

The Health Legal Report is published every two (2) months and is edited by Suzie Linden, Senior Consultant.

At Health Legal, we are keen to ensure that we address the specific needs of the Victorian health Sector.

We welcome your feedback and suggestions regarding particular issues and topics that you would like canvassed in future issues.

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Welcome to the March/April 2004 issue of the Health Legal Report. In this issue we provide an analysis of some of the legal issues involved in testing for HIV without consent.

### Testing for HIV without patient consent

Health care providers regularly encounter situations in which an HIV test is desirable, but it is not possible to obtain consent. These situations typically arise in the following ways:

First, where a patient who may be HIV-positive presents for treatment, is suspected of suffering from an HIV-related illness, but is unable to consent to a test.

Second, where a staff member is exposed to a patient's blood (through a needle-stick injury, for example), the patient's HIV-status is unknown, and the patient is not capable of giving consent to a test.

In each case, the inability to give consent may be because of long-term incapacity (such as intellectual disability) or short-term incapacity (anaesthesia or coma, for example).

Authorities recommend that antiretroviral drugs be administered as post-exposure prophylaxis as soon as possible following exposure. The side effects associated with these drugs mean that practitioners may be reluctant to prescribe them where there is only a small chance that the patient is HIV positive. Where an HIV test can be done quickly, it can offer a partial answer to these concerns. Of course, HIV testing is not a panacea for certainty. A patient may still be in the 'window' period and his or her blood may not return a true positive to an HIV test.

Two hospitals have recently asked us to consider this issue. Given the sensitivity of the subject, the rise of post-exposure prophylaxis and changes to the law that took effect on 1 January 2003, it is worthwhile to revisit this subject.

### Capacity to consent

A patient can only consent to an HIV test if he or she has the capacity to do so. At common law, a patient lacks capacity if he or she is unable to comprehend and retain information which is material to making the decision or is unable to use the information and weigh it in the balance as part of the process of arriving at a decision.

If the patient is conscious, staff should assess the capacity of the patient to give consent to an HIV test. Relevant observations and tests, and any consent given should be recorded in the notes.

If the patient has capacity to consent and refuses an HIV test, no test can be administered. However, under the *Health Act 1958* (Vic) the Secretary to the Department of Human Services may make an Order requiring a person to submit to an HIV test where that person may have transmitted the virus to a care-giver or custodian. This procedure only applies where the patient has **refused** to be tested, and does not extend to patients who are **unable** to consent to a test.

## Non-consensual testing in an emergency

## Substitute consent from an authorised decision-maker

### Emergencies

Common law and statute allow medical procedures to be carried out in emergencies in circumstances where consent cannot be obtained.

The *Guardianship & Administration Act 1986 (Vic)* (the G&A Act) provides that a medical practitioner may provide emergency treatment to an adult who has a disability and is unable to consent to the treatment. The definition of treatment for these purposes is broad, and will generally extend to giving an HIV test.

A patient is incapable of giving consent for these purposes if he or she is incapable of understanding the general nature and effect of the proposed procedure or treatment or is incapable of indicating whether or not he or she consents.

A practitioner may provide emergency treatment if he or she believes on reasonable grounds that the treatment is necessary, as a matter of urgency, to save the patient's life, to prevent serious damage to the patient's health or prevent the patient from suffering or continuing to suffer significant pain or distress.

In some circumstances, this provision may allow testing of an incompetent patient to determine whether to administer antiretroviral treatment to the patient. However, this provision should not be relied on to perform an HIV test in order to determine whether a staff member should be treated because, in that case, the test is not to prevent harm to the patient.

### Guardians

If the emergency provisions of the G&A Act do not apply, it may be possible to obtain consent from a substitute decision-maker.

If the Victorian Civil and Administrative Tribunal (VCAT) has appointed a guardian, or the patient has previously appointed an enduring guardian, with the power to make decisions about health care, then that person may consent to an HIV test on behalf of the patient. A guardian and enduring guardian must act in the best interests of the patient. In determining what is in the best interests of the patient, the decision maker must take into account a range of factors including:

- the wishes of the patient, so far as they can be ascertained;
- the consequences to the patient if the treatment is not carried out; and
- whether the treatment to be carried out is only to promote and maintain the health and well-being of the patient.

Each case must be judged on its merits, but these factors – which focus on the consequences to the patient – suggest that an HIV test in order to determine whether to provide post-exposure prophylaxis to a staff member is not automatically in the best interests of a patient and may not be authorised by these provisions.

## Short term vs long-term disability

### Other substitute decision-makers

The G&A Act also provides that a 'person responsible' may consent to medical treatment for an adult who has a disability and is unable to consent to the treatment. The person responsible is the first person listed below who is reasonably willing and able to make a decision:

- an agent appointed under the *Medical Treatment Act 1988 (Vic)*;
- a person appointed by VCAT to make decisions concerning the proposed treatment;
- a guardian appointed by VCAT with power to make decisions concerning the proposed treatment;
- an enduring guardian with power to make decisions concerning the proposed treatment;
- a person appointed by the patient in writing to make treatment decisions;
- the patient's spouse or domestic partner;
- the patient's primary carer;
- the patient's nearest relative (as defined in the Act).

### A short-term disability vs long-term disability

If a patient is likely to be capable, within a reasonable time, of giving consent to the treatment, the person responsible can only consent to treatment, if

- the registered practitioner who is to administer the treatment reasonably believes, and states in writing in the patient's clinical records, that a further delay in carrying out the treatment would result in a significant deterioration of the patient's condition; and
- neither the registered practitioner nor the person responsible has any reason to believe that the carrying out of the treatment would be against the patient's wishes.

If there is reason to believe that carrying out the treatment would be against the patient's wishes, then an application may be made to VCAT for consent to the proposed treatment.

What is a reasonable time will vary from case to case, but it is arguable that the desirability of administering antiretroviral treatment quickly is a relevant factor.

If a patient is not likely to recover capacity in a reasonable period, the person responsible may consent to treatment on his or her behalf, but must act in the best interests of the patient. The same considerations that apply to a guardian making a decision about whether treatment is in the best interests of a patient apply to a person responsible making a similar decision. Again, the provisions focus on providing treatment for the benefit of the patient and may not cover the situation of testing for the purpose of prophylactic treatment for a staff member.

### Where a substitute decision-maker is not available

A medical practitioner may carry out medical treatment without the consent of the person responsible if he or she has made reasonable efforts to find the person responsible without success. In order to do so, the practitioner must give notice to the Public Advocate outlining the patient's condition, the proposed treatment and the practitioner's belief on reasonable grounds that the treatment is in the best interests of the person. The practitioner must record in the notes why he or she considers the treatment to be in the person's best interests and how it will promote or maintain the health and well-being of the patient.

Patients under the  
Mental Health Act  
1986 (Vic)

At Health Legal  
we have developed a  
professional training  
program, designed to  
meet the needs of the  
Victorian Health Sector.

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for further information  
and to obtain a copy of  
our Training Program for  
the first half of 2004.

## Mental Health Act

The *Mental Health Act* 1986 (Vic) makes provision for the giving of consent to non-psychiatric treatment in the case of an involuntary, security or forensic patient who is incapable of giving informed consent. Non-psychiatric treatment is defined to include a 'surgical operation or procedure'. It is arguable, but not clear, that this includes drawing blood for the purpose of an HIV test.

For an adult patient, consent to non-psychiatric treatment may be given by the first person listed below who is reasonably available, willing and able to make a decision:

- an agent appointed under the *Medical Treatment Act* 1988 (Vic);
- a person appointed by VCAT to make decisions concerning the proposed treatment;
- a guardian appointed by VCAT with power to make decisions concerning the proposed treatment;
- an enduring guardian with power to make decisions concerning the proposed treatment; or
- the authorized psychiatrist.

For a patient under 18 years of age, consent may be given by any of the persons listed below who are reasonably available, willing and able to make a decision concerning the proposed treatment:

- a person with parental responsibility for the patient;
- a guardian with power to make decisions concerning the proposed treatment;
- a person who has authority under the *Children and Young Persons Act* 1989 (Vic) to consent; or
- the authorised psychiatrist (if none of the above is available, willing and able).

## Conclusion

Administering an HIV test without the consent of the patient, especially when its purpose is for the benefit of a staff member and not the patient, raises many complex issues regarding duty of care and professional conduct as well as the scope of various legislative provisions governing substitute decision-making. The above discussion gives general guidance on how to approach this complex issue, but is no substitute for a detailed consideration of each situation that arises.

## Who is Health Legal?

Health Legal was established as a result of the Victorian health sector indicating it wanted a quality and competitively priced legal service that understood their environment and was able to focus exclusively on their unique needs.

Health Legal is able to meet the health sector's daily legal needs. The team provides contracting and medico-legal advisory services. We can be contacted by telephoning (03) 9861 4001. Our website is [www.healthlegal.com.au](http://www.healthlegal.com.au)

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