Government of Western Australia
Department of Health

Policy Frameworks
MP 0175/22
Effective from: 13 March 2023

Consent to Treatment Policy

1. Purpose

Consent to treatment is a patient's agreement for a health practitioner to proceed with a proposed treatment. All patients have the right to make an informed decision about proposed treatments, except in very limited circumstances. Unless an exception applies, health practitioners must be satisfied that they have a patient's consent before providing treatment.

The purpose of this policy is to:

- set out key underlying legal principles relevant to consent
- ensure there is a consistent approach in seeking and documenting consent to treatment across the WA health system
- support a collaborative healthcare culture that encourages patients and their families to ask questions, be presented with information about treatment options (including to take no action), have their choices heard and respected by health practitioners and involve their family/loved ones in discussions as they choose.

Legislation pertinent to this policy includes:

- *Children and Community Services Act 2004*
- *Civil Liability Act 2002*
- *Commonwealth Family Law Act 1975*
- *Criminal Code*
- *Guardianship and Administration Act 1990*
- *Human Tissue and Transplant Act 1982*
- *Mental Health Act 2014*
- *Electronic Transactions Act 2011*.

This policy is consistent with the consent process and obligations contained within the following documents:

- the Australian Charter of Healthcare Rights
- the National Safety and Quality Health Service Standards
- the National Framework on Advance Care Directives
- National codes of conduct of health practitioners.

This policy is a mandatory requirement under the *Clinical Governance, Safety and Quality Policy Framework* pursuant to section 26(2)(d) of the *Health Services Act 2016.*

This policy supersedes OD 0657/16 *WA Health Consent to Treatment policy*.

Voluntary Assisted Dying sits outside the scope of this policy, please refer to MP 0154/21 Managing Voluntary Assisted Dying Policy.

2. Applicability

This policy is applicable to all health service providers excluding Health Support Services.

The requirements contained within this policy are applicable to the services purchased from contracted health entities where it is explicitly stated in the contract between the contracted health entity and the State of Western Australia or Health Service Provider. The State of Western Australia or Health Service Provider contract manager is responsible for ensuring that any obligation to comply with this policy by the contracted health entity is accurately reflected in the relevant contract and managed accordingly.

3. Policy Requirements

Health service providers must have policies in place which direct health practitioners on consent to treatment principles and processes in alignment with this policy. This includes determining and capturing those treatments which require explicit consent and documentation of such consent, and those which may be dealt with by implied consent.

3.1. Consent Principles

Consent to treatment is guided by two key legal principles:

- Patients have the right of autonomy or self-determination
- The provision of treatment without consent exposes health practitioners to risks of legal claims including trespass to the person (assault and battery) and/or negligence (failure to inform), except in cases where the law permits or requires treatment without consent. Refer to section 3.6 *Consent to Treatment Procedure*.

Health practitioners must seek a patient's consent prior to providing treatment unless an 'exception' applies. Refer to policy section 3.7.

Implied Consent

Implied consent may apply where a patient indicates through their actions they are willing to proceed with an aspect of their treatment, e.g. a patient holds out their arm to allow blood to be taken. Implied consent may apply where significant risks to the patient are not anticipated. If there is doubt whether the patient's actions imply consent, explicit consent must be sought.

Explicit Consent

Explicit consent (which is also referred to as 'express consent') must be sought where:

- it is unclear if the patient's actions imply consent
- where the proposed treatment is more complex and/or poses **material risks** to the patient, i.e., risks to which the patient may attach significance when making a decision to proceed or not.

The health practitioner must provide meaningful information about the proposed treatment to the patient, including details of the benefits and material risks specific to that patient and any relevant alternatives. Explicit consent must be sought and for most treatments, it must be documented.

In the case of surgical procedures, explicit consent does not imply anaesthetic consent unless it is administered by the operating surgeon (i.e. local anaesthetic). An anaesthetist must seek consent for the anaesthetic they are proposing to administer.

Refer to *Consent to Treatment Procedure* section 3.1.

3.2. Validity of Consent

To be valid, consent must:

- be voluntary – the patient's decision to either give or withhold consent to the proposed treatment must not be unduly influenced by the health practitioner, or the patient's friends or family
- be informed – the patient must receive sufficient and meaningful information about the proposed treatment (as relevant to the patient's situation including material risks and responses to patient queries) to enable them to make an informed decision
- be given by a patient who has capacity to understand the information presented to them and to make a decision about the proposed treatment
- cover the treatment/s to be performed – treatment/s provided must fall within the scope of the consent that has been given. Where a course of treatment involves multiple treatments, the consent obtained must cover all treatments
- be current – consent must be reviewed if, after consent was obtained, the patient's circumstances (including treatment options and risks) have changed.

A patient's consent remains valid until it is withdrawn, or the proposed treatment is no longer appropriate due to a change in the patient's circumstances. Consent can be withdrawn at any time before the treatment is provided.

Refer to *Consent to Treatment Procedure* section 3.1.

3.3. Assessing Capacity

A patient's capacity must be assessed in relation to a specific treatment decision prior to seeking the patient's consent to that treatment. An adult patient has capacity to give consent if they can understand the nature, consequences and risks of the proposed treatment. Their capacity is assumed unless there is reason to believe it is lacking.

Children are assumed **not** to have capacity, unless specifically assessed to have capacity for decision making in respect of the proposed treatment.

Refer to *Consent to Treatment Procedure* section 3.2.

3.4. Exchange of Information for Informed Consent

To ensure informed decision making, health practitioners must:

- provide relevant and comprehensive information regarding the proposed treatment to the patient that is appropriate in terms of the patient's language and communication needs, health literacy, and culture
- ensure that information provided covers material risks in a way that the patient can understand, and that other treatment options (including having no treatment) are discussed as relevant
- provide the patient the opportunity to ask questions and be heard, and afforded the time and support to understand the information presented.

Whenever there is uncertainty about English proficiency, language services must be engaged in accordance with MP 0051/17 *Language Services Policy.*

All reasonable efforts must be made to provide the patient supplementary information (e.g. written information, procedure specific information sheets, decision aid tools, videos) to broaden their understanding, enabling them to make a treatment decision.

Refer to *Consent to Treatment Procedure* section 3.3.

3.5. Documenting Consent

Where explicit consent is required, the health practitioner must document consent either in a consent form or the patient's medical record (where a consent form is not available). The information documented must include key points and clear outcomes (including whether consent is provided, declined or withdrawn) from discussions with the patient that are relevant to their decision to proceed with treatment. Patient queries and health practitioner responses must be recorded.

Health service providers must provide consent forms to be used by health practitioners when seeking explicit consent from patients. Refer to *Consent to Treatment Procedure* section 3.1.

As a minimum, the following must be included within a consent form:

- the patient's full name
- the proposed treatment (including whether anaesthesia is required, insertion of an implantable medical device)
- date/s and key points of consent discussion(s), including material risks and benefits discussed of the proposed treatment, patient questions and health practitioner responses
- details about the information provided to the patient and the person providing the information (e.g. procedure specific information sheets)
- whether or not language services were required and if present (physically or virtually)
- whether or not a health practitioner student has permission to be involved in the treatment (if applicable)
- the nature of the review of the patient's condition
- confirmation of consent prior to treatment (if applicable)
- confirmation of decline of consent, or if previously consenting, withdraw of consent (if applicable)
- full name and signature(s) of the health practitioner(s) who determined that the consent process has occurred
- signature of the patient and date signed.

Health service providers must include the above information in consent forms. Where a consent form is unavailable, this information must be documented in the patient's medical record.

Documenting consent does not make the consent valid, however it is essential evidence of the communications relevant to consent.

Refer to policy section 6**:** Supporting Information – Consent form templates.

Refer to *Consent to Treatment Procedure* section 3.4.

3.6. Children and Young People

The general position is that parents have responsibility for their children until they are aged 18 years. Parental responsibility involves decision-making in the best interests of the child, including medical matters such as consent to treatment.

Parents cannot provide consent for all treatments. For example, if sterilisation is proposed, the Family Court or Supreme Court may be required to determine, under its *parens patriae* jurisdiction, whether that treatment is in the child's best interests.

In the absence of court orders which vary parental responsibility, each parent has responsibility for their child regardless if they are living together, married to each other, separated, or have any other change of circumstances.

In some circumstances, courts may issue parenting orders which may vary parental responsibility between parents or transfer some or all parental responsibility to another person, such as a grandparent. Variation of parental responsibility may, or may not, alter responsibilities for decision making on medical matters.

A child may also be deemed capable of providing consent to treatment if they are assessed to be a 'Mature Minor'. Refer to Consent to Treatment Procedure section 3.2.2.

3.6.1 Children in Care

The Children's Court may issue an order, such as a protection order, that places a child "in the CEO's care" under the *Children and Community Services Act 2004*. Where such an order is made, responsibility for decisions about a child's medical treatment may or may not remain with a parent. Depending on the terms of the order, decisions about a child's treatment may be made either by a parent, a special guardian or the CEO (or delegate).

Where the health care team do not know which adult is responsible for making the treatment decisions for a child "in care", they must contact the child's case worker at Department of Communities (Child Protection) to resolve the query.

3.7. Circumstances Where Consent is Not Required or Irrelevant

Patient consent may not be required or is irrelevant in certain circumstances including where:

- there is an emergency which requires urgent treatment and the patient is incapable of providing consent, or
- the law either permits or forbids treatment regardless of consent.

3.7.1 Treatment in an Emergency

Treatment can only be provided without consent where necessary to save a person's life, prevent serious injury to the person's health or prevent the patient from suffering severe pain or distress in circumstances where:

- the patient is incapable of giving consent
- the patient does not have an Advance Health Directive applicable and available
- it is not practical to determine whether the patient has a substitute decision maker who can be readily identified and immediately available.

Treatment without consent must be:

- reasonably required to meet the emergency
- in the patient's best interests
- the least restrictive of the patient's future choices.

The rationale for treatment without consent must be clearly documented in the patient's medical record. The medical record must state details of attempts made to contact the substitute decision maker.

Treatment in an emergency does not include emergency psychiatric treatment. See Part 14, Division 2 of the *Mental Health Act 2014* (MHA).

Where the health practitioner provides urgent, non-psychiatric treatment for involuntary patients and the mentally impaired accused, compliance is required with the reporting requirements outlined under MHA Part 15 Division 2.

3.7.2 The Law Either Permits or Forbids Treatment

Some legislation specifies that treatment either may be provided without consent, or that even with consent, treatment is forbidden. Relevant legislation is outlined in the *Consent to Treatment Procedure* section 3.6.

4. Compliance Monitoring

Health service providers are responsible for monitoring and evaluating the effectiveness of local policies, processes and systems to ensure health practitioners are meeting their legal and professional obligations in relation to seeking patient consent prior to providing (or withholding, as the case may be) treatment.

The Patient Safety and Clinical Quality Directorate within the Clinical Excellence Division will monitor compliance with this policy using data sources available to the system manager (i.e. accreditation reports, clinical incident data and consumer feedback).

The Directorate may request information from health service providers on a 6 monthly basis, including assurance that health service providers are using and promoting Procedure Specific Information Sheets.

Non-compliance will be communicated to the Department CEO as the system manager, and the Chief Executive of the health service provider.

5. Related Documents

The following documents are mandatory pursuant to this policy:

- *Consent to Treatment Procedure*
- *WA Hierarchy of treatment decision makers* – based on the *Guardianship and Administration Act 1990*

6. Supporting Information

The following information is not mandatory but informs and/or supports the implementation of this Policy:

- Consent form templates

- Procedure Specific Information Sheets Library (WA Health staff only)
- WA clinician consent to treatment flowchart 'Can your patient consent to treatment?'
- Decision making tree for engaging an interpreter
- Guiding Principles for the quality use of off-label medicine 2013

7. Definitions

The following definition(s) are relevant to this Policy.

Term	Definition
Adult	A person who has reached the age of 18 years.
Advance Health Directive	An instrument recognised under the *Guardianship and Administration Act 1990* which records a competent adult's decisions about possible future treatment. Treatment decisions recorded in a valid Advance Health Directive (including Common Law Directives) must be followed in circumstances where the maker of the Advance Health Directive can no longer make or communicate the decision themselves.
Capacity	A patient has capacity if he/she is capable of: • understanding the information being given, the nature of the decision and its consequences • retaining the information as necessary to make the decision • using and weighing the information in the decision-making process • communicating their decision in some way. Capacity must always be assessed in the context of the decision that is to be made. Adults are presumed to have capacity unless shown otherwise whereas children do not have capacity unless they are a 'Mature Minor'.
Child (Children)	A person aged under 18 years (*Age of Majority Act 1972*).
Consent (to medical treatment)	In the context of health care, consent is a patient's agreement that a health practitioner can proceed to perform a specific proposed treatment.
Health practitioner	A person registered under the *Health Practitioner Regulation National Law (WA) 2010* in the health professions listed therein.
Health practitioner student	A person who is undertaking a course to gain an initial qualification to practice as a health practitioner in Australia.
Health service provider	A health service provider established by an order under section 32 (1)(b) of the *Health Services Act 2016* and includes North Metropolitan Health Service, South Metropolitan Health Service, Child and Adolescent Health Service, WA Country Health Service, East Metropolitan

	Health Service, PathWest Medicine WA and Health Support Services.
Implantable medical device	A medical device that is intended by the manufacturer: a) to be, by surgical intervention, wholly introduced into the body of a human being, and to remain in place after the procedure b) to replace, by surgical intervention, an epithelial surface, or the surface of an eye, of a human being, and to remain in place after the procedure or to be, by surgical intervention, partially introduced into the body of a human being, and to remain in place for at least 30 days after the procedure.
Interpreter/ Language services	A person who conveys a message or statement verbally or by using sign language into another language with accuracy and impartiality to enable effective communication between two parties who use different languages.
Material risks	A risk which, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it, or if the health practitioner is or should reasonably be aware that a particular patient, if warned of the risk, would be likely to attach significance to it.
Mature Minor	A person aged under 18 years who is assessed as being a 'Mature Minor' or 'Gillick competent', if they have attained sufficient emotional and intellectual capacity to fully comprehend the nature, consequences and risks of a proposed action (e.g. a treatment decision), irrespective of whether a parent (or legal guardian) consents to it. A child who is assessed to be a mature minor may themselves consent to or decline the proposed treatment.
Medical record	A written or electronic record which captures details of a patient's health information.
Off-label	Off-label' is applied when a medicine (or device) is used in ways other than specified in the Australian Therapeutic Goods Administration approved product information, including when the medicine is prescribed or administered: • for another indication • at a different dose • via an alternate route of administration or for a patient of an age or gender outside the registered use.
Patient	A person who has been, is being, or will or may be provided with health treatment. For the purposes of this policy, "patient" unless context

	indicates otherwise, encompasses substitute decision makers including enduring guardians, guardians and "persons responsible" under the *Guardianship and Administration Act 1990*, and parents of a child under the age of 18 as relevant. 'Patient' is inclusive of consumer and client.
Procedure Specific Information Sheet (PSIS)	Patient information sheets written in plain language, with high quality diagrams regarding the body parts to be impacted by the surgery or procedure. They provide the patient an explanation of the medical condition, the benefits of the procedure, any alternatives (including no treatment), what the procedure involves, what the patient can do to help make the operation a success, the potential complications and the post-operative expectations.
Substitute decision maker or 'person responsible'	Under the *Guardianship and Administration Act 1990*, an adult with capacity who is authorised to make a treatment decision on behalf of an adult patient who is unable to make reasonable judgments for themselves.
Telehealth	The delivery of health care services, where patients and providers are separated by distance. Telehealth uses ICT for the exchange of information for the diagnosis and treatment of diseases and injuries, research and evaluation. Both video and telephone consultations are captured under 'Telehealth'.
Treatment	Any medical, surgical (including a life-sustaining measure or palliative care), dental treatment or other health care.

8. Policy Contact

Enquiries relating to this Policy may be directed to:
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9. Document Control

Version	Published date	Effective from	Review date	Amendment(s)
MP 0175/22	13 December 2022	13 March 2023	December 2025	Original version
MP 0175/22 1.1	8 May 2023	13 March 2023	December 2025	Minor amendment as listed below.
Updated MP 0051/17 *Language Services Policy* link in Policy Requirements 3.4 section. Updated Supporting Information document link: Decision making tree for engaging an interpreter.				

10. Approval

Approval by	Nicole O'Keefe, Assistant Director General, Strategy and Governance Division, Department of Health
Approval date	5 December 2022

This document can be made available in alternative formats on request for a person with a disability.