



## C-Gen 2

# Guidelines for consent and the provision of information regarding proposed treatment

The purpose of this Statement is to assist doctors with some of the legal principles and guidelines that apply to the issues of patient consent and the duty to inform.

A patient's informed consent must be obtained before an examination or treatment may be conducted. In obtaining consent, both Federal and State /Territory law must be observed, so Fellows are advised to seek information about the laws which apply in their State or jurisdiction in addition to the information provided in this statement.

### ***Competence to Consent***

The consent of a patient who is not legally competent is not valid. The more obvious categories of legally incompetent patients are those who are intellectually disabled or unconscious. Doctors must assess the competence of each patient. If a patient is not competent to consent to treatment, the consent of a guardian, a person charged with the patient's medical treatment power of attorney, or sometimes even a court, must be obtained before the examination or treatment of the patient can proceed. If the doctor is unsure whether or not a patient is competent to consent to treatment, the doctor should seek a second opinion from another doctor (if possible) or seek legal advice.

In the case of an unconscious patient or an emergency situation where urgent treatment is needed to save life or avoid serious harm, the law recognises that full information cannot always be provided to the patient, and that it is not always possible to obtain consent. While it is also wise to consult relatives (if possible) in such situations, doctors must always act in the best interests of the patient.

### ***Consent from Children***

Where the patient is a child, and consent has not been obtained from both the child and the parent(s), complex issues as to consent arise. The obvious question is whether the child's consent is enough on its own. One school of thought is that a child may consent to medical treatment if the treating doctor is convinced:

1. that the child is sufficiently intelligent; and
2. that the child sufficiently comprehends:
  - a. what the doctor is proposing;
  - b. the nature of the treatment,
  - c. and the consequences and risks of the treatment.

In providing care to children, there are specific statutory requirements in some jurisdictions relating to consent to treatment and refusal of treatment. Doctors must be aware of the relevant requirements in their jurisdiction. The safest option is to, whenever possible, seek the consent of a parent or guardian, especially if a major intervention is proposed. Where this is not possible, doctors should seek a second opinion from a colleague and/or their medical defence organisation.

### ***Duty to Inform of Risks***

As a rule, consent must be informed consent. Accordingly, it is the responsibility of the treating doctor to provide the patient with as much information about the proposed intervention as is practically possible, before obtaining the patient's consent.

The patient should be provided with all relevant information that is necessary to allow her to make an informed decision about treatment.

The law requires that a doctor has a duty to warn a patient of a material risk inherent in any proposed procedure or treatment.

A risk will be considered material if, in the circumstances of the particular case, a reasonable person in the position of the patient, if warned of the risk, would be likely to attach significance to it,

OR

if the medical doctor is aware, or should reasonably be aware, that the particular patient, if warned of the risk, would be likely to attach significance to it.

Thus, when considering the need to inform a patient of a particular risk, there will be two separate matters that require consideration:-

1. **Would a reasonable person, in the position of the patient, be likely to attach significance to the risk?**
2. **Is the doctor aware, or should the doctor be reasonably aware, that this particular patient would be likely to attach significance to that risk?**

Treating doctors should also keep in mind that their legal obligation to inform a patient of a proposed treatment and/or examination is non-delegable. Therefore, while time constraints, for instance, may cause a treating doctor to have a junior doctor explain to the patient the nature of the proposed operation, if a junior doctor fails to properly discharge the treating doctor's responsibility, the fault lies with the treating doctor.

The National Health and Medical Research Council's *General Guidelines for Medical Practitioners on Providing Information to Patients* lists several matters it believes treating doctors must discuss with their patients before conducting an examination and/or treatment:

1. The possible or likely nature of the disease or illness the doctor proposes to treat;
2. The proposed approach to investigation, diagnosis and treatment:
  - a. What the proposed approach entails;
  - b. The expected benefits;
  - c. Common side effects and material risks (Test: Would a reasonable person in the patient's position attach significance to the risk if it were explained to them fully?);
  - d. Whether intervention is experimental or conventional; and
  - e. Who will conduct the intervention.
3. The degree of uncertainty of any diagnosis arrived at;
4. The degree of uncertainty as to any therapeutic outcome;
5. The likely consequences of not choosing the proposed diagnostic procedure or treatment, or of not having any procedure or treatment at all;
6. Any significant long term physical, emotional, mental, social, sexual or other outcome associated;
7. The time involved;
8. The costs involved, including out of pocket costs (i.e. not just those covered by health insurance, if any).

The NHMRC also recommends that treating doctors encourage patients to ask questions about what is being proposed and the financial implications of undergoing the treatment.. This not only includes the patient in the decision-making process, but also enables the treating doctor to gauge the patient's concerns and ascertain what the patient deems to be important. In obtaining consent for treatment, doctors have a duty to answer all patients' requests for information. Clear and precise written or audiovisual information can be used, but only to complement any information a doctor provides a patient with verbally.

When the patient's first language is not English, the medical practitioner must assess whether the patient has a sufficient understanding of the information provided to consent to the treatment (taking into consideration the complexity of the issues and the patient's proficiency in English). If an interpreter is required, it is highly desirable that an independent, professionally qualified health interpreter assist either in person or by telephone.\* If a professionally qualified interpreter is not available (or is not acceptable to the patient), assistance may be sought from family members or bilingual staff (see footnote \* below).

It is also useful to note that while standard consent forms can be of some use, they are not a sufficient substitute for actual medical advice provided in a consultation between patient and treating doctor.

In some instances a patient may indicate that he or she does not wish to be fully informed about a proposed treatment. While the doctor is not required to burden a patient with unwanted information, the doctor is still obligated to explain the procedure to the patient (at least in broad terms), the alternatives to the treatment, the likelihood of a satisfactory outcome, and the more serious and common possible side effects or complications. Information should not be withheld from a patient unless the doctor believes that the patient's physical or mental health could be seriously harmed by provision of the information.

Doctors should also keep clear, contemporaneous notes of the advice and information with which they have provided a patient, including the specific risks that have been discussed and the provision of information or literature (if any). It may be that a reference to the advice given is needed in a letter to a referring doctor. Where appropriate, a note should be made of the fact that the patient has received written or other information in a set form.

### ***Demonstration Procedures***

Where a Fellow is a visiting surgeon conducting a demonstration/teaching session for peers on a patient of another practitioner, the visiting surgeon must still undertake a consultation covering the nature and teaching format for the surgery, and obtain written consent from the patient for the procedure. This is necessary even if the patient's treating specialist has already undertaken a consultation and obtained consent (as the treating specialist may not have been in a position to give full details of the demonstration surgery and possible complications).

Fellows are also referred to statement C-Gen 6 Guidelines for Visiting Surgeons Conducting Demonstration Sessions for additional information.

### **Footnote**

\*The *Australian Health Insurance Commission* has a free telephone interpreting service to assist doctors in private practice. It undertakes to provide interpreters in major community languages within three minutes. Contact the Doctors' Priority Line 1300131450 or see <http://www.immi.gov.au/general/doctor/index.htm>

For more information on consumer rights in New Zealand, refer to the *New Zealand Health & Disability Commissioner's Code of Consumer Health*  
[http://www.hdc.org.nz/aboutus/The\\_Code/TheCode.html](http://www.hdc.org.nz/aboutus/The_Code/TheCode.html)

### **Links to other College statements**

[Guidelines for visiting surgeons conducting demonstration sessions \(C-Gen 6\)](#)

This College Statement is intended to provide general advice to Practitioners. The statement should never be relied on as a substitute for proper assessment with respect to the particular circumstances of each case and the needs of each patient.

The statement has been prepared having regard to general circumstances. It is the responsibility of each Practitioner to have regard to the particular circumstances of each case, and the application of this statement in each case. In particular, clinical management must always be responsive to the needs of the individual patient and the particular circumstances of each case.

This College statement has been prepared having regard to the information available at the time of its preparation, and each Practitioner must have regard to relevant information, research or material which may have been published or become available subsequently.

Whilst the College endeavours to ensure that College statements are accurate and current at the time of their preparation, it takes no responsibility for matters arising from changed circumstances or information or material that may have become available after the date of the statements.