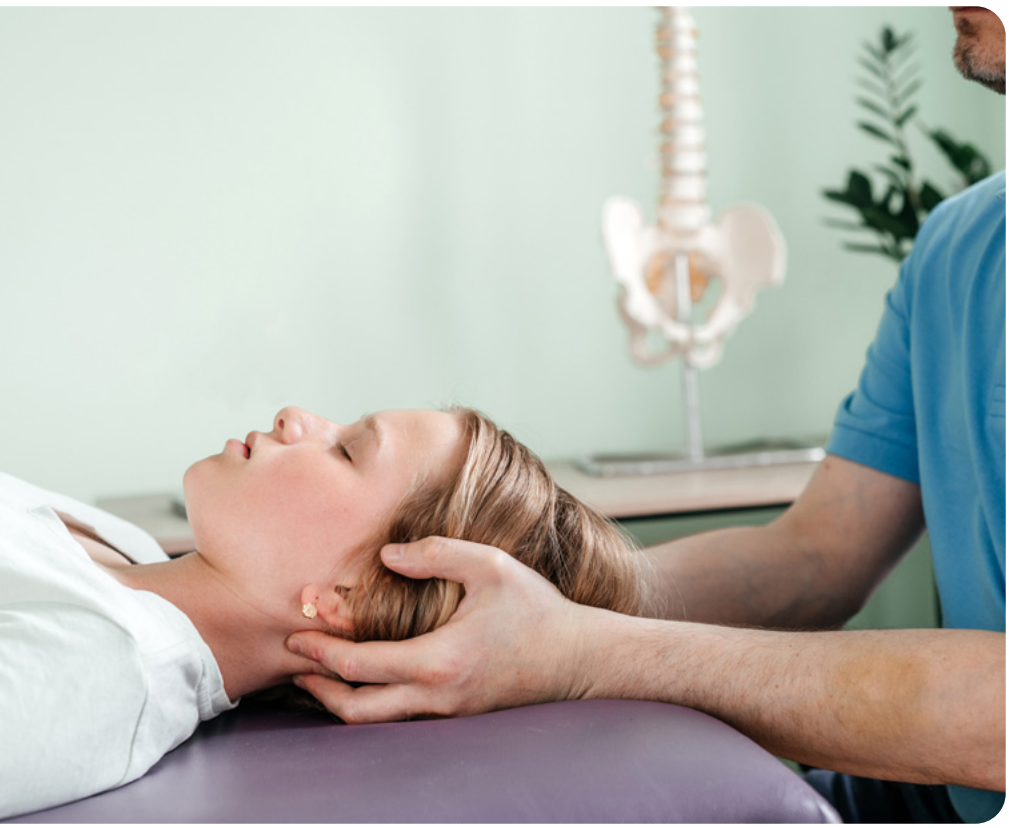

Can a Patient Under 18 Provide Informed Consent?

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There is no clear yes, or no answer. As we explain, consent will depend on the individual. In any case, understanding your rights and the rights of your patient is imperative.

DEFINING INFORMED CONSENT

Put simply, informed consent is a patient's voluntary decision to agree to treatment after being informed by a practitioner of all material risks associated with that treatment (as well as alternative options). The patient provides such consent by expressly indicating that they have adequate understanding of the benefits and material risks attached to the proposed treatment.

This of course imputes that the patient has the cognitive capacity to understand risks and benefits, and can enter into such an agreement.

Generally, a patient will not have the mental capacity and cognition to consent if the following occurs:

- the patient is too young;
- the patient has a mental illness or intellectual disability which detrimentally affects their ability to make decisions;
- dementia;
- impaired by alcohol or substance; and
- unconscious.

At first instance, children under the age of 18 (minors) do not have such capacity. Generally, such consent must be given by a parent (as long as the family court has not restricted their access to the minor) or authorised guardian.

However, there are special considerations for minors, which entail determining when a minor is able to give informed consent on their own account.

RELEVANT LEGISLATION

Turning to legislation, in all Australian states and territories except for South Australia, there is no legislation specifying when a child may consent to medical treatment on their own behalf. In South Australia, section 6 of the Consent to Medical Treatment and Palliative Care Act 1995 (SA) relevantly provides:

"A person of or over 16-years-of-age may make decisions about his or her own medical treatment as validly and effectively as an adult."

Under that Act, a child under 16 can validly consent to treatment if:

"The medical practitioner is of the opinion that the child capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interest of the child's health and well-being, and that opinion is supported by the written opinion of at least one other medical practitioner who personally examines the child before the treatment is commenced. (Section 12, Consent to Medical Treatment and Palliative Care Act 1995 (SA))"

In other states such as NSW, the answer is not so clear-cut.

Section 33 (2) of the Guardianship Act 1987 (NSW) provides:

"...a person is incapable of giving consent to the carrying out of medical or dental treatment if the person:

(a) is incapable of understanding the general nature and effect of the proposed treatment,
or

(b) is incapable of indicating whether or not he or she consents or does not consent to the treatment being carried out."

CONSENT AND PRIVACY

The Privacy Act 1988 Cth, which sets out the principles dealing with sensitive information and exemptions, does not provide an age at which children are considered capable of providing consent in relation to their personal information.

According to the Australian Privacy Principle (APP) Guidelines:

1. Individuals under the age of 18 generally have capacity to consent if they have sufficient understanding and maturity to understand what is being proposed
2. If it is impractical or unreasonable to assess an individual's capacity to consent:
   - Individuals aged 15 or over are presumed to have capacity to consent, unless there is some reason to suggest otherwise.
   - Individuals aged under 15 are presumed not to have capacity to consent.

WHAT DOES THAT MEAN?

At common law, a child under 18 may legally consent to most types of medical treatment on their own behalf if they are competent to do so. If they are not competent, consent by a parent or authorised guardian must be obtained.

In the absence of any legislation to guide practitioners, health practitioners must look to the common law for guidance on how to make an assessment of competency to consent for all patients under the age of 18.

Naturally, this will depend on considerations including that young person's particular age, intelligence, maturity and independence, as well as the seriousness of the proposed treatment or procedure.

In Marion's Case (Secretary, Department of Health and Community Services v JWB and SMB (1992)175 CLR 218), the High Court of Australia, in adopting a decision by the House of Lords in Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112, held that a child with the maturity to understand the nature and consequences of the treatment has the legal capacity to consent on their own behalf, without the necessity for parental consent or knowledge.

Sufficiency of capacity is seen as a spectrum and the more serious the consequences of the decision, the higher the level of capacity that must be demonstrated.

ASSESSING THE MATURITY OF A MINOR

With the 'mature minor' principle in mind, a practitioner must assess each child's mental state and cognition on a case-by-case basis to determine whether that particular child has sufficient intelligence and understanding to enable them to understand the proposed treatment.

This assessment necessarily involves determining the following issues:

- What is the treatment for and what does it involve?
- Can the patient communicate their consent?
- Is the treatment necessary?
- Are there any alternative options?
- What are the likely effects and possible risks attached?
- Are there any consequences of not treating?
- What are the consequences of discovery of treatment by the child's parent or guardian?

Other checks that are relevant to all consent should be assessed too, such as if the consent is freely given and if it is current (a practitioner cannot rely on consent obtained a time ago when the circumstances have materially altered.)

The assessment and the health practitioner's determination should always be documented.

IF UNCERTAIN, BE CAUTIOUS

Where there is any uncertainty, a practitioner should always err on the side of caution and either seek a second opinion, or seek the consent of the child's parent or guardian. That said, practitioners should remain aware of the patient's right to privacy and confidentiality, particularly the young person does not consent to the release of information. This can often be a difficult circumstance to navigate where there are difficult family situations (or the particular issue is sensitive, such as pregnancy or STD).

When considering whether it is appropriate to release information to a third party, practitioners need to consider:

1. Does the patient consent to releasing information?
2. If not, you need to assess competency. This may include assessing:
   - does the patient understand about the request for information?
   - why it is requested?
   - who requested it? and
   - the consequences of release i.e. are there any safety issues in releasing the information?

Overall, it is important to remember your role and paramount duty to the patient. With that in mind, it is wise to ensure you know your and the patient's rights so you can express and justify your position calmly and confidently, while not being dismissive of the emotional concerns of those involved. ■

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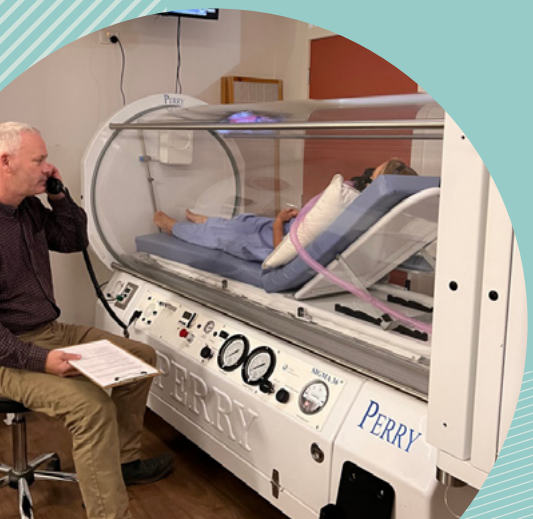

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