

**Supplementary guidance on consent**  
Legal framework for Northern Ireland:  
capacity to consent

1. In Northern Ireland, persons over 16 are presumed to have full legal capacity.
2. The Mental Capacity Act 2016 (not yet in force) will set out the criteria and procedures to be followed in making decisions when people aged 16 and over lack the capacity to take some or all decisions for themselves, because of a mental disorder or inability to communicate. The process of establishing capacity has two components requiring the person making the determination to consider (a) whether all practical help and support has been given to help the person make the decision and then (b) whether the person lacks the capacity to make a particular decision at a material time. The Act requires any substitute decision maker to consider what is in the individual's best interests in all the relevant circumstances before intervening and lists relevant people who might be consulted on this (where practicable and appropriate). The Department of Health, Northern Ireland is required to produce one or more codes of practice in relation to the Bill which will contain guidance for those acting in connection with the care, treatment and personal welfare of those over 16 who lack capacity.
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 2016 when it comes into force. 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. 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 when the Mental Capacity Act 2016 comes into force.

## 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 Northern Ireland, a child is defined as a person under the age of 18, although the presumed age of capacity is 16 and over.
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 the Children (Northern Ireland) Order 1995. If a person with parental responsibility is required to provide consent, you may need to get legal advice if:
  - 11.1 you are in any doubt about who has parental responsibility for the individual; or
  - 11.2 the views of those that have parental responsibility differ.
12. 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.

## Children with competence

13. Children are not presumed to have the capacity to consent; instead, the issue is whether children can demonstrate their competence.
14. 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. In this case you do not also 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.
15. 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'.
16. 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 children refuse to give consent**

17. A competent child may refuse to give consent. 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.
18. In some circumstances, the courts can override the refusal of consent of a competent child if health and care professionals involved in their care believe that the refused treatment would be in their best interests.
19. The law is complex when a competent 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.

## **Children without competence**

20. 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.
21. 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

22. 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.
23. 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.
24. An advance refusal of treatment cannot override the legal authority to give compulsory treatment as set out in legislation.
25. 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.
26. In the absence of specific statutory provisions, the position in Northern Ireland is governed by common law principles. An advance decision is still binding, and must be followed by healthcare professionals, provided they know about it.
27. In all jurisdictions, an advance decision requires the same level of capacity as a contemporaneous decision.

## **Further reading: Northern Ireland**

Mental Capacity Act 2016

[\*\*www.legislation.gov.uk/nia/2016/18/contents/enacted\*\*](http://www.legislation.gov.uk/nia/2016/18/contents/enacted)

Children (Northern Ireland) Order 1995

[\*\*www.legislation.gov.uk/nisi/1995/755/contents/made\*\*](http://www.legislation.gov.uk/nisi/1995/755/contents/made)