

Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992

4. Section 7A: requirement to consult with family/whānau

Section 7A requires a medical practitioner or responsible clinician to consult with family/whānau during the compulsory assessment and treatment process, unless it is not in the best interests of the patient or proposed patient or it is not reasonably practicable.

When a medical practitioner or responsible clinician is deciding whether family/whānau consultation is in the best interests of the patient or proposed patient, he or she must first consult the patient or proposed patient.

A medical practitioner or responsible clinician must apply any relevant guidelines and standards of care and treatment the Director-General of Health has issued under section 130 when deciding:

- when and how to consult family/whānau or the patient or proposed patient
- whether consultation with family/whānau is reasonably practicable
- whether consultation with family/whānau is in the best interests of the patient or proposed patient.

The names of family/whānau members consulted should be recorded on the initial assessment record form, and the nature of the consultation recorded in the patient's or proposed patient's clinical file.

4.1 General comments

The medical practitioner or responsible clinician should obtain a patient's or proposed patient's consent to consult family/whānau whenever possible. The requirement to consult does not mean a patient or proposed patient forfeits his or her right to confidential care and treatment. Patients' and proposed patients' rights and the protection of those rights continue to be paramount and a major philosophical tenet of the Act.

The Ministry of Health expects the requirement to consult with family/whānau will:

- strengthen family/whānau involvement in the compulsory assessment and treatment process
- enhance the family/whānau's contribution to the family member's subsequent care
- go some way towards addressing family/whānau concerns about information sharing and treatment options
- help facilitate ongoing family/whānau involvement in Mental Health Act processes such as clinical reviews of treatment or court hearings.

The section 7A requirement to consult does not mean all family/whānau concerns about the compulsory assessment and treatment of the family/whānau member will necessarily be addressed. It is possible the requirement will raise family/whānau members' expectations about the extent of their role in clinical decision making and involvement in daily decisions about the care of their family/whānau member. Nevertheless, the requirement to consult should ensure the medical practitioner or responsible clinician makes more informed decisions.

4.2 Who must consult

Section 7A places the requirement to consult clearly and directly on the medical practitioner or responsible clinician; consultation may not be delegated to other staff. However, other clinical staff (such as a care manager or cultural worker) may, because of a pre-existing relationship with the patient or proposed patient and family/whānau, have important roles in facilitating the consultation.

4.3 Who to consult

4.3.1 Defining 'family/whānau'

People's definitions and understandings of family/whānau vary and are informed by people's cultural backgrounds and practices. Almost always, the most important perspective for defining family/whānau is that of the patient or proposed patient.

The following definition is only one of many possible definitions, but the Ministry of Health recommends medical practitioners and responsible clinicians use it to help avoid confusion and for consistency across the country.

4.3.2 Recommended definition

'Family/whānau' means a set of relationships a patient or proposed patient defines as family/whānau. It is not limited to relationships based on blood ties, and may include:

- the spouse or partner of the patient or proposed patient
- relatives of the patient or proposed patient
- a mixture of relatives, friends and others in a support network
- only non-relatives of the patient or proposed patient.¹

A patient's or proposed patient's definition of family/whānau may differ from this recommended definition. If the patient or proposed patient is competent to decide who their family/whānau is, then their definition must be accepted.

¹ Royal Australian and New Zealand College of Psychiatrists. 2000. *Involving Families: Guidance notes: Guidance for involving families and whānau of mental health consumers/tangata whai ora in care, assessment and treatment processes*. Wellington: Ministry of Health.

The Act requires compulsory notifications at various stages of the assessment and treatment process to welfare guardians and to principle caregivers. Such persons should be regarded as family/whānau for the purposes of consultation under section 7A, in addition to other family/whānau members.

4.3.3 Prior competently expressed wishes

There are a number of ways in which a patient or proposed patient may have expressed their wishes as to who to consult in situations of severe illness or crisis, what treatment they do or do not want when in such situations, or who can make decisions on their behalf in certain circumstances. These include:

- crisis or treatment plans – see section 16 of NZS81434:2001 National Mental Health Sector Standard
- Advance Directives – see Code of Health and Disability Consumers' Rights
- Enduring Power of Attorney – see Part IX of the Protection of Personal and Property Rights Act 1988
- Personal Orders under the Protection of Personal and Property Rights Act 1988 – there are 11 types of personal orders that the Family Court can make, including appointment of a welfare guardian.

4.3.4 Deciding disputed definitions of family/whānau

In cases of doubt or dispute, the DAMHS is responsible for deciding:

- whether the patient or proposed patient is sufficiently competent to determine who is their family/whānau
- who the patient's or proposed patient's family/whānau is for the purposes of section 7A.

The DAMHS will make this decision based on advice from the responsible clinician, medical practitioner or key worker.

If the patient or proposed patient identifies as Māori, the DAMHS should seek advice from Māori health workers and cultural support staff. The DAMHS should consult other knowledgeable parties, for example, the patient's or proposed patient's usual general practitioner, key worker, Māori health worker, kaumātua, cultural support staff, Māori consumer advisory groups, Māori advisory committee, and other Māori providers of services to the patient or proposed patient, or a district inspector.

In urgent circumstances, the medical practitioner completing sections 10 and 11 of the Act is responsible for making this decision for the purposes of the Act.

4.4 What consultation is

4.4.1 Definition of 'consultation'

In practical terms, consultation in this context describes a clinical activity which seeks to engage family/whānau in a therapeutic process. Consultation is a two-way ongoing process.

Consultation does not require the parties to agree and does not require negotiations towards agreement. However, negotiations and agreement might occur as the tendency in consultation is for the parties to work towards consensus.²

Meaningful consultation has been described by the courts to consist of the following stages and may occur in a variety of ways, including in person or by phone (including by teleconference). The party required to consult:

- begins consultation in the formative stages of a process by notifying affected or interested parties of a proposed (not final) decision or action
- provides the affected or interested parties with a reasonable amount of time in which to respond to the notification (which will depend on the urgency of the decision or action)
- may have a working plan in mind that he or she informs the affected or interested parties about, but must keep an open mind and be ready to change or start afresh should that be required
- provides the affected or interested parties with a reasonable opportunity to form and state their views in a safe and open environment
- considers properly the representations of the affected or interested parties before deciding what will be done
- notifies the affected or interested parties of the outcomes of the consultation.

4.4.2 Deciding about consultation

A medical practitioner or responsible clinician must consult the patient or proposed patient to ascertain his or her views about consultation with family/whānau. The practitioner or clinician must also provide the patient or proposed patient with an opportunity to consider their final response.

A patient or proposed patient may refuse permission for a medical practitioner or responsible clinician to consult family/whānau. In this situation it is up to the practitioner or clinician to then decide whether consulting family/whānau would be in the best interests of the patient or proposed patient.

² *Wellington Airport v Air New Zealand* [1993] 1 NZLR 671.

If the circumstances are urgent, a medical practitioner or responsible clinician must still consult with the patient or proposed patient to seek his or her views about the consultation. However, given the urgency the clinician may decide it is not in the best interests of the patient or proposed patient or not reasonably practicable to consult family/whānau at that time. This does not preclude the practitioner or clinician from communicating with the family/whānau at the earliest possible opportunity after a decision has been made and before further action is taken.

4.5 When to consult

Consultation with family/whānau is an ongoing process. It is recommended a medical practitioner or responsible clinician consults:

- when making significant treatment decisions
- at each juncture in the compulsory assessment and treatment process
- when considering discharge from the Act.

Consultation may require the medical practitioner or responsible clinician to disclose a patient's or proposed patient's personal and health information to family/whānau.

The disclosure of information for the purposes of consultation under section 7A is not a breach of the Privacy Act 1993 or Health Information Privacy Code.³

Consultation at the different stages of the compulsory assessment and treatment process is likely to assist the responsible clinician in making decisions at those stages. It may also increase family/whānau awareness of and/or involvement in and contribution to court hearings under the Act.

4.6 How to consult

4.6.1 General comment

A medical practitioner or responsible clinician who consults family/whānau must use his or her discretion to decide how much information to disclose to the family/whānau. The practitioner or clinician must consider how much information the family/whānau needs to make informed and useful responses to the proposed course of assessment or treatment. The practitioner or clinician may have a working plan in mind, but must keep his or her mind open and be ready to change or start afresh if this is required.

For consultation to be meaningful it must occur before the medical practitioner or responsible clinician makes a decision. Consultation after a decision reduces the process to information sharing.

³ See sections 7 and 53 of the Privacy Act 1993.

Consulting family/whānau as part of the assessment and treatment process is generally ongoing to allow views to change as new information is exchanged. If a significant period has elapsed or new information has come to light since a consultation, the medical practitioner or responsible condition should not rely on that consultation but consult afresh.

Further consultation may be particularly relevant when the care of a patient changes between clinicians. The practitioner or clinician should outline the likely changes and the opportunities family/whānau will have to consult the new clinician or attend future meetings or court hearings.

4.6.2 Māori

Māori generally need family/whānau involvement, as Māori more often see themselves more as members of the family/whānau than as individuals. The emphasis the Act places on the individual patient or proposed patient conflicts with the 'whānaungatanga' concept of interdependence and the interconnectedness between all members of the whānau, including the tangata whai ora.⁴

A medical practitioner or responsible clinician should not make decisions about Māori individual interests versus family/whānau interests solely. He or she must involve Māori health workers, kaumātua, cultural support staff, tangata whai ora advocacy services, Māori advisory committees, or other Māori providers of services to tangata whai ora.

To implement section 7A appropriately and to ensure mental health staff work effectively with family/whānau, staff may need:

- specific training resources
- appropriate cultural expertise
- support within the organisation.

Māori do not all share the same views and practices. Every family/whānau needs recognition and to be able to participate in care, assessment and treatment processes in a culturally safe environment.

To reduce the risk of inappropriate service delivery and to ensure the patient or proposed patient remains culturally safe, mental health services may need to:

- ensure kaumātua are involved
- seek guidance from appropriate Māori support staff such as Māori health workers, Māori advisory group members or tangata whai ora advocates
- seek advice about tikanga Māori
- train staff in cultural safety
- ensure staff are flexible and responsible.

⁴ 'Tangata whai ora' means 'the one who is seeking wellness'.

For this involvement to be meaningful and effective, working relationships between mental health service staff and Māori support staff must be developed and maintained well in advance of any crisis intervention.

4.6.3 Other cultures

Similar consideration must be given to the cultural needs of a patient or proposed patient, and their family/whānau, when they identify as a Pacific person or from another culture or ethnicity.

4.7 Reasons for not consulting

4.7.1 'Best interests'

The importance of the 'best interests' concept is that the interests of the patient or proposed patient come ahead of anybody else's interests. 'Best interests' is an expression used elsewhere in the Act (eg, section 19 and clause 2 of the First Schedule).

The interests of a patient or proposed patient and his or her family/whānau may conflict. The 'best interests' assessment means the medical practitioner or responsible clinician must resolve the conflict in favour of the patient or proposed patient about or for whom they are making a decision.

A medical practitioner or responsible clinician must have reasonable grounds for deciding consultation with a patient's or proposed patient's family/whānau is not in their best interests (under section 7A(3)(a)).

To determine a patient's or proposed patient's best interests, a medical practitioner or responsible clinician must consider all relevant clinical or personal information, which includes:

- the mental state of the patient or proposed patient
- the patient's or proposed patient's competence to make such a decision
- any advance directives the patient or proposed patient may have made
- why the patient or proposed patient wants their family/whānau excluded
- the patient's or proposed patient's clinical and family/whānau history
- any previous contact the patient or proposed patient has had with other mental health service providers
- the likelihood of the family/whānau having information not available from other sources.

If the medical practitioner or responsible clinician decides consulting family/whānau is not in the patient's or proposed patient's best interests, he or she must take into account that:

- he or she may still seek information from the family/whānau

- the family/whānau may continue to provide information to the practitioner or clinician
- the family/whānau may be given information that was collected for the purpose of being disclosed to the family/whānau (such as information about medication when the family/whānau will be providing the ongoing care of a discharged patient)
- the family/whānau may be given information if the practitioner or clinician considers it will prevent a serious threat to the life or health of the patient or family/whānau members.

4.7.2 ‘Reasonably practicable’

The term ‘reasonably’ brings a measure of objectivity to a decision: with knowledge of the same facts, would another responsible clinician make the same decision?

The term ‘practicable’ has been considered in other jurisdictions.⁵ It acknowledges that, for various reasons, there are circumstances in which we must be content with less than the ideal, and the degree of compromise calls for judgment and common sense.

Thus when considering whether consultation is ‘not reasonably practicable’ the medical practitioner or responsible clinician needs to consider objectively whether consultation is feasible. He or she may consider:

- whether the situation is urgent (eg, if the patient or proposed patient is acutely unwell and the clinician needs to act quickly)
- the time it will take to contact family/whānau members as well as the time required for family/whānau members to form their views
- any other disadvantage.

A medical practitioner or responsible clinician needs to balance the disadvantages of consultation with the potential benefits to the patient or proposed patient.

For assessments occurring after hours, the time of day is not necessarily a reason for not consulting family/whānau. An after-hours assessment would invariably be an urgent assessment and family/whānau consultation may be highly relevant to the immediate safety and risk issues.

Likewise, resource constraints (eg, lack of clinician time) will rarely of themselves justify a ‘not reasonably practicable’ decision. Urgency combined with resource constraints may limit the time available for consultation but will not in most cases make it ‘not reasonably practicable’.

⁵ *R (on the application of E) v Bristol City Council* [2005] England and Wales High Court EWHC 74 (Admin).