

Legal Frameworks for Capacity and Consent for Young People

This guidance is not intended to replace legal advice. Please consult with your own organisation's legal team as necessary.

It is your responsibility to confirm if there has been updated case law in this area.

Introduction

This guidance has been developed to support services working with children and young people in understanding the legislation interfaces around capacity, consent, parental responsibility, and safeguarding.

The Mental Capacity Act 2005

The Mental Capacity Act 2005 (MCA) provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves because of a disturbance or impairment in the functioning of their mind or brain. The Act's starting point is to assume that anyone aged 16 or over has full legal capacity to make decisions for themselves (the right to autonomy) unless it can be shown that they lack capacity to make a decision for themselves at the time the decision needs to be made. This is known as the 'presumption of capacity'. The MCA also states that people must be given all practicable help and support to enable them to make their own decisions or to maximise their participation in any decision-making process.

The MCA is intended to be enabling and supportive of people who lack capacity, not restricting or controlling of their lives. The aim is to protect people who lack capacity to make particular decisions, and to maximise their ability to make decisions, or to participate in decision making, as far as they are able to do so.

The five statutory principles are:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because they make an unwise decision.
4. An act done, or decision made, for or on behalf of a person who lacks capacity must be

done, or made, in their best interests.

5. Before the decision is made, regard must be had as to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

For further information the MCA code of practice can be found here:

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

The Mental Capacity Act (2005) applies to all people 16 years of age and over in England and Wales and states that: young people aged 16 and over can consent to medical treatment, care, and provision of support. However, if there are concerns around the young person's capacity to consent and make decisions, then a Mental Capacity assessment should be completed under the Mental Capacity Act. (2005) This capacity assessment should be time and decision specific, and as such, any assessments completed may need to be revisited.

Key to assessing capacity is consideration of the young person's vulnerability in terms any of trauma, abuse, coercion or control they may be subjected to/have experienced.

Cognitive and developmental age/functioning must also be considered.

All concerns, assessments, actions taken, and decision making should be clearly documented in records.

When the MCA does not apply to young people aged 16-17

There are certain parts of the MCA that do not apply to young people aged 16-17 years. These are:

- Only people aged 18 and over can make a Lasting Power of Attorney, (LPA);
- Only people aged 18 and over can make an advanced decision to refuse medical treatment;
- Making a will. The law generally does not allow people under 18 to make a will and the MCA confirms that the Court of Protection has no power to make a statutory will on behalf of anyone under 18.

Under 16 years/Gillick Competence

At the age of sixteen, a young person can be presumed to have the capacity to consent; however, a young person under the age of sixteen may also have the competency to consent, depending on their maturity and ability to understand what is involved. Gillick competence use lies within the health sector – however, its principles can be used across sectors - for more information see NSPCC link below:

[Gillick competence and Fraser guidelines | NSPCC Learning](#)

In most situations, the legal framework of the Children Act 1989 supports the care and welfare of children under 18 years old. However, two parts of the MCA apply to children under 16:

- The Court of Protection can make decisions about a child's property or finances, (or appoint a deputy in order to make these decisions), if the child lacks capacity to make decisions

within section 2(1) of the Act and is likely to still lack capacity to make these decisions when they reach 18 years of age.

- The criminal offence of ill-treatment or wilful neglect of a person who lacks capacity applies to children under 16, as no lower age limit is specified for the person caused harm/ the victim. If the child/young person has capacity, this would be dealt with under safeguarding/ criminal legislation.

Parental Responsibility and the MCA

Parental Responsibility (PR), relates to the “rights, duties, powers, responsibilities and authority which by law a parent has in relation to a child” (Children Act 1989). Parental Responsibility ends when the young person (“child” under Children Act 1989) reaches 18 years of age or at an earlier age if ordered by the court.

Those with PR can make decisions on behalf of that child/young person that are deemed to sit within the zone of parental control. Things to consider include:

- Is this a decision a parent should reasonably be expected to make?
- Are there any concerns the person with PR may not/be unable to act in the child/young person’s best interests? Is the child/young person resistant to the outcome of the decision?
- How invasive is the proposed intervention/decision to be made?

The greater the resistance and the greater the intervention, the less it would be reasonable to expect a person with parental responsibility to make the decision whether it is in the child’s best interests.

Where there are issues around the mental capacity of the young person to consent to their arrangements for care and treatment, and the persons with parental responsibility are unable to consent on their behalf both these rights need protecting by the appropriate legal framework.

For further guidance about parental responsibility – see [Parental rights and responsibilities: Who has parental responsibility - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/parental-rights-and-responsibilities-who-has-parental-responsibility)

Deprivation of Liberty in relation to young people aged 16 -17 Years

Deprivation of Liberty provides the legal framework through which actions are taken so that people are not detained unlawfully. The term originates from Article 5 of the European Convention on Human Rights (ECHR) and in English law pertains to the Human Rights Act 1998. People of any age have the right to liberty; they can only be deprived of this in very limited circumstances and in accordance with strict legal procedures which include the process to appeal. Where someone is deprived of their liberty, there must be a programme of regular review.

What determines a deprivation of liberty?

There are three components which determine if someone is deprived of their liberty:

1. The person is confined
2. There is no valid consent for that confinement
3. The State is responsible for the confinement.

When considering if a child is confined a nuanced approach to the acid test as per Cheshire West is required. There must be consideration of what restrictions placed on children by their parents would be expected as part of their usual parenting responsibility.

There is also consideration in law as to whether a parent can consent to their child's deprivation of liberty, and this differs for young people 16-17 yrs and those under 16 yrs.

Can a child/young person consent to deprivation of their liberty?

16-17yrs

If the young person has capacity to consent to the confinement and gives their consent, there would be no deprivation of liberty - however if the young person does not consent, then they would be being deprived of their liberty.

If the young person is not able to consent to the confinement, their parents or other persons with PR would also be **unable** to consent to the confinement on the child's behalf.

Under 16 years?

Children under 16 years old who have been deemed to have competence can consent to their confinement, therefore in this situation there would be no deprivation of liberty.

In this age group, it is possible that parents or other persons with PR could consent to the child's confinement if this would fall within the scope of ordinary acceptable parental restrictions.

Important Note: if a child is subject to a care order and is confined, an application must be made to a court as neither the local authority nor a parent or other person with PR can consent to the child's confinement.

When a child/young person is Deprived of their Liberty

There are key issues which must be considered:

- Are all actions taken in their best interest?
- Are least restrictive options being exercised?
- Are decision makers considering the child/young person thoughts and wishes as much as possible?
- If the child/young person is deprived of their liberty is there a robust process for appeal and schedule for review ?

In the majority of cases, legal advice should be sought, and it is likely that an application to the courts will be necessary for authorisation.

For those aged 16-17 years old, who are deemed to lack capacity to make specific decisions, the Court of Protection is generally referred to.

The High Court will be required where inherent jurisdiction is required - most commonly this would be where a young person has capacity to consent to their deprivation of liberty but does not agree to it.

Children and Young People can also be legally detained under:

The Mental Health Act 1983

The Mental Health Act is the main piece of legislation that covers the assessment, treatment and rights of people with a mental health disorder and under this legislation a person can be legally detained without their consent when, due to their mental health disorder, they are at risk of harm to themselves or others.

Further information in respect of the MHA can be found here [Mental Health Act 1983 \(legislation.gov.uk\)](#) and [Treatment in hospital | Parent mental health guide | YoungMinds](#)

Section 25 Children Act 1989 (secure accommodation)

This piece of legislation provides the legal framework regarding depriving children and young people of their liberty in secure accommodation provision when the following conditions are met:

- The child has a history of absconding and would likely abscond from any other accommodation and if they were to abscond they would be at risk of significant harm or be at risk of injury to self or others.

Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended by the Police Crime, Sentencing and Courts Act 2022,

This legislation provides the legal framework for the remand of children following criminal offence charges where bail is refused. There are a number of conditions which must be met under these circumstances. For more information see:

[Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(legislation.gov.uk\)](#)

For further advice please contact your organisation's MCA Lead or seek legal advice on individual cases