

Consent

If the *Privacy Act 1988 (Commonwealth)* applies to your organisation, consent is usually required when personal information is collected, used and disclosed. According to the *Privacy Act 1988 (Commonwealth)* consent may be either expressed or implied. For example,

1. *expressed consent* refers to consent that is clearly and unmistakably stated. Expressed consent may be obtained either in writing, orally, or in any form where the consent is clearly communicated
2. *implied consent* arises where it is reasonable to infer that consent is given by the individual's conduct within the circumstances.

As a general rule, it is preferable to seek expressed consent.

Key elements of consent

To satisfy legal requirements, consent must contain the three following elements.

1. Consent must be voluntary. The individual must have a genuine opportunity to say yes or no without pressure or coercion.
2. Consent must be informed. The individual must be made aware of the implications of providing or withholding consent. The individual must receive the information in a meaningful and appropriate way.
3. The individual must have the capacity to provide consent. The individual must be capable of understanding the issues that are related to the decision, be able to form a view based on reasoned judgement, and be able to communicate a decision.

Capacity and consent

In practice, it is sometimes difficult to determine if an individual possesses sufficient mental capacity to give consent.

For an individual to give consent, the individual must be reasonably believed to possess sufficient mental capacity needed to *understand* the situation that requires consent.

Therefore, there is no age limit or I.Q. level necessary to give consent. Instead, an assessment needs to be made about whether the individual has sufficient mental capacity to understand the situation at hand.

Therefore, the more complex the situation that requires consent, the higher the mental capacity required to give consent. Note, it is likely that children, persons who are moderately intoxicated etc., are able to give consent in at least some situations.

Consent and personal information

With an individual's informed consent, there are few restrictions on the collection, use, and disclosure of personal information.

In specific circumstances, consent is not required to use or disclose personal information. For instance, consent is not required if:

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1. the use or disclosure of personal information is necessary to lessen or prevent a serious and imminent threat to an individual's life, health or safety
 2. the organisation has reason to suspect that unlawful activity has been, is being, or may be engaged in, and uses or discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to the relevant authority
 3. the use or disclosure is required or authorised by law.

Additional Information

More information is available from:

1. the Office of the Federal Privacy Commissioner www.privacy.gov.au
2. the Privacy Hotline 1300 363 992 (local call charge)
3. the department's Privacy Contact Officer (07 3224 5850).

Disclaimer

This information sheet is intended as a reference to privacy legislation. It offers general discussion and explanation on a range of privacy issues. However, it does not cover all circumstances faced by the diverse range of organisations in the non-government sector. This information sheet is advisory only and does *not* represent legal advice. If advice of a legal nature is required, independent legal advice must be sought and the content of this information sheet cannot be relied upon.