

Practitioner Perspective

Navigating consent: Legal implications and considerations for professional practice

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legislation from diverse areas such as family law and criminal law and also includes key policy documents from IACP and statutory bodies such as Tusla and the Health Service Executive (HSE). Each section of this paper as it relates to the separate areas of consent will also provide considerations for professional practice when encountering consent matters in their distinctive forms.

Defining children, parents, guardians and consent

Article 1 of the United Nations Convention on the Rights of the Child (1989) defines a child as anyone under the age of 18 unless otherwise defined by the laws of an individual country. The UN Convention on the Rights of the Child, while not a piece of legislation, has shaped Irish legislation with regard to defining what a child is in the Irish legal context and what the human rights of a child are in Ireland. Both the UN Convention on the Rights of the Child (1989) and Bunreacht na hÉireann (1937) acknowledge the family as the core group within society. However, two essential pieces of Irish legislation, the Childcare Act (1991) and the Disability Act (2005), expand on the definition of a child. The former defines a child as a person under the age of eighteen and any person under the age of eighteen has the right to receive care and protection that is “in the best interests of the

This article concerns the four areas of consent within the Irish legal context - medical consent, consent for counselling and psychological treatment, sexual consent and consent to marry. Each of these areas have clearly defined and distinct legal criteria which have specific implications for clinical practice for counsellors and psychotherapists

Introduction

This professional practice article looks at the five distinct areas of consent within Irish legislation and considers their legal implications and applications within professional practice. The central focus of this article is working with people under the age of 18 and how the varying legal forms of consent may impact them as young people, their parents and guardians and how we, as counsellors and psychotherapists, work with clients under 18 in a way

that is mindful of the legal consent framework and its application in professional practice. Consent and legal definitions of parents and guardians are defined in order to provide the context in which each discrete form of consent is operational. The five categories of consent considered are; consent to undergo counselling, consent for medical treatment, sexual consent, consent for psychiatric treatment and consent to marry. This paper is underpinned by key articles of

child” (Childcare Act, 1991). The latter further expands on this and provides that legal status alters from that of a child to an adult at the age of 18. However, where there is insufficient capacity to assume legal responsibility for decision making at the age of 18, consent will rest with that person’s parents or appointed parties acting *in loco parentis*.

The Guardianship of Infants Act (1964) defines guardianship of a child as the right to make decisions about a child’s upbringing to include, education, medical care, religion and general upbringing. It provides that a mother, regardless of her marital status, is automatically the parent and guardian of her child. Conversely, a father is considered the automatic parent and guardian of his child under the Act if married to the mother when the child was born. Non-marital fathers, however, can apply for guardianship under the Act (The Guardianship of Infants Act, 1964). Additionally, The Children and Family Relationships Act (2015) confers guardianship on non-marital fathers if they have cohabited with their child’s mother for a minimum of 12 months prior to the birth of their child and where any cohabitation has ended not more than 10 months prior to the birth of their child. The 2015 Act also allows for the court appointment of up to two legal guardians in the event that one or both parents cannot assume guardianship responsibilities and this order is made with parental consent as both parents have guardianship.

The National Consent Policy (2017) defines consent as:

Consent is the giving of permission or agreement for an intervention, receipt or use of a service or participation in research following a process of communication in which

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the service user has received sufficient information to enable him/her to understand the nature, potential risks and benefits of the proposed intervention or service (p.13).

Section 2 of the Guardianship of Infants Act (1964) and the Status of Children Act (1987) are clear in stating that only people who hold legal guardianship in respect of children can consent to any major decisions in relation to the welfare and best interests of a child. The HSE QPSD National Consent Policy Part Two Children and Minors (2017) provides this definition of a child in the context of consent: “The Child Care Act 1991, the Children Act 2001 and the Mental Health Act 2001 define a child as a service user under the age of 18 years of age, other than a service user who is or has been married” (p.51). It also states “ In Ireland, the courts place great emphasis on the rights of the family and the rights of parent(s)/ legal guardian(s) to decide what is in the best interests of their children.”

In terms of professional practice, while we require written parental consent to work with people under the age of 18, there are a number of contexts where the age of consent differs:

- 16 is the age of consent for certain forms of medical and dental treatment under Section 23 of the Non-Fatal Offences

against the Person Act (1997)

- 17 is the age of sexual consent under Section 3 of the Criminal Law (Sex Offences) Act (2006) as amended by Section 5 of the Criminal Law (Sexual Offences) (Amendment) Act (2007) where it is a criminal offence to engage in or attempt to engage in a sexual act with a child under 17 years of age.
- 18 is the age of consent for treatment of a psychiatric disorder under the Mental Health Act (2001).

This paper will consider these distinctions in more detail, beginning with the following section which examines the age of consent to engage in counselling and/or psychotherapy.

Consent to engage in counselling

IACP has the following legal definitions of a child, adolescent and minor as central foundations within the IACP Standards for Working with Under 18’s (2019):

Child: In Ireland under the Child Care Act 1991, the Children Act 2001 and the United Nations Convention on the Rights of the Child, a child is defined as anyone under the age of 18.

Adolescence: Defines that period of childhood extending from puberty to adulthood. (In accordance with Irish law and the UNCRC).

Minor: Person under the age of 18 who is not married (or has not been married).

The IACP Standards for Working with Under 18’s (2019) also states very clearly;

It is incumbent on all who engage in this work to maintain

an up-to-date knowledge base regarding child protection and relevant legislation. IACP Members qualified to work with under 18s, are expected to have a competent knowledge of all legal requirements which govern children's lives and the competencies for those working with minors in a professional context.

It is essential that all registered professional counsellors and psychotherapists working with people under 18 are up to date and compliant with mandatory reporting requirements and child protection measures as detailed in the IACP Standards for Working with Under 18's (2019). Essential legislation and guidance documentation in this area include The Children First Act (2015), National Guidance for the Protection and Welfare of Children (2017) and The Children's Health Act (2018).

At all times the IACP Standards for Working with Under 18's (2019) emphasises the importance of written parental consent as part of the therapeutic process for people under 18 and inclusion of both parents/guardians where possible:

As per Code of Ethics and Practice, point 1.3 (i); Parental participation is important in order to support a young person in the therapy process. Both parents, where possible, should be invited to take part in the therapy process and provide their written permission for Counselling/Psychotherapy to proceed. It is important to obtain written permission from both parents/legal guardians before commencing Counselling/Psychotherapy with a minor (A minor is a person under the age of eighteen). However, sometimes there are situations where it is not possible to obtain written permission from both parents/legal guardians. Where circumstances such as this arise, written permission must

be obtained from at least one parent/legal guardian prior to the commencement of Counselling/Psychotherapy. If it is not possible to obtain permission from both parents/guardians, this should be formally recorded by the Counsellor/Psychotherapist.

A number of important considerations and implications for counsellors and psychotherapists working with people under 18 emerge from this information:

- In advance of commencing work with anyone under 18 it is essential to have a thorough knowledge of the IACP Standards for Working with Under 18's (2019), The Children First Act (2015), National Guidance for the Protection and Welfare of Children (2017) and The Children's Health Act (2018).
- Signed, informed consent must be obtained – ideally from both parents/guardians in advance of commencing the therapeutic process. Best practice directs that contracting would take place in the presence of the child and their parents/guardians and that clarity is provided as to limits of confidentiality, the sharing of relevant information and any reports that may need to be written in the course of the work.
- Professional insurance premiums should include cover for working with people under 18.
- It is essential to clarify from the outset if there are family law, child protection or any other legal proceedings in process regarding the person who is under 18. It is important to explain your personal position as a professional in terms of court reports and subsequent court appearances.

- GDPR requirements must be taken into account regarding written consent and record keeping. The following is the requirement of the IACP Record Keeping and Retention Guidelines.

IACP recommends that, in the absence of a superseding requirement, Counsellors/Therapists retain records for a period of 7 years after the last date of service delivery. Records for children and young people should be retained until the client is 25 (or 26 if they are 17 when therapy sessions end) or 8 years after their death, if sooner. Some insurance providers may require the retention of client records for longer periods. Members should check their insurance policies before deciding on their retention periods (p.1)

Consent for medical treatment

Under Section 23 of the Non-Fatal Offences against the Person Act (1997) a person over the age of 16 can give consent to surgical, medical or dental treatment without having consent from their parent(s) or legal guardian(s). This relates to any procedure required for diagnosis and any procedure, e.g. undergoing an anaesthetic, which is supplementary to treatment, such as a surgical procedure.

The HSE QPSD National Consent Policy Part Two Children and Minors (2017) states in relation to consent for medical treatment by people of 16 under Section 23 of the Non-Fatal Offences against the Person Act (1997):

Consent to surgical, medical or dental treatment by a 16 or 17 year old has the same status under this Act as if he or she were an 18 year old. While currently there are no provisions in Ireland for minors under 16 to give consent on their own behalf, it is nonetheless good practice to involve the minor in

decisions relating to them and listen to their wishes and concerns in terms of their treatment and care.

The UK case of Gillick (1985) is often cited as an example to support medical consent in all instances. This was a case taken by Mrs Victoria Gillick to question the lawfulness of girls under 16 availing of advice on contraception. While the UK ruling outlined certain measures of competence, Gillick (1985) has no legal precedence in Ireland. Ni Rian (2005) states:

Irish law recognises that one becomes an adult for the purposes of consent to medical and surgical treatment at the age of 16 (Non-Fatal Offences against the Person Act, 1997, Section 23). However, consent to contraceptive treatment is not detailed in this Act and it is unclear if it is to be treated differently to medical treatment. Where decisions concern contraception it is important to remember that it is unlawful to have sexual intercourse with a person under the age of 17.

In view of the existing legal framework in Ireland regarding the age of medical consent, the following are important points to consider when working with people under 18:

- When contracting with a person under 18 and their parent(s)/guardian(s) ensure clarity is provided from the outset regarding medical procedures and sharing of information within the counselling setting.
- An emphasis should be placed on the difference between consent for medical and dental procedures and consent to engage in counselling and psychotherapy, that 18 is the age of consent to engage in counselling and 16 is the age of medical consent for certain medical and dental procedures.

The Mental Health Act (2001) defines a child as a person under 18 years of age

- Counsellors and psychotherapists must be mindful that due to the distinction in ages of consent depending on the context, statutory reporting issues may arise.

Sexual consent

The issue of sexual consent falls under Irish criminal law. Under the Criminal Law (Sexual Offences) Act (2017) Section 17 "A person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and shall be liable on conviction." The same section of the 2017 Act also recognises that while a person under 17 years may consent to a sexual act, as they are under the age of sexual consent statutory rape has been committed.

As outlined earlier there is a medical and legal grey area regarding providing contraception and contraceptive advice to people of 16 as the legal age for sexual consent in Ireland is 17.

Counsellors and psychotherapists are:

- Bound by mandatory reporting requirements per the IACP Standards for Working with Under 18s (2019), The Children First Act (2015), National Guidance for the Protection and Welfare of Children (2017) and The Children's Health Act (2018).
- At the time of contracting with a person under 18 and their parent(s)/guardian(s) clarity about this legal situation must be provided along with information on mandatory reporting, in the event that it may be required. If

necessary, explain to parents that 16 is the age of consent for minor medical and dental procedures however consultation and parental consent will be required in the event that a person under 17 (the age of sexual consent) requires contraception. Mandatory reporting to Tusla applies where a person under 18 is at risk physically, emotionally or sexually. Explaining this mandatory reporting requirement at the contracting stage of therapy with the person under 18 and their parents/guardians is key in order to provide clarity and augment the therapeutic relationship.

Consent for psychiatric treatment

The Mental Health Act (2001) defines a child as a person under 18 years of age. Under this Act the age of consent for hospitalisation for treatment is 18, in contrast to consent at the age of 16 years for medical and dental treatments. However, it is worth noting that the Law Reform Commission is currently reviewing the age of consent for psychiatric treatment in Ireland.

Counsellors and psychotherapists working with people under 18 who require psychiatric care should:

- Inform the person under 18 that the consent of a parent(s)/guardian(s) is required in order to access psychiatric care.
- Parent(s)/guardian(s) consent in writing to psychiatric care for the person under 18.

Consent to marry

Following the introduction of The Family Law Act (2019), a person must be over 18 years of age in order for a marriage to be legally valid in Ireland. It is no longer legally possible to be granted a Court Exemption Order to gain

permission to marry under the age of 18 years. Any marriage of a person under the age of 18 is automatically nullified. This ruling is primarily a child protection and anti-people trafficking measure.

As professionals statutory reporting must be adhered to where a person under 18 states they are married. If a person under 18 marries their marriage is automatically null or invalid i.e. the marriage never existed. This has implications in terms of property and entitlements. The status of children born of an invalid marriage is protected under the Status of Children Act 1987. A key reason that the law has changed in this area is to prevent the trafficking of children so determining what age the person was when they got married and if there are dependent children as a result is essential. Mandatory reporting to Tusla will apply for people under 18 and their dependents. In the instance of possible trafficking reporting to the Gardai under The Criminal Law (Human Trafficking) Act 2008 and the Criminal Law (Human Trafficking) (Amendment) Act 2013 will apply.

Conclusion

This article has outlined the distinctions in the ages of consent in the Irish legal context as follows:

- 18 is the age of consent to engage in counselling and psychotherapy.
- 16 is the age of consent for certain medical and dental treatments.
- 17 is the age of sexual consent.
- 18 is the age of consent for psychiatric treatment.
- 18 is the age of consent to marry.

Written consent from parent(s)/guardian(s) is required in order to work with people under 18. The possibility of existing family law and child protection cases and clarity for the client and their parent(s)/guardian(s) regarding court reports and participation in court proceedings should be considered. A further important distinction in the area of consent is 16 as the age of consent for certain medical and dental procedures and 17 as the age of sexual consent and the related statutory reporting requirements that are required in each of these distinct categories of consent. The main consideration in this area is the provision of contraception to people under the age of 17. Parental consultation and consent is required to provide contraception to a person under the age of 17. Best practice when working with people under 18 is to have professional working

knowledge of the relevant guidelines and legislation and to be direct from the outset with the client under 18 and their parent(s)/guardians(s) regarding the nature of consent and its implications within the context of therapy. ☺

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