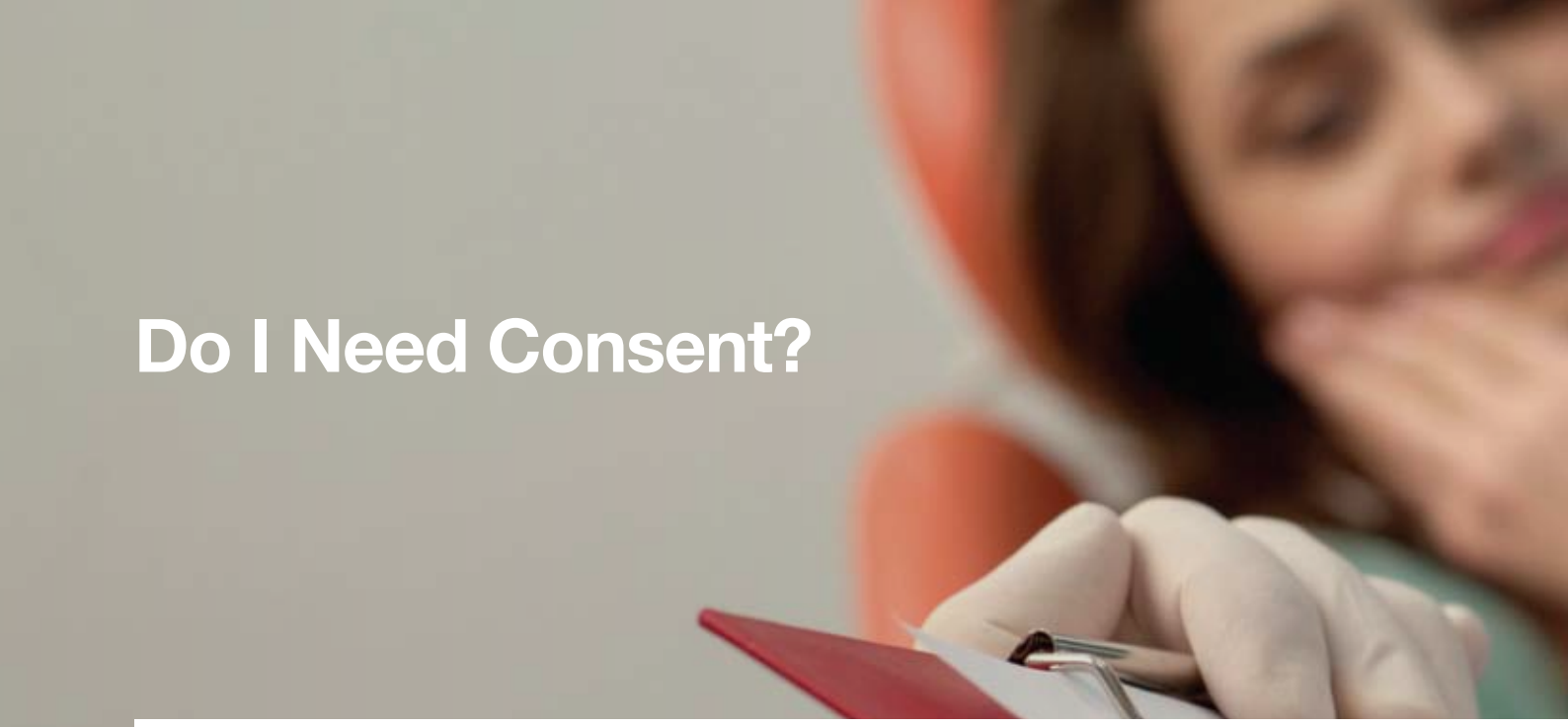

Do I Need Consent?

How can you provide treatment when your patient is unable to give consent? Situations do arise where patients do not have the capacity to consent. There are laws in each state and territory that guide you through the process for making treatment decisions where the patient cannot consent[1]. While there are some common elements, these laws are not uniform and doctors should always seek advice about the law applicable in their state or territory.

The Pitfalls When the Patient Cannot Give Consent

A NSW practitioner attended a 95 year old woman who had fractured her neck of femur. Repair surgery was needed. It was clear that the patient could not give consent and had no 'person responsible' nor next of kin who could provide consent on her behalf. The situation was complicated by a declaration made 18 years earlier that she did not wish to have any major surgery to save her life nor be resuscitated if she lapsed into unconsciousness. How was it resolved to perform the surgery on this patient in such confusing circumstances?

For a few frustrating days the practitioner considered if, or how, he could perform necessary surgery on the patient without fear of reprisal. It highlights difficult clinical decisions that can arise frequently.

Capacity to consent

As a first step, doctors must assess whether a patient has 'capacity' to consent to treatment. Many states and territories have defined capacity in their relevant legislation. Capacity goes to a patient's ability to understand the nature of the treatment and its consequences at the time the decision is required. If there is doubt about a patient's capacity, doctors should document all steps taken to establish whether a patient is capable of consenting.

What if the Patient Does Not Have Capacity to Consent?

Emergency situations

Doctors may treat a patient without consent in emergency situations. As a general guide, an emergency situation arises where a medical or surgical procedure is immediately necessary to save the life of the patient or to prevent serious harm to their health.

Some states and territories set out a specific process to be followed in the case of emergency treatment without consent. For example, in South Australia, the consent of another practitioner is required, unless it is impractical.

Substitute consent

With the exception of "special treatment" (discussed below), legislation in each state and territory specifies processes for obtaining 'substituted' consent in non emergency situations. Most legislation allows a 'person responsible' to make treatment decisions and sets out a hierarchy of people from whom a doctor must obtain consent. Some legislation has created a special title for the person responsible, for example, a Health Attorney in ACT and a Statutory Health Attorney in Queensland. A person responsible must still make decisions in the best interests of the patient.

If there is no one able to give substitute consent, a doctor may need to seek an order from the relevant guardianship tribunal or Court in their state or territory. This process is slow and several months can elapse before such an order is granted.

Minor treatment

In most states and territories, a doctor must seek the consent of a 'person responsible' before providing 'minor' treatment. In Queensland, doctors need not actively seek consent from the 'person responsible' but must consider that the treatment is necessary. Minor treatment is not usually defined in legislation and your own and your colleagues' experience should guide you.

Major treatment

In NSW, doctors must obtain the consent of the person responsible for 'major' treatment. Tasmania requires a person responsible's consent if the treatment is serious and dangerous. Only NSW & Tasmania have a separate category of 'major' or 'serious' treatment. In all other states and territories, the ordinary procedures for substitute consent must be followed.

Special treatment

All states and territories require the consent of their relevant guardianship boards or tribunals before giving 'special' treatment to a patient without their consent. An existing guardian or person responsible cannot consent to special treatment. Special treatment is defined in each state and territory's legislation but usually includes procedures for sterilisation and termination of pregnancy.

Advance care directives

An advance care directive may be a source of patient consent after the patient has lost capacity to make their own decisions. The wishes expressed in these directives will usually take priority over the wishes of a substitute decision maker. Legislation regulating directives about future health care has been enacted in Victoria, Queensland, South Australia, ACT and the Northern Territory. In other states without specific legislation, advance care directives can still be valid. Before acting on an advance care directive, doctors should consider a number of matters including the currency of the document and whether the directive is expressed in clear terms.

Where there is no one to consent

If the doctor cannot obtain consent from a person responsible or guardianship tribunal in the short term, they can still provide certain basic, necessary and reasonable treatment that is in the patient's best interests. However, this exception has limited application. Doctors should attempt to obtain consent to non emergency treatment whenever possible.

Disagreement

In some cases there may be disagreement between the doctor and the person responsible about the treatment needs of a patient. If the disagreement cannot be resolved, doctors may need to consult the relevant public advocate or guardian or apply to the guardianship tribunal or Court for an order.

Written records

Many states and territories require doctors to keep written records containing their reasoning and conclusions about a patient's capacity and their efforts to contact others and obtain consent. Even in the absence of a legal requirement, doctors should keep detailed and clear records of these matters.

The Outcome?

In NSW, the practitioner did not require consent to perform major surgery where he considered the treatment was necessary, as a matter of urgency, to prevent the patient from suffering or continuing to suffer significant pain or distress. Although the patient had expressed an earlier wish about treatment, it was out of date and was ambiguous as to the meaning of major surgery. The practitioner proceeded to perform the surgery.

Outside NSW, a practitioner in this situation would need to follow the appropriate procedure for treating patients in an emergency situation. In most states and territories, a practitioner could provide the treatment without consent if they considered it necessary and in the patient's best interests. The practitioner would need to get advice about the relevance of the patients prior written directive, whether this constituted a directive and whether it complied with any relevant legislation in their state or territory. On the facts of this case, the advance care directive would be unlikely to prevent a practitioner treating the patient.

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References

1. *NSW: Guardianship Act 1987*, Victoria: *Guardianship and Administration Board Act* 1986 and *Medical Treatment Act* 1988, Queensland: *Guardianship and Administration Act* 2000, South Australia: *Guardianship and Administration Act* 1993 and *Consent to Medical Treatment and Palliative Care Act* 1995, ACT: *Guardianship and Management of Property Act* 1991, Western Australia: *Guardianship and Administration Act* 1990, Tasmania: *Guardianship and Administration Act* 1995 and Northern Territory: *Adult Guardianship Act* 1998 and *Emergency Medical Operations Act 1973*.