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# Understanding and Navigating Informed Consent from Students and Parents

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Understanding and Navigating Informed Consent from Students and Parents – 15 October 2019, Brisbane

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# Introduction

## Corney & Lind Lawyers Pty Ltd

➤ Mid size law firm – 18 lawyers + 30 staff

➤ Our focus areas

Schools & Education

Not for Profit & Charity

Commercial

Employment & Discrimination

Personal Injury

Commercial & Construction Litigation

Migration & Visas

Family Law

Criminal & Traffic

Estate & Elder Law

➤ Our lawyers travel to you if needed

➤ Specialist lawyers committed to delivering “*just redemptive outcomes®*” with care and integrity

➤ Based right next to the CBD opposite the RBWH transport hub

## 1. What is Consent?

- Affirmative and explicit acceptance by word or conduct; not merely an absence of objection (*Bell v Alfred Franks & Bartlett Co Ltd* [1980] All AR 356
  - Not necessarily express – can be implied depending on the circumstances
  - But cannot be inferred simply by inaction
- But the meaning varies depending on the legal context



## 1. What is Consent?

- **Criminal Law**

- Voluntary agreement freely given by a rational and sober person able to form a reasonable opinion upon the matter to which he or she consents
- Can be expressed or implied by conduct, depending on the triviality of the situation (i.e. Trivial touching in the context of common everyday intercourse (*Boughey v R* 1986 161 CLR 10)
- Certain persons are presumed incapable of giving consent in certain situations (i.e. Children and the intellectually disabled)

- **Equity**

- A voluntary agreement or yielding of the will.
- Usually involves a reasoned act in the face of a situation calling for choice (*Mercier v Holmes* 125 A 2d 790 (1956))
- Requires knowledge of the matter to which consent is said to be given
- Can be contrasted with mere acquiescence or assent: Consent involves an affirmative act or attitude



## 1. What is Consent?

- **Tort (assault/trespass or negligence)**
  - Medical professionals generally need to obtain consent before performing a procedure
  - A person who is not “informed in broad terms of the nature of the procedure” may sue in trespass (assault) (*Rogers v Whittaker* (1992) 175 CLR 479)
  - A person who is not given adequate information when giving consent to a procedure may sue in negligence (*Rogers v Whittaker* (1992) 175 CLR 479)
  - Consent must be genuine and obtained without fraud or duress: *Norberg v Wynrib* [1992] 2 SCR 226
  - Minors: Person who has insufficient maturity and lacks understanding about the nature of medical treatment cannot give a valid consent (the “Gillick Principle”)



## 1. What is Consent?

- **Contract (Acceptance)**

- A contract usually arises when an offer is accepted.
- Acceptance may be express or implied from conduct
- Acceptance must be unequivocal
- Acceptance must be communicated to the other party
- Minors: Presumed to not have capacity and the contract is voidable (unless it is a contract for necessary goods or services)
  - “An infant, like a lunatic, is incapable of making a contract of purchase in the strict sense of the word, but if a man satisfies the needs of the infant or lunatic by supplying to him necessaries, the law will imply an obligation to repay him for the services so rendered, and will enforce that obligation against the estate of the infant or lunatic” *Nash v Inman* [1908] 2 KB 1
  - Are the goods or services suitable to the condition in life of the child and necessary to their actual requirements at the time?



## 1. What is consent?

### Privacy

- Australian Privacy Principles sets out the expectations of agencies and organisations when collecting, using, storing and disclosing personal information
- Expectations vary depending on the nature of the personal information (i.e. Is it also Sensitive Information)
- An individual's consent is generally required when collecting, using or disclosing personal information (subject to specific exceptions)
- Consent must be:
  - Express or implied (but not merely assumed)
  - Informed
  - Voluntary
  - Current and Specific
  - Given by an individual with the capacity to understand and communicate their consent
- Opt-Out mechanisms should be used with caution:
  - Was it clearly and prominently presented
  - Was there sufficient information presented with the Opt-Out regarding consequences
  - Is it easy for the person to Opt-Out



# 1. What is Consent

## General Principles

- Does the individual have capacity to consent?
  - Age of the individual
  - Intellectual capacity to understand what is being sought
- Is the consent voluntarily given?
  - Given without undue pressure, fraud, threats, duress or coercion
- Is the individual fully informed?
  - Does the individual understand what they are consenting to
  - Degree of information given will depend upon the circumstances
  - Does the individual understand the consequences that flow from the consent (risks of giving consent/not giving consent etc)
- Is the consent specific to the circumstance?
  - Consent should be specific to the circumstance, not general in nature (i.e. Not a blanket consent)
- Is the consent current?
  - How recently was the consent given?
  - Could the consent have lapsed with time and changed circumstances?





## 2. How is Age Considered in Assessing Consent in Different Circumstances

### Consent for Sexual Interactions

State	Legislation	Age of Consent
ACT	<i>Crimes Act 1900</i> (Section 55)	Age of Consent for Sexual Interactions is 16.
NSW	<i>Crimes Act 1900</i> (Section 66C)	
NT	<i>Criminal Code Act 1983</i> (Section 127)	
QLD	<i>Criminal Code Act 1899</i> (Section 215) Health and Other Legislation Amendment Bill 2016	
VIC	<i>Crimes Act 1958</i> (Section 45)	
WA	<i>Criminal Code Act Compilation Act 1913</i> (Section 321)	
SA	<i>Criminal Law Consolidation Act 1935</i> (Section 49)	Age of Consent for Sexual Interactions is 17.
TAS	<i>Criminal Code Act 1924</i> (Section 124)	



## 2. How is age considered in assessing consent in different circumstances?

### Health and Medical Treatment

#### **Gillick v West Norfolk AHA [1986] AC 112**

- “Parental rights do not wholly disappear until the age of majority ... But the common law has never treated such rights as a sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law ... Is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child”
- 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

#### **Secretary, Department of Health and Community Services v JWB (Marion’s Case) (1992) 175 CLR 218**

- Applied *Gillick* as persuasive authority
- “Parental power to consent to medical treatment diminishes gradually as the child’s capacities and maturity grow and that tis rate of development depends on the individual child”
- No fixed age rule, but Deane J noted from Piaget’s research: “the capacity to make an intelligent choice, involving the ability to consider different options and their consequences, generally occurs in a child somewhere between the ages of 11 and 14. But again, even this is a generalisation. There is no guarantee that any particular child, at 14, is capable of giving informed consent, nor that any particular 10 year old cannot.”



## 2. How is age considered in assessing consent in different circumstances?

### Privacy

- Applies the *Gillick* principle
- Obligation on the Organisation/Agency to determine if the individual has capacity to consent (to the collection/use/disclosure of personal information)
- Consider the understanding and maturity of the child – do they have sufficient understanding and maturity to understand what is being proposed
- Assess on a case-by-case basis
- BUT if this is not practicable, the Organisation/Agency may presume an individual aged over 15 has capacity to consent (in the absence of information to the contrary).
- Conversely, an individual under the age of 15 is presumed to not have capacity to consent.

### 3. When is a “blanket” consent adequate?

Blanket consent may be easy, but it is problematic

- How do you demonstrate the consent is voluntary?
- Is it informed (does the individual fully understand what they are consenting to)?
- Is it specific?
- Is it current (when was the consent first given)?

Consider: Does the “blanket” consent essentially undermine the consent given. When in doubt, obtain a fresh consent.

*“Blanket consent provided in advance for a psychological service is not considered to be informed consent. ... Informed consent is obtained before undertaking any assessment or interventions, or whenever the purpose, nature or focus of the psychological service alters. It is important to check and verify consent if a considerable period of time has elapsed since a previous referral. ... The schools psychologist has a continuing duty to obtain consent.”*

Australian Psychological Society, *The framework for effective delivery of school psychology services: A practice guide for psychologists and school leaders, Sept 2016*)



## 4. When is oral consent adequate?

- It will depend on the circumstances
- What is the level of risk involved (for the child and the organisation)
- Oral consent is still consent (and is express consent), but without clear evidence. It will rely upon your testimony being accepted.
- If relying on oral consent, keep a detailed file note:
  - Demonstrates the key elements of consent (voluntary, informed, specific, current, child has capacity)
- Ultimately you will bear the burden of proving consent
- When obtaining consent in writing, the key elements of consent still need to be documented



## 5. Addressing Challenges with Consent

### Obligations where parent does not consent to counselling and you believe the child needs it

- Are there any court orders limiting parental responsibility?
- Is the child competent to give informed consent? Potentially apply the Gillick Principle - parental right to give consent diminishes and may even terminate as the child grows older and acquires sufficient understanding and intelligence to fully comprehend the conditions for informed consent.
- Is there a concern regarding neglect? Consider mandatory reporting obligations and your duty of care towards the child
- If charging a fee for the service, it may not be a contract for “necessities” and therefore voidable

## 5. Addressing Challenges with Consent

### One parent consents, the other objects, to counselling

- Are there Court Orders in place?
- Where Sole Parental Responsibility – only that parent’s permission is required
- Equal Shared Parental Responsibility - The parents ought to be sharing information with each other, and making decisions jointly, there can be no decision made about a major long term issue unless both parties agree.
  - Section 65 DAC(4) states that:  
*“To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly”*
  - This means that it is not a responsibility of an organization to ensure that the decision is joint – an organisation is entitled to rely on a parent’s decision as communicated as if it is a joint decision of the parents.
  - But, if you are aware that a parent objects, section 65DAC(4) may not protect you.
- Consider the *Gillick* principal?
- *APS Ethical Guidelines for Working with Young People* (2016) – it is always desirable to have both parents or the child’s legal guardian consent to any psychological service provided to a minor.



## 5. Addressing Challenges with Consent

### Consent of Independent Students

- Is there a legal guardian?
- Apply the *Gillick* Principle to ensure competence
- Consent still needs to be voluntary, informed, current and specific
- Charging a fee for the service? Is it a contract for necessities?
- Obtaining consent in writing may be important for evidentiary purposes.



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