

Supplementary guidance on consent
Legal framework for England and Wales:
capacity to consent

1. In England and Wales, patients over the age of 16 are presumed to have the capacity to consent unless it is established that they lack capacity, although the position for young people aged 16 and 17 is discussed in more detail below.
2. The Mental Capacity Act 2005 states that a person is deemed to lack capacity if:
 - a. he or she has an impairment or disturbance (whether temporary or permanent) that affects the way their mind or brain works; and
 - b. that impairment or disturbance means they are unable to make a decision at the time it needs to be made. In order to make a decision, they must be able to understand, retain and weigh up the information relevant to the decision as well as communicate their decision.
3. If you are unsure about a patient's capacity you should get advice from other colleagues, healthcare professionals or people involved in their care. If you are still unsure you may need to consult your professional or representative body or obtain legal advice. Any advice you get or assessments carried out should be properly recorded, along with the outcome.

Adults who lack capacity

4. Most patients will have the capacity to consent. However, if your patient is not able to make decisions for themselves the law sets out the criteria and processes to be followed. It also grants legal authority to certain people to make decisions on behalf of patients who lack capacity.
5. If you believe that a patient lacks capacity to make decisions for themselves, you should consult the codes of practice that accompany the Mental Capacity Act 2005.

These set out who can make decisions on the patient's behalf, in which circumstances, and how they should go about this.

6. A person may be authorised to provide consent for your patient to be treated if:
 - a. they have previously been named by the patient as someone to be consulted;
 - b. if they are caring for or are interested in the patient's welfare, under a lasting power of attorney or when appointed by the Court (i.e. as a deputy appointed by the Court of Protection); or
 - c. that person is authorised in respect of personal welfare matters.

7. These principles also apply to decisions about the use of information about patients who lack capacity. For example, the codes of practice must be consulted when deciding to share confidential information about a patient who lacks capacity with their family, next of kin or carer, as well as making decisions about treatment.

Young people and children

8. The capacity to consent depends more on the patient's ability to understand and consider their decision than on their age.

9. In this guidance, a young person means anyone aged 16 or 17 and a child means anyone aged under 16.

10. As with any patient, a young person or child may have the capacity to consent to some services or treatments but not to others. Therefore it is important that you assess maturity and understanding individually, bearing in mind the complexity and importance of the decision to be made.

11. If a young person or child does not have the capacity to consent, consent must be provided by a person with parental responsibility as defined in Part 1 of the Children Act 1989. If a person with parental responsibility is required to provide consent, you may need to get legal advice if:
 - a. you are in any doubt about who has parental responsibility for the individual; or
 - b. the views of those that have parental responsibility differ.
12. Young people and children should be involved as much as possible in decisions about their care, even when they are not able to make decisions on their own.

Young people with capacity

13. Young people are presumed to have the capacity to make their own decisions and give consent for a service or treatment, unless there is enough evidence to suggest otherwise.
14. To decide whether a young person has the capacity to consent to a service or treatment, you should use the same criteria as for adults.
15. While not a legal requirement, you should encourage young people to involve their parents in making important decisions. However, you should respect a competent young person's request for confidentiality.

Children with competence

16. Children are not presumed to have the capacity to consent; instead, the issue is whether children can demonstrate their competence.
17. A child is competent and can give consent if you are satisfied that they have the maturity, intelligence and ability to fully understand the information given and what they are

consenting to, including any implications of the treatment they are consenting to. If you decide that the child is competent then you do not need consent from a person with parental responsibility. However, it is considered good practice to explore whether you can involve the child's parent or guardian by seeking consent from the child.

18. Where a competent child has been provided with appropriate information and voluntarily gives his or her consent to treatment, that consent cannot be overridden by a person with parental responsibility. This principle derives from the case of *Gillick v West Norfolk and Wisbech AHA [1986] AC112* and is often referred to as the test of 'Gillick competency'.
19. If you consider that the decision of a competent child is not in their best interests, you should consult colleagues and get legal advice before proceeding.

When competent young people and children refuse to give consent

20. A competent young person or child may refuse to give consent. If you consider that the decision of a competent young person or child is not in their best interests, you should consult colleagues and get legal advice before proceeding.
21. In some circumstances, the courts can override the refusal of consent of a competent young person or child if health and care professionals involved in their care believe that the refused treatment would be in their best interests.
22. The law is complex when a competent young person or child refuses to give consent for a treatment or service and someone with parental responsibility wants to override their decision. You should again get legal advice if you are faced with this situation.

Young people without capacity

23. A person with parental responsibility for a young person who is not considered to have capacity can give consent on behalf of that young person to investigations and treatment that are in the young person's best interests. If you are concerned that the investigations or treatment may not be in the young person's best interests you should get legal advice before proceeding further.

Children without capacity

24. When a child lacks competence to give consent, any person with parental responsibility for that child, or the court, can give consent on their behalf. Who will be considered to have parent responsibility may also vary. You should seek legal advice and/or advice from your professional or representative body.
25. While the consent of only one person with parental responsibility is required, where there is disagreement between those with parental responsibility you may wish to seek further advice.

Advance decisions on healthcare arrangements

26. People with capacity can say in advance how they want to be treated if they later suffer loss of mental capacity. An advance decision can only be used to refuse treatment, as a patient cannot demand specific treatment. These are unlikely within the optical sector context, but professionals should be aware of these if, for example, a patient makes an advance decision which refuses all types of healthcare.
27. An unambiguous advance refusal for a treatment, procedure or intervention which is voluntarily made by an adult with capacity and does not appear to have been withdrawn or is not applicable in the circumstances is likely to have legal force.

28. An advance refusal of treatment cannot override the legal authority to give compulsory treatment as set out in legislation.
29. Any advance decision can be superseded by a later decision by the person concerned at any time when they have capacity. This later decision may be made at any point between the making of the advance decision and the beginning of treatment. An advance decision will only apply in relation to treatment if the person giving it does not have capacity at the point that consent would be sought or treatment is given.
30. Advance decisions are covered by the Mental Capacity Act 2005. For an advance refusal of treatment to be legally valid, it must meet certain criteria set out in sections 24 to 26 of the Mental Capacity Act 2005.
31. If an advance decision does not meet these criteria, it is not legally binding but can still be used in deciding the patient's best interests.
32. You must follow an advance decision if it is valid and applicable to current circumstances.

Further reading: England and Wales

Mental Capacity Act 2005

www.legislation.gov.uk/ukpga/2005/9/contents

Mental Capacity Act Code of Practice

www.gov.uk/government/publications/mental-capacity-act-code-of-practice

Children Act 1989

www.legislation.gov.uk/ukpga/1989/41/contents

Department of Health (2009), Reference guide to consent for examination or treatment (second edition)

www.gov.uk/government/publications/reference-guide-to-consent-for-examination-or-treatment-second-edition