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RCPA
The Royal College of Pathologists of Australasia

Guideline

Subject:	Assessment of Capacity to Consent to Examination and Forensic Procedures.
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1. Overview/Procedure Description

Doctors must both obtain and document the informed consent of a patient, or obtain consent for a patient's examination from a lawful authority or valid proxy decision maker, prior to any examination, investigation, treatment, or involving patients in teaching and research.

Examination of a patient for forensic purposes must not occur in the absence of valid consent. Failure to obtain consent for an examination, whatever the reason, may constitute an assault for which the practitioner may be held to be civilly or criminally liable. In addition, the patient (or their representative) may lodge a complaint with the doctor's employer and or regulatory bodies in the jurisdiction in which the doctor is employed.

For consent to a medical procedure to be legally valid: the person must be legally competent, they must give consent voluntarily, they must be able to understand the nature and purpose of the examination, they must be able to retain the relevant information, and they must then be able to consider that information as part of the decision-making process. In addition, it is also necessary that they be able to unequivocally communicate their decision to the medical personnel involved in the prospective examination or procedure.

A delay in obtaining forensic samples could lead to a loss of material that might have assisted with the forensic assessment of the patient and investigation of a criminal offence. Such a defect in the forensic investigation process has the capacity to be detrimental to the patient and to the community. Delays in examination and collection of samples for forensic analysis are to be avoided whenever possible. In cases where there are any concerns regarding a patient's decision-making capacity, the medical practitioner should assist in a timely manner with the medical aspects of actively seeking the input of a valid proxy decision maker.

These guidelines advise forensic doctors of the methods that may be used to obtain consent for examination and collection of forensic samples when an assessment must be made of a patient's capacity to consent.

Guidelines are also provided regarding the release of personal information about the patient and the provision of forensic medical samples to police or other legal investigators.

General Principles regarding assessment of capacity to consent

Capacity and lack of capacity are legal, not medical or health-care issues. However, the assessment of capacity to consent is a multifaceted process that takes into account long-term medical factors as well as the patient's psychosocial situation, developmental history and their current acute health and welfare circumstances.

Incapacity has at least two elements. The first element concerns the inability to make decisions, and the second concerns the presence of a cognitive impairment. Without evidence around both of these a finding of incapacity cannot be entertained.

The following could constitute evidence of lack of capacity:

- lack of knowledge of the matters that they need to make decisions about.
- lack of knowledge of the choices that are potentially available regarding the matters that they need to make decisions about.
- lack of appreciation of the reasonably foreseeable consequences of choices, including the choices of doing nothing.
- decision-making based on delusional constructs.

The presence of any one or more of these above-mentioned items could constitute evidence of a lack of capacity provided they occur in the setting of 'cognitive impairment'.

It is the examining doctor's personal responsibility to determine a patient's capacity to consent on each occasion that examination is required. Another doctor's decision regarding an individual's capacity to consent on a prior occasion (either capacity to consent or lack of capacity to consent) does not determine capacity or lack of capacity to consent on subsequent occasions.

It is good practice to obtain formal consent for all procedures regardless of the apparent seriousness of the case. There are situations where the most minor injury might have major significance and at the time of examination it is not always possible to tell what is going to be important later. Implicit consent should not be assumed in any criminal matter.

An individual's capacity to consent may alter during a consultation, for example, as a result of modulation of the effects of intoxication, effects of drugs, alcohol or drug-withdrawal or changes in established or new medical conditions. Under such circumstances a patient's capacity to consent may need to be re-evaluated during the consultation. This might result in new decisions being made regarding any continuation of the examination and any forensic procedures being considered.

The following factors should be taken into consideration when an assessment is made of an individual's capacity to consent.

- Age
- Maturity
- Intelligence (eg. known degree of intellectual disability) and concentration
- Insight and understanding of the reasons for, and processes of, the proposed procedure
- Autonomy with demonstrated self-determination (eg. financial independence, living independently, dependency on others)
- Enduring conditions that might impair capacity to consent (eg. dementia, mental illness, chronic ill-health resulting in physical dependence on others)
- Transient conditions that might impair capacity to consent (eg. emotional upset or stress, fear, pain, intoxication or/and withdrawal from drugs or alcohol, tiredness, possible intimidation or coercion by others)

In some situations, a formal mental state examination may be required to determine a patient's capacity to consent.

Information from other medical or health care practitioners, family, carers or witnesses may help to inform the medical assessment process but must never supplant it.

In considering the process to be followed when assessing the decision-making capacity of an individual to consent to a forensic medical procedure, the medical examiner may wish to consider the the Six Step Capacity Assessment process (Darzins P, Molloy DW, Strang D.) the reference for which is given below. These steps include:

- Step 1 – ensure a valid trigger is present
- Step 2 – engage those being assessed
- Step 3 – Information gathering
- Step 4 – Education
- Step 5 – Capacity assessment
- Step 6 – Act on results of assessment

2. Situations when doctors must assess patients' capacity to consent to examination and forensic procedures

2.1 Children/ young people

Whereas adults are presumed by the law to have capacity, the reverse is true of Children. This has resulted in the creation of the 'mature minor concept'.

The High Court of Australia has recognized that as a child's decision-making capacity develops, there is a corresponding diminution of parental decision-making powers. In the case, The Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218 (commonly referred to as Marion's case) a majority of High Court judges held that:

> *A minor is capable of giving informed consent when he, or she, achieves a sufficient understanding and intelligence to enable him, or her, to understand fully what is proposed.*
> *(at 237).*

In the course of reaching their decision, the High Court approved the 'mature minor' concept enunciated by the House of Lords in Gillick v West Norfolk Area Health Authority 1986 1 AC 112 where it was determined that 'the ability of a child under the age of 16 to make his or her own medical decisions is evaluated according to chronological age, considered in conjunction with the child's mental and emotional maturity, intelligence and comprehension". This concept is known colloquially as Gillick competence.

If the child/young person (under 18 years) lacks Gillick competence to consent to the forensic assessment then consent must be obtained from a person who holds parental or other legal responsibility for the child/young person.

In the absence of parents, available to provide consent, there are a number of other possible ways that consent might be obtained. These include reference to:

1. A guardian (including a relative or family member) can be appointed by the appropriate authority;
2. The local child protection authority or other agency (depending on the jurisdiction) may hold or may be requested to seek to obtain authority to provide consent in their capacity as the child's temporary guardian; and
3. There may be a court order specifically authorising the examination for forensic purposes.

In practice, the assent and cooperation of the child/young person is also required. The use of sedation or anaesthetic should only be used when there are concurrent medical needs which require an examination and possible treatment under anaesthetic/sedation. Sedation and anaesthesia must not be used purely for the purpose of forensic examination and/or sample collection.

Doctors must always act in the best interests of the child and they cannot be compelled, by a parent, court or other person, to undertake an examination.

Mandatory child abuse reporting provisions need to be adhered to should such conclusions arise out of the findings of the forensic medical examiner. While these matters will usually be in train around the time of forensic examination of many children Doctors must be aware that the legislative requirements of the jurisdiction in this regard must be personally complied with by the practitioner.

2.2 Adults who might lack capacity to consent (enduring or transient)

Adults (individuals aged 18 years or older) and young people who live in jurisdictions where individuals aged less than 18 years have the legal right to consent to medical procedures should not be considered to lack capacity to consent unless:

- They have an impairment (temporary or permanent) of the mind or brain, or there is a disturbance affecting the way their mind or brain works and;
- That impairment or disturbance means that the person is unable to
    - understand the nature and purpose of the procedure and
    - make the decision about whether or not to consent to all or parts of procedure.

2.3 Patients who have Mental Health Disorder or Intellectual Disability

Whenever possible, when asked to examine a patient with such a disorder, the assessment of that person's capacity to consent to the forensic examination should involve other relevant health professionals. If it is confirmed that the patient lacks capacity to consent, the forensic examination may only be undertaken if the doctor considers that it is in the best interests of the patient and obtains consent from a guardian or relevant authority. In these circumstances the doctor should:

1. Inform the medical practitioner who is responsible for the immediate and/or ongoing medical care of the patient of the nature and purpose of the proposed examination, ascertain his/her opinion regarding the patient's best interests, and ensure that he/she has no objections to it being undertaken.
2. Consider speaking to people close to the patient[2] about the nature and purpose of the proposed examination in order to determine the person's past and present wishes or feelings, beliefs and values so that these can be taken into account.
3. Obtain signed consent from the person deemed legally responsible for decision-making around consent under such circumstances. If the patient is an involuntary psychiatric patient under the relevant legislation, the treating psychiatrist should be able to provide consent for an examination and therefore should be asked to provide signed consent for the examination.
4. Document all of the above steps in the medical record. Notes must include the basis for the determination of lack of capacity to consent and the reasons why the doctor determines that it is in the patient's best interests to proceed with examination.

5. Whenever possible have a family member or carer who knows the patient well present during the examination to provide emotional support for the patient and to facilitate communication.
6. If the patient does not assent and comply then the examination must be stopped.
7. When relevant, as soon as the patient is sufficiently recovered to understand, ensure that the patient is informed about what has been done, and why:
8. In some jurisdictions forensic information or specimens may not be released to police until consent is obtained from the patient (if recovered) or an official guardian.

2.4 Intoxication results in patients' temporary loss of capacity to consent

Patients who are intoxicated due to alcohol or drugs may lose their capacity to consent for a short period of time. In such circumstances, the forensic assessment should be deferred until the patient's capacity has returned. The period for the deferment will depend on the type, time, amount and quantity of the substances that have been consumed. It may be necessary to medically assess the patient repeatedly within a given period to determine if the patient's capacity has returned.

Similar consideration should be given to patients who may be transiently affected by their withdrawal from drugs or alcohol.

Doctors may wish to request that police conduct a preliminary breath test. Although there is no scientific basis for interpreting any particular blood alcohol reading as indicating that a person is unable to consent, the local criterion for driving (0.05% in Australian jurisdictions) is a safe and conservative value to use. Regardless of the level of alcohol, the doctor must be able to formulate the complete evidential basis upon which they are relying when determining capacity to consent on a medical basis.

2.5 Illness or remediable factors result in patients' brief transient loss of capacity to consent

On occasions, patients who would usually have the capacity to consent to examination may transiently and briefly lack the capacity to consent as a result of modifiable or remediable factors such as acute infections or other refractory disease process, tiredness, stress or pain. Under such circumstances interventions to remedy the problem should be offered to modify these factors in order that the patient regains the capacity to consent to the proposed forensic examination. Examination may occur once the patient has regained his/her capacity to consent AND has formally provided valid consent.

Following an episode of transient lack of capacity to consent, basis of the return of the capacity to consent needs to be explicitly documented by the forensic medical examiner.

2.6 Serious Injury results in patients' loss of capacity to consent

Patient who have been seriously injured during assaults and have suffered injuries which have resulted in a loss of capacity to consent (for example when patients are unconscious). or have been injured in a way that interferes with their level of consciousness or cognition will not be able to provide consent to forensic medical examination. This loss of capacity may be transient or permanent.

In such circumstances it is often impossible to predict the likely duration of this incapacity. If there is a reasonable suspicion that an assault has occurred, the doctor must confirm that the patient lacks capacity to consent and estimate on the basis of

available medical information whether the duration of incapacity is likely to be brief or of a longer duration.

When the lack of capacity to consent is determined to be brief then the procedure recommended in 2.4 should be followed.

When this incapacity will persist for a considerable time, then the forensic examination may only be undertaken if the doctor considers that it is in the best interests of the patient AND consent has been obtained from a guardian or other legal authority. In these circumstances, the doctor should:

1. Inform the medical practitioner who is responsible for the immediate and/or ongoing medical care of the patient of the nature and purpose of the proposed examination, ascertain his/her opinion regarding the patient's best interests, ensure that he/she has no objections to it being undertaken, and determine the best timing for the examination
2. Consider speaking to people close to the patient[1] about the nature and purpose of the proposed examination in order to determine the person's wishes, feelings, beliefs and values so that these can best be respected.
3. Obtain consent for the patient's examination from the person legally designated to be responsible for providing consent under such circumstances.
    a. Public advocates or guardianship boards exist in all Australian and New Zealand jurisdictions and can provide advice in difficult situations. See Appendix.
    b. Where the patient is an adult (over 18 years), a family member may be able to consent or refuse on the patient's behalf especially, but not exclusively, if they are an attorney appointed by the patient under a pre-existing Enduring or Medical Power of Attorney.

    Different requirements and facilities for this apply in different jurisdictions and the current legal requirements for these should be documented in local policies and procedures. Advice may also be sought from Medical Indemnity organisations.
4. Document all of the above steps in the medical record and record why the doctor determined that the patient lacks capacity and why the specific decision to proceed with examination and forensic sample collection is in the patient's best interests.
5. As soon as the patient is sufficiently recovered to understand, ensure that the patient is informed what has been done, and why:
6. In some jurisdictions forensic information or specimens may not be released to police until consent is obtained from the patient (if recovered) or an official Guardian.

2.7 When a forensic procedure is authorised by law, a court order or other legal means

On occasions police may obtain a court order, warrant or similar document authorising a forensic procedure such as an examination or collection of specimens. Alternatively, there may be legislative authorisation for a procedure – e.g. for compulsory collection of body fluid specimens under intoxicated driving laws.

It is important that forensic practitioners understand that the legal requirement in these cases applies only to the patient and not to the forensic medical examiner. Despite the legal compulsion for the patient, when confronted with such a document the doctor must still be satisfied that the patient gives valid consent for the procedure. This is an ethical requirement that applies to all medical practice. Where there is

doubt, or misunderstanding by police, a senior practitioner or medical indemnity organisation should be consulted.

In all situations when any examination is carried out under a warrant or court order the doctor should ask for and retain a copy of the documentation within their medical notes before conducting the assessment. This is because although this allows for appropriate documentation of the legal basis of the examination the document might also prescribe the place and time of examination, details of the procedure, the person(s) to be present, and the person to conduct the examination, as well as the person or authorities to whom the report and/or results should be given.

3. Consent for release of information and/or samples to police

Following a forensic examination of a person who lacks capacity, the doctor will need to consider whether to release information regarding the examination findings to the police or other appropriate agencies (e.g. Health and Human Services). In addition, they will also need to decide if they are going to transfer forensic samples to the custody of police in order that these samples might be analysed with results potentially used in relation to investigation and prosecution of a crime, or store them securely until the patient is able to consent to their release for analysis. Police may obtain a court order compelling the doctor to release the samples.

Legislation regarding the release of information and the release of samples to police varies across jurisdictions.

4. Exceptional Circumstances

4.1 Release of information and/or samples to police in the absence of consent

Disclosure of personal information about a patient without consent may be justified in the public interest if failure to disclose so may expose others to a risk of death or serious harm. Such a situation might arise, for example, when a disclosure would be likely to assist in the prevention, detection or prosecution of very serious crime, especially crimes against the person that might result in death and/or terrorism-related offences.

4.2 Doctor declines to examine due to conflict of interest or other reasons

When requested to perform a forensic procedure, issues of consent also apply to the doctor. Occasions may arise where a doctor feels that they cannot proceed with a procedure because of concerns about safety or other personal, professional, ethical, religious, cultural or social reason. Despite employment as a forensic professional there should be no obligation for doctors to participate in activities that are objectionable to them. If a doctor is not able to proceed for these reasons the situation should be explained to those requesting the service and every effort should be made to find an alternative practitioner.

Endnote

[1.] The clinician must be mindful that it in some cases it may be a member of the family or ‘close’ friend who is the perpetrator of the alleged assault. In other cases there may be sensitive information about an incident that the patient does not wish to be disclosed to friends and/or family. Therefore, the doctor must seek permission from the patient regarding the release of information and decide whether it is in the patient’s best interests to speak to family members and/or share information with others.

References

Gillick v West Norfolk and Wisbech Area Health Authority and Another (1986) AC 112, [1986] 1 FLR 224.

FFLM Guideline: “Consent from patients who may have been seriously assaulted” Faculty of Forensic and Legal Medicine (UK) July 2014

Darzins, Peteris, (editor of compilation.) & Strang, David, (editor of compilation.) & Molloy, William, 1953-, (editor of compilation.) & Alzheimer's Association (South Australia) (sponsoring body.) 2000, *Who can decide? : the six step capacity assessment process*, First edition, Adelaide, S. Aust. Memory Australia Press

Appendix: Links to Australia and New Zealand guardianship authorities

South Australia: http://www.sacat.sa.gov.au/types-of-cases/guardianship

NSW: http://www.ncat.nsw.gov.au/Pages/guardianship/guardianship.aspx

Tasmania: http://www.guardianship.tas.gov.au/about_us

Victoria: http://www.publicadvocate.vic.gov.au/guardianship-administration/guardianship

Western Australia: http://www.publicadvocate.wa.gov.au/G/guardianship.aspx

Qld: http://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters

Northern Territory:
https://legislation.nt.gov.au/Legislation/GUARDIANSHIP-OF-ADULTS-ACT

ACT: https://www.acat.act.gov.au/application-type/guardianship

New Zealand: https://www.justice.govt.nz/family/powers-to-make-decisions/

Relevant Legislations

Queensland: *Guardianship and Administration Act 2000, Mental Health Act 2016*

New South Wales: *Guardianship Act 1987, Mental Health Act 2007*

ACT: *Guardianship and Management of Property Act 1991, Mental Health Act 2015*

Northern Territory: *Adult Guardianship Act, Mental Health and Related Services Act 2002*

South Australia: *Guardianship and Administration Act 1993, Mental Health Act 2009*

Tasmania: *Guardianship and Administration Act 1985, Mental Health Act 2013*

Victoria: *Guardianship and Administration Act 1986, Mental Health Act 2014*

Western Australia: *Guardianship and Administration Act 1990, Mental Health Act 2014*

New Zealand: *Guardianship Act 1968, Care of Children Act 2004, Mental Health (Compulsory Assessment and Treatment) Act 1992*