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Consent for Treatment and Confidentiality Young People

Definitions

For the purposes of this document, a young person is generally considered to be less than 18 years of age.

Young People:

Consent for Treatment and Confidentiality

It is usually in a young person's interest to have their parents involved in their treatment. However, there will be times when a young person seeks advice or treatment without the knowledge or consent of their parents. The young person might specifically request that their parents are not informed of the treatment or may disagree with their parents' views about their treatment.

Young people may have the right to give or refuse consent for treatment, and may have the right to demand confidentiality, including refusing to inform their parents. This largely depends on the young person's level of maturity and cognitive competence, rather than on age alone. All Health Care Professionals, including those engaged in Manual Medicine modalities such as Massage, Remedial Massage and Myotherapy, must make a judgment about a young person's ability to give valid consent to or refuse treatment whenever they seek advice or treatment.

This leaflet to help Members who must decide whether or not a young person can consent to treatment and what rights of confidentiality they have. The law in this area is very complex and Members may be faced with many difficult challenges. Members with questions about specific cases should contact their professional indemnity insurance provider or their solicitor.

Defining a Mature and Competent Young Person

A young person can consent to or refuse treatment and is entitled to confidentiality (in relation to their parents or guardian) if they are assessed to be sufficiently mature and competent. This assessment is not made on the basis of chronological age alone and does not need to involve an accompanying parent or guardian.

Young Person

To be considered sufficiently mature and competent, the young person needs to understand the following:

- nature of the condition for which they seek treatment;
- nature of the treatment being proposed, including
- treatment options;
- possible outcomes of that treatment; and
- likely outcomes if treatment is not given.

Assessing Maturity and Cognitive Ability

Although maturity and cognitive ability are related developmentally in childhood, it is important to evaluate both factors when considering whether a young person can provide valid consent to treatment and seek confidentiality from parents or guardians.

The development of maturity and intellectual competence is a continuum and varies from one individual to another. There is no cut-off point, other than the legal age of maturity of 18. As a general guide, a young person aged between 16 and 18 is most likely to be able to consent. A young person aged between 14 and 16 is reasonably likely to be able to consent, depending on the nature of the treatment. A young person under 14 may not have capacity to consent, particularly in relation to more serious treatments.

Nevertheless, Members must assess each young person's maturity and cognitive ability individually before accepting as valid their consent for treatment.

Maturity

In assessing maturity, the following factors are important:

- age;
- general maturity of speech and bearing;
- level of independence from parental care;
- level of schooling;
- the therapist's prior knowledge of the client/patient;
- why the client/patient came to see the therapist about the issue on their own;
- functioning in other aspects of their life;
- ability to explain the clinical problem for which treatment is sought, by providing an appropriate clinical history; and
- ability to understand the gravity and complexity of the treatment proposed.

Competence

In assessing a young person's level of competence and cognitive ability, the therapist needs to be confident that the young person has sufficient understanding and intelligence about:

- the nature of their clinical problem;
- the nature and purpose of the proposed treatment;
- the effects of the treatment including side-effects;
- the consequences of non-treatment;
- other treatment options;
- possible repercussions of the treatment – for example, the consequences if parents found out; and
- how to carry through the proposed treatment.

Other advice about competence and maturity

A Member who is unsure about a young person's maturity or competence should not proceed with treatment on the basis of the young person's consent as it may not be valid. It may be appropriate to

seek an opinion from a colleague or the parents may need to provide consent on behalf of the young person.

When a decision is reached that a young person is able to provide valid consent to treatment, the Member should:

- document the assessment of maturity in the client/patient record, together with the factors taken into consideration in making this decision.
- competency should be tested for each new treatment being considered.

The form of assessment will depend on the nature of the presenting problem, the degree of complexity of the treatment proposed, the prior knowledge of the client/patient and previous assessments.

While in principle a competent young person can consent to any form of treatment, he or she may not be able to consent to treatment that is very complex or which may have very serious consequences.

Special Scenarios

Young people who are married or parents

Young people who are married assume legal competence for most purposes. Almost invariably they have the sole legal capacity to consent to treatment. An unmarried young person who is a parent should be assessed for competency like any other young person. This latter situation has not been tested in law.

Young people with an intellectual disability

A young person with an intellectual disability, particularly one who is a client of Intellectual Disability Services, is unlikely to be able to make treatment decisions. Parents and guardians can consent on their behalf. However, parental power to consent to treatment on behalf of their child is not absolute – Parents must act in the best interest of their child.

Young people with mental illness

A young person who would otherwise be competent to make decisions about their health, but who has a psychiatric illness that affects their competency, may not be able to consent to treatment. If the young person is an “involuntary patient”, there are special provisions under the *Mental Health Act 1986 (Vic)* that provide for other persons, including parents and duly appointed guardians, to give consent on behalf, depending on whether the no psychiatric treatment is “major”. Advice should be obtained before administering treatment in such circumstances.

Refusal of Treatment

The law in Australia is unclear about whether competent young people can refuse medical treatment, particularly when that treatment is considered important for their health.

Failure to provide treatment when there is a threat to the young person's health may have legal consequences for the Member, even when the young person is considered competent to give valid consent, but has refused to do so. Legal advice should be obtained in this situation.

Non-essential treatment

There will be times when a young person's refusal of recommended treatment does not pose a significant threat to health.

In these circumstances, the therapist may suggest that the young person discusses the matter with his or her parents, or returns to discuss the treatment decision further. Provided the young person is competent to make a valid decision, it is reasonable to accept his or her decision.

Treatment for potentially serious conditions and threats from failure to treat

It is possible that a young person may refuse consent for treatment that the Member considers necessary and in the patient's best interest even after a full discussion. In these cases, the therapist should try to persuade the young person to discuss the treatment with his or her parents and involve them in the decision.

If the young person refuses to involve his or her parents and the therapist cannot persuade him or her to do so, a decision about treatment must be made based on the risk of consequences to the young person from not having the treatment.

The response to this situation may include:

- the therapist may need to review his or her decision about the young person's competence to make a valid decision on consent in the specific circumstances of a serious or complex medical condition;
- it may be appropriate to suggest that the young person returns after giving further thought to the decision;
- the therapist may suggest that the young person seek a second opinion from a professional whom he or she trusts;
- the young person might be encouraged to come back with someone such as an older sibling, another family member or a friend, who might be more effective in persuading the young person to consider the consequences of refusal of treatment, or
- the therapist may need to consider breaching confidentiality if he or she believes the young person's life is in danger. This may be in the context of a risk of suicide or the progression of a potentially life threatening condition.

Confidentiality

Confidentiality in consultations

Members owe a duty to clients/patients of any age to keep all information obtained in the course of the therapeutic relationship confidential. The common law recognizes that competent young persons are entitled to the same confidentiality as adults, though there are some exceptions to this.

The *Privacy Act 2001 (C'th)*, the *Health Records Act 2001 (Vic)* and the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* reinforce the concept of confidentiality and further define what information should be recorded and in what circumstances. They confirm the right of the patient

(and thus a mature young person) to have access to his or her health records, both in the private and the public sector. A mature young person may be able to deny parental access to his or her health records. There may be rare circumstances when access to their own records is not considered in a young person's best interest, or when another person has provided confidential information that has been recorded.

Parents' rights to be informed

A young person may demand that a therapist does not contact his or her parents or give them confidential information. A Member should respect the young person's confidentiality if the competent young person demands that the therapist not divulge any information, even if it would have been desirable for the parents to become involved.

Current law does not specifically recognize that incompetent young persons who are approaching 18 years of age are owed a duty of confidentiality. However, there is some support for the view that incompetent young people may attract the legal right of confidentiality, depending on the circumstances of each individual young person. An additional criterion may be whether they are able to form a confidential relationship with the treating Member. The most prudent course for the Member to take is not to reveal personal matters communicated in the course of the professional relationship to any other person, unless there is consent or it is essential to safeguard the wellbeing of the young person. If the Member concludes that such a disclosure does need to be made, generally it is good practice to tell the young person and to discuss it with them first.

Exceptions to the duty of confidentiality

- When the client/patient specifically consents to the disclosure, including to whom and the content to be released (Note that consent may be given in general, but denied for the release of specific information such as sexual activity or drug use).
- Public interest (for example, if the Member believes that as a result of mental illness, the young person is putting others or is likely to put others in the near future at serious risk).
- Best interests of the client/patient (for instance, when the Member believes that the young person is at risk of suicide or serious self-harm).
- Court proceedings.
- Statutory reporting requirements.
- Notifiable infectious diseases.
- Children in need of protection (for example from physical, sexual or emotional abuse).

It is wise to inform the young person early in the consultation about the duty of confidentiality and about its potential limits.

This might include situations when there is a risk of suicide or sexual, physical and emotional abuse and serious risk to others.

Where to get a copy of the Mental Health Act 1986 and related legislation

Copies of the *Mental Health Act 1986* and the Mental Health Regulations 1998 can be viewed or downloaded from the [Victorian Legislation and Parliamentary Documents](#) website. Information about the *Health Records Act* can be accessed at the [Victorian Health Records Act](#) website.

Hard copies of the Mental Health Act and the Mental Health Regulations can be purchased from the [Victorian Government Bookshop](#), Level 20, 80 Collins St, Melbourne, 3000, or on 1300 366 356 for the cost of a local call anywhere in Australia or +613 9603 9900 for international callers.

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