



HUMAN RIGHTS &
DISCRIMINATION COMMISSIONER
ACT Human Rights Commission

Factsheet

Right to Protection from Medical or Scientific Experimentation (s.10(2))

Section 10(2) of the *Human Rights Act 2004* says that:

No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

Note: The prohibition on torture and cruel, inhuman or degrading treatment under international law applies at all times and under all circumstances.

This factsheet is not intended to be a substitute for legal advice.

Scope of the Right

Section 10(2) of the Human Rights Act specifically prohibits involuntary medical or scientific experimentation – a prohibition which stems from Nazi experimentation in the Second World War, but remains relevant today.

However, the protection is broader than medical or scientific experimentation. Section 10(2) provides that no medical treatment can be administered on a person without that person's free and informed consent. This issue comes up frequently for people with disabilities in our community, and often arises in end-of-life situations.

What is lawful consent?

A recent Victorian Law Reform Commission Review of Guardianship Law described the concept of capacity to consent as follows: 'Capacity is a legal concept that describes the level of intellectual functioning a person requires to make and accept responsibility for important decisions that often have legal consequences'.

Under the common law, all adults are presumed to have capacity and the burden of disproving capacity is placed upon any person who seeks to challenge capacity. In *Re T (An adult: Consent to Medical Treatment)* [1992] 4 All ER 649 Butler-Sloss LJ held:

A man or woman of full age and sound understanding may choose to reject medical advice and medical or surgical treatment either partially or in its entirety. A decision to refuse medical treatment by a patient capable of making the decision does not have to be sensible, rational or well considered.

This statement has been cited with approval in Australian courts: see *Hunter and New England Area Health Service v A* [2009] NSWSC 761.

Fluctuating capacity and advanced consent

There is a growing acceptance of advanced directions. That is, the ability of an individual with capacity to pre-determine how they will be treated in future if they lose capacity.

In *Re T*, the Court suggested that advanced directions were permissible, if:

1. The person had capacity at the time;
2. Their directions were clearly established;
3. Applicable to the current circumstances; and
4. Made without undue pressure.

However, advanced directions can be disregarded in emergency situations.

Example: Consent to medical treatment – *Australian Capital Territory v JT* [2009] ACTSC 105 (28 August 2008)

This case concerned an application for a declaration that it is lawful for medical practitioners employed by the Territory to desist from affording other than palliative care to a man, JT. The Supreme Court heard that JT was chronically psychotic and suffered from paranoid schizophrenia characterised by religious obsessions. This condition led to him to refuse to eat. Artificial feeding through naso-gastric intubation, though necessary to sustain JT's life, caused distress both to him and staff carrying out the procedure. The Canberra Hospital Clinical Ethics Committee and Psychiatric opinion argued that 'as JT was accepting of death, his mental state indicating capacity to consent should be ignored and his "wishes" respected'. The Supreme Court disagreed, holding that JT was not of sound mind nor capable of informed consent, as such, the declaration was application was dismissed.

The Court's decision accords with the general position that a human rights consistent framework for the withdrawal of medical treatment must operate from the presumption in favour of life-sustaining treatment. This presumption can only be overturned where it would conflict with the competent patient's right to refuse treatment.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 10 could be engaged by activities that:

- Remove or restrict the right to complain about service delivery, or mistreatment by a public authority;
- Regulate the treatment of persons located at any site for which a public authority is responsible, including: a public hospital, an approved mental health service, a prison, a government school, a disability or aged care service, and supported residential service;
- Involve crisis intervention strategies or behavioural management plans that include the use of seclusion, chemical restraint or physical restraint;
- Define and regulate procedures for obtaining consent to medical treatment and experiments;
- Regulate medical treatment of persons without their consent, for example under mental health or guardianship law;
- Regulate the conduct of medical or scientific research.



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