

*BEST PRACTICE FOR  
EDUCATIONAL  
PSYCHOLOGISTS IN  
GAINING CONSENT*

Guidance Document

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## 1. Introduction

This document brings together guidance and requirements around consent from various sources into one guide for Educational Psychologists (EPs) and EP services practising in the UK.

EPs practising in the UK are required to be registered with the Health and Care Professions Council (HCPC) and to practise according to a set of Standards of Proficiency (Health and Care Professions Council, 2015) and Standards of Conduct, Performance and Ethics (Health and Care Professions Council, 2016). These standards require EPs to obtain appropriate informed consent for all psychological work and to understand the legislation relevant to their practice. The British Psychological Society (BPS) has a set of practice guidelines and a code of ethics and conduct that psychologists must meet (British Psychological Society, 2017, 2021) and the Association of Educational Psychologists (AEP) includes a Code of Conduct for its members within its Members' Handbook (Association of Educational Psychologists, 2019). Additionally, all public authorities are required to act in accordance with The Human Rights Act (UK Government, 1998), which also makes clear that consent is necessary for all psychological involvement.

Following the Children and Families Act 2014, the EP role extended to work with children and young people (CYP) aged between 0 and 25 in England and Wales. Working across this age range means that several factors must be considered, such as parental responsibility, Gillick competence and mental capacity. EPs must ensure that informed consent is valid, as well as being obtained from the correct person or people.

In 2018, new data protection legislation (European Union, 2018) came into force, which impacts the way that EPs gather, store, and use data from clients. Since Brexit, the original General Data Protection Regulation (GDPR) has been adapted to form a standalone piece of legislation within the United Kingdom and is simply referred to as the UK GDPR. The obligations mirror those introduced in May 2018 and are further supported by the Data Protection Act (UK Government, 2018).

These changes to legislation mean that EPs' legal and ethical obligations with regards to consent and data protection are more complex than they have ever been. That said, with due consideration the obligations can be met, and EP practice can continue without significant impact. This guidance aims to help EPs to ensure that they are meeting those legal and ethical obligations in all of their practice.

Beyond the legal and professional requirements of the professional standards and legislation mentioned above, the Association of Educational Psychologists (AEP) believe that having good quality consent practices is a fundamental part of affording basic human dignity and creating a firm foundation on which to provide high quality psychological involvement to clients.

## 2. Definitions of key terms and notes on application of guidance

*N.B. There are some points in this document where we quote from legal texts that use terminology in a way that not all educational psychologists may support (e.g. the use of the word ‘intelligence’ when discussing Gillick competence). Please note that, by quoting these texts, we are not tacitly endorsing their content or the way that terms are defined. We are instead outlining the existing legal framework that EPs are expected to work within.*

Term	Definition
Informed consent	<p>Consent is a legally defined decision that must be made voluntarily by a person who is appropriately informed and has the capacity to consent to the involvement. For children and young people under 16 and not thought to be Gillick Competent, this will be a person with parental responsibility (see section 4 for further details.) For clients over 16 who do not have capacity, this may be someone authorised under a lasting power of attorney or someone who is authorised as a court appointed deputy (see section 6 for more details.)</p> <p>In addition to being informed, this document will also refer to consent being valid, meaning that the consent is given voluntarily and without undue pressure.</p> <p>Under the UK GDPR consent is any freely given, specific, informed and an unambiguous indication of an individual’s wishes through a statement or clear affirmative action to signify his/her/their agreement.</p>
Assent	<p>Assent is the active agreement or engagement of a person who is not able to consent. For example, a pre-school aged child engaging in an activity as part of the psychological involvement. However, a person with parental responsibility would still need to provide informed consent.</p>
Parental responsibility	<p>Parental Responsibility is defined in the section 3 of the Children Act 1989 (UK Government, 1989) as being:</p> <p>“All the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”.</p>

	<p>The term ‘Parental Responsibility’ attempts to focus on the parent’s duties towards their child rather than the parent’s rights over their child.</p> <p>Parental responsibility protects children while they are unable to make decisions for themselves and it diminishes over time as children develop the necessary skills and understanding to exercise their own rights.</p> <p>To reflect the diversity of families and care arrangements, the term ‘person/adult with parental responsibility’ will be used throughout this document.</p>
<p>Gillick competence</p>	<p>The right of a child under 16 to consent to medical examination and treatment, including immunisation, was decided by the House of Lords in <i>Gillick v West Norfolk and Wisbech Area Health Authority</i> (Court of Appeal &amp; Civil Division, 1984) where a mother objected to Department of Health advice that allowed doctors to give contraceptive advice and treatment to children under age 16 without parental consent. Their Lordships held that a child under 16 had the legal competence to consent to medical examination and treatment if they had sufficient maturity and intelligence to understand the nature and implications of that treatment.</p> <p><i>Note that the term ‘Fraser guidelines’ originates from the same case but refers specifically to guidelines for doctors when prescribing contraceptives to young people under the age of 16 without their parents’ knowledge. The terms are not interchangeable.</i></p> <p>In Scotland, The Age of Legal Capacity Act 1991 (Scottish Government, 1991) states that ‘A person under the age of 16 years shall have legal capacity to consent on his (sic) own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he (sic) is capable of understanding the nature and possible consequences of the procedure or treatment.’ The term Gillick competence will be used to describe consent gaining practices for all four UK nations throughout the rest of this document.</p>

	<p>As the term Gillick competence originates from medical case law, much of the language used also relates to medical practice. However, the term can also be used for other types of intervention, including psychological involvement.</p>
<p>Mental Capacity</p>	<p>The term mental capacity is used when discussing clients aged 16 or over. Mental capacity is the ability to make decisions for oneself. People who cannot do this are said to 'lack capacity'. This might be due to illness, injury, a learning disability, or a mental health issue that affects the way their brain works.</p> <p>To have capacity a person must be able to:</p> <ul style="list-style-type: none"> <li>• Understand the information that is relevant to the decision they want to make</li> <li>• Retain the information long enough to be able to make the decision</li> <li>• Weigh up the information available to make the decision</li> <li>• Communicate their decision by any possible means, including talking, using sign language, or through simple muscle movements such as blinking an eye or squeezing a hand</li> </ul> <p>People should be assumed to have capacity unless there is clear evidence that shows otherwise.</p> <ul style="list-style-type: none"> <li>• In <b>England and Wales</b>, The Mental Capacity Act (UK Government, 2005) sets out provision and protections for people over 16 who are unable to consent for themselves.  <a href="https://www.legislation.gov.uk/ukpga/2005/9/contents">https://www.legislation.gov.uk/ukpga/2005/9/contents</a>. The Mental Capacity Act Code of Practice can be accessed here:  <a href="https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice">https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice</a></li> <li>• In <b>Scotland</b>, the legislation is called The Adults with Incapacity (Scotland) Act 2000 (Scottish Government, 2000).  <a href="https://www.legislation.gov.uk/asp/2000/4/contents">https://www.legislation.gov.uk/asp/2000/4/contents</a>.</li> <li>• A guide produced by the Scottish government is available here:  <a href="https://www.gov.scot/publications/adults-incapacity-scotland-act-2000-communication-assessing-capacity-guide-social-work-health-care-staff/pages/2/">https://www.gov.scot/publications/adults-incapacity-scotland-act-2000-communication-assessing-capacity-guide-social-work-health-care-staff/pages/2/</a></li> </ul>

	<ul style="list-style-type: none"> <li>• In <b>Northern Ireland</b>, the Mental Capacity ACT (NI) 2016 was partially commenced in 2019 (Northern Ireland Assembly, 2016). <a href="https://www.legislation.gov.uk/nia/2016/18/contents">https://www.legislation.gov.uk/nia/2016/18/contents</a>.</li> <li>• A guide produced by the Northern Ireland Department of Health is available here: <a href="https://www.health-ni.gov.uk/mca">https://www.health-ni.gov.uk/mca</a></li> </ul>
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### Other terms used in guidance

- Client – the person aged between 0-25 who is or may be in receipt of psychological involvement.
  - *Note – when working in a context where a school, setting or parent has purchased EP time, it is important to recognise this relationship with the ‘customer’ is different to the relationship with the client. The views and experience of the person receiving the psychological involvement must always be centred, no matter who has commissioned the work.*
- Consent giver – the person who gives consent to psychological involvement, either for themselves or on behalf of the client.
- Request for involvement – the initial process, usually involving a consent form, where consent is gained and, after which, psychological involvement can proceed.
- **Must** and **should** language is used throughout the document to distinguish between aspects of practice that are legally required and those which are considered to be best practice.
- The terms used for teachers responsible for coordinating support for CYP with special/additional educational needs and disabilities varies between the four UK nations. For clarity, in this guidance, the role will be referred to as Special Educational Needs Coordinator (SENCo).

### Other professional guidance and policies

This guidance is designed to be used alongside other professional guidance and policies, such as safeguarding. It is not designed to replace any other guidance or policies. This point is particularly relevant to safeguarding legislation as it may be the only time when it is appropriate to pass on information or act against the wishes of the young person or consent giver.

### A note regarding consent to psychological involvement and data processing

It is helpful when using this guidance and implementing best practice to consider consent to psychological involvement and data processing as two separate issues.

It is essential that consent to psychological involvement is obtained before any EP work commences.

With regards to data processing, EPs will not always rely on consent as the lawful basis for processing data (see section 7 for further details.) Request for involvement forms or any other consent related paperwork or documentation **must** make the distinction clear.

### Differences in consent for statutory and non-statutory involvement

If the psychological involvement is part of a statutory process, such as an Education, Health and Care Needs Assessment, then written consent may already have been provided as part of the application. EPs **should** still take steps to ensure that the consent is informed and valid and apply the principles of best practice outlined in section 3.

In terms of data processing, as the involvement is part of a statutory process, then EPs **must** not rely on consent as the lawful basis for processing data. The correct lawful basis would be 'public task' as the EP is performing a duty in the public interest, as specified in the SENDCoP, a piece of statutory guidance. See section 7 for more information about lawful bases for processing data and informing clients of this using privacy notices.

### Contextual observations during individual casework

The guidance in this document is intended to apply to all direct work undertaken by EPs practising in all settings and services, including independent or private practice. The guidance is applicable to all activities, including observations of young people. Young people who are over 16 or are under 16 and Gillick competent **must** give their informed consent for an observation to take place, and young people who are not Gillick competent **should** give their assent, through whatever communication means are appropriate to them.

### When consent is not needed

There are some areas of EP practice that do not require informed consent. These may include:

- When discussing possible referrals with an SENCo It might be necessary to take a name to check for previous records of involvement but as long as no information is gathered or recorded then consent is not needed.



- When discussing young people anonymously and giving broad advice, if there is no identifiable information gathered or recorded and no direct work is undertaken then consent is not needed.
- When doing strategic work within a setting, such as providing training or evaluating large scale interventions, EPs might be in settings and observing whole classes or systems within that setting. If there is no direct work with individuals and no information on individuals gathered or recorded, then consent is not needed.

### 3. Principles of best practice

The topic of consent for EPs is complex, with many different ethical and legal obligations to meet, further complicated by the differences that must be considered across the 0-25 age range. There may be times when situations arise that are not specifically addressed within the available guidance. In these situations, professional judgement might be needed. As much as possible, EPs **should** try to ensure that decisions and actions around consent are guided by legal and ethical obligations. Where professional judgement is needed to address the situation, the following principles of best practice may be used.

- **Recording of consent** – EPs **should** ensure that the consent obtained at the outset of the psychological involvement is written. This ensures that consent is explicit. The ongoing checking of consent (see below) may be done verbally but written notes should reflect that consent is ongoing.
- **Power dynamics** – for informed consent to be truly valid, it **must** be given voluntarily, without undue influence and having had the time and opportunity to process the necessary information. Power dynamics that could impact the validity of consent **should** be mitigated as much as possible. This might look like:
  - Ensuring that the information provided to potential clients is accurate and that they are aware of the consequences of their decision either way. Services or individual EPs may choose to create a range of accessible materials that share information needed for consent to be valid, and work with referrers to ensure that these are provided to potential consent-givers.
  - Ensuring that potential consent-givers have adequate time to process and understand what they are being asked to consent to and seek independent advice as they feel necessary.
  - Being considerate of other factors related to power dynamics that might mean that consent is not being given voluntarily and without undue influence.

- Being aware of possible pressures from those commissioning EP work and ensuring the views, experiences and best interests of the person receiving psychological involvement are always centred.
- **Ongoing checking of consent and withdrawal** – consent **must** always be seen as an ongoing, dynamic process that can vary with time, place and activity. Explicit consent, written or verbal, **must** be obtained and recorded at the beginning of any psychological involvement. It is also important to provide evidence of consent to comply with regulatory requirements in relation to data protection. Consent **must** then be checked regularly, to ensure that consent is still valid. Consent-givers **must** also be aware and given opportunity to withdraw consent at any time. Information about what will happen if consent is withdrawn at any point **should** be part of the information shared prior to consent being obtained before involvement begins.
- **Consent/assent to specific activities** – EPs **should** obtain consent for specific activities that might be part of psychological involvement. This **should** happen at the very beginning of the process as well as throughout the involvement. This might look like:
  - A checklist of possible activities, with clients being able to opt in or out at the beginning of the process.
  - Checking in before beginning an activity to ensure the client is happy to proceed.
  - Considering behaviour as communication and noticing if non-verbal cues are suggesting that clients are uncomfortable with an activity.
- **Information sharing** – much of the work of EPs involves gathering and sharing information about clients. EPs **should** ensure that clients are aware that information will be shared and who it may be shared with and have the opportunity to ask for information not to be shared. The exception is information that must be shared for safeguarding reasons, and this must be made clear at the outset.
  - When working with children and young people under the age of 16 who have not been judged to be Gillick competent, it is important to take their views into account about what information they are happy to be shared but ultimately decisions **must** be made based on what is in their best interests. Making a decision about best interests can be subjective and complex. EPs **should** use their professional judgement based on the information they have available at the time.

- When working with young people aged over 16, or under 16 and Gillick competent, they **must** be afforded the right to withhold information even if this would appear to be unwise or inconsistent with the wishes or preferences of those with parental responsibility (further below). EPs **should** have an open conversation at the outset to clarify expectations and to ensure that they understand the consequences of choosing to share or not share information that may be helpful in supporting them.
- **Accessibility and differentiation** – all materials and processes should be made accessible to clients and those providing consent. This might mean having a range of differentiated materials or scripts available. If information about your role or service is regularly communicated by referrers, ensure that they have the necessary information and materials available and a good understanding of how to use them.
- **Informing clients about the role of the EP** – careful consideration **should** be given to how and when information about the role of the EP is shared. Having adequate time to process information is important and situations **should** be avoided where clients and consent givers are given the information at the same time that they are asked to provide consent. EPs **should** allow at least 48 hours between presenting clients with the information necessary to make a decision about whether to consent and asking for consent to be given.
- **Working with young people and families** – EPs **should** involve both young people and their adults with parental responsibility in the consent process from the beginning. If the young person is 16 or over or is under 16 and Gillick competent then their consent would be considered ‘primary’ and should be gained prior to approaching adults with parental responsibility. The consent of the Gillick competent young person would override that of their adults with parental responsibility if there were a disagreement. Involving clients of all ages in the consent/assent process as much as possible alongside their families is considered best practice as it supports their ongoing development of competence in decision making.
- **Working with referrers** – referrers such as school SENCos are often very involved with consent gaining processes. EPs and EP services **must** ensure that those consent gaining practices fulfil the same legal and ethical standards as their own. This might look like:
  - Consultation with referrers to understand what any changes to consent processes might

mean for them.

- Providing training on appropriate consent gaining practices.
- Ongoing supervision and monitoring of consent gaining practices.
- Providing necessary materials to guide consent gaining practices.
- Fostering close working relationships with referrers.

## 4. Parental responsibility and children's rights

- When working with children who are under 16 and not competent to consent to psychological involvement for themselves, a person with parental responsibility **must** give consent on their behalf.
- Parental responsibility is automatically given to the person who has given birth to the child. A second person may gain parental responsibility if they are married at the time of the birth or they are named on the birth certificate. Unmarried parents may also gain parental responsibility by procuring a parental responsibility agreement or by being awarded an order by a court. Parental responsibility may only be removed by order of the Court and is not automatically affected by separation or the dissolution of a marriage/civil partnership.
- Guidance from the Department for Education states that, for the sake of efficiency, only one adult with parental responsibility needs to provide consent. However, if there is another adult who shares parental responsibility, whether they are in the family home or not, and there is a suspicion that they would refuse consent, then they **must** be given an opportunity to do so. If all adults with parental responsibility are not in agreement, then psychological involvement cannot proceed until the position has reached a resolution or there had been a determination of the issue by the Family Court. This is accepted practice across the UK.
- For many children in the care of their local authority, parental responsibility will be retained by the child's parents or shared with the Local Authority. For example, if a child is looked after by the local authority under section 20 of the Children Act 1989, then the parents have consented to this and retain their parental responsibility.
- In these cases, liaising with the child's social worker, understanding the specific circumstances and also involving the child's parents in the process may be the best way to ensure that consent is obtained from the correct source and that parental responsibility is respected.
- Even if the client is not able to provide consent for themselves, EPs **should** involve them in the consent process as fully as possible. Parental responsibility legislation is designed to reflect the gradual development of competence and diminishing of parental responsibility up to age 16. Allowing children to have experience of making choices may help them to develop that competence in preparation for a time in their lives when they will be expected to make decisions for themselves.
- Allowing children to be active in the consent process and ensuring that they have given their assent to actively engaging in direct work with an EP also contributes to the profession's adherence to the United Nations Convention on the Rights of the Child (The United Nations, 1989). This might look like:

- Explaining, in accessible terms, what the role of the EP is, what activities you intend to carry out and what will happen with the information you learn.
- Paying close attention to the child's behaviour and recognising any signs that they might be uncomfortable with what you are doing.
- Stopping an activity if the child communicates that they want to stop.
- Giving choices, where possible, of what your involvement might look like.
- Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) states that every child has the right to express their views on matters that affect them and have those views taken seriously.
- Article 3 of the UNCRC states that the best interests of the child must be a top priority in all decisions and actions that affect them.
- Article 5 of the UNCRC refers to children's evolving capacity and states that the responsibilities of parents to provide guidance and direction for their child should be respected, but that this must be done in a way that recognises the child's increasing capacity to make their own choices.

## 5. Gillick competence

- Children under 16 years of age may be competent to provide consent for themselves, rather than needing a person with parental responsibility to consent on their behalf.
- If a young person is Gillick competent then they **must** be approached first regarding a request for psychological involvement and adults with parental responsibility **must** only be approached regarding a request with the consent of the young person.
- EPs **should** encourage Gillick competent clients to involve their adults with parental responsibility in their decision-making process, wherever possible, whilst recognising that they also have the right not to. Supporting good relationships and collaboration is important. However, if there is a disagreement, then a client who is Gillick competent would be able to override the decision of the people with parental responsibility.
- A Gillick competent client can consent to psychological involvement even if their person with parental responsibility has refused consent. They can also refuse consent for involvement against the wishes of their person with parental responsibility.
- There is no specific age at which children can become competent to provide consent for themselves, although around 12 is the age that many agree competence is likely to become more developed. It should be noted that life experiences can contribute significantly to the development of competence.
- Even if the client is not able to provide consent for themselves, EPs **should** still involve them in the consent process as fully as they are able. Parental responsibility legislation is designed to reflect the gradual development of competence up to age 16. Allowing children to have experience of making choices may help them to develop that competence in preparation for a time in their lives when they will be expected to make decisions for themselves.
- Young people may be competent to consent in some areas of their lives but not others, so a determination must be made specifically with reference to the request for psychological involvement.
- Judgements of whether children and young people are Gillick competent to consent to an EP request for involvement should be made on a case-by-case basis and a clear record made of any judgement reached (see section 10 for a suggested tool.)
- The NSPCC has some useful background information about Gillick competence here:  
<https://learning.nspcc.org.uk/child-protection-system/gillick-competence-fraser-guidelines>

## Who should assess Gillick competence?

- As consent gaining practices are part of Educational Psychologists' regulatory requirements, they have ultimate responsibility for ensuring that consent is obtained from the correct source.
- However, it is very common for referrers, such as school SENCOs, to obtain consent on their behalf and is likely not practical for EPs to be assessing Gillick competence for all young people.
- It may be necessary to provide referrers with specific guidance or training on when and how to assess Gillick competence to ensure that their practice meets the same ethical and legal obligations as EPs.
- See section 3 for more guidance on working with referrers.

## How to assess Gillick competence

- There is not a specific test or assessment tool for Gillick competence. Instead, there is a set of conditions or guidelines set out by one of the judges who sat on the original case that should be met to determine that a client is Gillick competent.
- From Griffith, 2015: "The rule in Gillick must be applied when determining whether a child under 16 has competence to consent. The aim of Gillick competence is to reflect the transition of a child to adulthood. Legal competence to make decisions is conditional on the child gradually acquiring both:
  - Maturity - that takes account of the child's experiences and the child's ability to manage influences on their decision making such as information, peer pressure, family pressure, fear, and misgivings.
  - Intelligence - that takes account of the child's understanding, ability to weigh risk and benefit and consider longer-term factors such as effect on family life and on such things as schooling." <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4962726/>
- See section 10 for a suggested tool for making and recording a judgement of Gillick competence.



## 6. Mental capacity and clients aged 16+

- All people over the age of 16 **must** be assumed to have capacity unless there is evidence to the contrary.
- EPs **should** encourage clients aged 16 and over to involve their families in the process, but the consent of the client overrides any preferences of their adults.
- Mental capacity legislation is designed to protect adults and young people over the age of 16 who may not be able to consent for themselves due to either a permanent or temporary impairment. Mental capacity is a complex area; the information contained in this document is not exhaustive and psychologists are not expected to be experts in the law. They should, however, have a good knowledge of the aspects of mental capacity legislation directly relevant to their practice.
- Wherever possible, people **should** be supported to make their own decisions and be involved in the consent process as much as they are able.
- Making decisions that could be deemed unwise is not a reason to assess someone as lacking capacity.
- Where a decision must be made for someone who lacks capacity, the decision made **must** be in their best interests.
- Any treatment or care provided to a person who is lacking capacity **should** be the least restrictive of their rights and freedoms.
- As with Gillick competence, mental capacity is specific to different areas. A person could have capacity to make decisions in some areas of their life but not others. For example, a person might have capacity to make decisions about their living arrangements but not their finances. For this reason, capacity should be considered specifically in relation to the decision in question.

### Who should assess mental capacity?

1. In many cases, the professional seeking to obtain consent is the one to assess mental capacity. According to the Mental Capacity Act (2015), no specific training or qualifications are required if the principles of the act are adhered to. However, in more complex cases it may be necessary for a professional with expertise in mental capacity to be consulted to assess mental capacity.
2. Assessments of mental capacity are likely to be needed infrequently, depending on the context EPs are working in. Some settings, such as those that work exclusively with young people aged 16+, may be more familiar with mental capacity legislation. Others may need support to ensure that their requests for involvement meet the same legal and ethical obligations of EPs. See section 3 for more guidance on working with referrers.

3. It may be necessary to provide referrers with specific guidance or training on when and how to assess mental capacity to ensure that their practice meets the same ethical and legal obligations as EPs'.
4. In more complex cases it may be necessary to consult another professional, such as a psychologist with expertise in complex mental capacity assessments.

#### How should mental capacity be assessed?

- Assessment of mental capacity is a two stage test: (*Information from Mental Capacity Act Code of Practice* (UK Government, 2007)
  1. **Stage 1: Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain?** Stage 1 requires proof that the person has an impairment of the mind or brain, or some sort of disturbance that affects the way their mind or brain works. If a person does not have such an impairment or disturbance of the mind or brain, they will not lack capacity under the Act. Examples of an impairment or disturbance in the functioning of the mind or brain may include the following:
    - conditions associated with some forms of mental illness
    - dementia
    - significant learning disabilities
    - the long-term effects of brain damage
    - physical or medical conditions that cause confusion, drowsiness or loss of consciousness
    - delirium
    - concussion following a head injury
    - the symptoms of alcohol or drug use.
  2. **Stage 2: Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?** For a person to lack capacity to make a decision, the Act says their impairment or disturbance must affect their ability to make the specific decision when they need to. But first people must be given all practical and appropriate support to help them make the decision for themselves. Stage 2 can only apply if all practical and appropriate support to help the person make the decision has failed.

#### How to proceed if someone is assessed to be lacking capacity

- In some cases, the person assessed to be lacking capacity may have someone appointed to make decisions on their behalf. This could be a legal deputy or a trusted person with lasting power of attorney.
- Where a person has been assessed as lacking capacity and there is no one appointed to make decisions on their behalf, then a decision **must** be made that is in their best interests.
- A person who has been assessed as lacking capacity **should** still be encouraged to participate in the decision-making process as much as possible.
- Take into account the views and wishes of the client (past and present), their carers and their friends and family.
- Consider any values or beliefs that the client may draw upon if they did have capacity to make the decision.

The BPS has a Mental Capacity Advisory Group that advises on a much more comprehensive range of issues related to mental capacity. Information about the group can be found here:

<https://www.bps.org.uk/mental-capacity-advisory-group>

## 7. Data protection

United Kingdom General Data Protection Regulation, or UK GDPR, came into effect in the UK following the Brexit transition period expired on 31 December 2020. It mirrors the original GDPR that applied across the EU from May 2018. UK GDPR applies to any organisation or individual that processes data related to people defined as ‘personal data’. There are seven principles of data processing under the UK GDPR:

GDPR principle	How this relates to EP practice
<p>1. <b>Lawfulness, fairness and transparency</b> — Processing must be lawful, fair, and transparent to the data subject.</p>	<p>Educational Psychologists and Educational Psychology services <b>must</b> utilise privacy notices to ensure that clients are fully informed about what data will be gathered, how it will be processed and stored and what the legal basis is for doing so. The lawful basis may differ depending on whether the involvement is part of a statutory assessment process or not. The lawful conditions are set out in Article 5 of the UK GDPR for any type of personal data. When the personal data being processed is a special category of personal data (defined below) a further lawful condition from article 9 of the UK GDPR and Schedule 1 Data Protection Act 2018 applies.</p>
<p>2. <b>Purpose limitation</b> — You must process data for the legitimate purposes specified explicitly to the data subject when you collected it.</p>	<p>Any data gathered <b>must</b> be used only for the express purpose of the psychological involvement as agreed with the client. There may be occasions when the law allows for personal data to be used in a way which is not necessarily compatible with the purpose for which it was collected.</p>
<p>3. <b>Data minimisation</b> — You should collect and process only as much data as absolutely necessary for the purposes specified.</p>	<p>Consider carefully what data is required at each stage of the involvement. Only gather the data that is necessary for the involvement.</p>
<p>4. <b>Accuracy</b> — You must keep personal data accurate and up to date.</p>	<p>All records <b>must</b> be accurate so take the time to refresh periodically to ensure that records meet this requirement.</p>
<p>5. <b>Storage limitation</b> — You may only store personally identifying data for as long as necessary for the specified purpose.</p>	<p>All services <b>must</b> have data retention policies and ensure that data is stored for the appropriate amount of time and securely destroyed once the retention period has been</p>

	met. UK GDPR does not provide guidance on how long data should be retained. This is for individuals and organisations to decide and justify based on the purpose of the data storage.
6. <b>Integrity and confidentiality</b> — Processing must be done in such a way as to ensure appropriate security, integrity, and confidentiality (e.g. by using encryption).	Ensure that all records are kept and shared securely.
7. <b>Accountability</b> — The data controller is responsible for being able to demonstrate GDPR compliance with all of these principles.	EP services, as data controllers, <b>must</b> be able to demonstrate their compliance with GDPR.

- UK GDPR sets out six basic lawful conditions to permit organisations/individuals to process personal data. They are:

1. The data subject gave you specific, <b>unambiguous consent</b> to process the data. (e.g. They've opted in to your marketing email list.) UK GDPR sets out strict rules about what constitutes consent to data processing. <ul style="list-style-type: none"> <li>○ Consent <b>must</b> be “freely given, specific, informed and unambiguous.”</li> <li>○ Requests for consent <b>must</b> be “clearly distinguishable from the other matters” and presented in “clear and plain language.”</li> <li>○ Data subjects can withdraw previously given consent whenever they want, and you have to honour their decision. You can't simply change the legal basis of the processing to one of the other justifications.</li> <li>○ Children who are Gillick competent (see section 5) <b>must</b> give their own consent. Children who are not deemed to be Gillick competent <b>must</b> have consent provided through those who hold parental responsibility.</li> <li>○ You need to keep documentary evidence of consent.</li> </ul>
2. Processing is necessary to execute or to prepare <b>to enter into a contract</b> to which the data subject is a party. (e.g. You need to do a background check before leasing property to a prospective tenant.)
3. You need to process it <b>to comply with a legal obligation</b> of yours. (e.g. You receive an order from the court in your jurisdiction.)

4. You need to process the data <b>to save somebody's life (vital interests)</b> .
5. Processing is necessary <b>to perform a task in the public interest</b> or to carry out some official function. (e.g. You're a school performing its public function.)
6. You have a <b>legitimate interest</b> to process someone's personal data. This is the most flexible lawful basis, though the "fundamental rights and freedoms of the data subject" override your interests, especially if it's a child's data. This condition cannot be used by public bodies through their normal operations. Public bodies may use this condition in their capacity as an employer.

- EPs are most likely to use unambiguous consent as their lawful basis in the case of non-statutory work and public task/legal obligation in the case of statutory work.
- UK GDPR categorises data in two ways:
  - Personal data is any information that can be used to identify someone or from which they could be identified, eg, their name, address, date of birth and telephone number.
  - Special category data is more sensitive information, such as race, ethnic origin, religious beliefs, physical or mental health conditions, or criminal convictions, that could, if misused, pose a risk to individuals' fundamental rights and freedoms.
- EPs frequently process special category data and **must** ensure that their procedures are adequate for keeping this sensitive data secure. Additional lawful condition(s) must be identified from article 9, in addition to a basic one set out above. The most relevant conditions are set out below:

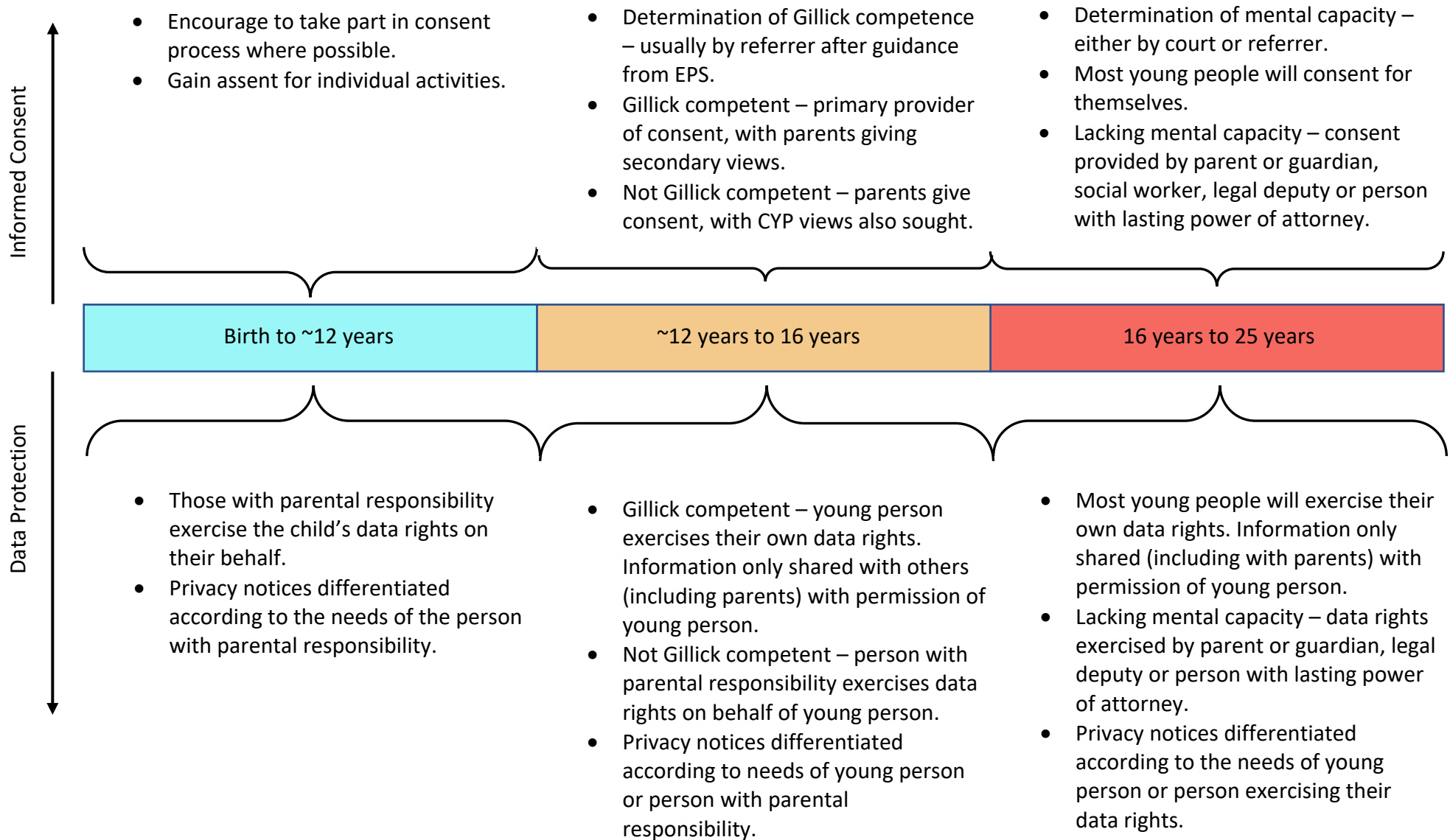
1. Explicit consent
2. Vital interests
3. Reasons of substantial public interest - further supported by granular conditions under Part 2, Schedule 1 Data Protection 2018 including: <ul style="list-style-type: none"> <li>a. Counselling</li> <li>b. Safeguarding of children and individuals at risk</li> <li>c. Preventing or detecting unlawful acts</li> <li>d. Support for individuals with a particular disability or medical condition</li> </ul>

- GDPR gives individuals several rights with regards to their data. These include:
  - The right to be informed – this is part of the key principle of transparency and means that all clients and those exercising their data rights on their behalf **must** be provided with privacy

information when data is collected and processed (usually with a privacy notice.) This information must be clear and accessible to the needs of the individual.

- The right of access – commonly referred to as a subject access request, individuals can ask for a copy of their personal data.
- The right to rectification – individuals have the right for inaccurate records to be rectified.
- The right to erasure - also known as the right to be forgotten. This means that clients can request that their data be permanently deleted. This right does not apply if the lawful basis for processing data that the data controller is relying on is ‘public task’. This is likely to be the case if the involvement is part of a statutory assessment process. An exemption to the erasure of data may also be applied if the data may be needed for demonstrating professional accountability and defending legal claims. EPs may hold liability insurance that requires them to retain information in case of complaints or legal claims.
- The Information Commissioner’s Office (ICO) website contains very detailed and specific guidance in relation to GDPR. <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/>

## 8. Diagram of differences in consent in 0-25 age range





## 9. Example scenarios

### Scenario 1 – co-parenting disagreement

Sam is 6 years old. His mother, Ms Shaw, and father, Mr Shaw are both named on Sam's birth certificate and so both hold parental responsibility. Sam's parents separated when he was two years old and Sam now spends most of his time living with Mr Shaw. There is no formal custody agreement and Sam has occasional contact with Ms Shaw. The separation was acrimonious, and Sam's parents struggle to co-parent effectively, often being critical of each other.

Sam has been having some difficulties with forming friendships at school and his social communication and interaction skills have become a concern. Sam's class teacher and the school SENCo have a good relationship with Mr Shaw and are aware of the co-parenting difficulties. They have discussed their concerns with him and he agrees that it would be useful to consult with an Educational Psychologist to help understand how to support Sam in school.

Mr Shaw is concerned that Ms Shaw gets upset if he suggests that Sam needs extra support and is worried that she would not agree to the request for consultation. Mr Shaw requests that the school does not contact Ms Shaw and they let him sign the consent form without her knowledge.

***In this scenario, it would not be appropriate to do as Mr Shaw suggests as there is a reason to believe that Ms Shaw would not agree that an Educational Psychologist should be consulted and may refuse consent.***

#### ***Possible considerations or actions:***

- ***It may be that Ms Shaw's limited contact with Sam and his school means that she does not have a good awareness or understanding of his current progress and needs. School may seek to strengthen their relationship with her through more frequent contact to help her to understand how the involvement could benefit Sam.***
- ***If Ms Shaw is relying on information being passed on from Mr Shaw, then she may not have adequate understanding of the role of the Educational Psychologist. Providing information directly to Ms Shaw may support her in making the decision.***
- ***If, after the above actions, Mr and Ms Shaw are still not in agreement, then family mediation may be considered.***
- ***Ultimately, it would not be possible for the involvement to proceed until the disagreement has been resolved.***

## Scenario 2 – withdrawal of consent

Eva is 10 years old and attends a mainstream primary school. There have been concerns for a number of years around her cognition and learning. Eva's mother, Mrs Jones, consented to involvement from an Educational Psychologist for Eva's needs to be assessed.

The Educational Psychologist (EP) completes a cognitive assessment with Eva. Eva scores in the very low range. The EP then meets with Mrs Jones to feedback the results of the assessment and discuss outcomes and strategies to support Eva as she transitions to high school. At the meeting, Mrs Jones states that she does not want the EP to write a report or share the information from the assessment with any other professionals. She states that the reason for this is that she is concerned that Eva will not be accepted into her preferred high school if they feel that they cannot meet her needs. Mrs Jones requests that the EP deletes or shreds all the information that has been gathered about Eva.

***In this scenario, it seems that Mrs Jones is now withdrawing her consent for the psychological involvement and is attempting to exercise Eva's right to erasure.***

***Possible considerations or actions:***

- ***It might be appropriate to have a discussion with Mrs Jones to ensure that her decision is not based on any misconceptions or misunderstandings. Once the EP has confirmed this then they must comply with Mrs Jones's request and not complete any further psychological involvement or reports.***
- ***As the involvement was not part of a statutory process, the lawful basis for processing data would have been consent, meaning that consent can be withdrawn, and Mrs Jones can ask for the data to be erased in the absence of a compelling reason for it to be retained.***
- ***In this case, the privacy notice shared with Mrs Jones at the beginning of the involvement clarified the EP service's retention policies and that data may be retained for reasons of professional defence. It must be confirmed again with Mrs Jones that the data will not be erased as it is necessary for the EP to retain it should they need to defend their practice or meet other regulatory requirements.***

### Scenario 3 – Gillick competent young person refusing consent

Nish is 14 years old and attends a mainstream secondary school. Over the last 6 months, Nish has been experiencing increasing anxiety about attending school. His attendance has dropped to 62% and his parents are extremely worried.

Nish's parents speak with his form tutor who suggests a meeting with the school SENCo. At the meeting Nish's parents, his form tutor, and the school SENCo agree that it would be useful to make a referral to the school's link Educational Psychologist for advice on how to support Nish to improve his attendance to school. The SENCo prepares the request for involvement form and Nish's parents sign it.

Nish's form tutor follows the guidance from the Educational Psychologist to assess Nish's competence and determines that he is competent to consent to involvement. Nish is called to a meeting with his form teacher to give his consent to the request for involvement. Nish reads the form but refuses to give his consent. He states that he is anxious about working with someone new and would prefer to have sessions with the counsellor that visits the school every week as he is more familiar with this person and feels that he would be more comfortable opening up to them.

***In this case, Nish has been judged to be competent and so his refusal to consent overrides the decision of his parents and the request for involvement cannot be made. Nish states clear and rational reasons for why he does not want to consent.***

***Best practice would have been to have involved Nish in the process and sought his views about the request right from the beginning, before approaching his parents. This might not have altered the outcome of Nish refusing consent but would have better respected his right to express his views and supported his decision making as a Gillick Competent young person. If Nish had not been Gillick Competent, then it still would have been best to involve him and gain his views from the beginning of the process to respect his rights and support his ongoing development of competence. The only time the school may have gone against Nish's wishes would have been if there was a safeguarding concern and safeguarding policies and procedures were being followed.***

## 10. Tools/materials

### Suggested tool for assessing Gillick competence

Assessing Gillick competence is a matter of professional judgement. The following questions may be used to help guide the processing of assessing Gillick competence, as well as providing a method for recording how the judgement was made. For each question, provide brief details of evidence used to arrive at an answer.

*There is no specific type of evidence that is right for assessing Gillick competence. Talking directly to the young person is often a helpful starting point.*

1. Does the client understand that there is a choice to be made and are they willing to make that choice?
  
  
  
  
  
  
  
  
  
  
2. Does the client appear to understand the possible outcomes or consequences of their decision or any possible alternatives?
  
  
  
  
  
  
  
  
  
  
3. Is the client able to state rational reasons for their decision?

Based on your answers to the above questions, in your professional opinion is the young person Gillick Competent? Yes/ no

Signed:

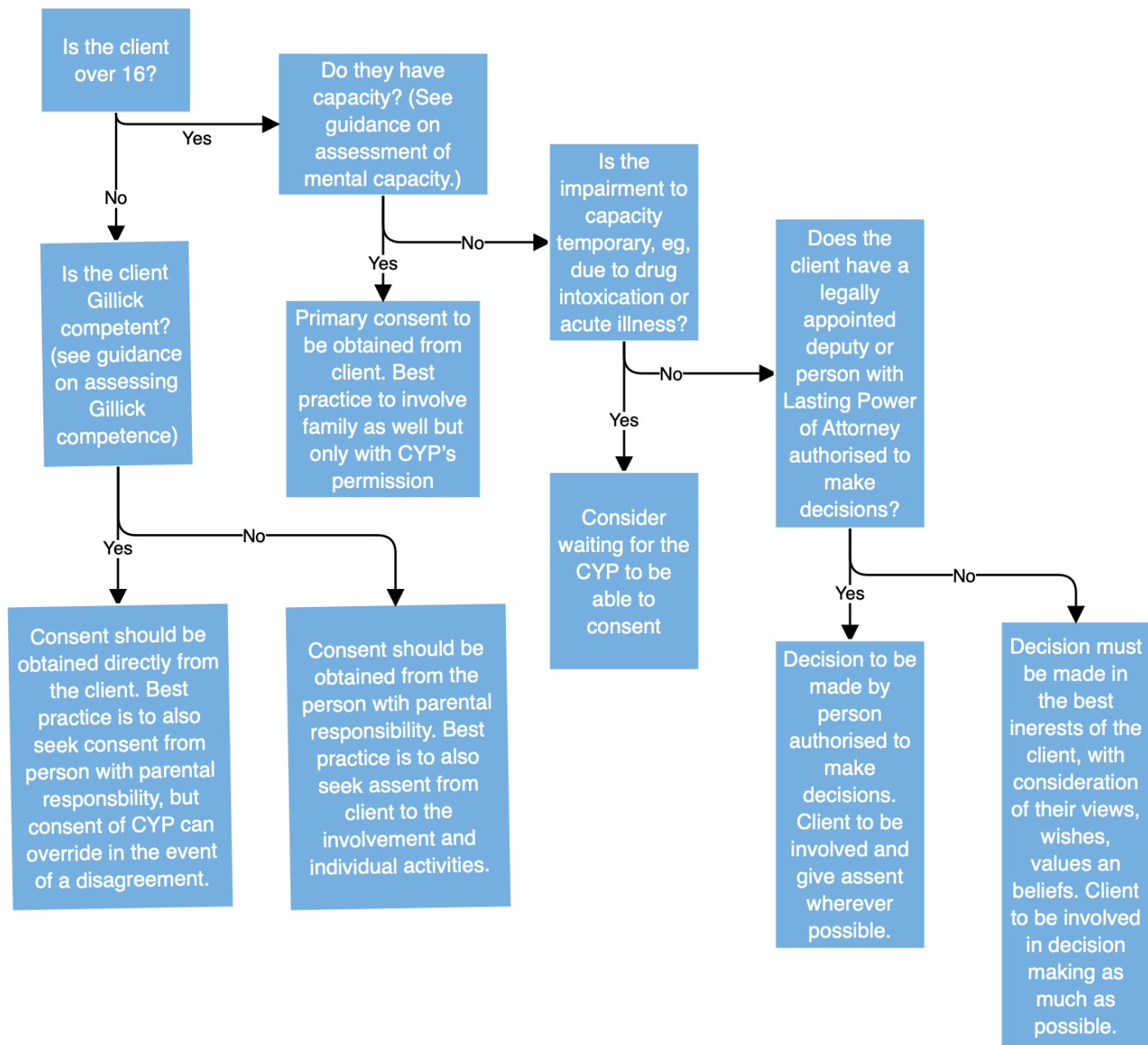
Job role:

Date:

## Consent self-audit

Consent best practice	Yes or no	Notes
1. Do you/your service have a privacy notice that clearly states the lawful basis that you rely on for processing clients' data?		
2. Is the privacy notice available in accessible formats?		
3. Are all consent givers directed to read or otherwise understand the information in the privacy notice prior to consenting to psychological involvement?		
4. Do you/your service have procedures in place for the assessment of Gillick competence?		
5. Where necessary, are referrers able to follow procedures for assessing Gillick competence?		
6. Does your/your service's consent paperwork reflect the need for different sources of consent depending on the age and competence or capacity of the client?		
7. Are consent givers routinely made aware of their right to withdraw consent at any time?		
<p>8. Are the following embedded in your/your services normal practice?</p> <ul style="list-style-type: none"> <li>a. Consent/assent gained for individual activities</li> <li>b. Consent gained for the sharing of information with different parties</li> <li>c. Ongoing checking of consent, recognising that consent is dynamic to time and place</li> <li>d. Consideration given to how and when the role of the Educational Psychologist is communicated to clients and consent givers</li> <li>e. Consent givers allowed time to process information before being asked to give consent</li> </ul>		

## Who should give consent? Flowchart



## What to include in information materials

EP practice and processes has the potential to vary greatly across different services, areas and models of service delivery. Due to this, and the need for information materials to be differentiated to the specific needs of clients and customers, this document will not provide any examples or templates. Instead, please find below a list of possible things to include and questions to ask while developing materials.

- Does the information material clearly explain the role of the EP?
- Does the information material describe your consent process and who should consent in different situations?
- Does the information material explain likely timelines?
- Does the information material describe specific activities that the EP intends to undertake? EPs may choose to have separate materials for different activities without presenting the consent giver with a list of all possible activities as this may not be appropriate for managing expectations.
- Does the information material explain what will happen if consent to psychological involvement is not given?
- Does the information material make clear that consent to psychological involvement can be withdrawn at any time?

## What to include in a privacy notice

Please use this link for advice from the ICO on what information must be included in a privacy notice:

<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/the-right-to-be-informed/what-privacy-information-should-we-provide/>

## 11. What to do if you encounter a scenario not covered by this guidance

- Consider using supervision to address any concerns around consent.
- Refer to the guiding principles of consent to see if professional judgement may be used to resolve the concern.
- Create and record actions plans used to address the concern. This may be useful to refer to when resolving any future concerns.
- Communicate with the AEP regarding any scenarios that are not covered so that these may be addressed in future versions of the guidance. (Feedback mechanism TBC.)
- Use the links embedded in the guidance document to find further information on the different aspects of consent relevant to Educational Psychology.



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