



# Does my patient have capacity to consent to treatment?

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A competent adult patient has an ethical and legal right to give or withhold consent to an examination, investigation or treatment. Depending on the nature and complexity of an intervention, a patient with a developmental disability may be capable of consenting to their own medical treatment. In circumstances in which an adult patient does not have the capacity to consent, there is specific guardianship legislation enacted in each state that provides for valid consent by a substitute decision maker.

## Case history

Ms Louise Smith, aged 25 years, was a new patient to the general practice. Louise had a developmental disability and was brought to the practice by the case worker from her group home. The case worker advised the general practitioner that Louise had recently moved into the group home. She thought Louise should have a full check up, including a Pap test and advice regarding contraception. The GP obtained a brief history from the patient. He was concerned that Louise may not have the capacity to consent to the proposed examination and treatment.

including a Pap test. He also needed to ascertain whether a Pap test and contraceptive advice were indicated in Louise's case. The GP then had to decide whether he thought Louise was capable of weighing the information to arrive at a decision. At the conclusion of his discussion with Louise and the case worker, the GP formed the view that Louise was not competent to provide consent for the proposed examination and treatment. He asked if Louise had a guardian. The case worker informed the GP that Louise's mother acted as her guardian. The GP asked Louise and the case worker to contact the patient's mother and ask her to attend a consultation with Louise, or to contact the GP directly to discuss the matter further.

## Discussion

This case raises some important issues surrounding consent in medical practice.

### When should patient consent be obtained?

A patient needs to give consent before undergoing any examination, investigation, procedure or treatment. In many instances, this consent is implied; for example, a patient holding out their arm to have their blood pressure checked. It is important to note that consent is not required in an emergency, if it is impractical to do so.

### What is valid consent?

To be valid, the consent of a patient must be:

- freely given and without duress
- given by someone who is legally capable (competent) of consenting
- specific and cover the intervention or procedure to be performed, and
- informed.

### What information should I provide to my patient?

The NHMRC's *General guidelines for medical practitioners on providing information to patients*<sup>1</sup> outlines the information that should be given to patients to ensure valid consent. This involves the provision of information about a proposed approach to investigation, diagnosis and treatment including:

- what the proposed approach entails
- the expected benefits
- common side effects and material risks of any intervention
- whether the intervention is conventional or experimental
- who will undertake the intervention
- other options
- the degree of uncertainty about the therapeutic outcome, and
- the likely consequences of not choosing the intervention, or not having any intervention at all.

## Medicolegal issues

In his discussion with the patient, the general practitioner tried to ascertain whether Louise was capable of consenting to the examination and treatment that had been recommended by the case worker. In order to make this determination, the GP needed to assess whether Louise had the ability to comprehend and retain information about the nature and consequences of a physical examination,

### How do I obtain consent if the patient has a developmental disability?

By law, an adult patient is presumed to be capable of consenting to treatment and it should not be assumed that every – or any – developmentally disabled patient is incapable of giving consent. The fact that a patient has a developmental disability is not sufficient grounds to determine that the patient is not competent. Depending on the nature and complexity of the intervention being proposed, a patient with a developmental disability may have the capacity to consent to their own medical care.

### How do I decide if my patient has the capacity (competence) to consent to their own treatment?

A competent adult patient is someone who has the capacity to make treatment decisions on their own behalf. Capacity is present if the patient can fulfil the following criteria:

- an ability to comprehend and retain information, and
- weigh that information in the balance to arrive at a choice.

### What should I do if my patient does not have the capacity to consent to their own treatment?

In circumstances in which an adult patient does not have the capacity to consent, there is specific guardianship legislation enacted in each state that provides for valid substitute consent (*Table 1*). Depending on the jurisdiction and the nature of the intervention, this substitute consent may involve obtaining consent from the next of kin, 'person responsible', guardian, Guardianship Board or Court.

### Risk management strategies

All states have guardianship legislation dealing with consent to the treatment of adults who lack capacity to consent on their own behalf. The purpose of this legislation is to promote the autonomy of the represented person and to safeguard the person's best interests. While the legislative provisions vary between states, all of the acts contain provisions allowing for the appointment of a person to act on behalf of the represented

**Table 1. State substitute consent**

<b>Vic</b>	Guardianship and Administration Board Act 1986
<b>NSW</b>	Guardianship Act 1987
<b>NT</b>	Adult Guardianship Act 1988
<b>WA</b>	Guardianship and Administration Act 1990
<b>ACT</b>	Guardianship and Management of Property Act 1991
<b>SA</b>	Guardianship and Administration Act 1993
<b>Tas</b>	Guardianship and Administration Act 1995
<b>Qld</b>	Guardianship and Administration Act 2000

person. It should be noted that in all states, only the Guardianship Board/Court has authority to consent to sterilisation and certain other defined procedures. General practitioners should ensure they are aware of the specific provisions of the guardianship legislation that is applicable in their state.

### Summary of important points

- Obtaining patient consent is good medical practice and a legal necessity.
- An adult patient is capable of giving consent to their own treatment if they have an ability to comprehend and retain information, and to weigh that information to arrive at a choice.
- In situations in which a patient's capacity to consent is difficult to determine, GPs should confer with an experienced colleague or seek advice from their medical defence organisation.

Conflict of interest: none declared.

### Reference

1. NHMRC. General guidelines for medical practitioners on providing information to patients. Canberra: NHMRC, 1993 (under review).

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