

Chapter 7: Disclosing information about patients with impaired capacity

Contents

Key points	1
Disclosure where the patient is unable to provide consent	1
Unable to give or communicate consent	2
Necessary for healthcare or compassionate grounds	3
Limiting disclosure to the extent reasonable and necessary for care or compassionate reasons	4
Ensuring disclosure is not contrary to expressed wishes	4

Key points

You can disclose a patient's health information to a 'responsible person' where:

- the patient lacks the capacity to consent or is unable to communicate consent, and
- the disclosure is either necessary to provide appropriate treatment, or is made for compassionate reasons.

Disclosure where the patient is unable to provide consent

While you can normally only use or disclose health information in accordance with the usual use and disclosure principles, you can disclose a patient's health information if all of the following conditions apply:

- you are providing a health service to the patient
- the patient is unable to give or communicate consent
- you only disclose the information to a responsible person for the patient
- the disclosure is either:
 - necessary for the provision of healthcare, or
 - made for compassionate reasons
- the disclosure is limited to the extent reasonable and necessary for the provision of care or treatment, or for compassionate reasons
- the disclosure is not contrary to the expressed wishes of the patient.

Unable to give or communicate consent

You can only disclose information in these circumstances where the patient:

- is physically or legally incapable of giving consent to the disclosure, or
- physically cannot communicate consent to the disclosure.

Incapacity

Patients may be physically or legally incapable of giving consent if they cannot understand the issues relating to the decision they are being asked to make, and are unable to form a reasoned judgement. This can occur on either a permanent basis (for example, when a patient has advanced dementia), or a temporary basis (for example, when a patient is unconscious).

Some patients may intermittently lose their capacity to give consent, or their capacity may gradually deteriorate because of illness. In such cases, you need to determine if the patient has sufficient capacity to indicate or withhold consent at the time of disclosure.

The following are examples of good practice:

- where a patient intermittently loses capacity, advise that you disclosed personal health information to the responsible person when the patient regains capacity
- where a patient gradually loses capacity, determine the patient's wishes for how health information is disclosed before capacity is lost.

Do children have the capacity to give consent?

The *Privacy Act 1988* (Privacy Act) does not specify an age after which individuals can make their own privacy decisions. As a general principle, a patient under the age of 18 has capacity to consent when the individual has sufficient understanding and maturity to understand what is being proposed.

Generally, you will need to assess each child's capacity to consent on a case-by-case basis. You will need to consider the child's maturity, degree of autonomy, understanding of the relevant issues and circumstances and the nature of the information being handled. Some young people in some circumstances will have sufficient competence to make their own decisions at a young age while some older teenagers may lack such competence. Other laws regarding obligations in relation to children or young people and their confidentiality may offer further guidance.

If you assess that a child lacks capacity to make personal privacy decisions, the child may still be able to contribute to decisions and should be involved in the decision making process to the extent possible.

Complexities arise in certain situations, such as:

- where a parent seeks health information about a child but the child explicitly asks that certain information not be disclosed. For instance, a child may reasonably seek health services in confidence, to address drug and alcohol, sexuality, suicide, depression and other mental illness or pregnancy issues. You may consider it appropriate, in the circumstances, to keep this information in confidence

- where there is parental separation or family breakdown it may be that only one parent or guardian has parental responsibility. In this case, you should clarify the arrangements when considering disclosing the child's health information
- in exceptional cases you may decide not to provide information about a very young child. This would generally be due to a risk of a serious threat to the child, or others, if you disclosed the information. For example, if a parent has a history of abuse, you may reasonably believe that disclosing the child's information would exacerbate that threat.

Unable to communicate consent

In some cases, a patient may be unable to communicate consent to the disclosure in any way (physically, verbally or in writing), even though the patient is able to develop an informed judgement. In this situation, you can disclose the health information to a responsible person (provided the other conditions outlined above are met). An example is a patient who has a physical condition or disease which impairs the ability to communicate, even though it does not impair capacity to consent.

Necessary for healthcare or compassionate grounds

You, as the individual practitioner providing the patient's healthcare, must be satisfied that either:

- the disclosure of information is 'necessary' to provide the patient with appropriate care or treatment, or
- the disclosure is made for compassionate reasons.

What is 'necessary' depends on the circumstances of each case. While the disclosure does not need to be critical for the provision of healthcare, it must be more than just a mere convenience. If a patient's care cannot continue or is diminished because you have not disclosed a particular piece of information, then disclosure would be considered necessary.

Example: disclosure necessary for healthcare

You are providing healthcare to a dementia patient. The patient has lost capacity and therefore is likely to forget to take her medication. Disclosing the patient's medication requirements to her carer therefore is necessary in order to ensure the patient receives appropriate care and treatment.

Example: disclosures for compassionate reasons

Examples of disclosures made for compassionate reasons may include:

- telling a patient's relative about the extent of the patient's injuries following a car accident
- where a cancer patient lacks capacity to consent, discussing his prognosis with a relative.

Limiting disclosure to the extent reasonable and necessary for care or compassionate reasons

When you are satisfied that disclosure is necessary for healthcare or that you are making the disclosure for compassionate reasons, you must limit the amount of information being disclosed to that which is reasonable and necessary for achieving that purpose.

In the example above where you disclose a patient's medication requirements, the extent of that disclosure must be limited to the information that is necessary and reasonable for providing healthcare. This means the disclosure would likely need to be limited to information about the prescribed medications, including drug names and dosages. It is unlikely to be necessary or reasonable to disclose information about previous unrelated medical procedures or diagnoses.

Ensuring disclosure is not contrary to expressed wishes

You must also ensure that the disclosure is not contrary to wishes expressed by the patient before becoming unable to give or communicate consent. This requirement applies to wishes of which you are aware, or of which you could reasonably be expected to be aware. These wishes may be recorded in the patient's file but do not have to be in writing.

Example

An aged care resident was admitted into a private hospital in an unconscious state following a fall. While treating her injuries, you discover in the aged care facility's notes for the patient that she has terminal bone cancer and has requested that this information not be disclosed to her family as she does not want to worry them. In these circumstances, disclosure of the bone cancer to the family may breach the Privacy Act.