Consent for treatment

A summary guide for health practitioners about obtaining consent for treatment

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Valid consent

A voluntary decision made by a competent patient* to receive specific medical care, which is based on a reasonable understanding of the general nature and effect of the treatment, the alternatives and the risks and benefits involved.

*or valid substitute decision maker
Consent and the law

- Competent adults have the legal right to give or refuse consent to their treatment in most situations. There are some exceptions.
- Practitioners could face legal action for assault and/or battery if they fail to obtain valid consent from a patient for the specific treatment they provide.
- Practitioners may breach their duty of care to patients if they fail to warn them of the risks inherent within a proposed treatment. This could give rise to legal action for negligence.
Consent is important

- Practitioners have both a professional and legal responsibility to provide information to patients about, and seek their consent to treatment. It is part of good clinical care.
- Cursory attention to consent increases the likelihood of a complaint being made, or legal action being taken against a practitioner.
- Think about what is:
  - Reasonable?
  - Sufficient?
  - Defensible?
Who is responsible?

Any practitioner who recommends a person undergo an operation, procedure or treatment, or who performs or provides these, is legally and professionally responsible for:

- ensuring a patient has sufficient, appropriate and relevant information and advice to enable them to make an informed decision.
- obtaining the patient’s consent, or confirming it has been obtained and that the patient has received sufficient information to provide informed consent.
Establishing valid consent

Four requirements must be met to establish whether a person’s consent is valid:

1. **Capacity**: Do they have capacity to understand what the treatment entails, and its implications?
2. **Freely given**: Have they given consent freely, and without undue pressure?
3. **Specific**: Does their consent relate to the treatment you discussed with them and they agreed to?
4. **Informed**: Has the intended treatment been discussed in a way that they can understand?
Providing information

The National Health and Medical Research Council (NHMRC) guidelines recommend that practitioners discuss with patients:

- the possible or likely nature of the illness.
- the proposed approach to investigation and treatment; what this entails, expected benefits, common side effects and material risks, how conventional or experimental it is and who will undertake the intervention.
- other options for diagnosis and treatment.
- the degree of uncertainty about diagnosis/ outcome.
- the likely outcome of not having the treatment.
- any significant long term effects that may impact the person which may be associated with treatment.
- time and costs involved, inc. out of pocket expenses.
Informing of material risk

- Material risk is any risk, which a reasonable person in the patient’s situation, would attach significance to.
- Practitioners should give information about the material risks of any intervention, especially those likely to influence a patient’s decision.
- Any known risks should be disclosed, particularly if a particular adverse outcome is a common event or may be severely detrimental to a patient if they were to be affected.
- The greater the risk, the clearer your documentation should be that it has been discussed and understood prior to consent.
Capacity to consent

- A person has capacity to give valid consent if they can understand what is proposed and communicate, in some way, their agreement or refusal.
- Children under 14 lack capacity in law to consent to their own treatment. A 14 – 18 year old may have capacity.
- Some people with an impairment in the functioning of their brain, whether permanent or temporary, may lack capacity to consent to specific treatment proposals.
Substitute decision makers:

▪ can make a decision about treatment on behalf of a person who lacks capacity, essentially acting ‘as the person’ for the purpose of providing consent. They can also refuse consent.

▪ should make an informed decision in the persons best interests after considering all of the relevant information.

▪ must have the legal authority to act in this role.

▪ can expect practitioners to consult with them prior to treatment in most situations.
Substitute consent limits

- Substitute consent is not required for:
  - Urgent treatment needed to save a person's life or prevent serious damage to their health.
  - Minor treatment that is necessary, in the person's best interests and which the person who lacks capacity does not object to, if there is no person responsible or they cannot be contacted.
  - Tests or treatment required under certain legislation, such as the Mental Health Act.
Consent for children

- Consent for treatment must be obtained from a child’s parent or legal guardian until they turn 14.
- Consent can be obtained from one or both parents (regardless of marriage status), unless a Court Order has been made which stipulates that one parent has sole responsibility.
- For children in care, the person or agency with ‘parental responsibility’ can consent.
Informed consent for young people

- From the age of 14, a minor may be mature enough to give their own consent.
- Medical and dental practitioners should assess whether they are capable of consenting and if not, should seek the consent of their parent or guardian.
- A young person’s valid consent cannot be overruled by their parents.
- From 16, the consent of a minor is generally viewed as sufficient.
Informed consent for adults who lack capacity

- A ‘person responsible’ can provide substitute consent to medical and dental treatment on behalf of the person. Practitioners should obtain the consent of the person responsible prior to treating the person.
- The NSW Guardianship Tribunal can provide consent for treatment or appoint a guardian with the authority to make medical & dental decisions if a person responsible can’t be identified.
Person responsible

A person responsible can be a:

- Public or private guardian appointed by the NSW Guardianship Tribunal/ Supreme Court.
- Enduring guardian appointed by the person prior to them losing capacity.
- Spouse/de-facto, or in their absence an unpaid carer, then family member or friend. The person responsible must have a close and continuing relationship with the person.
Informed financial consent

Informed financial consent = When a health practitioner gives a full explanation of the fees associated with a treatment and the patient agrees to proceed.

- Fees should be outlined well in advance of the procedure and any expected additional costs, such as the fees of other professionals used to undertake the treatment, should be available to the patient prior to their consent being obtained.
- Patients may have a remedy through NSW Fair Trading, if financial consent is not obtained.
References

Medical Board of Australia (2010), Good Medical Practice: A Code of Conduct for Doctors in Australia

National Health and Medical Research Council (2004), General Guidelines for medical practitioners on providing information to patients

Consumers Health Forum of Australia (2012), Informed Financial Consent discussion paper

NSW Health Policy Directive (2005), Consent to Medical Treatment - Patient Information

NSW Office of the Public Guardian (2011), Substitute Consent: What the law says
Useful links

Medical Board of Australia

NSW Health

Public Guardian