The Shopfront

YOUTH LEGAL CENTRE

Children and health care

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

In many cases, 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 more complicated.

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

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

Unless otherwise stated, a "child" means a person under 18 years of age.

2 When can a child 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 a mother's claim 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 can legally consent to most types of treatment in his or her own right. Medical practitioners must assess competence on a case-by-case basis, depending on the individual child and the nature of the treatment proposed. For example, a child may be competent to consent to a simple treatment for a minor injury, but not competent to consent to invasive surgery.

This applies to most types of medical and dental treatment. However, *there are some types of treatment that a child cannot consent to*, even if they are Gillick competent. These include sterilisation and other "special medical treatment" for children under 16, and some psychiatric treatments (see parts 5 and 9 of this fact sheet).

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.

2.4 Can a child refuse medical treatment?

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

Generally, a child who is competent to consent to treatment is also competent to refuse treatment. However, 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. In some cases a court order may be needed to allow treatment to proceed over the child's objection.

3 When a child cannot consent to treatment

3.1 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.

3.2 Children under 16 and "special" medical treatment

If a child is under 16 and the treatment is "special medical treatment" (as defined by the *Children and Young Persons (Care and Protection) Act* section 175), neither the child nor a parent or carer can give their consent.

In most cases an order must be obtained from the NSW Civil and Administrative Tribunal (NCAT).

For more information see part 5 of this fact sheet.

3.3 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) a “person responsible” may consent to some kinds of treatment on their behalf.

In other cases (especially “special medical treatment”), the NSW Civil and Administrative Tribunal (NCAT) may make an order for the treatment to proceed.

For more information see part 6 of this fact sheet.

3.4 Emergency treatment

A medical or dental practitioner may perform emergency treatment on a child under 18 without the consent of the child, parent or guardian if the practitioner believes 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 is unable to give consent (*Guardianship Act* section 37).

4 Situations where parental consent is required

4.1 When is parental consent required?

If a child is *not* competent to consent to medical treatment, parental consent will usually be required.

There are some exceptions, including:

- emergency treatment where it’s not possible to obtain consent (see part 3.4 of this fact sheet);
- special types of treatments which need a court or tribunal order (see parts 5 and 6 of this fact sheet);
- involuntary treatment under the *Mental Health Act* (see part 9 of this fact sheet).

4.2 Parental consent and parental responsibility

For most types of treatment, the consent of only one parent is required.

For the consent to be valid, that parent must have “parental responsibility” for the child.

“Parental responsibility” is a term used in the Commonwealth *Family Law Act* to mean “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children” (*Family Law Act* section 61B). In many ways it is similar to the older concept of “guardianship” (which is still used in some other Acts).

Normally, both biological 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 a court giving sole parental responsibility to one parent (or sometimes to another person such as a grandparent). The court would only do this if it believes this is in the best interests of the child.

The law on parental responsibility is a little different in the case of same-sex parents or surrogacy arrangements.

4.3 What if parents refuse consent or cannot agree?

What if a child wants or needs treatment, but is not Gillick competent and can't get a parent or guardian to consent? Or if one parent consents to treatment but the other objects?

Emergency treatment may be performed without consent (see part 3.4 of this fact sheet).

In other situations, the matter may be resolved by an order from the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) (see parts 5 and 6 of this fact sheet) or a "specific issues order" from a family law 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 primary consideration is the best interests of the child. The child's wishes may be taken into account, particularly if the child is relatively mature.

4.4 Children in care

Where a child cannot be adequately cared for by either parent, the care and protection system will often step in.

Unlike the *Family Law Act*, which is a federal law, child protection is a state responsibility. It is covered by the NSW *Children and Young Persons (Care and Protection) Act*, and court proceedings take place in the NSW Children's Court.

The Children's Court may make "care orders" allocating parental responsibility to the Minister for Families, Communities and Disability 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.

Just like children who are not in care, *children in care can consent to most types of medical or dental treatment in their own right if they are Gillick competent.*

Where parental consent would usually be required, the general rule is that whoever has parental responsibility (e.g. the Minister) may consent to treatment on a child's behalf. A person with day-to-day responsibility for the child (e.g. 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).

4.5 Medical examinations of children in need of care

Medical examinations of children under 16 believed to be in need of care and protection 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 Special medical treatment for children under 16

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

According to section 175, "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

(c1) any medical treatment that involves the administration of a drug of addiction within the meaning of the *Poisons and Therapeutic Goods Act 1966 (NSW*) over a period or periods totalling more than 10 days in any period of 30 days, or

(c2) 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 2013, or

(d) any other medical treatment that is declared by the regulations to be special medical treatment for the purposes of this section.

For most types of "special medical treatment", a child under 16 (or their parent or guardian) cannot consent and an order from the NSW Civil and Administrative Tribunal (NCAT) will be required. For more information see the NCAT fact sheet at: https://ncat.nsw.gov.au/documents/factsheets/gd_factsheet_special_medical_treatment_under_16_years.pdf

The exceptions are:

- Some types of special medical treatment are subject to an exemption granted by the Secretary of the Department of Communities and Justice. Currently this includes certain drugs for treatment of cancer, ADHD or narcolepsy. These may be performed with the child's consent (if the child is Gillick competent) or the consent of someone with parental responsibility.
- 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.

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

The Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) has jurisdiction over people aged 16 and over who, due to intellectual disability or some other significant impairment, cannot make decisions for themselves.

[It also has jurisdiction over children under 16 in certain cases involving "special medical treatment" as defined by section 175 of the *Children and Young Persons (Care and Protection) Act* (see part 5 of this fact sheet).]

For more information see NCAT fact sheets at https://ncat.nsw.gov.au/ncat/publications-and-resources/fact-sheets/guardianship-division-fact-sheets.html#Consent4.

Sections 33-48 of the *Guardianship Act* set out what is required when a person aged 16 or over is incapable of consenting to medical treatment.

6.1 Emergency treatment

Emergency treatment can be carried out without consent in most cases.

6.2 Minor treatment

"Minor treatment" means treatment that is not special treatment, major treatment or treatment in the course of a clinical trial. It would include treatments such as non-intrusive examinations and dental check-ups.

This may be carried out with the consent of a "person responsible". For a child, this usually means a person with parental responsibility for the child. If no-one with parental responsibility is available, a carer or a close friend or relative may be able to 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, as long as the health practitioner certifies in writing that:

> (a) the treatment is necessary and is the form of treatment that will most successfully promote the patient's health and well-being, and
>
> (b) the patient does not object to the carrying out of the treatment.

Consent given by a “person responsible” will *not* be valid if the patient objects (and the treatment provider is aware, or ought reasonably to be aware, of this), or if the proposed treatment is to be carried out for any purpose other than that of promoting or maintaining the health and well-being of the patient.

If the patient objects, NCAT can make an order authorising a “person responsible” to override their objection. This can only be done if NCAT is satisfied that the treatment is in the patient’s best interests, and that the patient’s objection is based on their lack of understanding of the nature of, or reason for, the treatment.

6.3 Major treatment

“Major treatment” includes treatment involving drugs of addiction, long-acting injectable contraceptives (e.g. Depo-Provera), HIV testing, the administration of restricted substances that affect the central nervous system, the administration of general anaesthetic or sedation involving a substantial risk of death or serious harm to the patient. It does not include “special treatment” or clinical trials.

A "person responsible" must consent, usually in writing. Oral consent is acceptable if the urgency of the situation makes written consent impracticable.

If there is no "person responsible", an application for consent must be made to NCAT.

As with minor treatment, consent given by a “person responsible” will not be valid if the patient objects or if the treatment is not for their benefit. An order can be sought from NCAT to override the patient’s objection.

6.4 Special treatment

An order from NCAT is required for “special treatment” which includes:

- 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 Guardianship Regulations, including termination of pregnancy, vasectomy, tubal occlusion, or treatment involving the use of an “aversive stimulus”,

but does not include clinical trials.

Note that this is different from the definition of "special medical treatment" in the *Children and Young Persons (Care and Protection) Act*. For example, termination of pregnancy is a special treatment within the *Guardianship Act,* but *not* a special treatment under the *Children and Young Persons (Care and Protection) Act*.

6.5 Clinical trials

For clinical trials seeking to involve a person aged 16 or older who lacks decision-making capacity, NCAT must decide whether consent to the trial is to be given by a "person responsible" or by NCAT itself.

7 Sexual and reproductive health

7.1 Sexual and reproductive health generally

Just like any other type of medical treatment, children who are Gillick competent can consent to most types of sexual and reproductive health services. This would include, for example, STI testing, pregnancy-related health care, contraception (implants, IUDs, the pill), and termination of pregnancy.

The main exception is sterilisation (see part 7.3 of this fact sheet).

Information and education (as well as condoms and the like) can be provided to young people of any age – although of course this should be done in an age-appropriate way.

Health practitioners may be concerned about child protection issues, especially if a young person has been sexually assaulted or abused. *However, merely being sexually active while under the age of consent is not necessarily grounds for a child protection report*. See part 11.4 of this fact sheet and our fact sheet on *Age of consent: issues for youth* workers.

7.2 Termination of pregnancy

Like most other medical procedures, a child can consent to a termination of pregnancy if they are Gillick competent.

If the child is under 16 and is not Gillick competent, parental consent is required (see part 4 of this fact sheet).

If the young person is 16 or over and is not competent to consent, an order from the guardianship division of NCAT will be required (see part 6 of this fact sheet).

7.3 Sterilisation

For children under 16, sterilisation may be performed:

- with the consent of the child (if competent) or a parent (if the child is not competent), *only if* it is an unwanted consequence of another treatment which is necessary to save a child's life or prevent serious damage to their health;
- without consent if urgently needed to save the child's life or to prevent serious damage to their health;
- in other situations, only with an order from NCAT.

For more information, see part 5 of this fact sheet.

For young people aged 16 or over, sterilisation may be performed:

- (possibly) with the young person's consent if assessed as Gillick competent - although, in practice, it is unlikely that a doctor would be willing to undertake such a procedure on someone under 18 without the approval of a court or tribunal, unless it is an unwanted side-effect of other necessary treatment;
- without consent if urgently needed to save the young person's life or to prevent serious damage to their health;
- if the child is not competent to consent and it is not an emergency, with an order from NCAT (see part 6.4 of this fact sheet) or possibly from a family law court.

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 couldn't authorise this procedure without an order of the Family Court, except where surgery was 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.

8 Treatment of children with gender dysphoria

Gender dysphoria has been defined as "clinically significant distress or impairment related to a strong desire to be of another gender, which may include desire to change primary and/or secondary sex characteristics". Not all transgender or gender diverse people experience dysphoria.

Children and young people diagnosed with gender dysphoria may seek treatment in different stages. Sometimes the Federal Circuit and Family Court of Australia will need to authorise the treatment before it can be provided. The Court's involvement, if any, in each stage of treatment is discussed below.

8.1 Stage 1 - fully reversible interventions such as injectable blockers to delay the onset of puberty

In the case of *Re: Jamie* [2013] FamCAFC 110, the Family Court of Australia 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).

In that case, the court found that Stage 1 treatment (if agreed to by the child, the parents and the treating medical practitioners) was not treatment of the kind that would require court authorisation. Only if the child, parents, and treating medical practitioners disagree about Stage 1 treatment is court authorisation is required.

8.2 Stage 2 – partially reversible interventions such as cross-sex hormone treatment

Previously, it was necessary for the court to authorise stage 2 treatment, or at least to determine whether the child was Gillick competent to consent, even where everyone agreed to the treatment.

This changed following the decision of the Family Court of Australia in *Re: Kelvin* [2017] FamCAFC 258. The Court decided that where:

(a) stage 2 treatment of a child for gender dysphoria is proposed, and

(b) the child consents to the treatment, and

(c) the treating medical practitioners agree that the child is Gillick competent to give that consent, and

(d) the parents of the child do not object to the treatment,

it was no longer mandatory to apply to the Family Court for a determination as to whether the child is Gillick competent. However, the court in *Re Kelvin* was careful to note that the court still had a role to play where there was any controversy.

So, if there is no disagreement about the treatment between a child's parents and treating medical professionals, Stage 2 treatment can proceed without any court authorisation, even if the child is not Gillick competent. If there is controversy, then an application must be made to the court to assess whether the treatment is in the best interests of the child.

The 2020 Family Court decision of *Re: Imogen (No 6)* [2020] FamCA 761, helped to clarify the role of the court in resolving such controversies. In that case, the court held that an application to the Family Court of Australia (now known as the Federal Circuit and Family Court of Australia) is mandatory if a parent or a medical practitioner disputes:

(a) a diagnosis of gender dysphoria, or

(b) a proposed treatment for gender dysphoria, or

(c) the Gillick competence of a child seeking treatment for gender dysphoria.

Once an application is made, the court should make a finding about the Gillick competence of the child. If the only dispute is Gillick competence, and the court finds that the child is competent, the child can decide on their treatment without court authorisation.

If there is also a dispute as to diagnosis or treatment, the court will authorise treatment if it is in the best interests of the child.

The court also said that if a parent or guardian does not consent to the child's treatment, medical practitioners should not commence treatment without court authorisation.

8.3 Stage 3 – irreversible interventions such as surgical interventions

The law concerning Stage 3 treatment, if all agree, is the same as stage 2 treatment. This was confirmed in *Re: Matthew* [2018] FamCA 161, with the court determining that where appropriately qualified medical and health professionals are satisfied that:

(a) the child is Gillick competent, and

(b) the treatment proposed is therapeutic, and

(c) there is no controversy,

stage 3 treatment can proceed without first going to court for a determination that the child is Gillick competent.

If there is a dispute in relation to stage 3 treatment, an application to the court would be mandatory and the court would likely approach it in the same way as the court dealt with the dispute in *Re Imogen*.

9 Treatment under the Mental Health Act

9.1 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 the child may remain as a voluntary patient.

9.2 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 designated carer and principal care provider must be notified within 24 hours.

9.3 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.

9.4 Special medical treatment for involuntary patients

"Special medical treatment" (which is defined in s 33 of the *Guardianship Act* 1987 (NSW) as 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" has a different definition and is covered by section 175 of the *Children and Young Persons (Care and Protection) Act.* This generally requires an order from NCAT (see part 5 of this fact sheet).

10 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.

10.1 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*.

10.2 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*.

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.

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

11.1 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 health 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 mature enough to understand the concept of confidentiality, the child would have a right to confidentiality over their own records.

There are a few exceptions to the confidentiality of health records. Some of these are mentioned below.

11.2 Health Records and Information Privacy Act

The *Health Records and Information Privacy Act* 2002 (NSW) ("HRIPA") governs the handling of health information that is held in the public and private sectors in NSW. 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.

Anyone, including a child, can request their own health records.

However, an authorised representative can act on behalf of a person who is incapable of understanding the nature of the issue or of communicating their intentions. The Act permits a parent to act as an authorised representative if a child under 18 is incapable of making decisions with respect to the Act.

11.3 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) ("HRIPA").

Under GIPA, anyone can apply for access to information or records from a government agency. However, there are several types of information that 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.

11.4 Reporting of children at risk

The reporting procedures in sections 23-29A of the *Children and Young Persons (Care and Protection) Act* may override a child's right to confidentiality.

Most people who work with children (e.g. youth workers, childcare workers, teachers, health professionals) are mandatory reporters. They *must* notify the Department of Communities and Justice (DCJ) if they have reasonable grounds to believe a *child under 16 is at risk of significant harm*.

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 DCJ. A person may also make a pre-natal report if they have reasonable grounds to suspect that an unborn child may be at risk of significant harm after their birth.

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.

11.5 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, provide a service, or manage any potential risk to the child or young person.

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

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.

11.6 Information requests from Department of Communities and Justice (DCJ)

Under section 248 of the *Children and Young Persons (Care and Protection) Act*, DCJ 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.

11.7 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.

11.8 Subpoenas or court orders

A subpoena or similar 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".

For more information, see the *Subpoena Survival Guide* at:
https://publications.legalaid.nsw.gov.au/PublicationsResourcesService/PublicationImprints/Files/753.pdf

12 Getting a Medicare card

12.1 Children aged 15 or over

Generally, a child can get their own Medicare card at the age of 15. A child aged 15 or over can either:

- Apply for a duplicate card – this means the child's details are transferred from their parent's/guardian's card to their own duplicate card. The parents/guardians can access information about which services the child has accessed (but not necessarily detailed information about the services provided); or
- Apply for a separate card – this means that the child's medical details would not be available to their parents/guardians.

Both options involve making an application to Medicare, either in person, by mail or email:
https://www.servicesaustralia.gov.au/individuals/services/medicare/medicare-card/getting-your-own-medicare-card-15-years-old

A child may also access a digital Medicare card if they have a MyGov account linked to their Medicare account:
https://www.servicesaustralia.gov.au/individuals/services/medicare/medicare-card/how-get-digital-card.

12.2 Children under 15

A child under 15 may be able to get their own Medicare card in special circumstances. The child will need to contact Medicare or ask their health care provider for help.

A child's health information may still be available to their parent/guardian under their My Health Record until the child turns 14 (or later with the child's consent – see part 13.5 of this fact sheet).

13 Children and My Health Record

13.1 What is My Health Record?

My Health Record (MHR) is an online summary of a person's health information which is accessible online. It is operated by The Australian Digital Health Agency.

The kinds of information that can be included in MHR include: Medicare, PBS and immunisation data; medical conditions, medications and allergies; test results; hospital discharge summaries; letters from GPs or specialists; and advance care directives.

13.2 Does everyone have a My Health Record?

No. If you have opted out before 31 January 2019, you will not have a MHR.

An individual who is 14 and over and has not opted out before 31 January 2019 is automatically assumed to have opted in. This means a MHR will have been automatically created for them. To activate their MHR, the individual must sign up or log into to MyGov.

If you are under 14 and your parent has not opted out on your behalf, a MHR would have been automatically created for you.

13.3 If you didn't opt out but don't want a My Health Record, what can you do?

The last day to opt out of having a MHR was 31 January 2019. Records have now been created for eligible Australians of all ages who didn't opt out.

You can cancel your MHR at any time, and the record will be permanently deleted. No backup copies will be kept in the MHR system, and your information cannot be recovered. However, any copies stored on your healthcare provider's own record-keeping systems will not be deleted.

13.4 Who has access to your My Health Record?

Usually, *if you are aged 14 or over*, only registered healthcare providers involved in your care are allowed by law to access your MHR.

It's your choice what information is in your My Health Record, and who you share it with. You can restrict which healthcare organisations can look at your record, or individual documents in it, by setting secure access codes. You can also permanently delete documents at any time, with no backups kept.

Your Record Access History lets you see who has accessed your MHR.

It is illegal for someone to access your record for a purpose other than providing you with healthcare, and there are serious penalties.

No one is allowed to access, or ask you to disclose, any information in your MHR for insurance or employment purposes.

Information on your MHR cannot be released to law enforcement or government agencies without your consent or an order from a judicial officer.

13.5 Involvement of parents or guardians

Before the age of 14, your "authorised representative" (usually a parent or guardian) manages your record for you. More than one authorised representative can apply to have access, for example, both of your parents.

They can look at your record and see health information about you uploaded by your doctor, nurse or specialist and Medicare. They can also see your medical tests and prescriptions, add and remove information, and set privacy controls in your record.

When you turn 14, your authorised representatives will automatically be removed from being able to access your record.

If you are aged 14 or over, and you would like a parent or guardian or other trusted person to have access to your record, you can add them as a "nominated representative".

For more information about managing your records when you are over 14, see https://www.myhealthrecord.gov.au/for-you-your-family/howtos/manage-your-record-from-age-14.

A person aged 14 or over who is not capable of making decisions for themselves may have an "authorised representative" (for example, a parent, guardian, or carer) appointed on their behalf. If you have an authorised representative managing your My Health Record on your behalf, and you would like to start managing your own record, you will need to show that you have the capacity to manage your record. See https://www.myhealthrecord.gov.au/for-you-your-family/howtos/remove-authorised-representatives.

13.6 Can you still access Medicare if you don't have a My Health Record?

If you are eligible to access Medicare services, you will still have access to these services and receive Medicare benefits, whether you have a MHR or not.

14 Further information and resources

14.1 NSW Health information on consent and confidentiality

NSW Health: *Consent to medical and healthcare treatment manual – patient information* (2020): https://www.health.nsw.gov.au/policies/manuals/Publications/consent-manual.pdf

Section 8 (pages 43 to 48) deals with "Minors". It contains useful guidelines, but please note the difference between NSW Health policy and the law (e.g. the manual says that parental consent must be obtained for treatment of children aged 13 and under; however, some children may be Gillick competent at this age and can lawfully consent to treatment).

NSW Health: *Youth-friendly confidentiality resources*: https://www.health.nsw.gov.au/kidsfamilies/youth/factsheets/youth-friendly-confidentiality.pdf

14.2 Guardianship Division of NCAT: medical and dental treatment

The Guardianship Division of NCAT has fact sheets about medical and dental treatment for people 16 and over who lack capacity to consent, and also about special medical treatment for children under 16: https://ncat.nsw.gov.au/ncat/publications-and-resources/fact-sheets/guardianship-division-fact-sheets.html#Consent4

14.3 Transgender children and medical treatment

Inner City Legal Centre information sheet (July 2019): https://www.iclc.org.au/wp-content/uploads/2019/06/ICLC-Transgender-children-and-medical-treatment-the-law-210901.pdf

14.4 Mental health treatment

Mental Health Rights Manual: https://mhrm.mhcc.org.au/

See Chapter 4 about involuntary treatment. Note that this information is not specific to children.

14.5 My Health Record

Information and answers to frequently asked questions about My Health Record can be found at https://www.digitalhealth.gov.au/initiatives-and-programs/my-health-record

14.6 Medicare

Department of Human Services, *How to get your own card at 15 years old* (Medicare): https://www.servicesaustralia.gov.au/individuals/services/medicare/medicare-card/how-get-your-own-card-15-years-old

14.7 Additional resources for youth workers

The following resources from the Shopfront Youth Legal Centre (available at https://www.theshopfront.org/legal-information-for-youth-workers) 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 December 2021

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

The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills in association with Mission Australia and The Salvation Army.

This document was last updated in December 2021 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

This document provides a summary only of the subject matter covered, without the assumption of a duty of care. It should not be relied on as a substitute for legal or other professional advice.