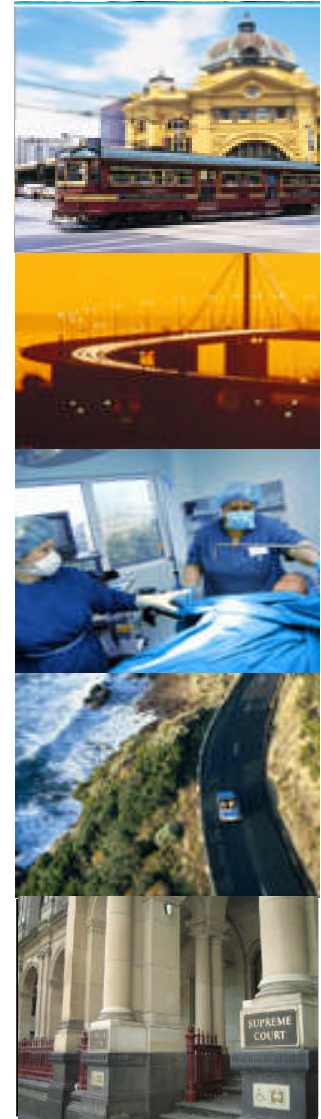


Informed Consent

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VICTORIAN MANAGED INSURANCE
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What is Informed Consent?



- The general rule is that a medical practitioner must not undertake medical procedures on patients without their informed consent.
- Informed consent is the voluntary agreement by a patient to a proposed health care management approach given after proper and adequate information is conveyed to the patient about the proposed management, including potential risks and benefits and alternative management options.
- Failure to obtain a patient's consent may expose a medical practitioner to a claim of negligence or on occasions for assault.

What are the requirements for valid consent?



For consent to be valid:

- It must be given voluntarily and not coerced or induced by fraud or deceit.
- It must cover the procedure undertaken.
- It must be given by a person with legal capacity.
- The patient needs to have an awareness and understanding of the proposed procedure or treatment, and its known material risks.

What are the exceptions to the general rule that consent is required?



- Emergencies.
- Treatment authorised by legislation or a Court.

Is a signed consent form evidence of the informed consent process?



A signed consent form, while helpful, is not proof that the patient has agreed to the procedure or that the patient was adequately informed.

What information must be given to a patient?



The case law requires a medical practitioner to mention “material” risks to a patient. A risk is “material” if in the circumstances of a particular case, a reasonable person in the patient’s position, if warned of the risk, would be likely to attach significance to it.

It is important to recognise that the obligation extends beyond giving information on material risks to other types of information that the medical practitioner knows, or should know, the patient would be likely to consider significant. Examples include the possibility of deferring an operation, possible alternatives to the proposed treatment and the cost of the treatment.

What information must be given to a patient (cont.)?



In each case the medical practitioner must decide what information is material. The following factors are relevant:

- The nature of the matter to be disclosed; where there is a greater risk of harm or the harm is likely to be significant, then there is a greater obligation to provide information.
- The nature of the proposed procedure or treatment. For example whether it is discretionary or necessary.
- The questions asked by the patient.
- The temperament and health of the patient as well as their personality and level of understanding.
- The information provided should take into account the patient's circumstances, their personality, expectations, fears, beliefs, values, health and cultural background.
- The general surrounding circumstances.

How should the information be presented?



- Use plain language in communicating information to a patient.
- Allow the patient time to make a decision.
- Use an interpreter where the patient is not fluent in English.
- Closely observe the patient's responses to help identify what is not being understood so that further explanation can be given.

Who can give valid consent on behalf of a child?



A child in this context is a person under the age of 18 years.

In general, a guardian of a child or minor (usually a parent) has the authority to consent to medical treatment and procedures provided that it is in the best interest of the child.

Consent of either parent will generally be sufficient but if the parents are separated it is a good idea to enquire if that parent has authority to consent to treatment, particularly if the treatment is risky.

When a parent consents to treatment, the parent must be provided with the information that is relevant to that treatment.

Generally, in the case of mentally disabled children, parents/guardians have the capacity to consent to medical treatment on the child's behalf. However, in the case of consent to non-therapeutic procedures such as sterilisation it may be necessary to seek the approval of the Court.

When can a child give valid consent independently of their parents/guardian?



The test is whether the child has achieved a sufficient understanding and maturity to enable him/her to understand fully what is proposed and that the treatment is in the best interests of the child.

There is little guidance on how a medical practitioner should assess the competence of older children to give informed consent. Obviously, the more risky the procedure the higher the standard. The child's age and their insight into the nature of the treatment and its possible side effects is relevant. It is also relevant to consider their intelligence and general attitude, personality and health.

If there is any doubt about whether the child satisfied the test of maturity, a medical practitioner can apply for a Court order to authorise the treatment.

In circumstances where major medical procedures are proposed that may be of significant risk, ethically sensitive or disputed, it is advisable to consider applying to the Court for an order authorising the treatment.

A contentious issue is whether the child can refuse the treatment

In what circumstances can a blood transfusion be given to a child without consent?



There is legislation in all states and territories that permits the administration of blood transfusions to children without parental consent in certain circumstances.

In Victoria, a medical practitioner who administers to a child a blood transfusion, without consent, will not face criminal charges provided that he or she can demonstrate that:

- in his or her opinion the blood transfusion was a reasonable and proper treatment for the condition from which the child was suffering; and
- Without the transfusion the child was likely to die.

It is important that the medical practitioner's opinion is supported by a second medical practitioner.

Who can give valid consent for an adult patient who is not mentally competent to consent?



Medical practitioners must assess the patient's ability to understand medical information in order to determine whether the patient is competent to decide whether or not to proceed with the proposed treatment or procedure. Each patient must be assessed individually.

In Australia, the test for competence is whether a person is capable of understanding the general nature and effect of the proposed procedure or treatment.

All states and territories have legislation dealing with consent to treatment of adults who lack the mental capacity to consent on their own behalf. The relevant legislation in Victoria is: *Guardianship and Administration Act 1986 (Vic) Part IVA 36(2)*.

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Who can give valid consent for an adult patient who is not mentally competent to consent (cont.)?



Victoria has legislation enabling a person over 18, while competent, to appoint someone else to make medical decisions if they later become incompetent.

In Victoria, the legislation provides a hierarchy of persons who can consent on a patient's behalf, where the patient has a "disability", is 18 years of age or over and is incapable of giving consent to the carrying out of the medical treatment. A "disability" means intellectual impairment, mental disorder, brain injury, physical disability or dementia. If the patient has a physical disability only he/she can give his/her own consent. The first people from the list below may consent on behalf of a patient who is incapable of giving consent to medical treatment:

1. A person appointed by a patient under the *Medical Treatment Act 1988 (Vic)*.
2. A person appointed by the Victorian Civil and Administrative Tribunal to make decisions in relation to the proposed treatment.

Who can give valid consent for an adult patient who is not mentally competent to consent (cont.)?



3. A person appointed under a guardianship order with power to make decisions regarding medical treatment.
4. An enduring guardian appointed by the patient while competent, and given the power to make decisions regarding medical treatment.
5. A person appointed in writing by the patient with power to make such decisions.
6. The patient's spouse or domestic partner.
7. The patient's primary carer.
8. The patient's nearest relative.