



## Opinion Medico-Legal

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# Treating children and young people – consent, capacity, and confidentiality

*It is important to be aware of the ethical and legal obligations relevant to this patient cohort, writes Ms Stephanie O'Connell*

**W**hen it comes to treating children and young people, doctors are often faced with challenging questions around the issues of consent, capacity, and confidentiality. These questions can sometimes be complex and it is important for all doctors who treat children and young people to be familiar with the ethical and legal obligations that may be relevant to this patient cohort. Understanding some of the issues that arise frequently will allow doctors to act in accordance with guidance and best practice whilst also protecting the safety and interests of their young patients.

### Can children and young people consent to medical treatment?

The Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*, 9th edition, 2024, (the Guide) acknowledges, at paragraph 22.2, that consent to and refusal of medical treatment in respect of persons aged under 18 years is complex. The Guide distinguishes between children and young people, with 'child' meaning a person aged under 16 and 'young person' meaning a person aged 16 or 17.

Paragraph 22.1 of the Guide states that children and young people should be involved in, and consulted on, decisions about their healthcare and that doctors should give children and young people information in accordance with their age and maturity, listen to their views and treat them with respect.

In general, if a patient is under the age of 16, the consent of a parent(s)/legal guardian(s) should be obtained before providing treatment. Where there are two or more parents or guardians with appropriate rights who share parental responsibility, it is usually sufficient for one parent/guardian to give consent to day-to-day treatment. However, where decisions may have profound and/or irreversible consequences, both or all parents or guardians should be consulted. The more complex the decision, or the more serious the situation, the greater the need to include all parents and guardians in your discussions.

The *HSE National Consent Policy* states:

*"Where both parents or all legal guardians have indicated a wish and willingness to participate fully in decision making for their child, this must be accommodated as far as possible by the service provider. However, this also imposes a responsibility on the parent or legal guardians to make this wish known to the service provider in advance, and to be contactable and available at relevant times when decisions may have to be made for their child. If one parent or legal guardian is not contactable or available at the required time, and the intervention is in the best interests of the child, the intervention can proceed on the basis of the consent of one parent only."*

If a parent or guardian and a child are in agreement about a medical decision, then this should not present a problem. However, if there is a disagreement between parents, guardians, a child or a medical practitioner, caution should be exercised, and if necessary legal advice should be obtained. Where there is reason to believe that the parents or guardians may not agree with one another, you should seek the consent of all parents or guardians.

The position is slightly different for young people aged 16 and 17. Section 23 of the Non-Fatal Offences Against the Person Act 1997 provides that a person over the age of 16 can give consent to surgical, medical or dental treatment and it is not necessary to obtain consent from his or her parent(s) or legal guardian(s). Nonetheless, the Guide states that it is good practice to involve parent(s) in healthcare decision-making for young people, if the young person consents to their involvement.

In practice, doctors sometimes encounter situations where children or young people do not wish to involve their parents or guardians in decisions regarding their healthcare.

Paragraph 22.4.2 of the Guide states:

*"If a child under 16 years does not wish to involve a parent(s) in decisions about their treatment you should, where appropriate, encourage and advise them to do so."*

Paragraph 22.4.3 of the Guide goes on to say:

*"If the child still refuses to involve their parents, you should act in their best interests, taking into account:*

- ▶ *The child's maturity and ability to understand the information relevant to the decision and to appreciate its potential consequences.*
- ▶ *Whether the child's physical or mental health, or any other factors, are affecting their ability to make a decision.*
- ▶ *Any other specific welfare, protection, or public health considerations, covered by relevant legislation guidance and protocols such as the Children First Act 2015 and the Children First: National Guidance for the Protection and Welfare of Children 2017 (or any equivalent replacement document). Where this is the case, you must follow the relevant guidance or protocols."*

### Can children and young people decline to consent to medical treatment?

This is a more complex and difficult question to answer, and can present a significant challenge for doctors, particularly if there is a conflict between the views of the child or young person and those of their parents or guardians.

Paragraph 22.4.4 of the Guide states:

*"In general, where a patient aged under 16 years refuses treatment, but where the parent(s) or legal guardian(s) consents, you may proceed with treatment in the best interests of the child, taking account of the age and maturity of the child, and the urgency of treatment being proposed."*

Although young people aged 16 or 17 can provide their own consent to medical treatment, whether or not that right extends to the refusal of treatment is not clear cut.

Paragraph 22.3.4 of the Guide states:

*"The law relating to refusal of treatment by young people aged 16 and 17, against medical advice and against parental wishes, is uncertain. If this situation arises, you should consider obtaining legal advice as to whether a court application is necessary."*

Any doctor faced with this difficult situation should consider contacting their indemnifier or legal advisor for advice specific to the situation.

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### Confidentiality

The Guide states, at paragraph 26.1, that doctors have the same duty of confidentiality to children and young people as they have to adults. Paragraph 26.3 of the Guide states:

*"If a child or young person does not want to share information with their parents, you should usually try to encourage them to involve a parent in such circumstances. If they refuse and you consider it is necessary and in the child's best interests for the information to be shared, you may, depending on the circumstances, consider disclosing information to parents. You should record your discussions and reasons for sharing the information."*

Although children and young people have a right to confidential medical treatment, it is important that they understand that this right is not absolute. Parents or guardians may be entitled by law to access the medical records of their children under the age of 18. Doctors should, therefore, tell children and young people that they cannot give an absolute guarantee of confidentiality.

In addition to the ethical duty of confidentiality, it is also important that doctors processing patient personal data are aware of their legal obligations under data protection legislation. The office of the Data Protection Commissioner has published guidance on this issue that gives the following example:

**"Q: I want to access my child's medical notes.**

**How do I do that?**

*A: If you are the legal guardian of a child, you can make a subject access request to the data controller under Article 15 of the GDPR for a copy of the child's personal data. You may be asked for proof of guardianship where the data controller has any reasonable doubts as to your identity. There is no automatic entitlement to this personal data, as it is not your personal data. The release of the personal data will be underpinned by a range of factors including the child's best interests. Depending on the age of the child, their views and wishes may be ascertained in advance of the release of any information to you."*

It is important when treating children and young people that doctors make them aware that they cannot be given an absolute guarantee of confidentiality. However, a parent or guardian's entitlement to their child's information is also not absolute, and any doctor faced with such a request should consider whether they need the consent of the child or young person before disclosing any information. Whether or not a doctor needs to seek a child's or young person's consent to release medical records is not dictated by the age of the child, it is based on their level of maturity and understanding of the request being made. The decision as to whether or not to release the records should, as stated above, be underpinned by what is in the best interest of the child or young person, amongst other factors. Regardless of whether the ultimate decision is to release or withhold the records, it would be advisable for the doctor processing the request to keep a detailed note of his or her decision-making process. Should a complaint be made to the Data Protection Commissioner, either by the parent/guardian following refusal, or by the child/young person following release without consent, it would be important for the doctor to be able to demonstrate the factors considered in arriving at the final decision.

There are, of course, many other issues and complexities that can arise for doctors in the treatment of children and young people and we always encourage our members in Medisec to contact us for issue-specific advice.

*Reference available on request*