**Kirklees Safeguarding Children Partnership Guidance on use of Mental Capacity Act 2005 for Young people and the role of those with parental responsibility**

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**What is mental capacity?**

Having mental capacity means that a person is able to make their own decisions.

The MCA 2005 does not apply to under 16s but does apply to 16 and 17 year olds

The five key principles:

**Principle 1: A presumption of capacity**

Every young person has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. This means that you cannot assume that someone cannot make a decision for themselves just because they have a particular medical condition or disability.

**Principle 2: Individuals being supported to make their own decisions**

A young person must be given all practicable help before anyone treats them as not being able to make their own decisions. This means you should make every effort to encourage and support young people to make the decision for themselves. If lack of capacity is established, it is still important that you involve the young person as far as possible in making decisions.

**Principle 3: Unwise decisions**

Young people have the right to make decisions that others might regard as unwise or eccentric. You cannot treat someone as lacking capacity for this reason. Everyone has their own values, beliefs and preferences which may not be the same as those of other people.

**Principle 4: Best interests**

Anything done for or on behalf of a young person who lacks mental capacity must be done in their best interests.

**Principle 5: Less restrictive option**

Someone making a decision or acting on behalf of a young person who lacks capacity must consider whether it is possible to decide or act in a way that would interfere less with the young person’s rights and freedoms of action, or whether there is a need to decide or act at all. Any intervention should be weighed up in the particular circumstances of the case.

When making plans and care or treatment arrangements for 16 and 17 year olds it is necessary to determine whether the young person has the capacity to consent to the arrangements that are being made for them. This is essential as the safeguards and steps that need to be put in place may vary if the young person lacks capacity to consent.

Practitioners and managers need to be aware of the inter-relationship between the Mental Capacity Act 2005 and other related legislation which include the Children Acts 1989 and 2004, the Children and Families Act 2014, the Human Rights Act 1998, the European Convention on Human Rights and the Mental Health Act.

**Assessing capacity**

Practitioners might need to assess capacity where a young person is unable to make a particular decision at a particular time because their mind or brain is affected by illness or disability. **Lack of capacity may not be a permanent condition.** Assessments of capacity should be time- and decision-specific.

**Two-stage functional test of capacity**

In order to decide whether a young person has the capacity to make a particular decision practitioners must answer two questions:

1. Is there an impairment of or disturbance in the functioning of a young person’s mind or brain? If so,

2. Is the impairment or disturbance sufficient that the young person lacks the capacity to make a particular decision?

The MCA says that a young person is unable to make their own decision if they cannot do one or more of the following four things:

* understand information given to them
* retain that information long enough to be able to make the decision
* weigh up the information available to make the decision
* communicate their decision – this could be by talking, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand.

Every effort should be made to find ways of communicating with the young person before deciding that they lack capacity to make a decision based solely on their inability to communicate. Also, you will need to involve family, friends, carers or other professionals.

The assessment must be made on the balance of probabilities – is it more likely than not that the young person lacks capacity? Practitioners should be able to show in the young person`s records why you have come to your conclusion that capacity is lacking for the particular decision.

A Best Interests meeting may be needed for cases that involve complex decisions or differing opinions about what is the least restrictive option or where many different parties are involved. A consensus decision may not be reached but the meeting may provide useful discussion and information gathering to further the Best Interests process for the decision maker. The decision maker is the person identified for this role in advance of the meeting who must have a professional qualification.

Evidence needs to be recorded carefully in the Best Interests meeting minutes. The meeting does not make the decision. A Best Interests decision should always be communicated in writing to the person concerned and those involved in the care and/or treatment who were consulted as part of the process. The decision maker will need to demonstrate in their record keeping that they have made a decision based on all the available evidence and taken into account all the conflicting views. Where there are disputes, it may be helpful to involve an independent advocate or to make an application to the Court of Protection for their ruling about what is in the person's best interests. The Court expects the decision maker to take all reasonable steps to build a consensus before making their decision. The evidence for this must be clear in the minutes of the Best Interests meeting before the application to the Court of Protection.

**The role of those with parental responsibility and decisions within the scope of parental responsibility**

The degree to which parental responsibility will be the determinative factor in making decisions for a child varies in accordance with the age, development and maturity of a child. For example, constraints which are universal for a 5 year old (not going out alone) may be liberty-restricting for a 16 year old with the capacity to make their own decisions

If a young person of 16 or 17 lacks capacity within the meaning of the Act, those with parental responsibility should be consulted about their best interests. However, practitioners must be satisfied that it is appropriate to rely on parental consent (remembering that, in these circumstances, a parent cannot consent to the young person being deprived of their liberty (see below))

In deciding whether the particular decision can be taken on the basis of parental consent, practitioners need to consider a range of factors to test whether the decision falls within the scope of parental responsibility:

1. Is this a decision that a parent should reasonably be expected to make? Significant factors determining this are likely to include: the type and invasiveness of the proposed intervention; the age and maturity of the young person; the extent to which the decision accords with the wishes of the young person or whether the young person is resisting the decision.
2. Are there any factors which might undermine the validity of parental consent? eg where the parent may lack capacity because of their own impairments; where parents disagree about what is best for their child and what action should be taken; where the parent is not able to focus on what course of action is in their child's best interests eg if they have gone through an acrimonious divorce and find it difficult to separate the decision about consent, for the particular action to be taken, from their own hostilities.
3. If there is doubt about whether or not parental consent can be relied on to authorise the particular intervention, professionals should take legal advice so that account may be taken of the most recent case law.

**Liberty Protection Safeguards**

The Liberty Protection Safeguards provide protection for people aged 16 and above who are or who need to be deprived of their liberty in order to enable their care or treatment and lack the mental capacity to consent to their arrangements.

People who might have a Liberty Protection Safeguards authorisation include those with dementia, autism and learning disabilities who lack the relevant capacity.

The Liberty Protection Safeguards were introduced in the Mental Capacity (Amendment) Act 2019 and replace the Deprivation of Liberty Safeguards (DoLS) system. The Liberty Protection Safeguards deliver improved outcomes for people who are or who need to be deprived of their liberty. The Liberty Protection Safeguards have been designed to put the rights and wishes of those people at the centre of all decision-making on deprivation of liberty.

**Good practice in this area includes the following:**

• Decisions should be taken and reviewed in a structured way and the reasons behind them recorded

• Proper documented assessment of whether the person lacks capacity to decide whether to consent to the care being proposed

• Alternatives to admission to hospital or residential care should be carefully considered and any restrictions on liberty in these settings should be kept to the minimum necessary

• Care should be taken to ensure as far as possible that the young person remains in contact with those close to them

• Where appropriate local advocacy services should be used to provide support to young person and their families The assessment of the young person’s capacity and their care plan are kept under review

**Three assessments will form the basis of the authorisation of Liberty Protection Safeguards:**

1. a capacity assessment
2. a ‘medical assessment’ to determine whether the person has a mental disorder
3. a ‘necessary and proportionate’ assessment to determine if the arrangements are necessary to prevent harm to the person and proportionate to the likelihood and seriousness of that harm

The assessment process will be embedded into existing care planning (for example under the Care Act 2014) and it will be easier to use existing valid assessments, where reasonable and appropriate.

Local authorities and NHS bodies will be ‘Responsible Bodies’ under the Liberty Protection Safeguards. Responsible Bodies will organise the assessments needed under the scheme and ensure that there is sufficient evidence to justify a case for deprivation of liberty. Ultimately, the Responsible Body is responsible for authorising any deprivation of liberty in certain settings.

**2. Greater involvement for families**

There will be an explicit duty to consult those caring for the person and with those interested in the person’s welfare. There will be an opportunity for a family member or someone else close to the person, if they are willing and able, to represent and support the person through the process as an “appropriate person”. Family members or others close to the person will also be able to raise concerns throughout the process and in response to any authorisation.

**Extending the scheme to and 16 and 17-year-olds**

Currently, when a 16 or 17-year-old needs to be deprived of their liberty, an application must be made to Court of Protection. Under the Liberty Protection Safeguards, Responsible Bodies can authorise the arrangements without a Court order. This will deliver more proportionate decision-making about deprivation of liberty and minimise potential distress and intrusion for young people and their families.

**Practice Implications for Children’s Services to build into existing planning arrangements**

Where there are mental health concerns that may influence future planning/decision points, mental capacity should be considered at key planning points, before a child reaches their 16th birthday or at the point of contact with services if they are already over 16.

The following are examples of potential opportunities to address mental capacity where relevant.

* For Looked After Children, this could be at their 15 year old LAC Review and then discussed regularly at future reviews.
* For children in residential schools, this could be the Education, Health and Care (EHC) Planning meetings at age 15.
* At any point in child protection planning and reviews
* During planning for transition to adult services

Relevant circumstances for consideration could be placement planning, consent to medical intervention or mental health treatment.

Settings for consideration

The legislation can apply to young people in all settings including the following.

* Hospital admissions for physical or mental health reasons
* Secure settings
* Health settings
* Children’s Homes depending on the regime
* Residential schools
* Foster care
* Section 20 accommodation
* Supported Housing
* Parents’ own home

**Workforce Development**

The key part of this process is the assessment of mental capacity and how it informs decision making, which is based on good social work practice, including recording.

Free e-learning module: [www.scie.org.uk/publications/elearning/mentalcapacityact/](http://www.scie.org.uk/publications/elearning/mentalcapacityact/)

Law society deprivation of liberty: <https://www.lawsociety.org.uk/en/topics/private-client/deprivation-of-liberty-safeguards-a-practical-guide>



**Gillick competence**

**Introduction**

Young people aged 16 and over are usually allowed to consent to their own medical treatment. This is because they will typically have enough understanding to be able to make an informed choice in the same way adults can.

Young people under the age of 16 can also consent to their own treatment, but only if they’re believed to have enough understanding to fully appreciate what’s involved.

Usually, a parent or carer will consent on behalf of the young person. If a young person wishes to receive treatment without consent, they can do but only if they’ve been assessed as being Gillick competent.

**What is Gillick competence?**

Gillick competence helps those who work with young people to find a balance between listening to young peoples wishes (which are sometimes different to the wishes of parents or carers) and recognising that they might not yet have enough understanding to make an informed choice.

Gillick competence recognises that young people mature at different rates, and that the age that they can make competent decisions won’t be the same for everyone. Even if you are deemed to be Gillick competent in making one decision, you may not be in a another.

**Who decides if I am Gillick competent?**

If you’re under 16 and your parent or carer agrees with your decision about whether or not you should have treatment, they can consent (or not) for you, and you won’t need to be assessed for Gillick competence.

If you wish to receive treatment without the consent of your parent or carer, or perhaps even without their knowledge, then it is important that everyone involved is certain you know what you are consenting to.

Your competence to make medical decisions must be assessed by a trained professional. You can’t assess your own competence, and nor can an older friend or your teacher.

How will it be decided if I am Gillick competent?

The professionals who assess your competence will need to consider:

* Your age, maturity, and mental capacity.
* How well you understand the issue and what it involved including the advantages and disadvantages (pros and cons) and potential long-term impact
* How well you understand the risks, implications and consequences that might arise from your decision.
* How well you understand any advice or information you’ve been given about it.
* Your understanding of any alternative options.
* Your ability to make and communicate a reasoned decision about what your wishes are.

<https://learning.nspcc.org.uk/child-protection-system/gillick-competence-fraser-guidelines>

**What if my decision goes against my parents or carers wishes, or I don’t want to tell them?**

It’s important that you have a conversation with your parents or carer, wherever possible, about any health concerns you have. If at first, you’re not in agreement about what is right for you, it can help to talk things through, so that you can understand their concerns and they can understand yours.

If you seek medical treatment without your parent or carer’s consent, the medical professional you speak to may try to encourage you to have another conversation with them, but if you don’t feel comfortable doing that or if they still don’t agree with your decision, your treatment can still go ahead as long as you’re assessed as being Gillick competent. Your parent or carer won’t find out about any treatment you have had without their consent unless there are serious concerns about your welfare.

Appendices

<https://learning.nspcc.org.uk/child-protection-system/gillick-competence-fraser-guidelines>

Attached separately is a flowchart highlight who has parenting responsibility and 2 check lists for Assessment of capacity and best interest decision making that might be useful to

  

**Deprivation of liberty legal mechanisms**

[Liberty Protection Safeguards: what they are - GOV.UK (www.gov.uk)](https://www.gov.uk/government/publications/liberty-protection-safeguards-factsheets/liberty-protection-safeguards-what-they-are)

[nfjo\_briefing\_DoL\_final\_20220203.pdf (nuffieldfjo.org.uk)](https://www.nuffieldfjo.org.uk/wp-content/uploads/2022/02/nfjo_briefing_DoL_final_20220203.pdf)