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Capacity to consent to treatment

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 an intellectual 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 and territory which provides for valid consent by a substitute decision maker.

Keywords: informed consent; mental competency; disability, intellectual

Case study

The patient, 52 years of age, presented to the general practitioner for the first time. The patient had a longstanding intellectual disability as a result of a motor vehicle accident some 30 years earlier. He was accompanied at the consultation by a paid community health worker. The health worker said that she was concerned about a lesion on the patient's cheek, which appeared to be slowly getting larger. When asked by the GP, the patient reported that he did not know how long the lesion had been present.

On examination, the GP thought the lesion was most likely a basal cell carcinoma (BCC) but he recommended an excision biopsy. In view of the patient's intellectual disability, the GP was not certain if the patient had the capacity to provide consent for the biopsy.

This case study 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
- informed.

How do I obtain consent in circumstances in which the patient has an intellectual disability?

At common law, there is a general presumption that a patient who is 18 years of age or older has capacity to make their own decisions and provide consent for their medical care. It should not be assumed that every, or any, intellectually disabled patient is incapable of giving consent and the fact that a patient has an intellectual 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 an intellectual disability may have the capacity to consent to their own medical treatment.

How do I decide whether 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 Australian state and territory, which provides for consent from a substitute decision maker (Table 1). Depending on the jurisdiction and the nature of the intervention, a substitute decision maker may be:

- the Supreme Court of each state or territory
- the Guardianship Board/Tribunal and the guardians they appoint
- health attorneys, enduring guardians and medical agents appointed by the patient, and
- relatives and friends under the 'person responsible' provisions of the relevant guardianship legislation.¹

In general, the order for appointment of the person responsible is as follows:

1. a court or tribunal appointed guardian
2. an enduring attorney or enduring guardian
3. the spouse of the person in a close and continuing relationship with the person
4. the unpaid primary carer
5. a close relative or friend of the person.¹

Table 1. Guardianship legislation

ACT	<i>Guardianship and Management of Property Act 1991</i>
NSW	<i>Guardianship Act 1987</i>
NT	<i>Adult Guardianship Act 1988</i>
QLD	<i>Guardianship and Administration Act 2000</i>
SA	<i>Guardianship and Administration Act 1993</i>
TAS	<i>Guardianship and Administration Act 1995</i>
VIC	<i>Guardianship and Administration Board Act 1986</i>
WA	<i>Guardianship and Administration Act 1990</i>

Risk management strategies

All Australian states and territories have enacted guardianship legislation which deals 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, all of the Acts contain provisions allowing for the appointment of a person to act on behalf of the represented person. It should be noted that substitute decision makers are bound to make decisions in the represented person's best interests, or which promote and maintain the person's health and wellbeing. The substitute decision maker should also take into account whatever was known about what the person would have wanted in the circumstances.

General practitioners should ensure that they are aware of the specific provisions of the guardianship legislation that is applicable in their state or territory. 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.

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Reference

1. Kerridge I, Lowe M, Stewart M. Ethics and law for the health professions. 3rd edn. Sydney: The Federation Press, 2009, p. 270–4.

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