

Consent to medical treatment

A doctor working in partnership with a patient to make good clinical decisions goes to the heart of good medical practice. It is essential for the therapeutic relationship of mutual respect and trust between doctor and patient to exist. It is a fundamental principle of medical law and necessary to protect a patient's autonomy. Doctors must respect that a patient must give permission for any medical treatment or examination to be carried out.

When obtaining consent from a patient, a doctor must have a full understanding of the procedure or treatment, how it is carried out and the risks associated with it and be in a position to inform the patient accordingly.

Informed consent

It is the doctor's responsibility to ensure that a patient has been given sufficient time and information to make an informed decision about the treatment or investigation proposed, including the prescription of medication.

Obtaining informed consent requires practitioners to keep their patients up-to-date with any changes in their condition and any treatment or investigation proposed.

The HSE National Consent Policy (available on the HSE website) in Appendix 4 provides guidance on how to best to facilitate communication with the person facing a decision about treatment options such as:

- **Timing:** *If practicable, choose the time of day when the person is most alert and able to make the decision.*
- **Environment:** *Choose the best physical location such as a quiet room and minimise distractions such as phones ringing or noise from a television*
- **Supporter:** *Some persons may wish to have someone close to them or an advocate present during discussion, and this should be facilitated where possible.*
Manner of communication: *Speak clearly and slowly and use simple and concise language avoiding medical terminology and jargon where possible.*
- **Use of printed or other educational material:** *Standardised informational material should always be additional to and not instead of an oral explanation.*
- **Use of communication aids:** *or those with communication difficulties, more specific assistance may be required. Ask the person or someone close to them if there are supports that could be provided to help the person understand, retain and respond to the information being shared with them. Specific communication assistance may be helpful for some, such as use of pictures, drawings, communication boards, yes/no signals and using sign, lámh or another sign system specific to the person.*

Any discussions with patients about the risks and benefits of a proposed procedure or treatment should be documented in the patient's records. Adequate time should be allocated to communicate with patients to obtain informed consent.

Information leaflets are not a substitute for detailed discussion. If leaflets are given to augment discussion with a patient this fact should be documented in the patient's notes.

Screening tests

It is important to realise that consent does not only apply to procedures but also to other forms of treatment and investigations, such as screening tests, eg, genetic screening, PSA levels, etc.

Most often this would take the form of verbal or implied consent; nonetheless the principles of including the patient in the decision-making process, and recording the information shared during the discussion, do apply. This is particularly relevant where there are conflicting views in the medical world as to the appropriateness of testing or potential benefit to the patient.

Prior to undertaking a screening test, the patient's informed consent should be obtained. The patient should be fully informed about the implications of having the test, the possible causes of abnormal levels and the likely management should the investigation highlight any concerns. Providing the patient with a leaflet would be helpful. Informed consent should be documented in the patient's medical record along with the advice that has been given to the patient including providing a patient information leaflet.

Verbal v written consent

Patients can give consent orally or in writing, or they may imply consent by complying with the proposed examination or treatment, for example, by rolling up their sleeve to have their blood pressure taken.

For physical examinations, doctors should always explain what is involved and obtain verbal consent before proceeding. Doctors should be aware of obligations regarding offering a chaperone for any intimate examinations. Please see our factsheet on Chaperones (available on our website).

When carrying out minor or routine investigations or treatments, if a doctor is satisfied that the patient understands what is proposed and the reasons for it, it is usually sufficient to have verbal consent.

Patients should be asked to sign a consent form for more serious or invasive procedures with higher risks, following a discussion on the risks and benefits of the proposed treatment.

Refusal of consent

Every adult with capacity is entitled to refuse medical treatment or withdraw consent and doctors must respect a patient's decision to refuse treatment or withdraw consent, even if they disagree with that decision, consider it unwise or likely to lead to serious harm to the patient.

In these circumstances, a doctor should explain clearly to the patient the possible consequences of refusing treatment and, where possible, offer the patient a second medical opinion. It is very important to take detailed notes of any such discussions with a patient.

If you have any doubts or concerns about the patient's capacity to decline treatment, you must comply with the provisions of the Assisted Decision Making (Capacity) Act 2015 or the Mental Health Act 2001.

Capacity

Please also see Medisec's fact sheet on Assessing Capacity for Medical Treatment (available on our website).

Ordinarily, adults are presumed to have the capacity to make decisions about their own medical treatment. Under the Assisted Decision-Making (Capacity) Act 2015, a person lacks capacity to make a decision if they are unable:

- to understand the information relevant to the decision,
- to retain that information long enough to make a voluntary choice,
- to use or weigh that information as part of the process of making the decision, or
- to communicate his or her decision (whether by talking, writing, using sign language, assistive technology, or any other means).

Medical Council Guidelines

Paragraph 13 of the Medical Council Guide to Professional Conduct and Ethics for Registered Medical Practitioners (available on the Medical Council website) provides general guiding principles in relation to capacity to consent.

The Guide states that:

Consent is a fundamental ethical and legal requirement in medical practice and is based on respect for patient autonomy.

- 13.1 *You must obtain informed consent from the patient, or have another lawful authority, before initiating any treatment.*
- 13.2 *Every adult patient is presumed to have capacity to make decisions about their health care.*
- 13.3 *In order to come to a decision about whether to proceed with any proposed treatment, patients must be sufficiently informed about the treatment options and the nature, risks and benefits of such treatment options.*
- 13.4 *Patients have the right to have an advocate of their choice present during discussions about their healthcare.*
- 13.5 *The process of consent involves dialogue between the patient and the doctor and the ongoing sharing of relevant information in relation to the patient's condition and any proposed treatment. You must listen to the patient and provide them with information in a way that they can understand. You should give the patient as much time and support as possible and answer their questions as accurately and honestly as you can.*
- 13.6 *For consent to be valid, it must be given freely. Patients must understand that they have the right to give, decline and withdraw consent at any time.*

There are instances where a person's capacity to provide consent can be affected by infirmity. In this regard, the Medical Council advises that a functional approach should be taken, when considering the capacity requirements in such an instance. The criterion in assessing the relevant choice depends on the following:

- The patient's level of understanding and retention of the information they have been given.
- Their ability to apply the information to their own personal circumstances and come to a decision
- Their ability to communicate their decision, with help or support where needed.

The Guide states that where a person lacks capacity to make their own decision, you must (paragraph 14.7):

- *Must give effect, as far as is practicable, to the patient's past and present will and preferences.*
- *Must consider the patient's beliefs and values and any other factors the patient would be likely to consider if they were able to do so.*
- *Must consider the views of any person named by the patient as a person to be consulted, and any decision-making supporter or person with legal authority to act on behalf of the patient.*
- *May also consider the views of any carer of the relevant person, anyone who has a bona fide interest in the welfare of the relevant person, or healthcare professionals.*
- *Must act in good faith and for the benefit of the person.*
- *Must act in a manner that minimises the restriction of the person's rights and freedom of action.*
- *Must have due regard to the rights of the person to dignity, bodily integrity, privacy, autonomy, and control over his or her financial affairs and property.*
- *Must consider the likelihood of the patient recovering capacity and the urgency of making the intervention prior to, or to promote, such a recovery.*

- *Must ensure that decisions you make are proportionate to the significance and urgency of the situation and are as limited in duration as is possible in the circumstances.*

Consent with Children and Young People

The Medical Council Ethical Guide clarifies that for the purpose of the guide, 'child' refers to a person aged under 16 years and 'young person' refers to a person aged 16 or 17 years.

Paragraph 22 of the Medical Council Ethical Guide states:

22.1 Children and young people should be involved in, and consulted on, decisions about their healthcare. You should give them information in accordance with their age and maturity, listen to their views and treat them with respect. Your primary duty is to act in their best interests.

Patients aged 16 years and over are entitled by law to give their own consent to surgical medical or dental treatment, which would include treatment for mental illness except where the young person has been admitted under the Mental Health Acts.

In general, for a young person aged under 18 years it is necessary to obtain consent from the young person's parent(s) for voluntary psychiatric admission, organ or tissue donation, or participation in medical research. It is good practice to seek the assent of the young person in these circumstances. Subject to these exceptions, where the young person gives consent to treatment, it is not necessary to obtain consent from their parent(s). It is however good practice to involve parent(s) in healthcare decision-making for young people, if the young person consents to their involvement.

If you are in doubt about providing treatment to a minor you should seek advice from your indemnifier.

A refusal of treatment by a 16 – 17 year old (who has the capacity to make this decision) is legally differentiated from consent to treatment. The Court can overturn this refusal of treatment if it considers this to be in the young person's best interests. Consideration should be given to seeking legal advice if this situation arises.

Patients aged under 16

If a patient aged under 16 years seeks to make a healthcare decision on their own behalf, they should be encouraged to involve their parents in the decision, where appropriate, bearing in mind the paramount responsibility to act in the patient's best interests.

The Medical Council Ethical Guide goes on to say:

22.4.1 In general, the consent of a parent (s) should be obtained before providing treatment to a child under the age of 16 years. It is good practice to involve the child in the discussion as appropriate to the situation and child's level of maturity. Their assent should be sought.

22.4.2 If a child under 16 years does not wish to involve a parent (s) in decisions about their treatment you should, where appropriate, encourage and advise them to do so.

22.4.3 If the child still refuses to involve their parents, you should act in their best interests, taking into account:

- *The child's maturity and ability to understand the information relevant to the decision and to appreciate its potential consequences.*
- *Whether the child's physical or mental health, or any other factors, are affecting their ability to make a decision.*
- *Any other specific welfare, protection, or public health considerations, covered by relevant legislation guidance and protocols such as the Children First Act 201536 and the Children First:*

National Guidance for the Protection and Welfare of Children 201737 (or any equivalent replacement document). Where this is the case, you must follow the relevant guidance or protocols.

22.4.4 In general, where a patient aged under 16 years refuses treatment, but where the parent(s) or legal guardian consents, the doctor may proceed with treatment in the best interests of the child, taking account of the age and maturity of the child, and the urgency of treatment being proposed. If the treatment is not urgent, it is good practice to allow time for discussion with the child and parent(s) or legal guardian with a view to achieving consensus.

In some cases, a patient under 16 may not wish to involve their parents and the Medical Council Ethical Guide says that you can provide treatment in such cases provided you have considered the factors above. Medisec recommends that you note your decision making process carefully in any such circumstances.

Where a parent refuses to consent to an intervention which you reasonably believe to be in the best interests of the child or young person, you must act in the child or young person's best interest, whilst making all reasonable efforts to reach a consensus with the parent. If it is not possible to reach a consensus with the parent, you should seek legal advice as an application to court may be required to determine what is in the best interests of the child or young person.

Confidentiality and children

It is important to note that children and young people have a right to confidential medical treatment but parents and guardians also have a legal right to access medical records of their children until they are 18. You should tell children and young people that you cannot give an absolute guarantee of confidentiality.

In summary

Ensure adequate consent is obtained prior to any investigation or procedure, eg,

- The nature and purpose of the procedure has been fully explained.
- The patient has been warned of the risks involved.
- The alternatives to the procedure have been discussed.
- A patient information leaflet was given (if available).

Record all verbal and written consent in the patient's record indicating that consent was obtained, and the risks/benefits explained.

Often undue emphasis is placed on the signing of a consent form. More important is a detailed discussion with patients, which needs to be clearly recorded in their notes.

If you have any specific queries in relation to consent, please contact a member of the Medisec team.

The contents of this publication are indicative of current developments and contain guidance on general medico legal queries. It does not constitute and should not be relied upon as definitive legal, clinical or other advice and if you have any specific queries, please contact Medisec for advice.