

Children and the Law

In 2011, the Commission published its [Report on Children and the Law: Medical Treatment](#) (LRC 103-2011) (Third Programme of Law Reform, Project 26), which followed the [Consultation Paper on Children and the Law Medical Treatment](#) (LRC CP 59-2009). The Report made over 20 recommendations for reform, aimed at (a) clarifying existing law that 16 and 17 year olds can consent to medical treatment; (b) ensuring that mature minors (those under 16) have their views fully taken into account when they seek medical treatment; and (c) providing clarity to parents, guardians and health care professionals. The Report also includes a draft *Health (Children and Consent to Health Care Treatment) Bill* and *Outline Scheme of a Mental Health (Amendment) Bill* to implement these recommendations.

The Report deals with the complex interaction between the rights, responsibilities and roles of parents and young people. The Report points out that, under the Constitution and international human rights conventions, parents and guardians are presumed to be best placed to ensure that the rights of children are implemented in practice, especially in the case of very young children. As children mature towards adulthood, their capacity to exercise their rights must be recognised. The literature on early adult development points out that maturing is usually a gradual process that occurs as the young person approaches adulthood; that many factors affect this, including the young person's life experiences (such as health and medical experiences) and wider influences from society. This gradual maturing is also recognised in the law, which sometimes sets down definitive age thresholds for specific matters (especially in the criminal law) and sometimes sets down rules based on tests of maturity and understanding (for example, in assessing whether a child or young person's views should be taken into account in child care or adoption proceedings). The Commission has taken this into account in the Report.

The main recommendations in the Report are:

16 and 17 year olds: the Commission recommends that 16 and 17 year olds should be presumed to have full capacity (based on a functional test that they understand the health care decision and its consequences) to consent to, and refuse, health care and medical treatment. This includes: advice, over-the-counter medicine, surgery, access to contraception and mental health services. (Note: section 23 of the *Non-Fatal Offences Against the Person Act 1997* already provides that consent given by a 16 and 17 year old to medical treatment is a defence in any criminal prosecution for assault against a medical professional).

Those under 16: the Commission recommends that those under 16 should not be presumed competent to consent to, or refuse, medical treatment; but that, in exceptional circumstances they may be able to give their consent or refusal, based on an assessment of their maturity, and a presumption that their parents or guardians will usually be involved.

The assessment of whether a person under 16 is sufficiently mature to consent to or refuse medical treatment would have to take account of the following factors: (a) whether he or she has sufficient maturity to understand the information relevant to making the specific decision and to appreciate its potential consequences; (b) whether his or her views are stable and reflect his or her values and beliefs; (c) the nature, purpose and utility of the treatment; (d) the risks and

benefits involved in the treatment; and (e) any other specific welfare, protection or public health considerations, such as the mandatory application of the 2011 Children First Guidelines (revised earlier this month by the Minister for Children and Youth Affairs).

Where any person under 18 refuses life-sustaining treatment, an application to the High Court would be required to decide on the validity of any such refusal.

The Commission recommends that the *Mental Health Act 2001* be amended to make specific provision for people under 18: for example, that a Mental Health Tribunal (with an age appropriate focus) rather than the District Court should review their admission and treatment.

The Commission recommends that a detailed statutory Code of Practice be published to provide guidance on the application of the Commission's recommendations; and that the Minister for Children and Youth Affairs should establish a broad-based Working Group to advise on its content (membership to include representatives of parents, young people and health care professionals).