

# YOUNG PEOPLE AND LEGAL CONSENT

## SHEET 1: BACKGROUND TO CONSENT



This fact sheet provides information about issues surrounding young people's right and ability to provide consent under NSW law. It is part of a four sheet package written for youth services and other organisations and applies the legal principles outlined in this background sheet to three contexts:

- *Sheet 2: Participation in youth services*
- *Sheet 3: Under-18s' participation in research*
- *Sheet 4: Photos and videos*

### CAPACITY TO CONSENT

*Consent* means agreeing to something. To legally consent to something, a person must have capacity. *Capacity* is a legal concept that applies to adults and children. A person with capacity:

- understands the information that is relevant to a decision
- can balance the risks and benefits involved, and
- based on this, can make a decision.

This is often referred to as the *capacity to give informed consent*.

### INFORMED CONSENT

Informed consent means that a person must have any relevant information to allow them to make an informed decision. That information will include any risks that a course of action poses. For example, informed consent to participate in an activity run by a youth service would require information such as:

- safety arrangements and the limits of those arrangements
- the risk of injury
- difficult emotional content
- privacy, confidentiality and the limits to confidentiality.

### UNDER-18s HAVE CAPACITY TO PROVIDE THEIR OWN INFORMED CONSENT

In Australian law, parents have the right to give consent for their child up until their child is capable of giving consent themselves. This parental right exists to safeguard the welfare of the child. The authority of parents to make decisions for their child is not absolute, but diminishes with the child's evolving maturity.

In relation to under 18s, the High Court has said: *'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.'*

### ASSESSING CAPACITY

Capacity is not all-or-nothing. A young person may have the capacity to give informed consent for a low risk or simple activity, but lack the capacity to provide consent for something more risky or complex.

The age of a young person generally affects their capacity to give informed consent. However, individuals differ greatly, and a particular seventeen year-old may lack capacity to consent to something that a particular twelve year-old can.

For service providers working with young people, it is reasonable to start from the assumption that young people have the capacity to provide their own consent, until a service becomes aware that a particular young person may lack capacity to provide their own informed consent.

The higher the risks associated with the activity, the more careful the service provider should be to judge the capacity of those giving consent.

### DEMONSTRATING CONSENT

**Consent can be written, verbal or implied.**

*Implied consent* means that a person's actions show their consent. For example, when a young person joins in an organised game of basketball, their consent to play basketball is implied. Implied consent is sufficient for low-risk activities, such as most of

the recreational and social activities that youth services typically provide for young people.

*Verbal consent* is necessary in situations where it may be otherwise unclear from the young person's actions whether they consent or not.

Where the risks are high *written consent* should be obtained. Risks include both risks to the young person, and risks to the service provider. For example, there may be a dispute later about the circumstances in which consent was obtained, and written consent may help to confirm that the service provider followed appropriate procedures in gaining consent.

However, a signature on its own does not prove that there was informed consent. As outlined above, the person consenting must know and understand all the relevant facts before signing. Often that information is provided in the document that the person signs, but the service provider needs to be satisfied that the person signing has not only read it, or had it read to them, but that they understand the information.

To read about how informed consent applies in various activities provided by youth services in NSW, read some of the other fact sheets in this series, available at [youthaction.org.au](http://youthaction.org.au).

*This series of fact sheets was a collaboration between Youth Action and Shopfront Youth Legal Centre, and were written by Nick Manning. All legal advice contained herein was accurate at the time of writing in January 2018.*