# Informed consent guidance

In the past, the ADAVB provided a short template for informed consent purposes. This form has been removed because the advice from our indemnity provider, Guild, and Guild's lawyers is that a template should not be used as it is not fit for recording the necessary information and defending members against a regulatory or civil finding.

The federal ADA has published a number of policies that reference informed consent, and as a membership organisation, it has no power to enforce them but does make recommendations on what is considered *best practice*. AHPRA set out requirements for record-keeping and informed consent – as the regulator, it can enforce these as professional conduct matters.

Each state has Health Records Acts and a judiciary system, which, along with the National Laws, define negligence. The High Court of Australia has ruled that (dental) treatment involves examination, diagnosis, treatment planning, and informed consent. All four are necessary to protect a practitioner against a possible negligence finding.

## Types of consent

### 1. Implied consent

Implied consent refers to consent that is not expressly given verbally or in writing but is inferred from a person's actions, circumstances, or the nature of the relationship between the parties involved. Implied consent assumes that a reasonable person would understand that their actions or situation indicate agreement to a particular course of action.

When a patient sits in the dental chair and opens their mouth for examination or treatment, their actions can imply consent for the dentist to proceed with the necessary procedures. The patient's voluntary presence in the dental clinic and willingness to undergo examination or treatment without explicitly stating their consent can be seen as implying consent for dental procedures within the scope of the appointment.

However, dental practitioners must communicate clearly with their patients about the procedures involved, obtain informed consent whenever possible, and ensure that patients are aware of their right to refuse or withdraw consent at any time during the process.

### 2. Minimum level

The type of consent required to avoid a civil claim for assault and/or battery and/or criminal charges is the minimum level. If you proceed with treatment in the absence of consent (and no exception exists), you will be committing what is known as the intentional tort of trespass to the person. This is a common law (judge-made law) cause of action. Trespass to the patient can be in the form of an assault (contact not required) and/or a battery (any unlawful touching).

### 3. Ideal and achievable level

The type of consent required to avoid a finding of negligence (in court) and/or a finding of unsatisfactory professional conduct (professional regulator) is the "ideal and achievable level", and defence against this is based on the recorded information in the clinical notes.

A competent adult patient has the legal right to give or withhold consent. There is no age of consent for minors (under 18) in Victoria: here is a link to more information www.health.vic.gov.au/mental-health-and-wellbeing-act-handbook/supported-decision-making/informed-consent-and-presumption

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## What does informed consent entail?

In summary, informed consent is integral to the right to information in the Australian Charter of Healthcare Rights, recognised in professional codes of conduct, and compliant with legislation, lawful requirements, and best practices ( which the ADA publishes in policies). The following links provide well-set-out criteria.

Due to the high level of compliance in taking and recording informed consent, it is impossible to reduce it to a template. Each procedure and patient has particular aspects that need to be considered (material risks for the procedure and special risks for the patient) **and recorded in clinical notes**. An example is when discussing RCT; there are recognised complications that can occur with any RCT: however, some risks may be "special" to that tooth – such as possible instrument fracture for all RCT, and increased risk for a calcified, curved or narrow canal. It would be expected that part of the diagnosis is to recognise these clinical presentations and discuss those heightened risks. Similarly, for post-operative bleeding after extraction in a patient on a blood thinning medication – special precautions are needed, and warnings given.

A written consent form does not replace the discussion required and the clinical notes recording the discussion, and it cannot be cut and pasted with no details or a sentence such as "discussed pros, cons and options". Written consent may be supportive but is not legally necessary, demonstrating that there was an attempt to gain informed consent but not that it was gained – this also needs to be recorded in the notes. Some companies publish brochures listing the material risks for particular procedures that can be used in the discussions members should be having with patients. The ADA states that *best practice* is to seek written consent for more complicated procedures.

## Relevant links

Informed Consent- Fact sheet for clinicians | Australian Commission on Safety and Quality in Health Care

Informed consent and presumption of capacity | health.vic.gov.au

ADA Topics- Managing your Practice- Australian Dental Association

ADA Guidelines for Consent for Care in Dentistry