



# Medical Consent Regimes

## Mental Health and Guardianship Legislation

The following table sets out an understanding of the consent regime likely to be applicable by reference to patient category and treatment for persons under the *Mental Health Act 2007* or the *Mental Health and Cognitive Impairment (Forensic Provisions) Act 2020*.<sup>1</sup> See overleaf for notes about this legislation.

Category	Mental health treatments	Electro convulsive therapy (ECT)	Sterilisation	Termination of pregnancy	Surgical treatment	Any other non-surgical treatment
<b>Voluntary patient</b>	Mental Health or Guardianship <sup>2</sup>	Mental Health	Guardianship	Guardianship	Guardianship	Guardianship
<b>Detained patient</b> Involuntarily admitted and awaiting assessment under s 27 of the MHA or admitted on a breach of a CTO	Mental Health	Mental Health	Guardianship	Guardianship	Guardianship	Guardianship
<b>Assessable person</b> Involuntarily admitted and assessment carried out under s 27 of the MHA but before the Mental Health Inquiry	Mental Health	Mental Health	Guardianship	Guardianship	Guardianship	Guardianship
<b>Mentally disordered patient</b>	Mental Health	Mental Health	Guardianship	Guardianship	Guardianship	Guardianship
<b>Involuntary patient</b> Involuntarily detained after the Mental Health Inquiry (MHRT order has been made)	Mental Health	Mental Health	Mental Health	Mental Health (if surgical treatment <sup>3</sup> )	Mental Health <sup>3</sup>	Guardianship (including non-surgical termination of pregnancy)
<b>Forensic or correctional patients</b>	Mental Health	Mental Health	Mental Health	Mental Health (if surgical treatment <sup>3</sup> )	Mental Health	Guardianship (including non-surgical termination of pregnancy)

<sup>1</sup> Note that references in the table to “Mental Health” and “Guardianship” are references to the *Mental Health Act 2007* and *Guardianship Act 1987* respectively.

<sup>2</sup> *Mental Health Act 2007* applies if patient has capacity to consent. *Guardianship Act 1987* applies if patient lacks capacity to consent.

<sup>3</sup> ‘Surgical treatment’ is defined in the *Mental Health Act 2007* as ‘a surgical procedure, a series of related surgical operations or surgical procedures, and the administration of an anaesthetic for the purpose of medical investigation’ (s 98).

## Notes about the legislation

The *Guardianship Act 1987*, *Mental Health Act 2007* and the *Mental Health and Cognitive Impairment (Forensic Provisions) Act 2020* provide medical consent regimes for people to whom those Acts apply.

Under section 34(2) of the *Guardianship Act 1987*, the provisions of the *Mental Health Act 2007* or the *Mental Health and Cognitive Impairment (Forensic Provisions) Act 2020* will prevail in the event of an inconsistency between the provisions of Part 5 of the *Guardianship Act* and either of those two Acts.

### Patient categories

These are the relevant patient categories under the *Mental Health Act 2007*:

- **Voluntary patient** – a person admitted under Chapter 2 or reclassified as a voluntary patient.
- **Detained patient** – A person admitted (involuntarily) to a mental health facility awaiting assessment under section 27 of the Act or on a breach of CTO under section 63.
- **Mentally disordered person** – A person (whether or not suffering from a mental illness) whose behaviour is so irrational that they have been assessed under section 27 of the Act as requiring involuntary detention for their own protection from serious physical harm or the protection of others from serious physical harm.
- **Assessable person** - A person detained in a declared mental health facility after examinations under section 27 of the Act for whom a mental health inquiry is required to be held.
- **Involuntary patient** - A person ordered to be detained as an involuntary patient after a mental health inquiry (or otherwise by the Mental Health Review Tribunal) and includes a forensic patient and a correctional patient \* (section 4 and section 98) and for the purposes of mental health treatments and ECT includes “a detained person” (section 82).
- **Forensic patients** - a person detained in a mental health facility, correctional centre or released subject to an order for conditional release under the *Mental Health and Cognitive Impairment (Forensic Provisions) Act 2020*.
- **Correctional patients** – a sentenced or remand inmate transferred from a correctional centre to a mental health facility.

### Community Treatment Order (CTO)

Note the following general comments:

- As persons on CTOs are not “patients” under the MHA, the categories set out above under the MHA do not apply. The Guardianship Act applies.
- The MHA authorises medication and treatment as set out in a Treatment Plan that forms part of the CTO.
- Treatment Plans should be carefully scrutinised if an application for consent to medical treatment is being considered by NCAT to ensure that consent is not being sought for mental health and associated treatment already contained in the treatment plan.
- In addition, if consent is sought for any other treatment or intervention, evidence should be sought as to whether what is being proposed fits with the treatment contained in the Treatment Plan or is not contra indicated.