Children's Safeguarding and Social Work

Consent and children and young people: guidance for social workers

Policy outline

Children and young people should be encouraged to take increasing responsibility for decisions affecting their lives and the services they receive to reflect their growing autonomy as they get older. The extent to which children and young people are considered to have capacity to make decisions is based on their age and understanding:

- Young people aged 16 and 17 can legally make decisions as long as they have the capacity to do so under the Mental Capacity Act 2005.
- Young people aged 13-15 are able to make decisions if they are considered to be "Gillick competent" and have an understanding of the nature of the decisions they are making.
- In general, children under 13 are unlikely to be Gillick competent although some may be.
- Where a child or young person lacks capacity or competence to make a decision their parents should be asked to make the decision on their behalf.

1 Introduction

It is important that social workers can engage with children fully and work directly with them in order to carry out assessments and implement plans, ensuring their views are heard and involving them in decisions about the services and support they receive.

The extent to which a child or young person should be involved in making decisions about their lives will be determined by their age and understanding, and as they get older and develop their understanding, they should be allowed to take on increased responsibility for their own decisions and exercise some autonomy as they move towards independence.

Whether or not children and young people have the capacity to make informed decisions on their own behalf is determined by their age and understanding, and the test for competence to make decisions will differ according to their age.

2 Young people aged 16 and 17

The Mental Capacity Act 2005 states that anyone over the age of 16 years has a legal right to make their own decisions as long as they have the capacity to do so. A person may lack capacity to make decisions because of an impairment of the mind that may be temporary or permanent. This can be due to illness, lack of consciousness at the time or because of the effects of drink or drugs, mental ill health or learning disability.

The Act provides the framework for deciding on whether a person has capacity to make decisions and what action needs to be taken in order to safeguarding those who lack capacity by setting out how decisions can be made on their behalf and in their best interests.

People working with young people aged 16 and over who may sometimes lack capacity to make decisions may make the decision for that person as long as these principles are followed;

- The starting point is to presume that a person has the capacity to make decisions unless it can be established that this is not the case.

- Those working with the young person should take every opportunity to help them make a decision before deciding on whether they have the capacity to do so.

- A young person is not incapable of making a decision simply because they are making a poor decision.

- When making decisions or taking action on behalf of a young person who lacks capacity, workers must act in the young person's best interests.

- Any action taken must be the least restrictive of the young person's rights.

The test for whether a person has capacity is:

- Can the young person take in and understand the information?
- Can the young person retain it (long enough to make a judgement on it)?
- Can they weigh up the information in order to make a decision?
- Can they communicate their decision?

Any assessment of a young person's mental capacity should be recorded on the *mental capacity assessment record* available on MOSAIC and uploaded onto the young person's case record, with a record made in case notes of the circumstances for carrying out the assessment.

Where a young person is judged to lack capacity to make a decision, it will fall to the person taking the action to make a decision for them (for example a social worker or doctor) but more likely a parent or carer.

In general, unless they lack capacity, young people aged 16 or 17 will be largely self-determining with limited parental involvement. This should be reflected in the way social workers work with this age group and will normally mean dealing directly with the young person. Young people themselves should decide what information they wish to share with parents and the extent to which parents are involved.

3 Children under 16

Children under 16 can make decisions about services and support they receive if their social worker considers them to be competent to make such a decision (known as "Gillick competent").

A child will be Gillick competent if it can be demonstrated that the young person:

- understands the advice and information they are being given about services and interventions
- understands the consequences of consenting or not consenting
- is able to make an informed decision based on this information.

Where an assessment of a child's competence to make decisions is carried out the circumstances and outcome of the assessment should be recorded in case notes. If the child is **not** considered to be competent to make a decision, their parents will need to give consent on the child's behalf.

Although social workers should be encouraging children of this age group to take increasing responsibility for decision-making if they are considered competent to do so, this should be in the spirit of partnership working with parents. Social workers should try to keep parents involved and informed of decisions that are being made and shared decision-making should be actively pursued (see section 5).

Parental responsibility means that parents have certain rights with regards to their child, including being informed of decisions taken about their child unless this is not in the child's best interests. Decisions not to inform parents should be discussed and agreed with the team manager.

4 Children under 13

In general, it is more likely that children under 13 will be not competent or have the understanding to give consent and make decisions, and the Data Protection Act 2018 states that children under 13 cannot give consent to their information being shared or processed.

Parental consent should be obtained at all times when working with the child unless this would put the child at risk of harm. Any decision not to inform parents or involve them in decision making should be discussed and agreed with the team manager.

5 Involving parents and shared decision making

One of the underpinning principles of the Children Act is that social workers work in partnership with parents, involving them in decision making and where possible, seeking consensus around CSSW action and interventions. However, the paramount consideration must be the safety and welfare of the child.

Shared decision making is an approach where social workers, children and parents work in collaboration in order to make decisions. The process involves identifying goals to be achieved (for example what needs to change) and agreeing what actions will be taken and support given to achieve these.

This approach recognises that children and parents have valuable knowledge, strengths and attributes that should be harnessed to help find solutions, which can lead to genuine collaboration that:

- empowers children and parents to make informed choices
- increases engagement and improves relationships between social workers and families
- reduces the power imbalance between social workers and service users
- helps facilitate open discussion and transparency.

Methods of putting shared decision making into practice could involve making sure families can get the best out of meetings and discussions with social workers and professionals by making sure:

- they are prepared for meetings and are aware of who will attend, what will be discussed and what information shared;

- they know how they will be supported to attend and participate;

- they are consulted on arrangements for meetings and that they feel safe to attend and contribute;

- that their contributions are valued and their views heard and that they have ownership of decisions and plans.

However, social workers need to be able to take action where parents make it difficult for social workers to seek children's views. In the event that parents will not consent to work co-operatively with CSSW, or avoid contact with social workers, guidance on what actions can be taken to engage families is available in the *Working with non-engaging, resistant and violent families* policy available at: https://ascpractice.camden.gov.uk/media/3693/working-with-non-engaging-resistant-and-hostile-families.pdf

6 Dealing with differences of opinion

Sometimes, social workers will need to balance children's rights, views and wishes against the need to safeguard and promote their welfare and may not be able to act on children's wishes because it is not in their best interests to do so. In these cases, social workers may be compelled to override the child's wishes in order to keep them safe.

This may be the case where social workers are working with adolescents who display risk-taking behaviours that may put them at risk of harm or make them vulnerable to exploitation. There will be situations where young people are assessed as having capacity or who are considered to be Gillick competent but are making decisions that put them at risk.

Where a young person is at risk of significant harm, the Children Act duty to safeguard and promote their welfare must be the primary concern and social workers may need to override the wishes of the young person.

In any situation where this happens, it is essential that social workers discuss the matter with the child or young person and explain why their wishes or views are not being acted on. This should be clearly recorded in the case notes of the MOSAIC case record. It is good practice for parents to be part of this conversation unless there are compelling reasons not to do so.

7 Consent for specific decisions

7.1 Consent to sharing information

CSSW has a legal basis for sharing information without consent under the Children Act 1989 for the purposes of safeguarding children. However, where children and young people have capacity under the Mental Capacity Act or are assessed as *Gillick competent* they should be informed when their information is going to be shared and given an age-appropriate explanation regarding why sharing this information is important, what information will be shared and with whom.

7.2 Consent to medical treatment

From 16 a young person is deemed capable of giving or withholding consent for medical examination or treatment and may give or withhold consent for information about them to be shared with third parties unless they lack capacity. In these cases, the Mental Capacity Act will apply (see section 2 of this guidance).

Children and young people under 16 can also give or refuse consent to medical examination or treatment if the health professional working with them considers them to be competent to make such a decision (known as “Gillick competence”), and it has not been possible to persuade them to inform their parents (see section 3 of this guidance).

If a child or young person is deemed to be unable to consent to their treatment, professionals would need to discuss this with them before seeking parental consent to intervention or treatment.

- For children who are accommodated under section 20, parental consent would need to be sought from their parents unless there had been a prior agreement that CSSW could take these decisions instead.

- For children who are subject to a care order, parents should still be approached for consent but if refused parental consent would be obtained

from LAC service manager. In some cases consent for medical care or treatment may be delegated to CSSW and consent will be provided by the social worker.

- For risky or highly intrusive medical treatment the Director's consent would be required. This is set out in the division's LAC health policy. https://ascpractice.camden.gov.uk/media/3214/health-care-planning.pdf

7.3 Consent to accommodation

Under the Children Act 1989, young people aged 16 and 17 are able to consent to being accommodated under section 20. However, they do not have a right to be accommodated and a decision to accommodate will always be based on assessment of their needs.

Parents should always be notified of any request for accommodation and social workers should work with the young person and parents to help the young person to remain at or return home where appropriate.
Further details of Camden's duty towards homeless 16 and 17 year olds can be found in the homelessness protocol available at: homeless-young-peoples-protocol.pdf (camden.gov.uk)

7.4 Consent to sexual activity

Under the Sexual Offences Act 2003:

- 16 and 17 year olds can give consent to sexual activity as long as they have the capacity to give consent and their consent is given freely. This means that if there is any suggestion of consent being given under duress or within an exploitative relationship, or if the person lacks the mental capacity to consent freely, for example due to being under the influence of substances, it can be assumed that they did not give free and informed consent to sex.

- It will be irrelevant if a 16 and 17 year old consents to sexual activity with a person who is in a position of trust to them, for example a teacher, as this will always be an offence.

- 13-15 year olds cannot give consent to sexual activity but it is unlikely the police would prosecute cases involving mutually agreed sexual activity between teenagers of a similar age unless there was the possibility of duress or exploitation.

- A child under the age of 13 cannot give consent and any sexual activity carried out with the child will be a sexual offence.

7.5 Looked after children

Delegated authority for taking decisions regarding the care of looked after children is agreed at the start of a placement having been discussed and agreed at the placement agreement meeting by social workers, foster carers and parents.

The delegated authority agreement records those decisions that can be taken by foster carers in the course of looking after the child, those decisions that have been retained by parents and those decisions that may only be taken by social workers or CSSW managers.

It is important that as looked after children get older, they are involved in the discussions around delegated authority so that decisions can be delegated to them in a gradual manner reflecting their increasing independence.