

**Ethical and legal challenges in children's mental healthcare:  
Part 2 – decision making, consent and capacity**

by Dr Moli Paul

Decision making, consent and capacity are complex concepts that vary in different contexts, i.e. from general health to mental health, community mental health to in-patient mental healthcare and then whether inpatient mental healthcare is voluntary or not. The law, clinical and ethical reasoning are all important when considering these concepts.

There are two sorts of decision makers, those who take part and those who have the final say. The aim should be to reach consensus but, on occasions where this is not possible, having the final say may depend on who can consent or the expression of an objection, whether competent or not, and the weighing up of harms and benefits.

Laws on consent are constantly evolving. There are four aspects of consent:

- capacity
- information
- voluntariness
- decision making.

It is helpful to be specific about the last aspect so that we remember to ensure we facilitate children and young people being active decision makers and participating in decisions that affect them. On the whole, a competent minor's refusal should be overruled 'very rarely' (and even then only when treatment is essential to save or significantly enhance life). Decision making should always give priority to their best interests.

Capacity is used in relation to those 16 years and older and is defined in the Mental Capacity Act 2005 (MCA). It requires:

- the understanding of relevant information
- retention and weighing of that information in order to decide
- the ability to communicate the decision.

Gillick competence is used in relation to under 16s. It requires sufficient understanding and intelligence to make the necessary decision.

In relation to the assessment and treatment of minors for mental health problems or disorders, there is no specific mental health legislation that covers mental healthcare in out-patient or community settings, unless this happens

post-discharge from in-patient care under the Mental Health Act 2007. Admission to hospital should take into account:

- all relevant legislation and codes of practice
- case law
- and international conventions.

Compulsory admission, with or without treatment, should only be undertaken under appropriate sections of:

- the Mental Health Acts 1983/2007
- the Mental Capacity Act 2005
- the Children Act 1989 (admission only)
- or by High Court Order.

The Mental Capacity Act Deprivation of Liberty Safeguards (DoLS) only apply to those over 18 years of age, so any deprivation of liberty of under 18s should be undertaken only when the Mental Health Acts 1983/2007 or Children Act 1989 permit this or with Court approval.

## Reflection questions

### **(1.2) Reflection**

In decision making about a child or young person's healthcare, who do you think:

- should take part?
- should have the final say?
- should promote and facilitate children and young people's participatory rights?

### **(2.6) Reflection: Who can give consent for the assessment or treatment of minors?**

In decision-making about a child or young person's general healthcare, who do you think can give consent?

### **(2.8) Reflection: Overruling minors – mental health considerations**

1. How well do you think that the advice to all doctors from the GMC, BMA and Department of Health sits in mental health settings?
2. Are there any specific differences in mental healthcare?

### **(3.6) Reflection: Mental health in-patient care: consent to voluntary admission**

What are the key questions related to gaining consent for the voluntary admission of a minor for mental healthcare?

### **(3.12) Reflection: Mental health in-patient care: compulsory admission**

What law or legal procedures could make compulsory admission of children and young people for in-patient mental healthcare legal?

### **(3.14) Reflection: Nearest Relative and Parental Responsibility**

Consider the following questions in the context of Wayne:

Who is the Nearest Relative?

Who holds Parental Responsibility?

Who will you involve in the decision-making process?

Can Wayne's mother block his admission under section 2 MHAs if he fulfills the criteria for detention?

### **References**

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OPSI, Mental Capacity Act, 2005 [[Website](#)]

Re R [1991], *Re W (A Minor) (Medical Treatment)* [1991], *Re E* [1993]

### **Further reading**

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3. Department of Health (2001) Reference guide to consent for examination or treatment. 4 London: DoH

4. Department of Health (2001) Seeking consent: working with children. London: DoH
5. Department of Health (2008) Code of Practice: Mental Health Act 1983 [[Website](#)] (See p350 of the CoP for a useful flow chart)
6. Department of Health (2008) Code of Practice: Mental Health Act 1983 [[Website](#)] (See p352 of the CoP for a useful flow chart)
7. MCA 2005 [[Website](#)]
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