

Fact Sheet

Consent to Medical Procedures for Minors

Introduction

In general, a minor (less than 18 years) requires consent from a parent or guardian before treatment can commence, with the exception of an emergency or where treatment is of a minor nature.

However, in Australia there are legislative provisions and common law principles that recognise the developing competency of adolescents to make decisions regarding their own medical treatment.

As a result, in some circumstances, parents and their teenage children hold concurrent rights to consent to the child's treatment.

The Law

In South Australia

The Consent to Medical Treatment and Palliative Care Act 1995 prescribes that;

- An individual of 16 years of age or over can consent to medical treatment 'as validly and effectively as an adult'
- When two medical practitioners believe and state in writing that certain treatment is in the best interests of the child and the child is 'capable of understanding the nature, consequences and risks' involved, that child can validly consent to their own treatment. This is so even when the child has not attained 16 years of age.

In New South Wales

According to the Minors (Property and Contracts) Act 1970,

- A child aged 14 years or over may consent to his or her medical treatment, and the consent of the child will be effective in terms of defending an action for assault or battery relating to the treatment
- Parents of children under the age of 16 can validly consent to their child's medical treatment.

ACT

The Age of Majority Act 1974 requires a parent or legal guardian to consent to medical procedures for persons under the age of 18 years.

However, if the practitioner assesses the child to have sufficient maturity to give consent and finds that the child adequately understands the nature and consequences of the treatment, that child is able to give their own consent.

Other States

The common law applies in those Australian jurisdictions that have not specifically legislated in relation to the issue of minors' consent to medical treatment.

The common law position relating to a minor's competency to consent to treatment was established by the English House of Lords decision in *Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112*.

That case determined that minors may authorise medical treatment when they are old enough and mature enough to decide for themselves, provided they are capable of understanding what is proposed and of expressing their own wishes. This is commonly referred to as the *Mature Minor* or *Gillick competent* child. The level of intelligence and understanding required to give a valid consent is a question of fact.

Assessing capacity is a matter for professional judgment. Judgment about a minor's competence involves consideration of:

- Their ability to understand the issues and circumstances
- Their maturity and degree of autonomy
- The type and sensitivity of the information to be disclosed
- The age of the minor, and
- The complexity and nature of the treatment (e.g. elective, therapeutic or emergency).

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Mature Minors right to refuse treatment

It seems logical that if a child has capacity to consent then they also have capacity to refuse treatment. This has not been considered in Australian courts but there have been a number of recent cases in the UK in which courts have authorised treatment of adolescent patients despite their refusal.

Disputes between parents and children about treatment

In the case where a child consents to treatment but the parents become aware of the issue and refuse to provide consent, then the child's consent will generally be sufficient legal authority for the doctor to undertake the procedure if the child is *Gillick* competent. If the situation is complicated or unable to be resolved then the jurisdiction for decision making lies with the Family Court of Australia and/or the Supreme Court.

Confidentiality

If the child meets the *Gillick* definition of a 'mature minor' it is not necessary for a doctor to contact the child's parent. The child is entitled to the same confidentiality of medical information as an adult patient.

There may be circumstances where a doctor is justified in breaching confidentiality and informing parents directly where first obtaining the child's consent may not be feasible. For example, where there is an urgent need to treat a previously undiagnosed serious illness.

The doctor's justification for the breach is based on his/her judgment and the balance between two competing duties:

- Not to disclose personal information about a patient to a third party without the patient's consent, and
- To promote the patient's health.

An unforeseen need to later contact the child may arise following any consultation/investigation/treatment provided. We suggest confidential contact details are sought from the child at the beginning of the consultation to avoid inadvertent breach of confidentiality later. This contact may be direct to the child or a phone number or address of a close responsible adult with whom the child feels comfortable sharing a confidence e.g. school counsellor or family member.

Medicare

The capacity of children below the age of 18 years to consent to medical treatment independently of their parents is recognised by Medicare.

The doctor may bulk bill Medicare for the consultation with or without advising the parents. A separate Medicare card may be issued to a patient over the age of 15 years.

Referral for Ongoing Care

Where a doctor has a moral, religious or ethical dilemma which prevents treating a minor for sensitive issues such as terminations of pregnancy or emergency contraception, alternative referral for investigation or treatment should be arranged immediately. We recommend the doctor does not impose his/her own views on the patient.

Conclusion

Absolute dominion of parents and guardians over a child is no longer the barrier it once was to maintaining a child's confidentiality. Societal change has given rise to a need to treat minors for a wide range of sensitive conditions without parental consent. Parental rights dwindle proportionally with the child's maturity.

Where disputes arise in relation to the medical treatment of a child the Family Court has jurisdiction to make a decision in the best interests of the child.

Gillick has paved the way for the circumstances of each individual child to be taken into account when assessing the need for parental or guardian consent.

If ever in doubt about consent issues concerning children we recommend that you contact Medical Insurance Group Australia.

Disclaimer:

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