Consent

The primary function of the Nursing and Midwifery Council (NMC) is to 'protect the public' by setting professional standards and giving advice and guidance to registered nurses, midwives and specialist community public health nurses (registrants).

The NMC code of professional conduct: standards for conduct, performance and ethics (the Code) is designed either to be used on its own or in conjunction with other NMC guidelines. When used with these other guidelines, the Code is an effective tool that leads to a much greater understanding of the principles of providing nursing and midwifery care.

Registrants have a responsibility to deliver safe and effective care based on current evidence, best practice, and where applicable, validated research.

Every adult must be presumed to have the mental capacity to consent or refuse treatment, unless they are:
* unable to take in or retain information provided about their treatment or care
* unable to understand the information provided
* unable to weigh up the information as part of the decision-making process.

The assessment as to whether an adult lacks the capacity to consent or not is primarily down to the clinician providing the treatment or care, but registrants have a responsibility to participate in discussions about this assessment.

Registrants have three over-riding professional responsibilities with regard to obtaining consent.
* Act in the best interests of the client. Consent must always be obtained before any treatment or care is given
* Ensure that the process of establishing consent is rigorous, transparent and demonstrates a clear level of professional accountability.
* Accurately record all discussions and decisions relating to obtaining consent.

Valid consent must be given by a competent person (who may be a person lawfully appointed on behalf of the client), must be given voluntarily and must be informed. Another person cannot give consent for an adult patient or client who has the capacity to consent. Exceptions to this are detailed below.

Emergency situations
An adult patient or client who becomes temporarily unable to consent due to, for example, being unconscious, may receive treatment necessary to preserve life. In such cases the law allows treatment to be provided without the patient's or client's consent, as long as it is in the best interests of the patient or client.

Medical intervention considered to be in the patient's or client's best interest, but which can be delayed until the patient or client can consent, should be carried out when consent can be given. Exceptions to this are where the patient has issued an advanced directive-detailed refusal of treatment.

Obtaining consent
Obtaining consent is a process rather than a one-off event. When a patient or client is told about proposed treatment and care, it is important that the information is given in a sensitive and
understandable way. The patient or client should be given enough time to consider the information and the opportunity to ask questions if they wish to. Registrants should not assume that the patient or client has sufficient knowledge, even about basic treatment, for them to make an informed choice.

It is essential that the patient or client be given adequate information so that they are able to make a meaningful and informed decision. If a patient or client feels the information they have received is insufficient, they could make a complaint to the NMC or take legal action. Most legal action is in the form of an allegation of negligence. In exceptional cases, for example, where consent was obtained by deception or where not enough information was given, this could result in an allegation of battery (or civil assault in Scotland). However, only in the most extreme cases is criminal law likely to be involved.

Who should obtain consent?
The registrant proposing to perform a procedure should obtain consent, although there may be some situations where this may be delegated to another.

The Code states in Clause 3.10:
"Usually the individual performing a procedure should be the person to obtain the patient's or client's consent. In certain circumstances, you may seek consent on behalf of colleagues if you have been specially trained for that specific area of practice."

There may be occasions where registrants, although caring for the patient or client, are not responsible for either obtaining consent or performing the procedure. In these cases the registrant is often best placed to know and to judge what information the patient or client requires in order to make an informed choice. Due to the therapeutic and caring relationship between registrant and patient/client they are usually more aware of their emotions, concerns and views. Registrants are reminded of the importance of communication within the team and are advised that any concerns regarding a patient's or client's understanding of a procedure should be communicated appropriately. Such difficulties in understanding could be as a result of language differences. Interpreters may be required to assist in such cases.

Forms of consent
Clause 3.5 of the Code of professional conduct: standards for conduct, performance and ethics states:
"Those who are legally competent may give consent in writing, orally or by co-operation. They may also refuse consent. You must ensure that all your discussions and associated decisions relating to obtaining consent are documented in the patient's or client's health care records."

The patient or client may demonstrate their consent in a number of ways. If they agree to treatment and care, they may do so verbally, in writing or by implying (by co-operating) that they agree. Equally a patient or client may withdraw or refuse consent in the same way. Verbal consent, or consent by implication, will be enough evidence in most cases. Written consent should be obtained if the treatment or care is risky, lengthy or complex. This written consent stands as a record that discussions have taken place and of the patient's/client's choice. If a patient or client refuses treatment, making a written record of this is just as important. A summary of the discussions and decisions should be placed in the patient's/client's records.

When consent is refused
Legally, a competent adult patient/client can either give or refuse consent to treatment, even if that refusal may result in harm or death to him or herself. Registrants must respect the patient's refusal just as much as they would their consent. It is important that the patient or client is fully informed and, when necessary, other members of the health care team are involved. Refusal to consent, as with consent itself, must be recorded in the patient's or client's records.
The law and professional bodies recognise the power of advanced directives or living wills. These are documents made in advance of a particular condition arising and show the patient's or client's treatment choices, including the decision not to accept further treatment in certain circumstances. Although not necessarily legally binding, they can provide very useful information about the wishes of a patient or client who is now unable to make a decision.

Consent of people under 16

If the patient or client is under the age of 16 (a minor), registrants must be aware of local protocols and legislation that affect their care or treatment. Consent of patients/clients under 16 is very complex, so local, legal or membership organisation advice may need to be sought.

Children under the age of 16 are generally considered to lack the capacity to consent or to refuse treatment. The right to do so remains with the parents, or those with parental responsibility, unless the child is considered to have significant understanding and intelligence (sometimes referred to as the Fraser guidelines, formerly Gillick competence) to make up his or her own mind about it.

Children of 16 or 17 are presumed to be able to consent for themselves, although it is considered good practice to involve the parents. Parents or those with parental responsibility may override the refusal of a child of any age up to 18 years. In exceptional circumstances, it may be necessary to seek an order from the court.

Child minders, teachers and other adults caring for the child cannot normally give consent.

More information and specific leaflets for children and young people, and their parents can be found on the Department of Health website.

The Legal Capacity (Scotland) Act 1991 sets out the current position on the legal capacity of children, including giving or withholding consent to treatment. The law is broadly similar to that in England and Wales. However, one important difference is that parents consent cannot override a refusal of consent by a competent child. In Scotland a child under the age of 16 has the legal capacity to consent to his or her own treatment where, according to the Act..."in the opinion of the qualified medical practitioner attending to him/her, he/she is capable of understanding the nature and possible consequences of the procedure or treatment."

Consent of people who are mentally incapacitated

It is important that the principles governing consent are applied just as vigorously to patients or clients who are mentally incapacitated. A patient/client may be described as mentally incapacitated for a number of reasons. There may be temporary reasons such as sedative medicines, or longer-term reasons such as mental illness, coma or unconsciousness.

When a patient or client is considered incapable of providing consent, or where the wishes of a mentally incapacitated patient or client appear to be contrary to the interests of that person, registrants caring for that particular patient/client should be involved in assessing their care or treatment. Registrants should also consult relevant people close to the patient or client, but respect any previous instructions the patient or client gave.

The Code states that:
"When patients or clients are no longer legally competent and thus have lost the capacity to consent to or refuse treatment and care, you should try to find out whether they have previously indicated preferences in an advance statement. You must respect any refusal of treatment or care given when they were legally competent, provided that the decision is clearly applicable to the present circumstances and that there is no reason to believe that they have changed their minds. When such
a statement is not available, the patients' or clients' wishes, if known, should be taken into account. If these wishes are not known, the criteria for treatment must be that it is in their best interests.”

The courts have identified certain circumstances when referral should be made to them for a ruling on lawfulness before a procedure is undertaken. These are:
* sterilisation for contraceptive purposes
* donation of regenerative tissue such as bone marrow
* withdrawal of nutrition and hydration from a patient in a persistent vegetative state
* where there is doubt as to the patient's capacity or best interests.

The Adults with Incapacity (Scotland) Act 2000 allows people over the age of 16 to appoint a proxy decision-maker. This person has the legal power to give consent to medical treatment when the patient loses the capacity to consent. The Act also requires medical practitioners to take into account, so far as is reasonable and practicable, the views of the patient's nearest relative and their carer.

**Mental Health Acts**

For patients or clients detained under the relevant mental health legislation, the principles of consent continue to apply for conditions not related to the mental disorder. Registrants who are involved in the care or treatment of patients or clients detained under the relevant mental health legislation, must ensure that they are aware of the circumstances and safeguards needed for providing treatment and care without consent. This information can be obtained from the relevant government health departments of the four countries of the United Kingdom.

It is advised that local policies should be developed or amended using the information outlined above. Information on updated advice sheets will be published in NMC News.

**Further information**

The NMC code of professional conduct: standards for conduct, performance and ethics (2004)
NMC advice sheet on Accountability
Department of Health (England) [www.dh.gov.uk](http://www.dh.gov.uk)
The Scottish Executive [www.scotland.gov.uk](http://www.scotland.gov.uk)
The Welsh Assembly [www.wales.gov.uk](http://www.wales.gov.uk)
Department of Health and Social Services and Patient Safety of Northern Ireland [www.dhsspsni.gov.uk](http://www.dhsspsni.gov.uk)
Health and Personal Social Services in Northern Ireland [www.n-i.nhs.uk](http://www.n-i.nhs.uk)
Community and District Nurses Association [www.cdna-online.org.uk](http://www.cdna-online.org.uk)
Community Practitioners and Health Visitors Association [www.amicus-cphva.org](http://www.amicus-cphva.org)
Royal College of Nursing [www.rcn.org.uk](http://www.rcn.org.uk)
Royal College of Midwives [www.rcm.org.uk](http://www.rcm.org.uk)
UNISON [www.unison.org.uk](http://www.unison.org.uk)
General Medical Council [www.gmc-uk.org](http://www.gmc-uk.org)
British Medical Association [www.bma.org.uk](http://www.bma.org.uk)

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If this advice sheet has been unable to answer your question please e-mail advice@nmc-uk.org or call one of the staff at the NMC Professional Advisory Service on 020 7333 6541/6550/6553. When e-mailing the service, please remember to give your name.

All communications are dealt with as quickly as possible, but please note that it can take up to 10 working days to deal with correspondence. A query by e-mail can take just as long to process as a written letter.