The Shopfront

YOUTH LEGAL CENTRE

Children and Medical Treatment

1 Can a child consent to medical treatment?

In a nutshell, yes - children who are mature enough can consent to medical or dental treatment in their own right. However, if the child lacks the maturity to give informed consent, or requires "special" or "controversial" treatment, the situation is far more complicated.

1.1 Basic principles

In an English decision, the ***Gillick*** case (*Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402), the House of Lords established the principle that children with the intellectual capacity and emotional maturity to understand the nature and consequences of the treatment, should be legally able to consent to that treatment on their own behalf. The court dismissed the claim of a mother, Mrs Gillick, that a medical practitioner should not give contraceptive advice or treatment to a teenage child without parental consent.

The principle established in the *Gillick* case was adopted by the High Court of Australia in ***Marion's*** case (*Secretary Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218).

1.2 The law in New South Wales

In NSW, the law is based on the principles of *Gillick* and *Marion's* case. A child who is mature enough to understand the nature and consequences may legally consent in their own right.

Generally, this will be at about age 14, but may be higher or lower depending on the individual child and the nature of the proposed treatment.

Section 49 of the *Minors (Property and Contracts) Act 1970* protects medical or dental practitioners from legal action for assault or battery if they provide treatment to a child:

- who is 14 or over and has consented; or
- who is under 16 and a parent has consented on their behalf.

Although the purpose of this law is to protect doctors and dentists, it does provide some guidance as to what is an appropriate age for medical consent. In practice, most doctors would be reluctant to treat a child under 14 without parental consent.

The above law applies to most types of treatment (including abortion and contraception) **but does not include "special" treatment such as sterilisation and some psychiatric treatments** (see sections 6 & 7 of this document).

1.3 Health information, advice and education

Remember that not all health services are "medical treatment". Services such as counselling and information can be provided to young people who are mature enough to give informed consent to the service.

Health education can be provided to children of any age. There is no age restriction on distribution of items such as condoms, lube and safe injecting equipment – although services should ensure that these are being provided in an age-appropriate way.

2 Emergency medical treatment – no consent required

A doctor or dentist may perform emergency treatment on a **child under 16** without the consent of that child, parent or guardian if the practitioner believes that it is urgently required to save the child's life, to prevent serious damage to their health, or to relieve significant pain or distress (*Children and Young Persons (Care and Protection) Act* section 174).

There is a similar provision in the Guardianship Act allowing emergency treatment to be given if someone is **16 or over and unable to give consent** (*Guardianship Act* section 37).

3 Children who cannot consent to treatment

- **If a child is under 16 and not mature enough to consent to treatment**, a parent or guardian may consent to most types of treatment on their behalf. **If the parents unreasonably withhold their consent,** a court order may be obtained to allow the treatment to take place (see section 4 of this document).
- **If a child is under 16 and the treatment is a special medical treatment**, neither the child nor the parents can give their consent. In this case an order must be obtained from the Guardianship Tribunal or a court (see section 7 of this document).
- **If a child is 16 or over but not capable of consenting to treatment** (for example, because of an intellectual disability) parents or carers may consent to non-controversial treatment on their behalf, as long as the young person does not object. In other cases the Guardianship Tribunal may make an order for the treatment to proceed (see section 5 of this document).

4 Situations where parental consent is required

4.1 When is parental consent required?

As mentioned in the introduction, medical treatment of a child requires parental consent except for:

- treatment of children who are mature enough to consent in their own right
- emergency treatment (can be conducted without consent)

- involuntary treatment under the *Mental Health Act* (requires a court or Tribunal order)
- special treatments which parents cannot legally consent to (eg sterilisation) (requires a court or Tribunal order)

4.2 Must both parents consent?

The law provides that the consent of **"a parent or guardian"** is required. This would mean that, where a child has two parents but they do not agree, the consent of **only one** of those parents is required.

However, **if the parents don't agree**, it is open to either of them to apply to the Family Court for a "specific issues order" (see section 4.8 of this document).

For a parent's consent to be valid, that parent must have **"parental responsibility"** for the child.

4.3 What is parental responsibility?

"Parental responsibility" is a term used in the *Family Law Act* to mean all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. (*Family Law Act 1975* s 61B)

In many ways it is similar to the old concept of **"guardianship"** (which is still used in some other Acts).

4.4 Joint or sole parental responsibility?

Normally, **both parents of a child will have joint parental responsibility**, whether or not they have ever been married or lived together. This means that they both have input into major and long-term decisions affecting the child's welfare and upbringing.

This situation may be altered by the Family Court giving **sole parental responsibility** to one parent or to another person altogether. The court would only do this if it believes it to be in the **best interests of the child.** It would be rare for the court to give sole parental responsibility to one parent, unless the other parent poses a serious risk to the child or has no role whatsoever in the child's life.

Some people talk about a parent being awarded "sole custody". This is a misleading term. Words such as "custody" and "access" have been replaced in the *Family Law Act* by "residence" and "contact". [The word "custody" was thought to be a relic of the days when children were considered the property of their parents.]

A **residence order** governs which parent the child will live with. A **contact order** defines the child's contact with the other parent or with other significant people.

A parent with a residence order will make decisions concerning the day-to-day life of the child (eg what the child eats for lunch, what time the child has to come home, what the child wears). However, **unless the court makes an order to the contrary, both parents have parental responsibility**.

4.5 Adoption

If a child is adopted, parental responsibility is removed from the natural parent(s) and given to the adoptive parent(s).

4.6 Step-parents

A **step-parent** may acquire parental responsibility through a court order or through adoption. Step-parent adoptions used to be relatively common and involve the natural parent and their new spouse adopting the child as a couple. This has the effect of removing parental responsibility from the other natural parent.

Because of the emphasis on shared parental responsibility, a court would now be less willing to approve such an adoption (unless, of course, the other natural parent is dead or uncontactable).

4.7 Children in care

Where a child cannot be cared for by either parent, the **care and protection** system will usually step in. Unlike the *Family Law Act*, which is a federal law, care and protection is covered by NSW state law, and court proceedings will take place in the Children's Court.

The *Children and Young Persons (Care and Protection) Act* allows the Children's Court to make "care orders" allocating parental responsibility to the Minister for Community Services. This is similar to "wardship" under the old Act. Sometimes the court will order parental responsibility to be shared between the parent(s) and the Minister, or may allocate parental responsibility to an extended family member.

Medical treatment for children in care is covered by sections 176 (special medical examinations) and 177 (ordinary medical and dental treatment) of the Act.

Children in care can consent to treatment in their own right if they are mature enough (just like children who are not in care). The child's rights must be explained to them before a special medical examination (which means an invasive genital or anal examination) may be carried out.

If the child is too young to consent, the general rule is that whoever has parental responsibility (eg. the Minister) may consent to ordinary treatment on a child's behalf. A person with day-to-day responsibility for the child (eg. an authorised foster carer) may be able to give consent in some circumstances. In certain situations (eg special medical examinations) the natural parents must consent or an order must be obtained from the Children's Court.

4.8 What if parents refuse consent or can't agree?

What if a child wants or needs treatment, but is legally too young to consent and can't get a parent or guardian to consent? Or one parent consents to treatment but the other doesn't?

In these situations (unless it's an emergency, in which case see section 2 above) the matter may be resolved by a **"specific issues order"** from the Family Court. Specific issues orders can cover all sorts of things such as change of surname, schooling, religious upbringing, and, of course, medical treatment.

In making a specific issues order - indeed, in making any order to do with a child - the court's paramount consideration is the **best interests of the child**. The child's wishes may be taken into account, particularly if the child is relatively mature.

5 Situations involving children aged 16 or over who are incapable of consenting to treatment

The Guardianship Tribunal has jurisdiction over people 16 and over who, due to intellectual disability or some other significant impairment, cannot make decisions for themselves. It also has jurisdiction over people under 16 in certain cases involving *special medical treatment.*

Sections 33-40 of the *Guardianship Act* set out **what is required when a person aged 16 or over cannot consent to medical treatment.**

5.1 Special medical treatment

This includes sterilisation, termination of pregnancy, and some treatments involving the long-term administration of drugs of addiction.

An order of the Guardianship Tribunal is required.

5.2 Major medical treatment

This includes treatment involving drugs of addiction, long-acting injectable contraceptives (eg Depo-Provera), HIV testing, or any treatment that involves a substantial risk of death or serious harm to the patient.

A "person responsible" must consent in writing (oral consent is acceptable if the urgency of the situation makes written consent impracticable).

A **"person responsible"** would usually be a parent, guardian, spouse or close relative. The "person responsible" for a child is the person with **parental responsibility** for the child (see section 4.3 of this document).

If there is no "person responsible", application for consent must be made to the **Guardianship Tribunal**.

5.3 Minor medical treatment

A "person responsible" must consent. Consent must be in writing unless written consent is not practicable or the treatment provider is happy to accept oral consent.

If there is no person responsible or they cannot be contacted, **treatment can go ahead without consent (provided the patient does not object).** The doctor must note on the file that the patient did not object.

5.4 Emergency treatment

As with other situations, **emergency** treatment can be carried out without consent.

6 Treatment under the Mental Health Act

6.1 Involuntary patients

A person of any age can be detained as an **involuntary patient** (often referred to as being "scheduled") under the *Mental Health Act*. This does not require parental consent, but the child's parent(s) would presumably have to be notified and given the right to appear at any review hearing.

6.2 Voluntary patients

When a child **under 16** enters a psychiatric hospital as an informal (voluntary) patient, the child's **parents or guardian must be notified** as soon as practicable (*Mental Health Act* section 13).

If the child is aged **under 14** and a **parent or guardian objects** to the child being a patient, the hospital must discharge the child (unless, of course, there are grounds to admit the child as an involuntary patient) (section 15).

If the child is **aged 14 or 15**, and the parent does not wish the child to remain in hospital, it is the child's wishes that prevail, so that if the child wishes to remain as an informal patient, he or she may do so (section 14).

6.3 Psychosurgery and other psychiatric treatments requiring a court or tribunal order

Under the *Mental Health Act*, **psychosurgery** can only be carried out with the informed consent of the patient. Children are presumed to be unable to consent to such treatment. However, if a court decides that the child is able to give informed consent and has done so, the treatment may be carried out (sections 154-156, 175, 176).

Other treatments such as **electro-convulsive therapy** require the informed consent of the patient or an order from the Mental Health Review Tribunal, but there are no special provisions in the Act relating to children.

It would appear that a parent cannot consent to psychosurgery or ECT on a child's behalf. However, a court or tribunal may be able to order this treatment if it is in the child's best interests.

7 Sterilisation and other special medical treatments requiring a court or tribunal order

Some treatments can't be carried out without a court or tribunal order (even if the child and/or parents consent to the treatment).

7.1 Children under 16

Special medical treatment of a child under 16 requires the consent of the Guardianship Tribunal, unless the medical practitioner is of the opinion that it is necessary, as a matter of urgency, to save the child's life or to prevent serious damage to the child's health (*Children and Young Persons (Care and Protection) Act* section 175).

According to the Act and the regulations, "special medical treatment" includes:

(a) a vasectomy, tubal occlusion, or anything intended or reasonably likely to render the person permanently infertile;

(b) treatment that involves administration of drugs of addiction (otherwise than in association with the treatment of cancer) over a period or periods totalling more than 10 days in any period of 30 days;

(c) treatment that involves certain experimental procedures; or

(d) treatment that involves the administration of a long-acting injectable hormonal substance for the purpose of contraception or menstrual regulation.

7.2 Children 16 and over

In the case of a person aged 16 or over who has an intellectual disability or some other impairment which prevents them from making decisions, "controversial" treatment such as sterilisation, abortion, etc, cannot be performed without the consent of the **Guardianship Tribunal** (see section 5 of this document).

It seems that a child aged 16 or over can consent in their own right to special or controversial medical treatment if mature enough to do so (although, in practice, it is unlikely that a doctor would undertake such treatment without parental consent or a court or tribunal order).

7.3 Sterilisation of children with intellectual disabilities

The issue of sterilisation of a 14-year-old girl with an intellectual disability was addressed in the 1992 High Court decision referred to as ***Marion's Case***. The Court held that the parents of the child cannot authorise this procedure without an order of the Family Court, except where surgery is immediately necessary for conventional medical purposes (that is, the preservation of life or the treatment or prevention of a grave illness).

The Court recognised the risk of a wrong decision being made by parents as to whether the procedure would be in the child's best interests, given the difficulties parents must face where a disabled child has an unwanted pregnancy. It stated that where a procedure as invasive as sterilisation is involved, and one which carries such serious consequences to the child's life, it is vital that the decision be made by an independent and objective body.

In NSW, an order authorising sterilisation of a child could presumably be made by either the Guardianship Tribunal or the Family Court.

8 Who can access information about a child's medical treatment?

The basic rule is that, if a person is able to consent to treatment in their own right, they have a right to **confidentiality** with respect to their medical records. This would mean that, if a child has given consent to treatment in their own right, the child's parents must not be informed without the consent of the child.

8.1 Reporting of children at risk

A child's right to confidentiality would be subject to the **reporting** procedures in the *Children and Young Persons (Care and Protection) Act*. Anyone who has reasonable grounds to suspect that a child is **at risk of harm** (eg. because the child is being abused) **may** make a report to DOCS (section 24). Underage sexual activity or drug use is not in itself a ground for reporting under the Act.

Most people who work with children (eg. youth workers, child care workers, teachers, health professionals) are now **mandatory reporters**. They **must** notify DOCS if they have reasonable grounds to believe a child under 16 is at risk (section 27).

You should bear in mind that many government departments and government-funded youth services have protocols which require them to notify DOCS in a variety of situations not covered by the Act.

8.2 Requests from parents

If a parent or guardian has provided consent on a child's behalf, that parent or guardian would generally be entitled to obtain information about the child's treatment.

What if one parent ("Dad") has provided medical consent and the other parent ("Mum") wants information? It would appear that Mum does not have a right to receive this information without the consent of Dad (or the child, if now mature enough to consent). Mum may be able to get access through a Freedom of Information application (see below).

8.3 Subpoenas or court orders

A subpoena or other order may require a health service provider to **disclose information to a court.**

If the information is confidential, its use or disclosure in court may be restricted by "confidential communications privilege" or "sexual assault communications privilege" (see separate handout on "Privacy and Confidentiality for Youth Workers").

8.4 Freedom of Information

Access to health records held by NSW government agencies is covered by the *Freedom of Information Act* 1989 (NSW).

Under this Act, anyone can apply for access to information or records from a government agency. However, there are several types of information which the agency does not have to provide, including information relating to someone else's personal affairs.

Documents concerning a person's personal affairs are covered by section 31 of the *Freedom of Information Act 1989 (NSW).* The agency must not release information about someone else's personal affairs without first consulting that person (and, usually, obtaining their consent to the release of the information).

The Act does not seem to address the situation where a parent is applying for access to a child's records. It would therefore appear that a parent cannot have

access to the child's records under FOI, unless the child has been consulted first. It is possible that the child's objection to disclosure could be overridden if it was thought to be in their best interests.

Anyone, including a child, may apply for access to their own records, and access will normally be granted. However, information of a medical or psychiatric nature may be withheld if the agency believes that disclosure may have an adverse effect on the physical or mental health of the applicant. In this situation, the agency must instead provide access to a registered medical practitioner nominated by the applicant (*Freedom of Information Act* section 31).

8.5 Health Records and Information Privacy Act

The *Health Records and Information Privacy Act 2002 (NSW)* governs the handling of health information that is held in the public and private sectors. It seeks to protect the privacy of individuals, and ensure that the information is used for legitimate purposes. The Act also aims to enable people to access their own health information.

The Act applies to all persons, regardless of age. Anyone, including a child, can request their own health records. However, where a person is incapable of understanding the nature of the issue, or is incapable of communicating their intentions, then an **authorised representative** can act on their behalf. The Act permits a parent to act as an authorised representative if a child (aged under 18) is incapable of making decisions with respect to the Act. (*Health Records and Information Privacy Act* sections 7 and 8).

9 Further information and resources

"Working With Young People: Ethical and Legal Responsibilities for Health Workers" (NSW Association for Adolescent Health (NAAH) Resource Paper) February 2005, at: www.naah.org.au

Issues Paper 24: "Minors' Consent to Medical Treatment" (NSW Law Reform Commission) 2004, at:
http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip24toc

"Adolescent Health: A Resource Kit for GPs" (NSW Centre for the Advancement of Adolescent Health and Transcultural Health Centre) 2004, at:
http://www.caah.chw.edu.au/resources/#03

"Guardianship Tribunal Publications: Substitute Consent" (Guardianship Tribunal) 2004, at:
http://www.gt.nsw.gov.au/information/doc_14_substitute_consent.htm

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The Shopfront Youth Legal Centre is a service provided by Freehills, in association with Mission Australia's Sydney City Mission and the Salvation Army.

This document was last updated in February 2006 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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