

Capacity and Consent Guidance

In every situation it will be assumed that a person can make their own decisions unless it is proved that they are unable to do so. There will be a presumption against lack of capacity.

The Law Commission proposed three definitions to ascertain whether a person lacks capacity.

- A person is without capacity if, at the time that a decision needs to be taken, he or she is ***"unable by reason of mental disability to make a decision on the matter in question; or unable to communicate a decision on that matter because he or she is unconscious or for other reason."***
- Mental disability is *"any disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning."*
- A person is to be regarded as unable to make a decision by reason of mental disability if the disability is such that, at the time when the decision needs to be made, the person is *"unable to understand or retain the information relevant to the decision, or unable to make a decision based on that information."*

Law Commission, pages 32-48, 1995

Issues of capacity and consent are central both in deciding whether an act or transaction was abusive and in deciding to what extent the adult can, and should, be asked to take decisions about how best to deal with the situation.

During the investigation process, it is essential that you are certain that the vulnerable adult fully understands the nature of the concerns and the choices facing them.

In cases in which the investigating officer(s) feel that the adult is unable to give informed consent, it will be necessary to commission a multi-disciplinary assessment. Consideration should be given to calling a speech therapist.

Capacity should be assessed in relation to the specific activity or issue that is being considered.

It should not be assumed that capacity or lack of capacity in respect to one area equates directly to another situation. For example, the ability to consent to medical treatment may not mean that an adult is able to give their consent to sexual activity. This approach to the assessment of capacity can be regarded as a "functional approach".

This approach focuses on the decision itself and the capability of the person concerned to understand, at the time it is made, the nature of the decision required and its implications. This approach is very specific and avoids generalisations that may involve unnecessary intrusions into the affairs of the person.

An assessment in respect of capacity should:

- Relate to the timing and nature of a particular situation, such as a particular treatment or decision.
- Be undertaken by a person with expertise relevant to the vulnerable adult's situation.
- This person should consult other relevant people who know the vulnerable adult

- Consider whether the vulnerable adult is able to understand and retain the information relevant to the decision to be made.
- Consider whether the vulnerable adult is able to make a decision based on that information.
- Be fully recorded in the case file.

Circumstances where the vulnerable adult is considered to lack capacity might include those:

- Where the vulnerable adult does not know that they have a decision to make.
- Where the vulnerable adult does not understand the choices available or the consequences of those choices.
- Where the vulnerable adult cannot communicate their decision. However, in these and other circumstances they can only be deemed incapable of making a decision where every reasonable effort has been made to assist their understanding of the situation and the communication of their wishes. This will include arranging an advocate and/or interpreter where necessary and possible.
- It is important to start from the assumption that the vulnerable adult is trying to find some way of communicating their wishes rather than that they cannot do so.
- There may be situations where the vulnerable adult seems able, in terms of their knowledge and understanding, to make their own decisions. However, they may be subject to undue pressure to support a particular course of action, perhaps pressure from, or fear of, a professional or relative.
- See guidance on the Mental Capacity Act 2005

Workers will need to determine whether the vulnerable adult is making the decision of their own free will or whether they are being subjected to coercion or intimidation.

If it is believed that the vulnerable adult is exposed to intimidation or coercion, efforts should be made to offer the adult “distance” from the situation in order to facilitate decision making.

Situations where the vulnerable adult does have capacity.

If it is decided that the vulnerable adult does have capacity, has taken an informed decision and so is placing him or herself at risk, staff should consult with:

- The vulnerable adult themselves.
- Their carer - with the person’s consent.
- Their community supports.
- Any other relevant agency, service or individual to ensure that the vulnerable adult understands the risk that they are taking and the choices available to them to remove or reduce the risk.
- If you cannot offer the vulnerable adult anything better than the situation they are enduring, they may well choose to remain in an abusive situation.

Situations where the vulnerable adult does *not* have capacity.

If it is decided that the vulnerable adult does not have capacity then staff should act in the best interests of the vulnerable adult, and do, what is necessary to promote health or wellbeing or prevent deterioration.

Note: An adult can only be compulsorily removed from an abusive situation through the use of either the National Assistance Act 1948 or the Mental Health Act 1983. Both of these pieces of legislation involve what may be regarded as sanctions against the vulnerable adult *not* the alleged perpetrator. Seek advice from your agency or organisation's legal section/department in relation to compulsory removal.

Where appropriate, consultation with or appointment of a legal or other independent advocate may help make the best decisions on the person's behalf.

Independent Mental Capacity Advocates (IMCA)

It is a mandatory requirement of the Mental Capacity Act (2005) that adults who lack capacity have the services of an IMCA case worker when: i) they are without family and friends (although there are exceptions to this – see local guidance), and ii) are faced with a decision about serious medical treatment or a change in accommodation.

The new regulations to the MCA (October 2006) also give Local Authorities and the NHS the power to instruct IMCAs in certain cases of accommodation reviews and safeguarding adults cases. It would be unlawful not to consider the exercise of these powers to instruct IMCAs for accommodation reviews and safeguarding adults where the qualifying criteria are met.

Devon Adult and Community Services and Torbay Care Trust have jointly commissioned an IMCA service to cover both authorities from April 2007. Full information can be found on the Mental Capacity Act page of the Devon website (<http://www.devon.gov.uk/mentalcapacityact>), the Living Options website (http://www.livingoptions.org/division.php?division=IMCA_Service) and Age Concern Devon website (<http://www.ageconcerndevon.co.uk/imca.htm>)

Medical Examinations

Based on case law, the **capacity to give informed consent to medical treatment** has been defined as containing three essential stages:

- The ability to comprehend and remember information about treatment.
- Believing the information.
- Balancing the information and arriving at a decision.
- An adult will be assessed as having capacity if they are able to:
 - Understand what the treatment is.
 - Understand why the treatment is being proposed.
 - Understand the nature of the proposed treatment.
 - Understand the benefits and risks of the treatment.
 - Balance the information and arrive at a decision.