



Can young people under 18 make their own decisions?

This sheet is intended to provide general information only, not advice. If you have a particular legal problem you should contact a solicitor. Each section ends with a list of agencies who might be able to assist you, including legal agencies. The Youth Advocacy Centre does not accept responsibility for any action arising out of reliance on this information. This section was last updated on 1 January 2010. This legal information is relevant to Queensland, Australia.

Can young people under 18 make their own decisions? The answer to this question can be found in the *Gillick* Case, an English House of Lords decision which has been approved by the High Court of Australia. Sometimes legal advocates refer to young people as *Gillick competent*, which means that the young person, according to the test set out in the *Gillick* Case, has been determined capable of making their own decisions.

The *Gillick* Case

The *Gillick* Case¹ centred on the issues of contraception and abortion. Mrs Victoria Gillick, the mother of ten children including five girls, lived in the area of the West Norfolk and Wisbech Area Health Authority. She wrote to the Health Authority requesting that no daughter of hers under 16 years of age be provided with contraception or an abortion, and that if any of her children did contact the authority that she automatically be informed. The Health Authority, acting on a Department of Health and Social Security directive, informed Mrs Gillick that, whilst they would encourage her children to discuss the matter with her, they could not give a categorical assurance to her that she would be informed of her children's contact with the authority, because consultations were confidential and therefore the final decision must rely on the doctor's judgment. Mrs Gillick sought a declaration in the court that the Department's directive was unlawful. Justice Kirby (1984)² has summarised the arguments thus:

Mrs Gillick's Queen's counsel told the court that she found the circular 'quite intolerable'. According to her it encouraged the secret provision of the Pill or other contraceptives to under-aged girls. She wanted to retain her right and duty as a mother, to the exclusion of any other person, to advise her children on sexual matters. Specifically, she wanted to retain her right to prevent other persons doing things that would encourage her children to have a sexual relationship 'which the law forbids'.

Mrs Gillick asserted her 'fundamental right' to concern herself with the moral upbringing of her children and a 'fundamental right' to rebuke, and even prevent, interference. Though professional secrecy between the doctor and his patient was important, confidentiality should not be permitted to 'cloak illegalities'. To do so would be to abandon completely the protection of the law against under age sexual relationships.

Mr Simon Brown, Counsel for the Department, rejected Mrs Gillick's argument. He drew upon a competing area of the law. He said that, as long as young people knew the consequences of their decision, they could give valid consent for medical treatment. An under-aged girl who had sexual intercourse was not herself guilty of a criminal offence though the man might be guilty. Therefore, in giving the girl advice and medical treatment, the doctor could not be said to be encouraging or procuring a criminal offence. It should be borne in mind that Mrs Gillick sought the orders in relation to her five daughters - not to her five sons. Contraceptives were said to be prescribed to those under the age of 16 years

¹ *Gillick v. West Norfolk & Wisbech Area Health Authority* (1985) 3AU ER 402

² Kirby, M (1984) 'Law and Family Planning' *Medical Journal of Australia* March 17, p 358.

for their own good, and to stop the tragedy of unwanted pregnancies. There was no reason to suppose that doctors and family planning clinics want to encourage their patients to have unlawful sexual relations. But it was their duty to give confidential advice to their patients, including young patients of sufficient maturity to understand the advice. Better that the advice be given by professional doctors than that it be gleaned behind the school shed or at the local discotheque”

In the course of his judgment in the House of Lords, Lord Scarman made the following observations:

Three features have emerged in today's society which were not known to our predecessors: (1) contraception as a subject of medical advice and treatment; (2) the increasing independence of young people; and (3) the changed status of women... The law ignores these developments at its peril.....

The common law has never treated parental rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. Parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child....

The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose upon the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.

The Law in Queensland

In 1992 in a case commonly known as *Marion's Case*,³ the *Gillick* decision was accepted as part of Australian law. In the Australian case a majority of the High Court of Australia stated that *[a] minor is ... capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.*

As the Queensland Parliament has not passed any laws relating to the issue, the law decided in these two cases is the law in Queensland. Other State Governments have passed specific laws, with the result that the law is not the same throughout Australia. Therefore, in Queensland it is the case that:

*It is part of the everyday experience of doctors to make judgments about their patient's capacity. Doctors are required to explain adequately to any patient the nature of proposed treatment and must be satisfied that the patient understands it. Under *Gillick and Marion's Case* the practitioner's responsibility is to inform the child in language which the child can understand, of the nature of the proposed treatment and its short and longer term medical implications including any risks. If the child demonstrates a capacity to understand the explanation and shows an appreciation of the benefits and risks, the doctor can make a judgement as to the child's competence (Wilson et al, NC & YLC, 1995).*

In addition, if the doctor is satisfied as to the child's ability to make choices and decisions and agrees to provide medical assistance, the doctor is then bound by confidentiality in the same way as they would if treating an adult.

Youth workers should be aware that the *Gillick* Case is not limited to the work of doctors giving people under 18 contraceptive advice. It applies to any adult who works with a young person. The reasoning behind the decision was drawn from recognition

³ Secretary, Department of Health and Community Services v JWB and SMB (1992) CLR 218

by the Court of children's increasing ability, as they gain in maturity, to make their own decisions about their lives in general.

In essence the test can be stated as if a young person can understand the physical, emotional and spiritual consequences of their decisions both in the short and long term then they can make their own decisions.

Workers need to assess whether the young person is Gillick Competent in relation to each decision separately as the young person may be competent to make a decision about one issue but not another.

How does a worker tell whether a child is sufficiently mature? Since it is about understanding, it is a case of using appropriate techniques to check whether the child has properly understood. The more complex and serious the circumstances and the decision to be made and the younger the child, the more a worker will need to do to be sure that the understanding exists. 'Understanding' includes appreciating the possible consequences and impacts of the decision in both the short and long term.

The first question to ask is: **is the young person *Gillick Competent*?** If the answer is 'no' then the worker may act in what they judge to be the best interests of the child.

Remember under the Convention on the Rights of the Child a person should act in the best interests of the child (but best interests is not necessarily a paternalistic approach) as well as having regard to other strategies (see discussion on negligence). Best interests should always include listening to and hearing the young person's views.⁴

Best Interest Principles

Youth workers should have an understanding of best interest principles in order to work effectively with young people.

Article 3.1 of the United Nations Convention on the Rights of the Child (CROC) promotes a general principle regarding best interests.

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Many interpret 'best interests' as their subjective view of what they consider best for the child whereas a rights based philosophy interprets 'best interests' on objective standards. While CROC uses the term 'best interests', it could be contended that this needs to be read in the light of the rights it gives to children to participate and be heard in relation to all issues concerning them. For example, a youth worker should ask:

1. what is best for this child?
2. what is best for this child in this situation? And
3. what is best for this child in this situation and at this time?

Taking into consideration the (child's) views and wishes of the situation and their right to participate in decisions that affect them is crucial.

If the youth worker does believe that the young person is *Gillick Competent* then the youth worker will need to act in a confidential way (see paper: Confidentiality)

⁴ Convention on the Rights of the Child