

Legal Issues

Adults

An adult is a person 18 years and over.

There is a presumption of capacity for adults.

Capacity is treatment specific - it depends on the treatment to be performed. A higher level of capacity is required if the treatment is risky/has potential serious side effects.

Capacity can fluctuate.

In Scotland the Adults with Incapacity (Scotland) Act 2000 provides that competent individuals over 16 can appoint someone to make decisions about medical treatment on their behalf if they become unable to do so.

The new Mental Capacity Act 2005 sets out a framework in England and Wales for persons aged 16 years and over who lack capacity. The Act sets out a statutory test for those who lack capacity.

A person lacks capacity if he/she cannot:

- * understand information relevant to the decision,
- * retain that information,
- * use or weigh up that information as part of the decision-making process
- * communicate a decision (by any means)

The Act provides that any decision made on behalf of a person who lacks capacity must be taken in his best interests. The Act sets out a checklist that a decision maker should consider in assessing the best interests of a person who lacks capacity. Account should be taken, as far as is reasonably ascertainable, of the person's past and present wishes and feelings, the beliefs and values that would be likely to influence his decision and other factors that he would be likely to consider if he were able to do so.

The Act codifies the common law position on advance statements. These are referred to in the Act as advance decisions. An advance decision can be made by a person who has capacity when aged 18 years and over. The advance decision has the effect of *refusing* specified treatment. It must be both *valid* and *applicable*. If the advance decision applies to life sustaining treatment it must be written and witnessed and state that it is to apply to a treatment, even if 'life is at risk'.

The Act enables the appointment of a proxy under a Lasting Power of Attorney. The proxy will be able to take healthcare decisions for the person appointing him. Certain formalities must be complied with and the document must be lodged with the Public Guardian.

It is thought that the provisions of the Act will come into effect in 2007. For information on the way the Act will work it is useful to look at the draft Code of Practice and the Explanatory Notes: <http://www.dca.gov.uk/menincap/legis.htm>

Children

In law, children are those who are under 18 years of age.

Children under 16 years old

A child under 16 years old is considered incompetent unless he/she is found 'Gillick competent'.

In the case of **Gillick v West Norfolk and Wisbech AHA [1986] AC 112** it was stated that if a minor has sufficient intelligence and understanding to enable him / her to understand the treatment and implications of treatment then he / she is 'Gillick competent'.

A Gillick competent child can consent to treatment.

Children aged 16 and 17

Patients aged 16 and 17 years old are considered competent to consent to treatment although this may be rebutted on evidence.

Babies, young children and teenagers who are not competent

In law someone else must consent on their behalf. This can be a proxy or the court. A proxy is usually a parent or another person with parental responsibility.

Those taking decisions on behalf of the minor must act in the child's best interests and if this is not the case then the decision can be overridden by the court.

If there is a difference of opinion between the parent (s) and the clinician regarding best interests the matter can be referred to the Official Solicitor who is likely to make an application to the court.

Refusal of treatment

A competent adult patient may refuse treatment, even if this results in his /her death.

A refusal of treatment by a minor may be overridden by a parent or the court even if the minor is competent where such a refusal would be likely to result in his/her death or permanent disability. Then the wishes of the minor may be overridden to preserve his / her long-term interests.

When Consent may not be needed - s63 Mental Health Act 1983

A patient who has been sectioned under the Mental Health Act may be treated without the requirement for consent. This is only applicable for treatment for the mental illness.

See further:

<http://www.ethics-network.org.uk/Ethics/econsent.htm#tests>

<http://www.doh.gov.uk/mentalhea>