

Ms Melanie Shea
Legal Officer
Legal and Regulatory Services
NSW Ministry of Health
LMB 961 North Sydney NSW 2059
By email: melanie.shea@health.nsw.gov.au

Dear Ms Shea,

Re: Response on the draft *Consent to Medical Treatment Manual*

The Australian College of Nursing (ACN) is Australia's pre-eminent and national leader of the nursing profession. ACN is committed to advancing nurse leadership to enhance health care and believes that all nurses, regardless of their job title or level of seniority, are leaders. In that context, ACN welcomes the opportunity to provide feedback on the draft NSW Health "*Consent to Medical Treatment Manual*" (the Manual) and commends those responsible for preparing such a comprehensive, accessible and clearly written policy. In preparing its response, ACN has consulted with its Members and Fellows and their feedback is included in the comments below. The response explains the legal and ethical obligations of nurses in Australia in relation to consent and suggests inclusion of these for all health practitioners; provides general comments about the Manual and then suggests specific areas for refinement and/or clarification.

Mandatory standards for all nurses in relation to (informed) consent

As health practitioners, all nurses must be registered with the Nursing and Midwifery Board of Australia (NMBA) and meet the NMBA's professional standards in order to practice in Australia. These standards include the *Code of conduct for nurses* (2018); the *Registered nurses standards for practice* (2016) and the *ICN Code of ethics for nurses* (2012)¹. All three documents establish the mandated legal, ethical and professional practice standards for registered nurses. Section 2.3 of Principle 2 of the code of conduct concerns "Informed Consent". It sets out for nurses the specific requirements expected of them by the NMBA and is similar to the requirements set out in the Manual. Likewise, Element 1 of the code of ethics sets out the ethical expectations of nurses in relation to consent. Once again it is similar to the Manual in its content and outcomes intended. Standard 1 of the standards for practice states that a nurse "complies with legislation" and will "use ethical frameworks when making decisions".

Similar expectations apply for other health practitioners therefore ACN suggests the Manual notes all health practitioners are expected to observe the relevant legislation as set out in the Manual and the other applicable national legislation, ethical codes and professional practice standards. This could be included in Section 3 "Scope" or in Section 4.1 "Why is it necessary to obtain patient consent and warn patients about material risks?". The level of detail we have in mind is like that provided in Section 10.6 of the Manual ("Research (including clinical trials)").

¹ Nursing and Midwifery Board of Australia, <https://www.nursingmidwiferyboard.gov.au/Codes-Guidelines-Statements/Professional-standards.aspx> Retrieved 12 August 2019.

Definition of “nurse”

The definition in Section 1 of a nurse and a midwife is incorrect. It is correct that both nurses and midwives are registered by the NMBA under the *Health Practitioner Regulation National Law*. The correct terminology for Nurse Practitioners however, is that they are “endorsed”². A small proportion of nurses also practice as midwives, that is, they are registered nurses as well as midwives³. ACN therefore recommends that the definition of “nurse”, “nurse practitioner” and a “midwife” be separated and align with the Nursing and Midwifery Board of Australia definitions.

ACN’s response represents nurses only. For feedback from midwives, please consult the Australian College of Midwives at <https://www.midwives.org.au/>

General comments

ACN notes that the Manual incorporates the requirements of New South Wales (NSW) legislation for “obtaining consent to medical treatment from patients or their substitute consent providers” and that the intent of the Manual is to provide procedural guidance to health care practitioners in obtaining that consent.

In relation to Section 2.1, ACN supports the principles informing the development of the Manual. In particular, the principle that adults and mature minors with capacity have a right to decide what happens (or does not happen) to their own bodies and that if they do not have that capacity, then additional legal and ethical standards apply. ACN also supports the desired outcomes for the Manual, for instance, the importance of respecting patient autonomy in the informed consent process, and the significance of accurate documentation in recording any consent which is subsequently provided (or not provided as the case may be).

The new version of the Manual is well written with clearly explained terminology: the authors are to be commended for that achievement in such a complex and difficult policy area. For this reason and those following, ACN considers that the Manual can be adapted to the workplace and to local procedures:

- The comprehensive and detailed “Contents” section (or index) makes it easy to find guidance on specific circumstances
- The structure of the Manual flows logically so is likely to facilitate easy and quick access for health care practitioners (including all levels of nurse), who are seeking precise guidance in specific (troubling) situations

² Nursing and Midwifery Board of Australia, *Registration and endorsements*.

<https://www.nursingmidwiferyboard.gov.au/Registration-and-Endorsement.aspx> Retrieved 12 August 2019

³ Australian Health Practitioner Regulation Agency, *Annual report 2017/18*.

<https://www.ahpra.gov.au/annualreport/2018/registration.html> Retrieved 12 August 2019

- Section 11 “Consent tables – quick finder” is particularly useful and could perhaps be emphasised more such as with cross references throughout the text?
- The actual consent forms (Attachments A-F) have been well designed both in terms of content and layout: it is very clear what needs to be included and which form is for each situation or type of patient.

ACN also welcomes the various references to nurses and endorses the content of the sections where the nature and extent of a nurses’ role in obtaining (informed) consent is articulated and clarified. For example, Sections 5.2 – Sexual Assault Nurse Examiner; 10.3 – Nurse Practitioners and anaesthetics; and 10.8 – nurses and forensic examinations. Recognition of the limitations which may apply in rural areas and the impact for nurses is also a welcome inclusion, for instance, Section 10.1 and blood transfusions. Likewise, reminders for all health care practitioners (including nurses) of their responsibilities in obtaining consent for research, including clinical trials, is a sensible inclusion (Section 10.6).

Clarification and areas for further development or refinement

Mature Minors

The definitions of “mature minors” and the detail provided about when they may or may not give consent is comprehensive and useful (Sections 1 and 8.1- 8.6). It may be advisable however, to emphasise that assessment by the health care practitioner is on a case-by-case basis and is contingent on the professional judgement of that health care practitioner such that the mature minor is of “sufficient maturity and intelligence” to understand fully the circumstances and treatment/s for which they are providing consent. Further, if it does not already contain it, then the proposed online training module for clinicians needs to include examples of these sometimes delicate ethical, legal and professional circumstances so that patient autonomy is respected and no untoward harm is caused, intentionally and unintentionally. An example box in the text of the Manual would also help clarify the content of these sections (as has been done in other sections).

Consent (or refusal) of treatment in relation to minors and sexual health treatment

In Section 8.6 the explanation of the requirements for (informed) consent for minors seeking “sexual health treatment” uses the example of contraception. ACN recommends consideration of inclusion of sexually transmitted infections (STI) here as well since the *Australian STI management guidelines for use in primary care* indicates that “Rates of chlamydia and gonorrhoea diagnoses in Australia are highest amongst people aged 15-24 years”⁴.

Section 8.6 also refers to mandatory reporting requirements for minors. Since STI may be an issue in the circumstances cited in the Manual, it is useful here to state that referrals to sexual health clinics may be required. The NSW STI Programs Unit could be consulted to assist in developing further this

⁴ Australian Sexual Health Alliance, *Australian STI management guidelines for use in primary care* (2014). Retrieved 8 August 2019 from <http://www.sti.guidelines.org.au/>.

section of the Manual and the online educational material which will accompany the Manual:
<https://stipu.nsw.gov.au/>.

Obtaining consent: Section 5

It is pleasing to see in Section 5.2 the explanation and caveats for health practitioners (other than medical practitioners) when obtaining consent, for example, nurse practitioners. It is suggested that the last paragraph in this section be emphasised more as the legal and ethical status of simply witnessing a signature on a (consent) form is often misunderstood. As the Manual rightly notes “this practice should not be encouraged” (See too the paragraph above on the mandatory legal, ethical and professional practice requirements for nurses). ACN therefore recommends that this circumstance be explained more (for instance, the possible harmful consequences) and be made more obvious. The educational material which will accompany the Manual should include specific examples (case law perhaps).

Notwithstanding the clear explanation in Section 5.3 of the rights and obligations of Junior Medical Practitioners when obtaining consent has been delegated to them, ACN recommends that cross reference to Section 5.2 be included in Section 5.3 to emphasise the potential for negative legal and ethical consequences⁵. It may also be pertinent to mention medical codes of ethics and of conduct at this point.

In conclusion, ACN would like to thank the NSW Government Department of Health for the opportunity to provide comments and feedback on this very significant and often sensitive area of clinical practice. The new version of the ***Consent to Medical Treatment Manual: Procedures*** has the potential to be a valuable and practical resource for health practitioners, including nurses, especially as it is to be accompanied by an online training module.

If you have further enquiries or points of clarification, please contact Dr Carolyn Stapleton, Manager - Policy and Advocacy, at carolyn.stapleton@acn.edu.au.

Yours sincerely,



Carolyn Stapleton FACN
Policy and Advocacy Manager
26 August 2019

⁵ British Medical Association, 2017, *Seeking consent: delegation and responsibility*, <<https://www.bma.org.uk/advice/employment/ethics/consent/seeking-consent>. retrieved 12 August 2019.