

# INFORMATION SHEET 6 – CAPACITY AND CONSENT

## Quick Reference

*This information is primarily intended for Health Practitioners*

*Consent usually allows information handling that would otherwise be prohibited - particularly relating to collection, use, disclosure and access.*

*In most instances it would be reasonable to assume that a consumer has legal capacity unless there is evidence that suggests otherwise*

## INTRODUCTION

This information has been developed to assist with the implementation of the **Initial Needs Identification** tool template and provides additional guidance relating to the practice of gaining consent for disclosure of consumer health information. This advice should be read in conjunction with Information Sheet 5 – **Use and Disclosure**.

## WHY DO YOU NEED CONSENT?

Where a consumer **consents** to specific handling of their personal information in relation to its collection, use, disclosure or access, the Privacy Principles provide that such handling is lawful (unless of course the activity is illegal under other laws).

## WHAT IS VALID CONSENT?

Consent is valid when:

- (a) It is **informed, voluntary, specific and current** and
  - (b) The consumer has the legal **capacity** to consent.
- **Informed** means that the consumer was provided with enough information to form a reasonable understanding of the nature and effect of the decision. In practice, this will usually mean discussing in some detail what will be done with the information and what is likely to result if it is done.
  - **Voluntary** means the consumer agreed of their own free will, without the undue influence of other people or circumstances that could impair their independent judgment. A clear way of demonstrating that the consumer has been provided with a genuine choice in whether or not their information may be disclosed is using a standard form to record consent. (Refer to **consumer consent form** contained in **Initial Needs Identification** tool template).
  - **Specific** means the consent is to a clearly defined activity. Again, use of a consent form will enable the capture of this information in a clear manner.
  - **Current** means that the consent is not likely to be outdated because of lapse of time, or change of relevant circumstances. If there is any doubt about whether the consumer's recorded consent is still current, they should be asked to reconfirm their wishes.

## WHAT IS CAPACITY?

In order to provide consent, a person must have legal **capacity** to make the decision to agree. This means that they must understand both the nature of the proposed consent, that is, what they would be agreeing to, and its effect - what is likely to happen if and when they agree to it.

This test also applies to **minors** - refer to section below for specific advice about children and adolescents below 18 years of age.

In relation to a proposed disclosure of a consumer's information from one Primary Care Partnership (PCP) practitioner to another, the consumer would have to understand both what the disclosure was (including what kind of information was involved and to whom it would be provided), and also what was likely to happen if the disclosure took place (eg the practitioner receiving it would be likely in the first place to contact them to discuss treatment options).

Generally speaking, it is reasonable for a practitioner to assume that a consumer has legal capacity unless there is evidence before the practitioner that clearly raises a significant doubt about that capacity. Such evidence would relate to conditions (eg serious mental illness) or circumstances (eg emotional or physical trauma) that are likely to impair decision-making ability.

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**Capacity** is assessed by a practitioner using their professional judgment

If a consumer does not have capacity, then an authorised representative should be consulted.

**HRA section 85(6)** specifies **Authorised representatives** as:

(a) **guardians** appointed under the *Guardianship and Administration Act 1986* or

(b) **attorneys** under enduring power of attorney or

(c) **agents** under the *Medical Treatment Act* ('medical power of attorney') or

(d) **administrators** appointed under the *Guardianship and Administration Act* or

(e) a **parent** where the individual is a child (see *Minors* section below) or

(f) a person otherwise able to act as an agent for or **in the best interests of the individual**

## WHO MAY ASSESS CAPACITY?

The assessment in any individual case of whether a consumer is impaired in a way and to a degree likely to impair their decision-making ability is clearly a matter for professional judgment. It is important to note that privacy law makes no change to longstanding standards of medical practice in relation to the assessment of client capacity.

## WHAT IF A PERSON DOESN'T HAVE CAPACITY?

If a practitioner is satisfied that a consumer does not have the capacity to consent (or make any other legally binding decision), they should then consult the consumer's **representative**. This role is not open to any person - only people who have been appropriately **authorised** may act as representatives.

## WHAT IS AN AUTHORISED REPRESENTATIVE?

Consulting a representative to make decisions on behalf of an individual who lacks capacity is current and longstanding practice, and is particularly familiar to practitioners in health fields. The only significant change which privacy law makes is that the Health Records Act 2001 (HRA) puts these various obligations together in statutory form. The HRA section 85(6) defines the categories of people who can act as authorised representatives in relation to decisions about health information. In summary, an authorised representative for an individual is a person who has the right to make legal decisions on their behalf, either through:

- (a) nomination or
- (b) appointment.

### (A) 'NOMINATED' AUTHORISED REPRESENTATIVES

A nominated representative is a person the consumer has nominated to represent them - often a family member, carer or friend. Nominations must be made at a time when the consumer has legal capacity – i.e. is not suffering from any disability which significantly impairs their decision-making ability.

The most common forms of nominated representation are those made under an enduring or medical power of attorney. Where these particular forms are not used, but consumers wish to make a nomination, it would be sufficient for a signed statement to that effect to be prepared by the consumer and witnessed by a person other than the nominee.

### (B) 'APPOINTED' AUTHORISED REPRESENTATIVES

An appointed representative is a person appointed by an authorised body to hold decision-making power for a consumer who does not have capacity, including the capacity to nominate their own representative.

Legal representation status is conferred through statutory **orders**, such as Guardianship or Administration Orders. Before accepting a decision by a person claiming to hold this status, a practitioner should verify the status by sighting a copy of the relevant order.

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*Practitioners should endeavour to sight proof of representation where practicable*

*Where there is NO authorised representative available, a judgment should be made about who is able and willing to act in the best interests of the individual.*

*Practitioner should not take on the role of authorised representative for their patient / client*

## VERIFYING REPRESENTATIVE STATUS

Before accepting a decision by a person claiming to hold this status, a practitioner should **verify** the status by sighting a copy of the relevant document. If this is not possible, the practitioner must record the fact they were unable to sight the document and why, and note all relevant details about the claim to representation (eg who advised about this, the claimed authority, and any other information).

## WHAT IF THERE IS NO AUTHORISED REPRESENTATIVE?

In many cases an individual without capacity will have no authorised representative. In these cases, it is **reasonable** for the practitioner to make a professional judgment about who can act in the best interests of the individual. Often this will be a family member, carer or friend. It could also be an independent practitioner, not involved in the individual's treatment. The only relevant criteria are that there are reasonable grounds available to assess that the potential representative is able and willing to act in the person's best interests. It would always be good practice to document the grounds for making this assessment in case of any dispute.

Under no circumstances should a practitioner treating an individual take on the role themselves of acting as that individual's representative. This would be a significant conflict of interest, and would be prohibited both ethically and legally.

In a situation where no suitable person is available or can be identified, advice may be sought from the **Office of the Public Advocate** (tel. 03 9603 9500).

## EMERGENCY SITUATIONS

In emergency circumstances where there is a serious imminent threat to the person's life and no access to a representative (if any exists), it is **always** permissible to act without consent to lessen or prevent the threat.

## DECISIONS ABOUT INFORMATION OF DECEASED PERSONS

In the case of a **deceased** individual, their authorised representative for the purpose of decisions about their personal information would be the executor or administrator of their estate. Where the estate has been settled – or where this can be reasonably assumed because of the length of time since the person's death – the representative would be the most senior next of kin.

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*Children and adolescents under 18 years of age are entitled to make their own decisions about their personal information – provided they have capacity*

*Assessment of a child's capacity: - do they have the intelligence and maturity to understand the nature and effect of the proposed decision?*

*If given, is the consent informed, voluntary, specific and current?*

*A parent may represent children without capacity - or where no guardian parent, an authorised representative.*

## ASSESSING CAPACITY AND OBTAINING CONSENT FROM MINORS

For the purpose of this advice a **minor** – that is a child or adolescent under the age of 18 years – will be referred to here as a **child**.

A child's personal information is their own, and as with any individual, no other person would normally be able to make decisions about it – provided that the child has legal capacity. As with an adult, a child's capacity to make decisions on their own behalf means the ability to understand both the nature and effect of a proposed action (such as a specific handling of their personal information).

### DOES THE CHILD HAVE CAPACITY?

In assessing a child's capacity, age will of course be relevant but not necessarily decisive. Privacy laws adopt the common law test referred to as the '**Gillick test**', which briefly stated asks the question: **does this child have the intelligence and maturity to understand the nature and effect of this proposed decision?**

If the child does have capacity under this test, then their decision must be respected. In that case, the earlier comments provided about consent needing to be informed, voluntary, specific and current equally apply.

### ENSURING CONSENT CRITERIA ARE MET

As well as ensuring that the child is given enough information about the nature and effect of the consent, the practitioner must also be satisfied that they have consented of their own free will. This requires some consideration of whether there are any apparent circumstances that might **negate** that consent- such as a relationship of significant duress or undue influence (eg a history of abuse of the child by a person to whom the decision relates).

As with any consent, it is important that the child understands they have the option of **refusing** permission for a proposed handling of their information.

### WHAT IF THE CHILD DOES NOT HAVE CAPACITY?

If the child does not have capacity, decisions about their personal information can only be made by the child's **parent** – or in the absence of a guardian parent, the child's authorised representative.

Because some parents have had the power to make decisions for their child legally removed (as a consequence of child protection or family law decisions), practitioners should consider any **available** evidence that there is an order in place limiting or removing a parent's guardianship rights – such as a Family Court order. In that case, the child's legal guardian should be consulted (often the parent with whom the child lives).

### LEGAL ADVICE: DISCLAIMER

Information contained within this information sheet is not intended to substitute for legal advice. Primary Care Partnerships and / or member agencies should take advice from their legal advisors in determining whether their policies and practices comply with all relevant legislation.