Consent Requirements for Medical Treatment

WHAT IS INFORMED CONSENT AND THE HEALTH SERVICE ESTABLISHMENT OBLIGATIONS?

Advisory Notice 6/20 March 2020

Health practitioners must obtain informed consent from patients undergoing any procedure before the treatment begins. This is a legal requirement. Health service establishments must ensure that consent from patients complies with the law. Note that this Advisory is not legal advice to licensees and represents the Department of Health's view of legal policy for consent requirements for medical treatment.

1 What is informed consent?

1.1 The Department's position is that for consent for medical treatment to be legally effective, all the following criteria must be met:

a. The person giving consent is *competent* to make a decision about their health care
b. The person has been *fully informed* of the treatment and its alternatives and risks
c. The consent is given freely and *voluntarily*, and without coercion.

(Note that different but related requirements apply for persons with a disability under the *Guardianship and Administration Act 1995*.)

1.2 The Australian Commission on Safety and Quality in Health Care defines "informed consent" in the National Safety and Quality Health Service (NSQHS) Standards – Second Edition as:

A process of communication between a patient and clinician about options for treatment, care processes or potential outcomes. This communication results in the patient's authorisation or agreement to undergo a specific intervention or participate in planned care. The communication should ensure that the patient has an understanding of the care they will receive, all the available options and the expected outcomes, including success rates and side effects for each option.

1.3 The Medical Board of Australia's '*Good Medical Practice: A Code of Conduct for Doctors in Australia*' defines "informed consent" at section 3.5 as:

Informed consent is a person's voluntary decision about medical care that is made with knowledge and understanding of the benefits and risks involved. The information that doctors need to give to patients is detailed in guidelines issued by the National Health and Medical Research Council (NHMRC). Good medical practice involves:

1 Providing information to patients in a way that they can understand before asking for their consent.
2 Obtaining informed consent or other valid authority before you undertake any examination, investigation or provide treatment (except in an emergency), or before involving patients in teaching or research.
3 Ensuring that your patients are informed about your fees and charges.
4 When referring a patient for investigation or treatment, advising the patient that there may be additional costs, which patients may wish to clarify before proceeding.

2 Who cannot give consent?[1]

2.1 In most cases, the consent of a parent or legal guardian is required for children. Further information on circumstances where parental or legal guardian consent is not required can be found in the Hobart Community Legal Service Inc. Handbook.

2.2 The provisions of the *Guardianship and Administration Act 1995* apply for adults who are incapable of giving consent either because of permanent disability or due to the person being unconscious.

3 Health service establishment obligations

3.1 The common law requires that patients understand "in broad terms, the nature of any procedure proposed to be performed upon them",[2] and the treatment or procedure must be *specifically named*, to protect the patient from unnecessary interventions by the clinician. The patient must be provided with sufficient information that is relevant, in a form that they will comprehend, and relevant information must not be withheld. The person consenting must do so with a clear mind and without any kind of coercion.

3.2 Private Hospitals and Day Procedure Centres are required to comply with the National Safety and Quality Health Service (NSQHS) Standards. Action 2.4 of the NSQHS Standards – Second Edition requires that: "*The health service organisation ensures that its informed consent processes comply with legislation and best practice*". Best practice principles for Action 2.4 are documented in the NSQHS Standards - Guide for Hospitals and NSQHS Standards - Guide for Day Procedure Services.

3.3 Action 2.5 of the NSQHS Standard – Second Edition requires that:

The health service organisation has processes to identify:

a. The capacity of a patient to make decisions about their own care

b. A substitute decision-maker if a patient does not have the capacity to make decisions for themselves

Health service establishments should refer to NSQHS Standards - Guide for Hospitals and NSQHS Standards - Guide for Day Procedure Services for further information on how to determine the capacity of patients to make decisions about their own care and how to identify a substitute decision-maker.

3.4 Health service establishments are required to comply with the *Health Service Establishments Act 2006* (Act) and *Health Service Establishments Regulations 2011* (Regulations). The Regulations prescribe that licensees must keep clinical records for patients, including the name of any person whose consent to the carrying out of the medical treatment is necessary, and consent forms, as per clause 2(2)(h) and (i) of Schedule 1, Part 5.

4 Questions and further information

4.1 Health service establishments should seek independent legal advice if health practitioners require specific advice on the law relating to informed consent and obtaining proper consent for procedures and treatment.

4.2 For general questions or information about the Department of Health's policy about informed consent, contact 6166 3856 or hselicensing@health.tas.gov.au

[1] Hobart Community Legal Service Inc. *Handbook/Consent/15. Medical and Mental Health – Medical Treatment – Consent*, www.hobartlegal.org.au/handbook/medical-treatment-and-medical-products/medical-treatment/consent/

[2] *Rogers v Whitaker 1992*