Factsheet – Consent for Medical and Dental Treatment for children and young people in statutory OOHC – September 2023

Overview

This factsheet provides an overview of who has authority for providing consent for medical and dental treatment on behalf of children and young people in statutory out-of-home care (OOHC). Medical treatment is defined as any medical procedure, operation or examination.

This factsheet applies to children and young people in foster, relative and kinship care placements as well as in Intensive Therapeutic Care (ITC) or Alternate Care or Special Care Arrangements supervised by either Non-Government Organisation (NGO) Service Providers or DCJ. It does not apply to children and young people in temporary care arrangements.

When can children and young people give consent to their own medical or dental treatment?

Children and young people can consent to their own medical and dental treatment if they are assessed by a medical practitioner as having a sufficient level of understanding, intelligence and maturity to fully understand proposed medical treatment. The term used by NSW Health to describe this is Mature Minor or Gillick Competent.

A medical practitioner will carefully assess a child or young person's capacity to consent to the specific medical or dental treatment proposed by taking into account the significance of the proposed treatment. It is not the responsibility of the child's caseworker or carer to make this assessment.

For mature minors Barnardos or DCJ consent is not required for most medical treatments. However, health workers and carers should support the young person to inform their caseworker that they have undergone treatment to support holistic casework.

Is there a set age at which a child or young person is capable of giving consent?

There is no set age at which a child or young person may be assessed as capable of giving consent for their medical and dental treatment. It depends upon the treatment being proposed and their ability to fully understand the implications of that treatment. A court may still override a Mature Minor's consent to or refusal of treatment if they do not consider the decision to be in the Mature Minor's best interests.

Who can give consent on behalf of a child or young person who does not have capacity to give consent?

If a child or young person is assessed by a medical practitioner as lacking the capacity to consent to medical treatment, either the child's authorised carer or the delegate exercising parental responsibility will be required to provide consent. This will depend on the type of treatment proposed (refer to Medical and Dental Tool). In these instances, it may still be appropriate for the child or young person to be involved in discussion and decision making about their treatment. A young person with an intellectual disability is not automatically deemed incompetent to consent to treatment. The competence of a young person with an intellectual disability must be assessed on a case-by-case basis.

When can authorised carers provide consent to medical and dental treatment for children or young people in their care?

An authorised carer is a person who has been authorised by a designated agency under the care legislation. This may include a foster, relative or kinship carer or DCJ or agency staff in an Intensive Therapeutic Care Home, Alternate Care or Special Care Arrangement. Authorised carers can consent to most day-to-day medical or dental treatment for a child or young person in their care if the child or young person lacks the capacity to consent including:

- Medical or dental treatment of a child or young person, not involving surgery (except for minor dental surgery), on the advice of a medical or dental practitioner.

- Medical or dental treatment involving emergency surgery, if certified (ideally in writing) by a medical or dental practitioner as being urgent and in the best interests of a child or young person. The urgency of the treatment is determined by the circumstances and the consequences for the child.

It might include circumstances where the child's life is not in immediate danger but a delay in treatment is causing the child significant distress or severe pain.

The law requires authorised carers to immediately notify their designated agency (i.e. DCJ or the NGO service provider who supervises the placement) if a child or young person in their care suffers a serious accident, illness or injury.

To ensure children and young people in care are provided with timely medical and dental treatment, it is important authorised carers are fully informed of the range of circumstances for which they can (and cannot) give consent. A foster or relative kinship carer cannot delegate this responsibility to another family member and should attend medical appointments with the child or young person when consent is required for a medical or dental treatment.

Informing carers about the requirements for consent occurs through initial and ongoing carer training and through communication with their caseworkers. The child's Health Management Plan developed through their participation in the OOHC Health Pathway Program can support this cooperation between the caseworker and carer to meet the health needs of the child.

When is DCJ consent required for medical or dental treatment?

Where an authorised carer does not have the authority to consent (as set out above), DCJ (or Barnardos) may be required to provide consent as an exercise of parental responsibility. This includes:

- Medical and dental treatment involving surgery (non-urgent)
- Medical interventions involving drug and alcohol programs
- Admission to and treatment within a psychiatric hospital
- Contraception for children not considered to be mature minors
- Specialised invasive medical testing advised by a medical practitioner.
- End of Life medical interventions and decisions including endorsement of End of Life Plans
- Gender affirming health care

DCJ may also become involved in the medical or dental care of a child or young person under the parental responsibility of the Minister in other circumstances, including:

- Where there is disagreement between the NGO service provider and the carer regarding the medical approach or a negative outcome from the medical approach, and there has been no resolution through normal processes set out under the Permanency Case Management Policy
- Where there is an allegation that the medical procedure was done without lawful authority. This should be immediately reported to DCJ.

Wherever possible, consent should be obtained from DCJ during normal business hours to avoid the need to contact the Child Protection Helpline. NGO OOHC Service Providers should contact their local DCJ Child and Family District Unit (CFDU) to obtain consent if required. This should also be done on behalf of foster or relative kinship carers. NGO OOHC Providers will be required to complete relevant paper work with input from the foster, relative or kinship carers and provide to the CFDU.

When after-hours consent from DCJ is sought by a health practitioner, it is important for DCJ to obtain details about the proposed treatment, including the need for the proposed treatment and the consequences if treatment is not provided. This information is critical for DCJ to provide informed consent.

Are there circumstances where neither DCJ nor an authorised carer is able to consent to medical or dental treatment?

Yes, there are some circumstances where medical treatment can only occur with the approval of a Tribunal or Court, including "special medical treatment" within the meaning of section 175 of the *Care Act* and a "special medical procedure" under the *Family Law Act 1975*.

In these instances, DCJ staff can refer the matter to DCJ Legal and NGO staff can seek advice from their DCJ CFDU.

Is consent required if the treatment is considered to be a medical emergency and necessary to save a child or young person's life or to prevent serious damage to his/her health?

A medical practitioner or registered dental practitioner may carry out medical treatment on a child or young person *without* consent if they are of the opinion, that the treatment on the child or young person is necessary to save his or her life, or to prevent serious damage to his or her health.

Can NGO OOHC service providers give consent to medical and dental treatment?

No, NGO OOHC service providers (with the exception of Barnardos) are not authorised to consent to medical and dental treatment for children and young people who are not considered to be mature minors in OOHC on the Minister's behalf.

However, NGO OOHC service provider staff authorised as carers in an ITC, Alternate Care or Special Care Arrangement can consent to certain medical and dental treatment as the child or young person's authorised carer (refer to Medical and Dental Consent Tool). NGO OOHC service providers may have policies and procedures in place that require authorised carers to seek advice and endorsement of any medical and dental treatment before consenting to certain treatments.

Any policy decisions related to consent for medical and dental treatment developed by the NGO service provider should be shared with authorised carers. If the service provider is aware that the medical or dental treatment requires the consent as an exercise of parental responsibility, they should inform DCJ immediately so that consent can be considered and provided, when appropriate.

When can Barnardos give consent to medical and dental treatment?

Barnardos is the only NGO providing OOHC that has been delegated certain aspects of parental responsibility (including a delegation to consent to a broader range of medical and dental treatments) for certain children and young people, for whom that agency has case management. These decision making functions are set out in a formal Instrument of Delegation and Deed of Agreement with Barnardos.

This delegation does not include a decision to consent to, or to decline to consent to end of life medical treatment or medical treatment involving the termination of a pregnancy, rendering a child or young person infertile or medical treatment involving potential terminal illness. Those matters are to be made by the relevant DCJ delegate in accordance with current DCJ policy and practice.

For more information

For more information refer to:

The Medical and Dental Consent Tool which outlines who has authority to give consent for a range of medical and dental treatments for children and young people in OOHC.

NSW Consent to Medical and Healthcare Treatment Manual which provides operational guidance and procedures to support compliance with the NSW law on obtaining consent to medical and healthcare treatment from patients or their substitute consent providers.