benefit are not considered paid carers); or, if there is no carer, relative or friend with a close personal relationship with the person. <p>If the person responsible can't or won't make a treatment decision, he or she must decline in writing. The next person in the list will then become the person responsible. A practitioner or other qualified person can remove the person responsible from their role by certifying, in writing, that the person responsible is not capable of carrying out the role. .</p> <p>If there is no 'person responsible' or they cannot be located or cannot/will not respond and patient is not objecting, the doctor may treat without consent. It must be noted on the patient's record that treatment is necessary to promote the patient's health and wellbeing, and that the patient is not objecting.</p>
<p>MAJOR</p>	<p>Medications affecting the CNS (including ALL PSYCHOTROPICS) (except if "minor" see above) and drugs of addiction.</p> <p>NB androgen reducing medications for behavioural control are PRESCRIBED SPECIAL TREATMENT: requiring NCAT consent</p>	<p>Person responsible can consent if patient not objecting. If no 'person responsible' or they cannot be located or cannot/will not respond and patient is not objecting, then only NCAT can consent. The request and consent must be in writing or, if not practicable, later confirmed in writing.</p>
<p>OBJECTION</p>	<p>A patient who cannot give a valid consent to treatment is considered to be objecting if they indicate, or previously indicated, that they do not want the treatment carried out and have not withdrawn their objection</p>	<p>Only (i) NCAT, or (ii) a Guardian given authority by NACT in a guardianship order to override the patient's objections, can override a patient's objection to treatment. AND only if satisfied that the proposed treatment is in best interests of the patient</p>

Appendix 2: Tasmania

Summary guide to consent to psychotropics for adults who cannot consent in Tasmania



Legislation: Guardianship and Administration Act 1995 (Tas)

Name of Board/Tribunal: Guardianship and Administration Board of Tasmania

CATEGORY	INCLUDES (not limited to)	WHO CAN CONSENT
<p>Medical Treatment in Tasmania</p> <p>(Note: no distinction between MINOR and MAJOR treatment)</p>	<p>Treatments that may not be carried out without consent:</p> <ol style="list-style-type: none"> 1. treatment that is continuing or ongoing and involves the administration of a restricted substance primarily to control the conduct of the person to whom it is given; or 2. treatment that involves the administration of a drug of addiction other than in association with the treatment of cancer or palliative care of a terminally ill patient; or 3. electro convulsive therapy (ECT); 4. treatment involving a substantial risk to the incapable person of - <ol style="list-style-type: none"> (i) death; (ii) brain damage; (iii) paralysis; (iv) permanent loss of function of any organ or limb; (v) permanent and disfiguring scarring; (vi) extreme pain or distress. 	<p>Person responsible, in order of priority, is:</p> <ul style="list-style-type: none"> • an appointed guardian or an enduring guardian, who has been given the function of consenting to medical and dental treatments or, if there is no guardian; • the most recent spouse or de facto spouse (including same-sex partner) when the spouse or de facto has a close and continuing relationship with the person or, if there is no spouse or de facto spouse; • the unpaid carer or the carer at the time the person entered residential care (note: recipients of a government carer benefit are not considered to be paid) or, if there is no carer; • a relative or friend who has a close personal relationship with the person. <p>If no person responsible, an application must be made to the Board for consent</p>
<p>OBJECTION</p>	<p>No formal legislative provisions for objections in Tasmania</p>	

Appendix 3: South Australia

Summary guide to consent to psychotropics for adults who cannot consent, South Australia

Legislation: The Guardianship and Administration Act [1993] (SA)

Name of Board/Tribunal: Guardianship Board South Australia

CATEGORY	INCLUDES (not limited to)	WHO CAN CONSENT
MEDICAL TREATMENT	<p>Medical treatment is defined to mean treatment or procedures administered or carried out by a medical practitioner or other health professional in the course of professional practice and includes the prescription or supply of drugs. All medical treatments that are neither urgent nor prescribed, no matter how significant or how minor in nature, require the consent of the "appropriate authority".</p>	<p>“Appropriate authority is”:-</p> <ol style="list-style-type: none"> 1. a medical agent appointed under a medical power of attorney 2. an enduring guardian appointed under an enduring power of guardianship (under an appointment doesn't exclude the guardian from giving consent to medical treatment) 3. a guardian appointed by the Board (under an order that does not exclude the guardian from giving consent to medical treatment); 4. if there is no medical agent, guardian or enduring guardian, then the following specified relatives can provide consent to medical or dental treatment: <ol style="list-style-type: none"> (i) a spouse, including a "putative" spouse (i.e. a person who has been cohabiting as a husband or wife of a member of the opposite sex currently for a continuous period of five years, or for periods amounting to at least five years in the last six years or has been cohabiting with a member of the opposite sex and they are the parents of a child who has been born. (ii) a parent (iii) a brother or sister of or over 18 years; (iv) a daughter or son over 18 years (v) a person who acts in loco parentis i.e. the person who provides the main ongoing day to day care and supervision of the person (not the person who is going to provide the treatment) <p>Where no one is available from the above categories, or where there is dispute or conflict about the treatment, the Board can provide consent</p>
OBJECTION		<p>Although the Act does not deal directly with objections to the treatment by the incapacitated person, this is a situation in which it is appropriate to make an application to the Board for consent.</p>

Appendix 4: Victoria

Summary guide to consent to psychotropics for adults who cannot consent, Victoria

Legislation: The Medical Treatment Planning and Decisions Act 2016 (Vic)

Name of Board/Tribunal: Victorian Civil and Administration Tribunal (VCAT)

CATEGORY	INCLUDES (not limited to)	WHO CAN CONSENT
<p>MEDICAL TREATMENT</p>	<p>The Act defines the term ‘medical treatment’ to mean certain treatments of a person by a health practitioner for the purposes of diagnosing a physical or mental condition, preventing disease, restoring or replacing bodily function in the face of disease or injury or improving comfort & quality of life. Such treatments include</p> <ul style="list-style-type: none"> • treatment with physical or surgical therapy, • treatment for mental illness, • (treatment with— (i) prescription pharmaceuticals <p>Two types of treatment are defined “Routine” (ie not “significant”) and “Significant treatment.” Significant treatment:” includes any medical treatment that involves—</p> <ul style="list-style-type: none"> • a significant degree of bodily intrusion, • a significant risk to the person, • significant side effects, or • significant distress to the person. <p>NB. We suggest that treatment with psychotropics would be “significant treatment”</p>	<ol style="list-style-type: none"> 1. The relevant instructional directive in an advance care directive; 2. The medical treatment decision maker appointed by the person who is reasonably available, willing & able to make the decision; after considering any relevant values directive, & any other matters they are required to consider by provisions in the Act; 3. the guardian appointed by VCAT & given power to make medical treatment decisions for the person, who in the circumstances is reasonably available, willing & able to make the decision; after considering any relevant values directive, & any other matters they are required to consider by the Act. 4. the first of the following list of persons who is in a close & continuing relationship with the person & who, in the circumstances, is reasonably available, willing & able to make the medical treatment decision; after considering any relevant values directive, & any other matters they are required to consider by provisions in the Act. <ol style="list-style-type: none"> i. the spouse or domestic partner of the person; ii. the primary carer of the person; iii. the first of the next list who meet the relationship and other criteria already set out (in 4); <ol style="list-style-type: none"> a. an adult child of the person (if more than one, the oldest), b. a parent of the person, or c. an adult sibling of the person. <p>If none of the above available, willing and/or able to make the medical treatment decision, and the proposed treatment is ‘significant’ treatment, the health practitioner may administer it only if the Public Advocate has consented to the treatment</p>
<p>Refusal of treatment</p>	<ol style="list-style-type: none"> 1. Refusal of medical treatment in an instructional directive in ACD. 2. Refusal by the medical treatment decision maker 	<ol style="list-style-type: none"> 1. Health practitioner can treat in “changed circumstances”, otherwise person’s directive should be respected 2. If (treating) health practitioner tells Public Advocate(PA), PA can apply to VCAT

Appendix 5: Queensland

Summary guide to consent to psychotropics for adults who cannot consent, Queensland

Legislation: Guardianship and Administration Act [2000] (Qld)

Name of Board/Tribunal: Queensland Civil and Administrative Tribunal (QCAT)



CATEGORY	INCLUDES (not limited to)	WHO CAN CONSENT
<p>HEALTH CARE</p>	<p>Substitute decision-making for medical treatment proposed for adults unable to give a valid consent to their own treatment relates to "matters relating to health care". Health care is described as, care or treatment of, or a service or a procedure for an adult:</p> <ol style="list-style-type: none"> 1. to diagnose, maintain, or treat the adult's physical or mental condition; and 2. carried out by, or under the direction or supervision of, a health provider <p>Psychotropic medications have both effects that are intended & serious adverse side effects. Hence careful consideration should be given to prescribing them in the first place, & then in determining how long they should be prescribed. The Act requires substitute consent givers to give careful consideration before consenting to proposed treatments. (See consent column)</p>	<p>An advance health directive; then the first person who qualifies in the following list:</p> <ol style="list-style-type: none"> 1. any guardian for health matters appointed by QCAT; 2. any enduring attorney for health matters appointed by the person; 3. the first available & culturally appropriate statutory health attorney from the following list: <ol style="list-style-type: none"> (i) a spouse if the relationship with the person is close & continuing ("spouse" includes a "de-facto partner" who can be opposite or same sex). (ii) an adult who has the care of the person and is not a paid carer. A person has the care of an adult if they provide domestic services & support or arranges for the person to be provided with domestic services and support. Note also that where an adult resides in an institution (e.g. hospital, aged care facility home, group home, boarding-house or hostel) & is cared for there, they are not to be regarded as being in the care of that institution but remain in the care of the person in whose care they were immediately before residing in the institution. (iii) an adult who is a close friend or relation of the person & is not a paid carer. A close friend of a person with impaired capacity means another adult who has a close personal relationship with the person with impaired capacity & a personal interest in their welfare. <p>If no-one in this list is readily available & culturally appropriate, the Public Guardian becomes the adult's statutory health attorney for the particular health matter.</p> <p>The SDM's may exercise their power to consent to medical treatment only in the way that:</p> <ol style="list-style-type: none"> 1. is least restrictive of the person's rights; 2. necessary and appropriate to maintain their health and wellbeing; and 3. in all the circumstances in their best interests.
<p>OBJECTION</p>		<p>QCAT does not have jurisdiction to deal directly with applications for consent to health care. The way to deal with the objection is to make an application to QCAT for a declaration about the capacity of the adult & other orders, including appointing guardians & obtaining directions or advice from QCAT if appropriate. QCAT may give directions to guardians and attorneys, including statutory health attorneys.</p>

Appendix 6: Western Australia

Summary guide to consent to psychotropics for adults who cannot consent, Western Australia



Legislation: Guardianship and Administration Act 1990 (WA)

Name of Board/Tribunal: Western Australian State Administration Tribunal (WASAT)

CATEGORY	INCLUDES (not limited to)	WHO CAN CONSENT
<p>TREATMENT</p>	<p>The term "treatment" is defined as medical or surgical treatment. A treatment decision is defined to mean a decision to give or to refuse consent to the commencement or continuation of any treatment.</p> <p>N.B. WASAT has previously considered the use of psychotropics (e.g. olanzapine) in a nursing home as both a chemical restraint and a treatment and appointed a guardian with authority to give consent to both treatment and the use of chemical and physical restraint</p>	<ol style="list-style-type: none"> 1. A relevant advance health directive; then 2. in order of priority of the following people >18, reasonably available and willing to make a decision to consent or to refuse consent to the treatment : <ol style="list-style-type: none"> I. an enduring guardian authorised to make treatment decisions about the treatment, is; II. a guardian appointed by WASAT, and who is authorised to make treatment decisions about the treatment III. the person's spouse or de facto partner who is of full legal capacity, and is living with the person, IV. the person's nearest relative who maintains a close personal relationship with the person, has frequent personal contact with them and a genuine interest in their welfare, who is of full legal capacity, and who is first in the following order of priority of relatives: <ol style="list-style-type: none"> (a) their spouse or de facto partner who is not living at home with them, (b) the person's child, (c) the person's parent, (d) (d) a sibling of the person; V. the person's primary provider of care and support, but who is not remunerated for providing that support and who also maintains a close personal relationship with the person, has frequent personal contact with them and a genuine interest in their welfare, who is of full legal capacity, who has reached 18 years of age; and VI. finally, a person who maintains a close personal relationship with the person, has frequent personal contact with them and a genuine interest in their welfare, who is of full legal capacity
<p>OBJECTION</p>		<p>There are no provisions in the W.A. about objections to treatment. However consent or refusal of particular treatment may be found in a person's advance care directive (if they have one). Also it is the obligation of every person when acting as person responsible and making a treatment decision to act according to their opinion of the best interests of the person needing the treatment. That obligation may need to be taken into account by the SDM and the treating doctor when the person although lacking the decision-capacity to give or refuse the proposed treatment is, nevertheless, objecting to that treatment.</p>

Appendix 7: Australian Capital Territory

Summary guide to consent to psychotropics for adults who cannot consent, ACT



Legislation: Guardianship and Administration of Property Amendment Act 2008 (ACT); Medical Treatment (Health Directions) Act 2006]; the Powers of Attorney Act 2006 (ACT)

Name of Board/Tribunal: Australian Capital Territory Civil and Administrative Tribunal (ACAT)

CATEGORY	INCLUDES (not limited to)	WHO CAN CONSENT
TREATMENT	Medical treatment is defined to include any medical procedure or treatment as well a series of procedures or a course of treatment	<ol style="list-style-type: none"> 1. the person's guardian appointed by ACAT with authority to give consent to medical treatment, 2. the person's enduring attorney with authority to give consent to medical treatment appointed either under the Powers of Attorney Act 2006 (ACT) or a law of a State or the Northern Territory that substantially corresponds with that Act 3. a health attorney for the person, defined in a "priority order" to mean a capable adult who is: <ol style="list-style-type: none"> (i) the person's domestic partner who is in a close and continuing partnership with the person, ("domestic partner" is someone who lives with the person in a domestic partnership, and includes a reference to a spouse or civil partner of the person. (ii) the person's carer (a person who gives, or arranges for the giving of, care & support to the person in a domestic context but does not receive remuneration or reward, but may receive the care's pension, for giving, or arranging for the giving of, the care and support). However, if the person lives in a hospital, nursing home, group home, boarding-house, hostel or similar place, a person giving, or arranging care and assistance to the person at that place is not, only because of that fact, a carer for the protected person; (iii) a close relative or friend of the incapable person (a relative or someone else in a close personal relationship with the person who has frequent contact with the person and a personal interest in the person's welfare but does not receive remuneration or reward for the contact..
OBJECTION		<p>Objection to the proposed treatment by the person is not addressed by the legislation. If the objection is in the form of a common law advance directive that is relevant to the person's current situation, it should be followed. If the person has made a health direction under the Medical Treatment (Health Directions) Act 2006] that is relevant to their current situation, it should be followed the extent possible under that Act. If their objection to the proposed treatment is known, but is not one of these, it must, be given effect to under the principles to be followed by (substitute) decision-makers under the Guardianship and Management of Property Act [1991] (ACT) unless, making the decision in accordance with those wishes is likely to significantly adversely affect the person's interests.</p>

Appendix 8: Northern Territory

Summary guide to consent to psychotropics for adults who cannot consent, Northern Territory



Unlike the States and the ACT, the Northern Territory does *not* have a comprehensive scheme for substitute consent to proposed health care action for a person lacking the capacity to consent or refuse consent to medical treatment proposed for them. However the *Advance Personal Planning Act* (NT) allows adults in the Northern Territory to make advance care plans that contain advance consent or refusal decisions about future treatment (health care action) and advance care statements setting out their views wishes and beliefs as a basis for decisions made for them by others. Adults may also appoint their own decision makers to make the sorts of decisions for them as they would have made (substituted decisions). Also NTCAT may appoint decision makers for them.

Legislation: *Advance Personal Planning Act* (NT)

Tribunal: NTCAT

CATEGORY	INCLUDES	WHO CAN CONSENT
	<p>Health care is very broadly defined in the <i>Advance Personal Planning Act</i> (NT) to mean health care of any kind that that is part of a health service defined in the s. 5 of the <i>Health Practitioner Regulation National Law</i>. Health care action means commencing, continuing, withholding or withdrawing health care for the adult.</p> <p>Psychotropic medications are clearly within these broad descriptions of health care and treatment.</p>	<ol style="list-style-type: none"> 1. If the adult has made an advance personal plan that contains a relevant advance consent (or refusal) decision, treatment is to be according to that decision unless the doctor is absolved from complying with the decision by operation of the <i>Act</i> or by NTCAT 2. a decision maker appointed by the adult may make a substituted decision based on the views wishes and beliefs of the adult 3. a guardian appointed by NTCAT to make substituted decisions for the adult which must be based on the views wishes and beliefs of the adult, subject to absolutions and directions given by NTCAT. 4. NTCAT may make a consent decision about proposed health care action. <p>As the Northern Territory does not have a comprehensive legislative scheme about substitute consent, we suggest that health care providers fill in the gaps by following the best practice approaches developed in regards to consent by their professions, if they are registered in a health profession (or in their occupation if covered by the definition of health care provider in the <i>Act</i>). In particular, we suggest that they attempt to discover what the adult with decision-making incapacity's view of the proposed health care action was likely to be, based on their previous use of health services, if they had access to information about that, and the opinions the adult expressed about particular treatments or treatments in general when they had capacity. If that information can be provided, it should be considered along with the best interests of the person. The views of relatives, especially those who have responsibilities under customary law for the well-being of the person with the decision-making incapacity, should also be considered, but not so as to override the views or the best interests of the adult with the decision-making incapacity.</p>



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For additional information go to:

1. Capacity and the Law by N O'Neill & C Peisah at:
2. The EMPOWERED Project www.empoweredproject.org.au
3. Capacity Australia's website at: <http://capacityaustralia.org.au/>

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