

The legal position regarding contraceptive advice and provision to young people

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FAMILY PLANNING ASSOCIATION FOR NORTHERN IRELAND

FACTSHEET

This factsheet summarises the legal position in Northern Ireland relating to the provision of contraceptive advice and supplies to young people. Particular reference is made to the provision of contraception to under 16s without parental consent.

Key points

- The age of sexual consent is 17 in Northern Ireland, but the medical age of consent is 16, the same as in the rest of the UK.
- A doctor or other health professional can provide contraceptive advice and treatment to those under 16, without parental consent, in certain circumstances.
- Doctors and other health professionals must try to obtain a young person's consent to involve their parents before providing contraceptive advice or treatment. If they are not successful, they may proceed only if they are satisfied on specific matters, including the young person's maturity and ability to understand what is proposed.

Current legislation

Over 16s - The age of sexual consent is 17 in Northern Ireland, one year higher than in the rest of the UK. The Offences Against the Person Act 1861 and the Criminal Law Amendment Act 1885 are the basis of Northern Ireland's laws on sex and the latter fixes penalties of a maximum prison sentence of two years for a man who has sexual intercourse with a girl between 14 and 17 years old. An offence against a girl aged under 14 carries the maximum penalty of life imprisonment. Unlike in English law, a man cannot claim as a defence that he believed either that he was legally married to the girl or that she was over the age of consent.

Young people over the age of 16 can give consent to their own surgical, medical or dental treatment without obtaining the consent of parents. In cases where a young person is judged

not competent to give valid consent, then the consent of a parent or guardian must be sought. This power only extends until the young person reaches 18.¹

Family planning clinics treat all patients over 16 alike, whatever their marital status or age. Patients who have agreed to use any medical method of contraception (ie oral contraceptives, injections, implants, IUS, IUD) as a means of birth control are asked if they have any objections to their doctor being informed. If there are none, the GP is then not only made aware of the prescription, but is also given the opportunity of making known any possible contraindications. If a patient does not want their GP to be informed, the clinic doctor must exercise their own judgement in deciding whether the patient's best interests would be served by prescribing a medical method, or whether another contraceptive method should be offered (ie condom, diaphragm, cap).

Under 16s - Parental consent is required for the treatment of a young person below the age of 16 unless the treatment can be justified on the grounds of necessity, or unless it can be demonstrated that the minor was capable of giving an informed consent. GPs and family planning doctors must use their clinical judgement about giving treatment, but should not breach a patient's confidence.

It is important to note that some GPs offer a limited contraceptive service to young people, or to all their patients. For instance, they might refuse to prescribe emergency contraception for moral reasons.

Confidentiality and the under 16s

Contraceptive advice and treatment for the under 16s has been the subject of much controversy and confusion in recent years. This has led to many young people being afraid to approach their GP about contraception, because they fear the consultation will not remain confidential.

Contraceptive
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A British study² of the experiences of young people using three family planning and pregnancy counselling services found that 75% of the under 16s and nearly 50% of the 16-19 year olds thought GPs would tell their parents that they had been to see them and why. The report concluded that there is an urgent need for appropriate services for young people. Clarifying the present legal position is therefore vital.

Although much of the following focuses on statutory bodies in Great Britain, it is, except where stated, equally applicable to Northern Ireland.

History

The original advice to health care professionals was provided in Section G of the 1974 Department of Health and Social Security (DHSS; now Department of Health (DoH)) Memorandum of Guidance³, which stated that a doctor was:

“not acting unlawfully provided he acts in good faith in protecting the girl against the harmful effects of intercourse”.

The Memorandum incorporated the advice of the Medical Defence Union in the same year: *“The Medical Defence Union have advised that the parents of a child, of whatever age, should not be contacted by any staff without his or her permission, even though as a matter of clinical judgement the refusal of permission to involve the parents may affect the nature of the advice to the child. Nevertheless, it would always be prudent to seek the patient’s consent to tell the parents”*

In December 1980, as a result of mounting concern regarding young people, the DHSS reissued Section G of the Memorandum⁴ to stress that the Department would hope that the doctor “will always seek to persuade the child to involve the parent or guardian”, but that ultimately, the decision must be for the clinical judgement of the doctor, a view supported by the Family Planning Association.

The wording of the revised Memorandum made it quite clear that obtaining parental consent was the norm and that any departure from this practice was the exception.

However, the Department recognised that to abandon the principle of confidentiality for under 16s

might discourage young people from seeking professional advice at all. The Memorandum noted that in some cases, such as the breakdown of family relationships, the consequences of withholding contraceptive advice or treatment, such as unwanted pregnancy or sexually transmitted disease, might be more of a threat to stable family life than the consequences of providing it without parental consent. The Department advised that, in such cases, health professionals must follow their clinical judgement.

Current legislation - The current situation stems from the House of Lords’ ruling in the Gillick case (see below for further details). The Law Lords ruled that:

“A girl under 16 of sufficient understanding and intelligence may have the legal capacity to give valid consent to contraceptive advice and treatment including necessary medical examinations.

Giving such advice and treatment to a girl under 16 without parental consent does not necessarily infringe parental rights.

Doctors giving such advice in good faith are not committing a criminal offence of aiding and abetting unlawful intercourse with girls under 16.”

The Law Lords further ruled that the doctor’s decision to give contraceptive advice and/or treatment to under-age girls should be guided by the following points:

- that the girl, although under 16, is capable of understanding the doctor’s advice;
- that she cannot be persuaded to involve her parents;
- that she is very likely to begin or continue having sexual intercourse, with or without contraceptive treatment;
- that her mental or physical health (or both) are likely to suffer if contraceptive advice or treatment is withheld;
- that the provision of contraceptive advice or treatment without parental consent is in her best interests.

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The Law Lords emphasised that doctors should not regard this as a licence to ignore the wishes of the parents.

Following the House of Lords' decision, the DHSS issued revised guidelines⁵ (see Appendix 1 for the full text). Further reference to children and young people and their consent to medical treatment and right to confidentiality can be found in the Data Protection Act 1984, the Access to Health Records (Northern Ireland) Order 1993, the Charter for Patients and Clients, and Services for Children and Young People (1997).

- **Data Protection Act 1984**

Under this Act young people under 16 have the right of access to personal information stored on computers, providing the data user considers the young person capable of understanding the request. A parent or guardian will only be given access if the young person has consented or is deemed to be incapable of understanding the nature of the request.

- **Access to Health Records (Northern Ireland) Order 1993**

This gives individuals, including the under 16s, the right of access to recorded information about themselves which is not already covered by rights of access to computerised records under the Data Protection Act 1984. If the individual is under 16, parents and guardians will usually be able to see their records, but if the child is judged capable of understanding why parents want to see the records, they must give their consent. In some cases access may be denied - for example, if it might cause serious harm or distress to the young person or someone else.

- **The Children (Northern Ireland) Order 1996**

This Act does not change the above legislation. It refers to the aforementioned rights and provides further details.

The Gillick case

Public attention was drawn to the dilemma concerning contraception and the under 16s by a protracted campaign mounted by Mrs Victoria Gillick.

Following the publicity given to the 1980 DHSS revised Memorandum, Mrs Gillick wrote to her

local area health authority (AHA) (now district health authority (DHA)), seeking an assurance that no contraceptive advice or treatment would be given to her daughters without her knowledge and consent. West Norfolk and Wisbech AHA was unable to provide this assurance and in 1982 Mrs Gillick sought a High Court ruling against her AHA and the DHSS on the grounds that the 1980 circular was unlawful and that no AHA employee could therefore give advice to her children without her consent.

On July 25th 1983⁶, the High Court ruled that the DHSS guidelines were not unlawful. Mrs Gillick's claim was dismissed on the grounds that, by giving contraceptive advice or treatment to patients under 16, doctors could not be seen to be aiding the crime of under-age sex and nor were they infringing parental rights.

But, in December 1984⁷, the Appeal Court overturned this ruling, and Mrs Gillick's declaration was granted with immediate effect. The case rested on the importance of parental consent and, except for advice in an 'emergency' or 'with leave of the Court', health care professionals were deemed to be acting illegally if they provided contraceptive advice or treatment to a girl under 16 without the consent of her parents.

DHSS guidance was suspended⁸, leading to a large drop in the number of under 16s attending family planning clinics. The DHSS appealed to the House of Lords⁹, and in October 1985, by a three to two majority, the House of Lords ruled that the guidance given to doctors by the DHSS was not unlawful.

Following this decision, the DHSS's guidance was reinstated immediately, although a full review was announced to take account of the Law Lords' judgements and the wide range of views expressed on the issue. The revised guidelines, issued on March 6th 1986⁵, are reproduced in full in Appendix 1.

The views of professional organisations

The British Medical Association (BMA) and the Royal College of General Practitioners (RCGP) have continued to issue guidelines confirming the Law Lords' ruling and the DoH guidelines.

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However, the guidelines issued by the General Medical Council (GMC) differ slightly.

A BMA publication¹⁰ states that when a doctor is unable to obtain the patient's consent to involve parents he must decide:

"Whether the girl has the mental maturity to understand the possible consequences of her action. If she has not, then her consent is not informed and so invalid. If he is satisfied that she can consent, he makes a clinical decision as to whether the provision of contraception is in the best interests of the patient. A decision not to prescribe does not absolve him from keeping the interview confidential."

In November 1991, the GMC issued guidelines for doctors on professional confidence¹¹, which state:

"A doctor who decides to disclose confidential information about an individual must be prepared to explain and justify that decision, whatever the circumstances of the disclosure."

These guidelines replaced those issued in 1986¹², which stated that if a doctor did not consider a girl under 16 sufficiently mature, they were not legally obliged to maintain confidentiality. The GMC have been under continuous pressure to revise their 1980 guidelines, which currently state that, when dealing with patients who lack sufficient understanding to appreciate what the treatment or advice involves due to immaturity, illness, or mental incapacity:

"If the patient cannot understand or be persuaded, but the doctor is convinced that the disclosure of information would be essential to the patient's best medical interests, the doctor may disclose to an appropriate person or authorities the fact of the consultation and the information learned in it."

References

1. A guide to consent for examination or treatment, HC(90)22. Department of Health, 1990.
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Guidance. Issued with Health Service Circular, HSC(IS)32, WHSC(IS)22. Department of Health and Social Security, 1974.

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7. Gillick v Norfolk and Wisbech AHA and the DHSS (1984) Queen's Bench Reports (England) 581.
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9. Gillick v Norfolk and Wisbech AHA and the DHSS (1986) Appeal Cases (England) 112.
10. Philosophy and practice of medical ethics. British Medical Association, 1988.
11. Guidance for doctors on professional confidence. General Medical Council, 1991.
12. Professional conduct and discipline. General Medical Council, 1986.

Other Northern Ireland factsheets are:

Sex education in schools

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APPENDIX 1

HEALTH CIRCULAR HC(86)1

LOCAL AUTHORITY CIRCULAR HC(FP)(86)1

LAC(86)3

CONTRACEPTIVE ADVICE AND TREATMENT FOR YOUNG PEOPLE UNDER 16

1. The following guidance draws the attention of health authorities and others concerned to the considerations doctors and other professionals need to have in mind when providing contraceptive advice and treatment to young people under 16, and to the circumstances in which such advice and treatment can be given without parental knowledge or consent. This guidance results from a review of that in Section G of the Memorandum of Guidance of the Family Planning Service, as specified in the appendix to Health Notice (81)5 and Local Authority Social Services Letter (81)2 in the light of the House of Lord's decision in the case of *Gillick v West Norfolk and Wisbech AHA* and the DHSS delivered last October.
2. In considering the provision of advice or treatment on contraception doctors and other professional staff need to take special care not to undermine parental responsibility and family stability. The doctor or other professional should therefore always seek to persuade the young person to tell the parents or guardian (or other person in loco parentis), or to let him inform them that advice or treatment is given. It should be most unusual for a doctor or other professional to provide advice or treatment in relation to contraception to a young person under 16 without parental knowledge or consent.
3. Exceptionally, there will be cases where it is not possible to persuade the young person either to inform the parents or to allow the doctor or other professional to do so. This may be, for example, where family relationships have broken down. In such cases, a doctor or other professional would be justified in giving advice and treatment without parental knowledge or consent, provided he was satisfied:
 - a) that the young person could understand his advice and had sufficient maturity to understand what was involved in terms of the moral, social and emotional implications;
 - b) that he could neither persuade the young person to inform the parents, nor to allow him to inform them, that contraceptive advice was being sought;
 - c) that the young person would be very likely to begin, or to continue having, sexual intercourse with or without contraceptive treatment;
 - d) that, without contraceptive advice or treatment, the young person's physical or mental health, or both, would be likely to suffer;
 - e) that the young person's best interests required him to give contraceptive advice, treatment or both without parental consent.
4. Decisions about whether to prescribe contraception in such cases are for a doctor's clinical judgement. If a doctor who is not the young person's general practitioner has formed the view, after due consideration of the points made above, that it is in the best interests of the young person to prescribe contraception without parental knowledge or consent, it may be advisable and helpful for him with the young person's agreement, to discuss the matter in confidence with her own general practitioner before making his decision.
5. In organising contraceptive services for young people, health authorities may find it helpful to make separate, less formal arrangements than those for older age groups. The staff should be experienced in dealing with young people and their problems.