



# Kids' legal rights in medical care, your obligations and risk minimisation

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Please note that the information contained within this presentation is of a general nature and is not intended to constitute legal advice with regard to any particular case.



# Kids' legal rights in medical care, your obligations and risk minimisation

- Consent, confidentiality and the importance of good record keeping.
- Why do health professionals need to understand Child Protection legislation, criminal law, privacy and medical records law?



# Support structures

- VFPMS
- Policies and procedures
- Legal Services



# What is consent?

- **Consent –**
  - voluntary agreement by a patient/parent/guardian to proposed procedure/treatment
- **What you need to look for –**
  - freely given (voluntary) by the right person
  - informed - specific for the procedure/event, and key points understood



# Kids rights - consent

Two extremely challenging aspects of consent in your context –

- You're dealing with children, who are often very distressed and in the company of distressed support people potentially from a complex family dynamic
- The stakes are high
- What kinds of things need to be understood in the forensic paediatric context?



# Kids rights - consent

- The person consenting must understand –
  - the nature and inherent **risks, material risks**, of the procedure/examination in question **vs benefits**
  - the **alternatives** – not going ahead/ not going ahead now



# Kids rights - consent

- How do you know what they understand?
  - allow them time to ask questions
  - recognise that consent is not ticked off at a moment in time, be alert to particularly confronting issues/changing circumstances and reconfirm
  - good communication throughout your encounter with the patient is critical





# Consent for a child

- Parent or guardian
  - Unless no longer have **'parental responsibility'**; see Court orders to accept that a parent's 'parental responsibility' has been limited
  - One parent's consent is often sufficient
  - Parent must act in the child's best interests
- Child Protection
  - DHHS (the Secretary) to consent to examinations and treatment for a child in certain circumstances



# Kids rights – consent - mature minors

- **Consent by a minor – forensic exam context**
  - Gillick competent 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.’*
  - Gillick v West Norfolk AHA [1986] AC 112*
- **Rules of thumb**
  - under 12, always parent/guardian; 13 be aware of potentially increasing maturity
  - over 14 consider assessment for Gillick competence
  - if the context allows consent from child and parent – all the better



## Documenting consent – risk minimisation

- A signed consent form is not conclusive of consent
  - was there adequate discussion? Evidence this by documenting it with precision
  - did the person consenting understand the nature and consequences
- **Please note – you** need to get consent for what **you** are going to do
- Follow VFPMS policy and guidelines



# Kids' rights - Privacy & confidentiality

- **Ethical basis**
  - Respecting a patient's privacy and confidentiality is consistent with respect for their autonomy
- **Public policy reasons**
  - Trust in medical system; breach of privacy/confidentiality may discourage people to seek help
- **Starting point –**
  - maintain confidentiality and do not disclose patient information to anyone **except with consent or by operation of law - when in doubt, chicken out!**



# Kids rights - Privacy & confidentiality - disclosure

- **Consent**

- For child and mature minor, recommend same approach as consent to treatment – informed and specific

- **Operation of law**

- Subpoenas; warrants
- Health Services Act, s141
- Health Privacy Principles
- Mandatory reporting – will be addressed later in conference; new offences for protecting children



# Privacy and the police

- No general right in public health, even where relevant to an investigation or suspicion of unlawful behaviour
- Usually need **consent** or a **warrant**; or a **subpoena to produce to court**
- General exception where:

*'the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent--*

*(i) a serious and imminent threat to an individual's life, health, safety or welfare; or*

*(ii) a serious threat to public health, public safety or public welfare--'*

Health Records Act, Health Privacy Principle 2.2(h)

(141(3)(eb) Health Services Act 1988)

# Kids' rights – privacy & child protection

- Child protection officers may seek information –
  - ask them to put their request in writing identifying power to obtain the information
  - need consent/legislative power eg section 212 *Children Youth and Families Act 2005 – child needing therapeutic treatment (s185 investigation)*
    - protects the child's rights; protects you
    - note - often health professionals seek the support of child protection – these requests re power etc are not in any way intended to be obstructive

# Risk minimisation - documentation







# Risk minimisation - documentation

- **VERY important both clinically and legally:**
  - to ensure all information available for future analysis/care
  - to evidence what was done and why
  - particularly important if you need to
    - hand over care to another party
    - respond to queries from families/patients later in time
    - justify opinion in Court/Commission/regulatory authority



# Risk minimisation - documentation

- Therefore, very important to record all ***relevant*** information – consider how you do that
- Very important that documentation is **professional** and you will be **comfortable explaining** the language to the patient or a court or others



# Risk minimisation – preparing for disclosure

- Patient and/or parents can access records under **Freedom of Information** legislation
  - Exemptions limited
  - Patient health and safety specifically addressed
- Others – **courts under subpoena, police under warrant, regulators by order**



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