

# Prescribing cannabis medicines to adult patients who lack capacity to consent



This fact sheet assists medical practitioners in NSW who are seeking to prescribe a cannabis medicine to patients<sup>1</sup> who do not have the capacity to give informed consent to treatment.

In NSW there are laws to protect people who are aged 16 and over and are incapable of giving consent. A person is incapable of giving consent if they do not understand the general nature and effect of the treatment or cannot communicate their consent. Medical practitioners should be aware of responsibilities when prescribing experimental medicines or Schedule 8 medicines (drug of addiction). Use of most cannabis medicines is considered experimental as they are unregistered medicines and their effects are being studied. Most cannabis medicines are also Schedule 8 medicines, with the exception of cannabidiol only medicines in Schedule 4.

Special rules apply when prescribing Schedule 8 cannabis medicines for children. A child is defined as a person under the age of 16 years.

For further information, see:

[www.medicinalcannabis.nsw.gov.au/patients/children-vulnerable-people](http://www.medicinalcannabis.nsw.gov.au/patients/children-vulnerable-people)

## Guardianship Act 1987

Medical practitioners' legal obligations when treating adult patients who lack capacity to consent are outlined in the *Guardianship Act 1987* (the Act) and the *Guardianship Regulation 2016* (the Regulation).

### Valid consent

A medical practitioner has a responsibility to seek consent from their patients before any treatment is given. Patients also have the right to give or withhold consent to any treatment proposed by the practitioner.

Section 33(2) of the Act states that a patient is incapable of giving valid consent if they are unable to:

- understand the general nature and effect of the proposed treatment; or
- indicate whether he or she consents to the treatment.

Medical practitioners are responsible for assessing the patient's capacity to provide valid consent to the proposed treatment. If the practitioner determines that the patient is unable to provide consent, consent must be obtained from a substitute decision maker (unless the treatment is urgent).

Depending on the circumstances, substitute consent must be sought from either the person responsible

for the patient (see below) or the NSW Civil and Administrative Tribunal (NCAT).

### Hierarchy of persons responsible

A person responsible is someone authorised to consent to medical treatment on behalf of a person who is incapable of giving consent. Section 33A(4) of the Act sets out a hierarchy of persons responsible:

1. A **guardian**, including an enduring, private or **Public Guardian**, appointed with a medical consent function, or
2. A **spouse, de facto spouse or partner** who has a close and continuing relationship, or
3. A **carer** who provides or arranges domestic support regularly and is unpaid, or
4. A **friend or relative** with a close personal relationship, frequent personal contact and a personal interest in the person's welfare, on an unpaid basis.

Further information about how the hierarchy is applied can be found here:

[www.ncat.nsw.gov.au/content/dam/dcj/ctsd/ncat/documents/factsheets/gd\\_factsheet\\_person\\_responsible.pdf](http://www.ncat.nsw.gov.au/content/dam/dcj/ctsd/ncat/documents/factsheets/gd_factsheet_person_responsible.pdf)

### Who can provide substitute consent for different types of treatment

The Act describes different types of medical treatment and who can consent to them. Administration of a cannabis medicine may be classified as urgent, major, special or experimental special treatment depending on the circumstances (see table on p.2).

If the person responsible is the Public Guardian or if consent is required from NCAT, specific procedures must be followed to obtain consent, as explained on p.2.

An application to NCAT is required if one or more of the following apply:

- the treatment is special medical treatment
- the treatment is major medical treatment or dental treatment and there is no Person Responsible or the Person Responsible is unable or unwilling to provide consent
- the patient is objecting to the proposed treatment (major or minor) and there is no appointed guardian authorised to override objections
- the appointed guardian or Person Responsible is not acting in the patient's best interests.

Type of treatment	How administration of a cannabis medicine may satisfy the definition of the type of treatment	Who can provide substitute consent
<b>Urgent treatment</b>	Treatment required to save the patient's life, prevent serious damage to the patient's health or prevent or alleviate significant pain or distress.	<b>Consent not needed.</b>
<b>Major medical treatment</b>	Treatment that involves administration of: <ul style="list-style-type: none"> <li>a Schedule 8 medicine (drug of addiction),</li> <li>a Schedule 4 medicine (restricted substance) for the purpose of affecting the central nervous system, other than treatment intended to be used for analgesic, antipyretic, antiparkinsonian, anticonvulsant, antiemetic, antinauseant or antihistaminic purposes.</li> </ul>	<b>Person responsible can consent.*</b> Request and consent must be in writing or, if not practicable, later confirmed in writing. If there is no person responsible, they cannot be located, or they will not or are unable to respond, consent must be sought from NCAT.
<b>Special medical treatment</b>	Any new treatment not yet supported by a substantial number of medical practitioners specialising in the area of practice concerned.	<b>Only NCAT can</b> initially consent. It can then authorise the guardian to give consent to continuing the treatment or to further treatment of a similar nature.
<b>Experimental special medical treatment</b>	Treatment involving administration of a Schedule 4 medicine (restricted substance) to a patient for the purpose of affecting the central nervous system if the dosage levels, combinations or numbers of Schedule 4 medicines (restricted substances) used or the duration of the treatment are outside the accepted mode of treatment for such a patient.	<b>Only NCAT can</b> consent and only where it is satisfied that the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient.

\* Determined by applying the hierarchy outlined on p.1.

### How to seek Public Guardian consent

To obtain substitute consent from the Public Guardian, a practitioner must provide information to the Public Guardian to enable them to understand the nature and effects of the proposed treatment, usually in writing.

An *Application to carry out medical or dental treatment for a person under guardianship of the Public Guardian* form is available here:

[www.tag.nsw.gov.au/sites/default/files/2022-08/Medical\\_dental\\_consent\\_2021.pdf](http://www.tag.nsw.gov.au/sites/default/files/2022-08/Medical_dental_consent_2021.pdf)

If the treatment is major treatment and must be carried out quickly, the request can be over the phone but should later be confirmed in writing.

### How to seek NSW Civil and Administrative Tribunal consent

To obtain substitute consent from NCAT's Guardianship Division, a practitioner must complete an *Application for consent to medical and dental treatment* form, available here:

<https://ncat.nsw.gov.au/forms-and-fees/forms/guardianship-division-forms.html>

For further guidance, practitioners should contact NCAT's Guardianship Division on 1300 006 228 or visit their website:

<https://www.ncat.nsw.gov.au/how-ncat-works/ncat-divisions-and-appeal-panel/guardianship-division.html>

## Further information

### For practitioners:

In relation to enquiries about guardianship matters, contact the NSW Civil and Administrative Tribunal's Guardianship Division on 1300 006 228 or email [gd@ncat.nsw.gov.au](mailto:gd@ncat.nsw.gov.au)

In relation to enquiries about cannabis medicines, general practitioners, community pharmacists and rural health practitioners may contact the John Hunter Hospital Pharmacy Department for guidance, via [HNELHD-JHHParmacy@health.nsw.gov.au](mailto:HNELHD-JHHParmacy@health.nsw.gov.au)

### For patients:

Email the Centre for Medicinal Cannabis Research and Innovation [MOH-CannabisTrial@health.nsw.gov.au](mailto:MOH-CannabisTrial@health.nsw.gov.au)

*Doctors should seek advice from their Medical Defence Organisation for further guidance regarding specific scenarios.*