

 <p><b>BAY OF PLENTY DISTRICT HEALTH BOARD HAUORA A TOI</b></p> <p><b>INFORMED CONSENT PROTOCOL</b></p>	<p align="center"><b>INFORMED CONSENT – DIMINISHED CAPACITY AND COMPETENCE TO CONSENT</b></p>	<p align="center"><b>Policy 1.1.1 Protocol 2</b></p>
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**PURPOSE**

For consent to be valid it must be voluntary, knowing or informed, and competently given. Medication, intellectual disability, mental illness, inebriation, or physical injuries all may affect the informed consent process.

Right 7 (2) of the Code of Rights provides that everyone must be presumed competent to give informed consent, unless there are reasonable grounds for believing that the person is not competent.

As stated in Right 7 (3) of the Code of Rights a patient with diminished competence retains the right to give informed consent appropriate to that patient’s level of competence.

**STANDARDS TO BE MET**

1. Bay of Plenty District Health Board (BOPDHB) patients will not be denied appropriate medical treatment solely by virtue of their inability to give consent.
2. Right 7 (4) of the Patient Code of Rights  
Where a consumer is not competent to make informed choice and give informed consent, and no person entitled to consent on behalf of the consumer is available, the provider may provide services where –
  - 2.1 it is in the best interests of the consumer; and
  - 2.2 reasonable steps have been taken to ascertain the views of the consumer; and
  - 2.3 Either;
    - a) if the consumer's views have been ascertained, and having regard to those views, the provider believes, on reasonable grounds, that the provision of the services is consistent with the informed choice the consumer would make if he or she were competent; or
    - b) if the consumer's views have not been ascertained, the provider takes into account the views of other suitable persons who are interested in the welfare of the consumer and available to advise the provider e.g. family members and / or caregivers.
3. Emergency situations: where a patient is incompetent and emergency intervention is required to prevent death or serious harm then any treatment that in the opinion of the medical professional is beneficial to the patient can be provided.
4. **Notes On Use Of Right 7 (4) HDC Code**
  - 4.1 If in any doubt about use of right 7 (4) then consult with the Senior Advisor, Governance & Quality.
  - 4.2 See steps on flowchart for requirements that must be met in relation to right 7(4).
  - 4.3 If the situation is an emergency (i.e. death or permanent disability will result if treatment is not provided **immediately**) then right 7 (4) does not need to be complied with.
  - 4.4 For the purposes of right 7 (4), deciding not to provide treatment is the same as deciding to provide treatment. The same consultation and documentation must occur.
  - 4.5 All factors in the flowchart should be considered and recorded fully on the BOPDHB Treatment / Non Treatment of the Incompetent Adult Patient form.
  - 4.6 If there is a divergence of views between medical staff and the patient’s family or caregivers about what is in the best interest of a patient, or what the patient would

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<p>Protocol Steward: Senior Advisor, Governance &amp; Quality</p>	<p>Authorised by: Medical Director</p>	

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- have wanted, the Senior Advisor, Governance & Quality should be consulted. A court order may need to be sought.
- 4.7 Right 7 (4) may be utilised even for the most serious of procedures (e.g. heart bypass surgery), but not for procedures to which specific statutory provisions apply, e.g. Abortion Legislation Act 2020, Mental Health (Compulsory Assessment and Treatment) Act 1992.
  - 4.8 If there is any doubt whatsoever about the views of the patient or other relevant people, the Senior Advisor, Governance & Quality should be contacted.
  - 4.9 Other rights of the HDC Code must still be complied with, e.g. right to consent to the extent the patient is able to, right to be fully informed, right to effective information.

## 5. Determining Competence

- 5.1 Clinicians are required to determine competence i.e. to form an opinion as to whether a patient has the capacity to give informed consent. If clinicians are uncertain about a particular patient's competence they should ask for review, e.g. by a psychiatrist or psychologist.
- 5.2 In an emergency situation procedures may be undertaken without determining competency. An emergency situation is defined as one in which there is an imminent threat of loss of life or permanent harm.

## 6. When a Patient Lacks Capacity to Give Or Withhold Consent

- 6.1 If the patient has an Enduring Power of Attorney (EPOA) then the person(s) who hold this EPOA under this document may sign the informed consent form after being given the same information that would normally be provided to the patient.
- 6.2 In those circumstances, and where there is no other person available who can provide consent on behalf of the patient, a clinical decision can be made to treat where:
  - a) It is in the best interests of the patient, and
  - b) Reasonable steps have been taken to ascertain the patient's views, **AND** Either:
    - i. Having regard to those views, the clinician believes on reasonable grounds that the treatment is consistent with the informed choice the patient would make if competent, or
    - ii. If the patient's views have not been ascertained, the clinician takes into account the views of other suitable people who are interested in the welfare of the patient and able to advise the clinician.
  - c) This determination should include an Advanced Directive given by the patient while they were competent.
- 6.3 If after considering the above the clinician believes it is in the patient's best interest to proceed with the procedure then this decision should be well documented and the clinician along with a second clinician should complete the "Treatment / Non-treatment of the Incompetent Adult Patient" form (Note: in the case of disability patients in long term care requiring routine dental procedures under general anaesthesia this form may be signed by the dentist and the Anaesthetist)

## 7. Consent and the Mental Health Act (1992 And Amendments)

- 7.1 The Mental Health (Compulsory Assessment & Treatment) Act 1992 provides provision only in respect to psychiatric illness / disorder, not medical illness (the only exception is if the medical illness is the direct cause of the psychiatric disorder).

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## 8. Medication and Competence to Consent

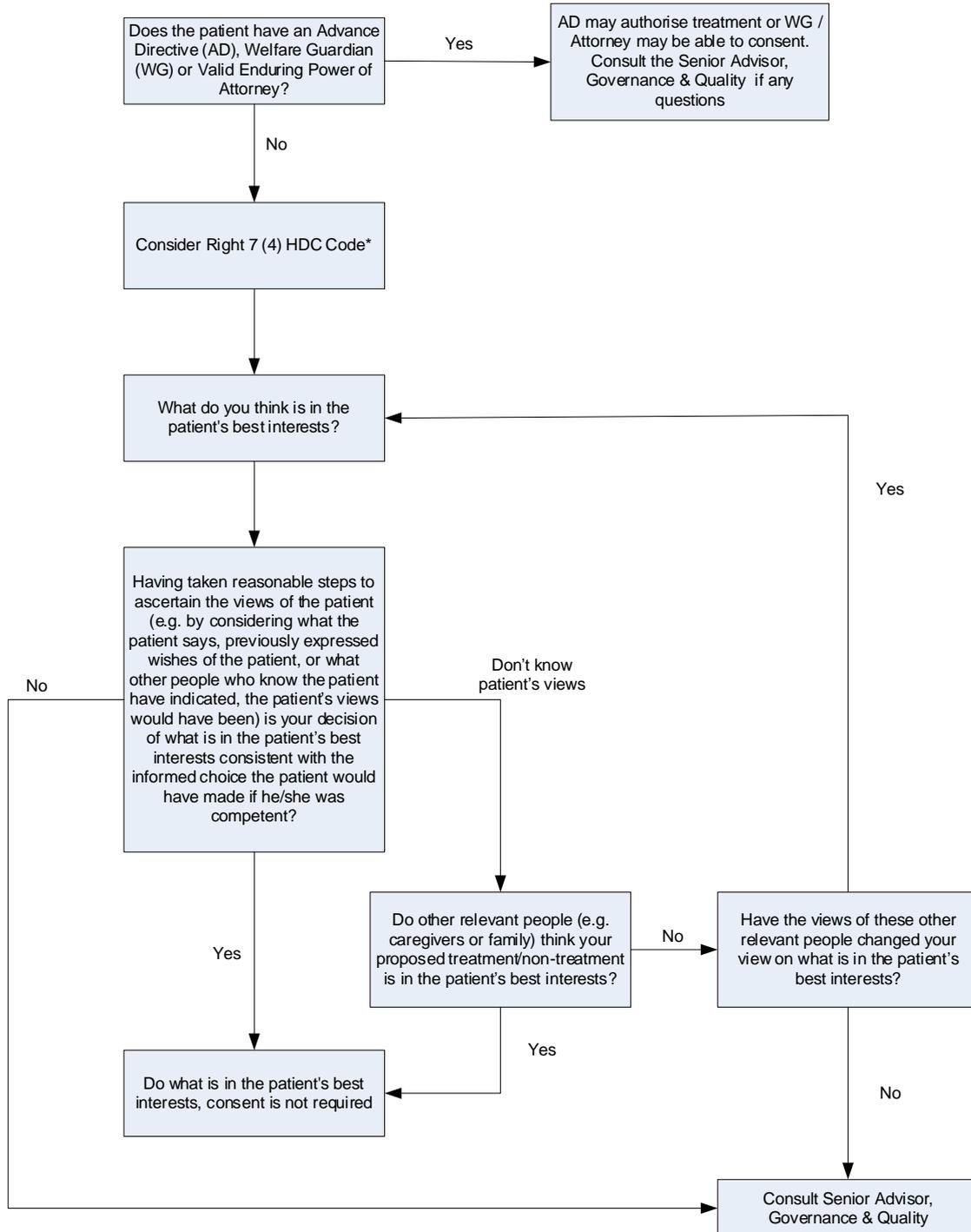
- 8.1 In principle, consent should not be sought when a patient is drowsy or unable to concentrate, but in practice consent for further treatment will sometimes be necessary from patients, who have, for instance, received medication for pain relief.
- 8.2 It would be impractical to suggest that consent should never be sought from patients on any medication with the potential to affect concentration and thinking. Sound clinical judgment and common sense should always be exercised.

## ASSOCIATED DOCUMENTS

- Bay of Plenty District Health Board policy 1.1.1 Informed Consent
- Bay of Plenty District Health Board policy 1.1.1 protocol 1 Informed Consent – Standards
- Bay of Plenty District Health Board policy 1.1.1 protocol 3 Informed Consent – Children
- Bay of Plenty District Health Board policy 1.5.1 Interpreter Services
- Bay of Plenty District Health Board policy 2.5.2 Health Records Management
- Bay of Plenty District Health Board policy 6.1.4 Advanced Directives
- Bay of Plenty District Health Board policy 6.3.9 Body Parts, Tissues and Substances
- Bay of Plenty District Health Board policy 6.6.1 Death of a Patient
- Bay of Plenty District Health Board policy 2.1.4 protocol 3 Incident Management – Open Disclosures
- Bay of Plenty District Health Board policy 2.4.2 External Enquiries, Investigations, Inquests and Hearings
- Bay of Plenty District Health Board policy 2.5.1 Health Information Privacy
- Bay of Plenty District Health Board policy 1.2.5 Jehovah’s Witness Patients – Providing Care
- Bay of Plenty District Health Board policy 1.2.6 Refusal of Blood Products
- Bay of Plenty District Health Board Informed Consent form (7752) – *viewable only. Order from Design & Print Centre*
- Bay of Plenty District Health Board Form FM.T7.1 Treatment / Non Treatment of the Incompetent Adult Patient
- Bay of Plenty District Health Board Form FM.B2.1 Blood Products – Refusal - Understanding Regarding Refusal for Minors
- Bay of Plenty District Health Board Form FM.H1.1 Health Care Directive

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**INCOMPETENT PATIENT OVER 18 YEARS OF AGE**



\*see notes on use of Right 7(4) of HDC Code for explanatory notes

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