



Villamanta Disability
Rights Legal Service Inc.

Villamanta Disability Rights Legal Service Inc.

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Capacity and Consent

What does 'capacity' mean?

'Capacity' is a legal term that means:

- being able to understand the information that is relevant to you; and
- being able to balance the various risks and benefits available with the alternatives; and
- on the basis of this, being able to make a decision.

What is 'informed consent'?

Generally speaking, the law says that you have given informed consent when:

- you have had access to sufficient information about the act, procedure or process that you are consenting to, to enable you to make a balanced judgement. This includes the risks and benefits of what you are consenting to, as well the alternatives that are available to you; and
- the information you have had access to is information specific enough to answer the questions which, from your perspective, are the important ones; and
- you have the capacity to understand all of this information, to weigh it up and to make a decision; and
- you make the decision by balancing the information without any threat, duress or biased influence from other parties.

However, what constitutes 'informed consent' may depend on the circumstances of the case, in particular, the nature of the act, procedure or process to which you are being asked to consent.

Who has capacity to give informed consent?

The law assumes that all people over the age of 18 have capacity to give informed consent, unless a Court or the Guardianship List of the Victorian Civil and Administrative Tribunal has said that they do not have capacity. In some situations, even people under the age of 18 are considered to have capacity to give informed consent, but once again a Court or the Guardianship List of the Victorian Civil & Administrative Tribunal can rule to the contrary.

What if I am not given correct information, or I am given biased information, upon which to base my decision?

Your consent is based on a mistake. You have not been given all the information you need to make an informed decision. Where consent is based on mistake it is not informed consent at all.

Is it my responsibility to prove that I have the capacity to consent?

If you are over the age of 18, the law assumes that you have the capacity to consent, unless there is objective evidence to the contrary. If you are an adult it is therefore not your responsibility to prove you have capacity. If a person is seeking your consent for something, it is their responsibility to make sure you have the information you need in order to give consent and they can, within reason, check with you that you have understood that information.

IMPORTANT NOTE!

Remember - this Information Sheet has been produced only for use in **Victoria, Australia**. Some of the laws mentioned in this Information Sheet will be different in other places.

How do I show that I am giving informed consent to something?

This will depend on the nature of the decision. For some decisions you might need to show consent by signing a form. For others you might show your consent by saying something, or doing something. The more important the decision is, the more likely that you will need to show your consent in writing. For example, when you agree to a medical procedure, or enter a contract where a significant sum of money is involved, you will usually have to show your consent by signing a form.

In decisions where what is at stake is not so great, you can often show your consent in less formal ways. If someone asks you if they can borrow money from you for a bus ticket, for example, just saying "yes" will usually be enough to indicate your consent. In other cases, you can show your consent by what you do, rather than by what you say. If, for example, a person kicks a football to you, and you pick it up and kick it back to them, you are showing your consent to play a game of football.

What if someone does something to me without my consent?

In most cases a person will be breaking the law if he or she does something to you physically, or uses your money or your property without your consent. Taking money from you without your consent is theft. Performing a routine medical procedure on you without your consent is an assault. Locking you in your home without your consent is false imprisonment. Consent has to be from you for these things, unless you have a guardian or an administrator. If you have a guardian, an administrator or have given a person E during Power of Attorney, he or she can consent to some things on your behalf. There are a few occasions where the law gives a person specific authority to do some things to you without anyone's consent. There are others where what the person is doing doesn't need anyone's consent.

In what sorts of situations is it not necessary to obtain anyone's consent?

There is a range of situations where one person can do something to another without consent. For example, if you need medical treatment in an emergency, this can be done without consent, as long as the treatment doesn't go beyond what is needed to avoid imminent danger.

There are also some situations where it would be reasonable for someone else to presume that you are consenting. This would generally be the case in situations where there is no risk to you and that it would be unlikely that any person in your position would not consent. For example, if you are doing your washing at a public laundry and you are away from the machine when it has finished washing your clothes, another person might take your clothes out of the machine and put them in your laundry basket for you. Although they have handled your property without your consent, it is probably safe and reasonable for them to assume your consent in that situation.

There are also some situations in day-to-day life where things can be done to you without consent - for example, the government can collect taxes from you without consent; a court can make you pay a fine even though you might not want to pay it. But in all these situations, things can be done to you without your consent only because there are specific laws that allow this to happen. If someone is doing something to you, or something that affects you, without your consent then you are entitled to know under what legal authority he or she is acting. You might also like to talk to a lawyer to check whether or not the person is acting within the law.

What if I do not have capacity to give consent?

If you do not have the capacity to give consent, then someone has to be appointed to give consent on your behalf, if it's a situation where formal consent would normally be required. Only the Guardianship List of the Victorian Civil and Administrative Tribunal or the Courts have the authority to appoint someone to give consent on your behalf, unless you have had capacity in the past and have given Enduring Power of Attorney or Guardianship to someone. In this case, that person is able to give consent on your behalf, but only in the areas where you have given them the authority to do so. In Victoria, the law allows a person to grant Enduring Power of Attorney to another person/s, both in relation to financial decisions and in relation to decisions about medical treatment. A person may also grant Enduring Power of Guardianship to another person/s, which confers the power to make lifestyle decisions.

If I currently do not have legal capacity, can someone fill out an Enduring Power of Attorney on my behalf?

No. If someone gets you to sign an Enduring Power of Attorney form when you do not have the legal capacity to understand it, then the appointment will not be legally valid. Although the appointment remains valid even after you lose legal capacity, you must have had legal capacity at the time you signed the document.

Can friends or relatives give consent on my behalf, if I don't have the capacity to do so myself?

Technically, no, unless they have been given this power by the Guardianship List of the Victorian Civil & Administrative Tribunal, or the Court, or by you through an Enduring Power of Attorney. In practice, however, the consent of a friend or relative can be acceptable in situations where there are no risks involved. If there is any controversy or dispute about the decisions involved, and you do not have capacity to make your own decision, a formal decision-maker should be appointed.

However, until such time as you have appointed a formal substitute decision-maker, it is a good idea to at least make sure that people within your family or close friends know and understand your views on certain issues on which they might have to make a decision on your behalf, say, if you were to be involved in an accident (e.g. your views about organ donorship or being put on life support). This may lessen the risk of controversy or dispute, in the event that such decisions needed to be made on your behalf.