The Shopfront

YOUTH LEGAL CENTRE

Children and health care

1 Can a child consent to health care or medical treatment?

In a nutshell, yes. Children who are mature enough can consent to most types of treatment in their own right, without their parents' knowledge or consent.

However, if the child lacks the maturity to give informed consent, or objects to treatment that is in their best interests, or requires "special" treatment, the situation is far more complicated.

Some forms of health care do not amount to "medical treatment". This would include, for example, counselling, the provision of health information or education, or the distribution of condoms. In general, there are no laws restricting children's access to such services.

This document is a guide to the law that applies in New South Wales.

2 When can a child can consent to health care or treatment?

2.1 Competence to consent to treatment

In NSW, the law is based on the principles of the *Gillick* case and *Marion's* case.

In the ***Gillick*** case (*Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402), the English 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 court held that parental authority over their children diminishes as the child becomes increasingly mature.

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).

A child who has "sufficient understanding and intelligence to enable him or her to understand fully what is proposed" is said to be "Gillick competent", and may legally consent to most types of treatment in his or her own right. Competence must be assessed by medical practitioners on a case-by-case basis, depending on the individual child and the nature of the treatment proposed.

This applies to most types of medical and dental treatment (including abortion and contraception) but **does not include "special" treatment** such as sterilisation and some psychiatric treatments (see section 6 of this document).

2.2 Legal protection for medical and dental practitioners

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 practitioners from liability, it does provide some guidance as to what is an appropriate age for medical consent.

Even though a child under 14 may be "Gillick competent", in practice most doctors would be reluctant to treat a child under 14 without parental consent.

2.3 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.

3 Can a child refuse medical treatment?

The answer to this question is more complicated.

A competent adult has the right to refuse treatment, even if this leads to death or serious damage to their health.

However, **a child who is competent to *consent* to treatment does not necessarily have the right to *refuse* treatment**. A child's objection to treatment may be overridden if the treatment is thought to be in the child's best interests, particularly in emergencies or life-threatening situations.

4 When a child cannot consent to treatment

4.1 Children under 16 who are not competent to consent

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 5 of this document).

4.2 Children under 16 and special medical treatment

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 most cases an **order must be obtained from the Guardianship Tribunal (which will be replaced by the NSW Civil and Administrative Tribunal (NCAT) from 1 January 2014) or a court** (see section 6 of this document).

4.3 Children aged 16 or over who are not competent to consent to treatment

If a child is 16 or over but is not competent to consent 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 (which will be replaced by the NSW Civil and Administrative Tribunal (NCAT) from 1 January 2014)** may make an order for the treatment to proceed (see section 7 of this document).

4.4 Emergency medical treatment

In an emergency, it is not always possible to obtain the consent of the patient or their parent or guardian.

A medical or dental practitioner 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 law allowing emergency treatment to be given to someone who is **16 or over and unable to give consent** (*Guardianship Act* section 37).

5 Situations where parental consent is required

5.1 When is parental consent required?

Medical treatment of a child generally requires parental consent, except for:

- treatment of children who are competent to consent in their own right
- emergency treatment (can be conducted without consent – see section 4.4)
- involuntary treatment under the *Mental Health Act* (see section 6.5)
- special types of treatments which parents cannot legally consent to (requires a court or Tribunal order – see section 6)

5.2 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 involved in their life, the consent of **only one** of those parents is required.

5.3 What is parental responsibility?

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

"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* section 61B). In many ways it is similar to the old concept of **"guardianship"** (which is still used in some other Acts).

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

5.4 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.

In practice, a child will often reside with one parent and spend time with the other. The parent who the child lives with will make decisions concerning the child's day-to-day life (eg what the child eats for lunch, what time the child has to come home). However, **unless the court has made an order to the contrary, both parents have parental responsibility**.

5.5 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).

5.6 Children in care or in need of care

Where a child cannot be adequately 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 the NSW *Children and Young Persons (Care and Protection) Act*, and court proceedings take place in the Children's Court.

The Children's Court may make "care orders" allocating parental responsibility to the Minister for Community Services. 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.

Children in care can consent to most types of medical or dental treatment in their own right if they are mature enough, just like children who are not in care.

Where parental consent would usually be required, the general rule is that whoever has parental responsibility (eg. the Minister) may consent to 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 (see *Children and Young Persons (Care and Protection) Act* sections 157, 177).

Medical examinations of children under 16 in need of care are covered by section 173 of the *Children and Young Persons (Care and Protection) Act*. This section allows for medical examinations to be performed without the consent of the child's parent or carer. The section says nothing about the child's consent, although it refers to "such medical examination … as the medical practitioner thinks fit", and many practitioners would think it inappropriate to examine a relatively mature child without their consent.

5.7 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 objects?

Emergency treatment may be performed without consent (see section 4.4 above). In other situations, the matter may be resolved by an order from the Guardianship Tribunal (see sections 6 and 7 below) or 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 an order, 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.

6 Special types of treatment

6.1 Special medical treatment for children under 16

Special medical treatment of a child under 16 is covered by section 175 of the *Children and Young Persons (Care and Protection) Act* section 175).

According to section 175 of the Act, "special medical treatment" means:

> (a) any medical treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out, not being medical treatment:
>
> > (i) that is intended to remediate a life-threatening condition, and
> >
> > (ii) from which permanent infertility, or the likelihood of permanent infertility, is an unwanted consequence, or
>
> (b) any medical treatment for the purpose of contraception or menstrual regulation declared by the regulations to be a special medical treatment for the purposes of this section [*nothing is currently prescribed by the regulations*], or
>
> (c) any medical treatment in the nature of a vasectomy or tubal occlusion, or
>
> (d) any other medical treatment that is declared by the regulations to be special medical treatment for the purposes of this section.

Clause 25 of the Children and Young Persons (Care and Protection) Regulations lists the following as “special medical treatment”:

> (a) any medical treatment that involves the administration of a drug of addiction within the meaning of the *Poisons and Therapeutic Goods Act* 1966 over a period or periods totalling more than 10 days in any period of 30 days (*unless granted an exemption by the Director-General of Community Services – there are exemptions for certain drugs used to treat cancer, ADHD and narcolepsy* - www.community.nsw.gov.au/docswr/_assets/main/documents/general_exemption_notice.pdf)
>
> (b) any medical treatment that involves an experimental procedure that does not conform to the document entitled National Statement on Ethical Conduct in Human Research 2007 published by the National Health and Medical Research Council in 2007 and updated in 2009 (www.nhmrc.gov.au/guidelines/publications/e72)
>
> (c) any medical treatment that involves the administration of a psychotropic drug to a child in statutory out-of-home care for the purpose of controlling his or her behaviour (*unless administered as part of an approved behaviour management plan – see clause 26*)

Special medical treatment may be performed without consent if 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.

Otherwise, special treatment requires the consent of the **Guardianship Tribunal (which will be replaced by the NSW Civil and Administrative Tribunal (NCAT) from 1 January 2014)** or **“**consent in accordance with the regulations”. “Consent in accordance with the regulations” presumably means that the consent of the child (if competent) or parent will suffice, if the treatment is covered by an exemption or special clause in the Children and Young Persons (Care and Protection) Regulations, such as cancer treatment or drugs administered as part of a behaviour management plan.

6.2 Special medical treatment for children aged 16 and over

If a person aged 16 or over is not competent to consent to treatment, special treatment such as sterilisation, abortion, etc, cannot be performed without the consent of the **Guardianship Tribunal (which will be replaced by the NSW Civil and Administrative Tribunal (NCAT) from 1 January 2014)** (see section 7 below).

It seems that a child aged 16 or over can consent in their own right to special medical treatment if mature enough to do so (although for more drastic treatments, a court may be required to decide whether the child is competent – see section 6.4 below).

6.3 Sterilisation

If sterilisation is an unwanted consequence of another treatment which is necessary to save a young person's life or prevent serious damage to their health, treatment can generally be performed with the child's consent (if the child is competent), or otherwise with parental consent, or without consent in an emergency.

However, if sterilisation is sought for contraceptive purposes, or for other purposes (such as menstrual management for a young woman with an intellectual disability), parental consent is not sufficient, and a court or tribunal order will be required.

It seems that a child aged 16 or over can consent to sterilisation if assessed as competent (although, in practice, it is unlikely that a doctor would be willing to undertake such a procedure without the approval of a court or tribunal, and it is suggested that a court will be required to assess whether the child is competent – see 6.4 below).

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 child with a disability has an unwanted pregnancy. It said 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.

6.4 Treatment of intersex and transgender children

The law about treatment of children with ambiguous sexual characteristics or suffering from gender dysphoria (intersex or transgender) has been uncertain for some time.

It has recently been clarified by the Family Court of Australia in the case of *Re: Jamie* [2013] FamCAFC 110.

The court drew a distinction between stage 1 treatment (which involves treatment with puberty-suppressing hormones) and stage 2 treatment (which, in Jamie's case, involved additional treatment with oestrogen).

The court held that stage 1 treatment (which is reversible, and is thought to have few, if any, side-effects) may proceed without court authorisation if the child, parents, and treating medical practitioners agree.

However, stage 2 treatment is another matter, because there is a significant risk of the wrong decision being made, and the consequences of such a wrong decision would be particularly grave.

The court held that:

- If a child is *not* Gillick competent, parental consent is not enough: the court must decide whether or not to authorise stage 2 treatment.
- If a child *is* Gillick competent, the child can consent to stage 2 treatment without court authorisation. However, the question of whether or not a child is Gillick competent is a matter to be determined by the court. The court noted that the relevant treatment guidelines recommend that stage 2 treatment should not usually commence until age 16.

6.5 Treatment under the Mental Health Act

(a) Voluntary patients

When a child **under 16** enters a psychiatric hospital as a **voluntary patient**, the child's **parents or guardian must be notified** as soon as practicable (*Mental Health Act* section 6).

If the child is aged **under 14** and a **parent or guardian objects** to the child being a patient, the hospital must not admit the child (unless, of course, there are grounds to admit the child as an involuntary patient).

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 a voluntary patient, he or she may do so.

(b) Involuntary patients

A person of any age can be detained as an **involuntary patient** (*Mental Health Act* Part 2 and section 10). 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.

(c) Children and electro-convulsive therapy

Electro-convulsive therapy (ECT) may be administered only with an order from the Mental Health Review Tribunal (in the case of an involuntary patient), or otherwise with the informed consent of the patient (*Mental Health Act* sections 89, 91).

There do not appear to be any specific provisions covering children and ECT. It appears that a child who is not an involuntary patient *can* consent to ECT, but that a parent cannot consent to ECT on a child's behalf.

(d) Special medical treatment for involuntary patients

Special medical treatment (which means treatment intended or reasonably likely to render the person permanently infertile) **may not be conducted on an involuntary patient aged 16 or over except**:

- if the medical practitioner is of the opinion that it is necessary, as a matter of urgency, to carry out the treatment to save the patient's life or to prevent serious damage to their health; or
- with an order from the Mental Health Review Tribunal (*Mental Health Act* section 102).

In the case of **involuntary patients under the age of 16**, special medical treatment is covered by section 175 of the *Children and Young Persons (Care and Protection) Act* (see section 6.1 above).

7 Children aged 16 or over who are incapable of consenting to treatment

The **Guardianship Tribunal (which will be replaced by the NSW Civil and Administrative Tribunal (NCAT) from 1 January 2014)** 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 (see section 6 above).

Sections 33-45A of the *Guardianship Act* set out what is required when a person aged 16 or over cannot consent to medical treatment.

7.1 Special medical treatment

An order of the Tribunal is required for special treatment, including:

- any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out
- any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned
- treatments listed in clause 9 of the Regulations, including termination of pregnancy, vasectomy, tubal occlusion, or treatment involving the use of an “aversive stimulus”.

7.2 Major medical treatment

This includes treatment involving drugs of addiction, long-acting injectable contraceptives (eg Depo-Provera), HIV testing, or involving a substantial risk of death or serious harm to the patient (Guardianship Regulation, clause 11).

A "person responsible" must consent in writing (oral consent is acceptable if the urgency of the situation makes written consent impracticable). This 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 5.3 of this document).

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

7.3 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.

7.4 Emergency treatment

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

8 Tattooing and piercing

Although tattooing and piercing are not health care or medical treatment, they are somewhat similar to medical procedures, and there are legal restrictions on a child's capacity to consent.

8.1 Tattooing

A child under 18 requires parental consent for tattooing. A person performing tattooing (or similar procedures such as scarification or branding) on a person under 18 without parental consent is committing a criminal offence under section 230 of the *Children and Young Persons (Care and Protection) Act*.

8.2 Piercing

A child under 16 may not lawfully have their genitalia or nipples pierced, even with parental consent. A person performing such a piercing on a child under 16 is committing an offence under section 230A of the *Children and Young Persons (Care and Protection) Act 1998* .

Children under 16 may have piercing to another part of the body with parental consent.

Children aged 16 and over may have piercing done to any part of their body without parental consent.

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

9.1 The right to confidentiality

Generally, if a young person has the capacity to consent to treatment, they have the capacity to understand the concept of **confidentiality**, and they have a right to confidentiality with respect to their medical records.

This usually means 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.

If a parent has consented to treatment on behalf of a child, this would usually mean that the confidentiality obligation is owed to the parent and the child has no independent right to confidentiality. However, if time has elapsed and the child is now more mature, a confidentiality obligation would also be owed to the child.

There are a number of exceptions to the confidentiality of health records, including the ones listed below.

9.2 Reporting of children at risk

A child's right to confidentiality is subject to the **reporting** procedures in the *Children and Young Persons (Care and Protection) Act*.

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

Anyone who has reasonable grounds to suspect that a **child or young person under 18 is at risk of significant harm may** make a **voluntary** report to Community Services (section 24).

Underage sexual activity, pregnancy or drug use are not in themselves grounds for reporting under the Act.

A person who makes a mandatory or voluntary report in good faith is protected from any action for breach of confidentiality or other forms of professional misconduct.

9.3 Exchange of information between agencies working with children

Chapter 16A of the *Children and Young Persons (Care and Protection) Act* provides for government and non-government agencies to exchange information relating to the safety, welfare and well-being of children (aged under 16) or young people (aged under 18).

It applies to "**prescribed bodies**", which includes some courts, government departments, fostering and adoption agencies, and any organisation providing health care, welfare, education, child care, residential or law enforcement services to children.

A prescribed body:

- **must** pass on information if requested by another prescribed body
- **may** provide information to another prescribed body, even if not requested to

if the agency passing on the information reasonably believes it would assist the other agency:

- to make a decision or provide a service relating to the child or young person's safety, well-being or welfare; or
- to manage any potential risk to the child or young person that might arise in the agency's capacity as an employer or designated agency.

This information can be provided even though the agency would normally owe the client a duty of confidentiality.

However, a prescribed body **may refuse to provide information in certain circumstances**, for example: if it would prejudice the conduct of an investigation or inquiry, endanger a person's life or physical safety, or would not be in the public interest.

9.4 Information requests from Community Services

Under section 248 of the *Children and Young Persons (Care and Protection) Act*, Community Services may **direct a "prescribed body" to furnish information** about the safety, welfare and well-being of a particular child or young person (or a class of children or young persons).

Unlike Chapter 16A, section 248 does not allow a prescribed body to refuse to provide this information. It overrides any confidentiality obligations that would otherwise exist.

9.5 Notification of certain medical conditions

Under the *Public Health Act*, medical practitioners and pathology laboratories are required to notify the Director-General of the Department of Health about patients who have certain medical conditions. In most cases the identity of the patient must be kept confidential. There are also requirements for hospital staff to provide information about patients suffering from certain notifiable diseases.

9.6 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".

9.7 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.

If the child has consented to treatment on their own behalf, a parent would not usually be entitled to information without the child's consent.

9.8 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.**

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 is incapable of making decisions with respect to the Act. (*Health Records and Information Privacy Act* sections 7 and 8).

9.9 Access to government information

Access to health records held by NSW government agencies is covered by the *Government Information (Public Access) Act* 2009 (NSW) ("GIPA") as well as the *Health Records and Information Privacy Act* 2002 (NSW).

Under GIPA, 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.

Anyone, including a child, may apply for access to documents concerning their own personal affairs, and access will normally be granted.

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 GIPA, unless the child has been consulted first, or if the agency decides there is an overriding public interest in favour of disclosure despite the child's lack of consent.

10 Further information and resources

Adolescent Health: A Resource Kit for GPs (NSW Centre for the Advancement of Adolescent Health and Transcultural Health Centre), 2nd Edition, 2008: http://www.caah.chw.edu.au/resources/#03

Working With Young People: Ethical and Legal Responsibilities for Health Workers (NSW Association for Youth Health (formerly NSW Association for Adolescent Health), February 2005: http://www.nayh.org.au/documents/Final_Working%20with%20young%20people_ethical%20and%20legal%20responsibilities.pdf

Young People and Consent to Health Care (New South Wales Law Reform Commission Report 119), 2008: http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r119toc

The *Guardianship Tribunal* has information sheets about medical and dental treatment:

http://www.gt.nsw.gov.au/gt/gt_sheets.html#Consent_to_Medical_o

The following resources from the Shopfront Youth Legal Centre (available at http://www.theshopfront.org/24.html) may also be helpful:

Confidentiality and privacy for youth workers

Age of consent: issues for youth workers

Children and young people at risk – reporting and exchange of information

The Shopfront Youth Legal Centre
Updated November 2013

The Shopfront Youth Legal Centre
356 Victoria St
Darlinghurst NSW 2010
Tel: 02 9322 4808
Fax: 02 9331 3287
www.theshopfront.org
shopfront@shopfront.org