

Consent to special treatment Intended / reasonably likely to cause permanent infertility

This fact sheet explains how NCAT's Guardianship Division can provide consent to special treatment intended or reasonably likely to cause permanent infertility.

What is special treatment?

The NSW Civil and Administrative Tribunal (NCAT) has power under the *Guardianship Act 1987* to consent to special treatment for people over 16 who lack capacity to consent to the treatment.

One type of special treatment is treatment which is:

- Intended to make a person permanently infertile
- OR**
- Reasonably likely to make a person permanently infertile.

This type of treatment is sometimes called *sterilisation*.

Giving consent

What if a person isn't capable of giving consent to special treatment?

Most people can make their own decision about a sterilisation treatment and can give consent. They are capable of understanding the information their doctor gives them about the treatment and can communicate their decision to the doctor.

However, sometimes a medical practitioner may believe their patient is incapable of consenting to sterilisation treatment because they are:

- incapable of understanding the general nature and effect of the sterilisation treatment
- OR**
- incapable of indicating whether they consent to the sterilisation treatment

The medical practitioner needs to obtain consent **before** the treatment can be given to a patient who is incapable of providing consent.

If the treatment is given without consent, penalties apply under the *Guardianship Act*.

Who can consent to special treatment?

Only NCAT has the power to give consent to special treatment for a person over 16 years who is incapable of giving consent.

The person's spouse, parents, carers or other relatives cannot provide substitute consent on their behalf for these treatments.

Before NCAT can consent to the sterilisation treatment, it must be satisfied that the treatment is necessary to:

- Save the person's life
- OR**
- Prevent serious damage to the person's health.

The treatment must be needed to save life or prevent serious damage to health

Making an application

Who can make an application?

Any person can apply to NCAT for consent to special treatment, such as:

- the 'person responsible' for the person who is incapable of providing consent
- the person's doctor or specialist.

However, NCAT is not required to consider an application from someone if it is not satisfied they have a sufficient interest in the health and well-being of the person concerned.

Making an application for consent to a special medical treatment

An applicant must complete and lodge the 'Consent to special medical treatment' application form. The form is available on the NCAT website.



To lodge your application form and attachments:

- **Post**
NSW Civil and Administrative Tribunal
Guardianship Division
PO Box K1026, Haymarket NSW 1240
- **Deliver in person**
Level 6 John Maddison Tower, 86-90 Goulburn
Street, Sydney NSW 2000

What should be included with the application?

The applicant should provide NCAT with the following reports:

- **Healthcare Professional Report (HPR)** from the person's treating doctor (available on the NCAT website)
- **Additional reports** as required to be attached to the HPR (for specific sections)
- **Separate medical report** (if required) from a specialist in the relevant area of medicine who is not involved in the person's care, and who has no interest in the outcome of the hearing.

If an application does not provide sufficient material, the applicant may be asked to submit further materials before the hearing.

What information should be included in medical reports to the Tribunal?

Any medical reports to NCAT, including the HPR, should provide information about:

- (a) The person's capacity to consent to the proposed medical treatment
- (b) The person's disability and effect upon decision making
- (c) The reproductive health of the person (including difficulties in relation to menstruation)
- (d) The medical needs of the person
- (e) The nature and purpose of the proposed medical treatment
- (f) The benefits, risks and side effects (if any) of the proposed treatment
- (g) Any available alternative courses of treatment, whether these have been tried in the past and the outcomes of such treatment

- (h) The benefits, risks and side effects (if any) of any alternative treatments
- (i) Whether the proposed medical treatment is necessary to save the person's life or prevent serious damage to their health
- (j) Whether it is the most appropriate treatment to promote and maintain the person's health and well-being
- (k) The views of the person about the treatment
- (l) The wishes of other relevant parties.

What information does NCAT require about capacity?

The person's ability to understand the general nature and effect of the treatment is of critical importance. To deal with this issue, NCAT needs information about:

- the nature and extent of the person's disability in the form of assessments or reports about the person's disability and how this affects their understanding of the treatment
- whether anyone has spoken directly to the person to explain the treatment
- the person's understanding of what the treatment involves and its effects.

NCAT should be provided with any medical reports or assessments setting out this information.

If NCAT decides that the person is capable of consenting to the treatment, the decision about the treatment will be their own. NCAT will not need to consider the appropriateness or need for the treatment.

What happens once the Tribunal receives an application?

After an application for consent to special treatment is received at NCAT, it will be registered and a copy will be returned to the applicant. The applicant is to give a copy of the application to the person the proposed treatment is about.

The matter will be allocated to a Tribunal staff member who will:

- Telephone the applicant to discuss the application and ask for more information and reports, if necessary.



- Telephone the person concerned and talk to them about the application and ask their views about it. They will also find out if the person has any particular needs for the hearing, such as an interpreter.
- Provide information to the person, the applicant and others about what the pre-hearing process involves.
- Ask for further documents to be provided, if necessary.
- Arrange for a directions hearing for the application. At the directions hearing, NCAT may make directions about further evidence that needs to be filed before the final hearing can be held.
- Arrange for a hearing to be held to decide whether to grant the application. If the person lives in a country area, NCAT will try, if possible, to hold the hearing in regional centres near them.
- Send a written notice to the person, the applicant and other parties with the details of the time, date and place of the hearing.
- Any material lodged with NCAT must, at the same time, be sent by the person lodging it to the parties so that they all have an opportunity to review these before the hearing.

Tribunal staff may ask for reports from the doctor proposing to carry out the treatment or other health professionals about what issues led to the proposal to give special medical treatment to the person.

NCAT will want to know whether other treatments, education or counselling have been provided to the person and to what extent this has worked to address the issues.

Views of the person about the treatment

The *Guardianship Act* requires that NCAT take into account any views of the person the application is about. Information on their views about the proposed treatment should be provided to NCAT.

Views of others

NCAT will also consider the views of other people closely involved with the person. These include close friends, family and other carers, as well as those who provide support services. If they cannot attend the hearing, they can put their views in writing before the hearing.

Separate representation

In applications for sterilisation, NCAT may appoint a separate representative. This is an independent lawyer who represents the interests of the person the application is about.

The role of the separate representative is to present the views of the person wherever possible. They will also provide other relevant information and submissions which assists NCAT make a decision.

The separate representative is different from a legal representative. They do not act on the instructions of a client and are not bound by the views of the person. They are not an advocate for the interests of the other parties to the application.

Tribunal hearing

Once NCAT has received all the necessary documents, it will conduct a hearing to decide whether consent should be granted.

Hearings about an application for consent to special treatment must heard by three Tribunal Members:

- Senior Member (Legal)
- Senior Member (Professional) such as a doctor or other professional person
- General Member (Community).

Who should come to the hearing?

The applicant should attend the hearing to explain why the application was made and why consent should be given.

NCAT may ask the applicant to give further information about the proposed treatment.

The person concerned should also attend the hearing whenever possible and appropriate so that NCAT can hear their views. Attempts should have been made to explain the proposed treatment and alternatives to the person before the hearing.

The person's close relatives, friends, and other people providing residential care or other support services to the person should also attend, where appropriate.

NCAT will also want to speak with the person's treating doctor and other health professionals who have provided reports.



What happens at a Tribunal hearing?

Evidence and views about the application will be heard at the hearing. The applicant and the person will have an opportunity to talk about the application.

NCAT may ask questions about the sterilisation treatment. It may also seek people's views about whether the person should have the treatment.

Before making a decision, NCAT will consider:

1. Is the person incapable of consenting to the treatment?
2. Is it the most appropriate treatment to promote and maintain the person's health and wellbeing?
3. Is the treatment necessary to save the person's life or prevent serious damage to their health?

NCAT can only consent to the sterilisation treatment if it is satisfied that all these criteria are met.

After the Tribunal hearing

NCAT may make a decision on the day of the hearing about whether to consent to the proposed special treatment. If it does, it will inform the hearing participants of the decision at the end of the hearing.

Sometimes, NCAT will reserve its decision and make its decision at a later date.

Once NCAT has made its decision, parties will receive a copy of the order and reasons for decision.

Contact NCAT

1300 006 228 | www.ncat.nsw.gov.au

Interpreter Service (TIS) 13 14 50

National Relay Service for TTY users 13 36 77

For more information and assistance visit the NCAT website or contact NCAT's Guardianship Division on (02) 9556 7600 or 1300 006 228.