Acknowledgement

The Medical Practitioners Board of Victoria acknowledges the contribution of the original document developed by the Young People and Informed Consent Project, Deakin University in consultation with the Centre for Adolescent Health, Royal Children’s Hospital, Melbourne and the Australian Medical Association (Victoria).

Consent for Treatment and Confidentiality in Young People

Level 16, 150 Lonsdale Street
Melbourne Vic 3000
GPO Box 773H
Melbourne Vic 3001
Tel: 9655 0500
Fax: 9655 0580
info@medicalboardvic.org.au
www.medicalboardvic.org.au

Issued: September 2004
Young Person
For the purposes of this document, a young person is less than 18 years of age.

Medical Treatment
The Medical Treatment Act 1988 (Vic) defines ‘medical treatment’ as the carrying out of:

a) an operation, or

b) administration of a drug or other like substance, or

c) any other medical procedure.

‘Medical treatment’ does not include palliative care.

Special Medical Procedures
There are some special procedures that require authorisation from the Family Court, whether or not the young person or his or her parents have consented. These include procedures that may permanently affect the quality of life of a young person such as life-threatening situations or treatments of significant risk and irreversible procedures, including therapeutic sterilisation and gender reassignment.

It is usually in a young person’s interest to have their parents involved in their medical 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 medical 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. Treating doctors must make a judgement about a young person’s ability to give valid consent to or to refuse treatment whenever they seek medical advice or treatment.

The Medical Practitioners Board of Victoria has published this pamphlet to help medical practitioners who must decide whether or not a young person can consent to medical treatment and what rights of confidentiality they have. The law in this area is very complex and practitioners may be faced with many difficult challenges. Medical practitioners with questions about specific cases should contact their professional indemnity insurance provider, their solicitor or, if they are hospital employees, medical administration. There may be times when it is necessary to refer the matter to the Family Court of Australia (Family Court) or to the Victorian Civil and Administrative Tribunal (VCAT). However, it is wise to seek legal advice before doing so.
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.

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

- 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 at 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 treating doctors 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 doctor’s prior knowledge of the patient
- Why the patient came to see the doctor 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 treating doctor 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 doctor 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 doctor should document the assessment of maturity in the medical record, together with the factors taken into consideration in making this decision.

Competency should be tested for each new treatment being considered, except in an emergency when consent from the young person or their parents is not necessary. The form of assessment will depend on the nature of the presenting problem, the degree of complexity of the treatment proposed, the doctor’s prior knowledge of the 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 medical procedures may require authorisation by the Family Court. A useful guide to this process ‘A Question of Right Treatment’ is available from the Family Court or online at http://www.familycourt.gov.au/papers/pdf/vicmedical.pdf

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 medical treatment. Should a practitioner consider that such a young person is not competent, he or she could initiate proceedings in VCAT to have a guardian appointed for that young person. 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 medical treatment decisions. Parents or guardians can consent on their behalf. However, parental power to consent to medical treatment on behalf of their child is not absolute – parents must act in the best interests of their child.

In the High Court decision of Marion (1992) 175 CLR 218, the parents of a 14-year-old girl with a severe intellectual disability had applied to the Family Court for an order authorising the performance of a hysterectomy and oophorectomy. The High Court determined that such situations need to be referred to the Family Court for authorisation and that parental consent was not sufficient.

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 medical 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 their behalf, depending on whether the non-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 doctor, 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. Examples include refusal to have treatment for a fractured metacarpal or for a non-serious infection. In these circumstances, the doctor 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 doctor considers necessary and in the patient’s best interest, even after a full discussion. In these cases, the doctor 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 doctor 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. Examples could include refusal to have medication for frequent epileptic seizures, or treatment for a potentially curable malignancy.

The response to this situation may include:

- The doctor may need to review his or her decision about the young person’s competence to make a valid decision on consent in the specific circumstance 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 doctor 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 doctor 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.

Refusing treatment – parental involvement

If the parent becomes involved and supports their child’s decision to refuse treatment or cannot persuade their child to have the treatment, the doctor can accept the decision as valid, and would normally not be expected to take the matter further. However, if the doctor considers that refusal by both the young person and parent poses a serious threat to the young person’s health, the doctor may refer the family to the Family Court. The Court has the power to override a parent’s decision.

Occasionally the young person’s parents disagree on such matters, with one parent willing to consent, and the other refusing consent. If this cannot be resolved, and if the young person’s life or long-term health is at risk, it may be necessary to involve the Family Court in the decision. While a doctor may decide to trigger the involvement of the Family Court, he or she would be well advised to seek legal advice on this issue.
Confidentiality

Confidentiality in consultations
Doctors owe a duty to patients of any age to keep all information obtained in the course of the therapeutic relationship confidential. The common law recognises 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) and the Health Records Act 2001 (Vic) 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 medical records is not considered in a young person’s best interest, or when another person has provided confidential information that has been recorded. Examples include information about family members or genetic risks.

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

Current law does not specifically recognise that incompetent young people 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 doctor. The most prudent course for the practitioner 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 doctor 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 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.)
- Disclosure necessary to treat a patient (such as prescription of Schedule 8 drugs)
- Public interest (for example if the doctor 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 patient (for instance, when the doctor believes that the young person is at risk of suicide or serious self-harm)
- Court proceedings
- Statutory reporting requirements
- Notifiable infectious diseases
- Children under 17 years in need of protection (for example from physical, sexual or emotional abuse)
- Reporting of blood alcohol levels after a traffic accident
- Prescribed drug dependency and supply of certain drugs, and
- Registration of births and deaths.

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.