

MENTAL CAPACITY ACT

Tips for assessing capacity



First Principle of the Act

A person must be assumed to have capacity unless it is established that s/he lacks capacity. If there is any reason to doubt whether the person's ability to make decision or if it has been called into question, then there is an expectation that it will be assessed. It is for the assessor to show on the balance of probabilities that the person cannot make decision.

Balance of Probabilities

Anyone who claims a person lacks capacity should be able show, *on the balance of probabilities*, that s/he lacks capacity to make a particular decision, at the time it needs to be made. This means being able to show that it is more likely than not that s/he lacks capacity to make the decision.

Who is responsible for assessing capacity?

The person who is providing or organising the care or treatment (decision-maker) should be the one to assess capacity (i.e. it does not always have to be a doctor/psychologist/psychiatrist). It may be necessary to seek advice about a person's understanding or cognitive abilities from an expert. The decision-maker should take that advice into account in completing their assessment.

What is a formal capacity assessment?

There are some times when an assessment needs to be completed by a medical professional and recorded on a set template. For example, the court of protection requires a medical capacity assessment on an official template when a request is made to appoint a financial deputy. However, in most cases, a capacity assessment is a conversation or series of conversations with the person about the decision that needs to be made. Below are some tips on holding that conversation.

Second Principle of the Act

Consider what might help or support the person to make the decision. Provide whatever support is practicable in the circumstances given the urgency of the decision.

Consider the best time and place to speak to the person where the person will feel at ease. Consider if the person has any communication need and whether a friend or relative could help the person feel at ease and help the assessor understand the person's method of communication.

Capacity is Decision-Specific – What information is relevant to this decision?

Make sure it is clear what decision is to be made. Have a clear idea of what information is considered "relevant" that the person must understand in order to make the decision.

Relevant information will always include the nature of the decision, the reason why the decision is needed, the likely effects of deciding one way or another, and the likely effects of making no decision at all. It is not necessary for the person to comprehend every detail of the issue but needs to comprehend and weigh the salient or most important details. It is important not to assess someone's understanding before they have been given relevant information about a decision.

Understanding of information

Explain the relevant information as clearly and simply as possible. The person should be given information on all of the options. It may need to be explained more than once.

Understanding of information continued...

If the person is being asked to make a choice between a lot of options, don't try to present them all at once. It may need to be explained in a different way, with visual cues or reminders.

To test a person's understanding, start with concrete questions. Subjective questions such as "how do you feel about living here," may be more difficult for the person to answer. Make sure the person feels able to say, I don't know or I'm not sure.

After a few minutes, ask the person to give a rough explanation of what has been discussed. If a person is only able to answer yes and no questions, ask the question again, but worded in a different way to check that the person has understood and not just given a repetitive response.

Retention of information

Consider in advance how long the person would need to retain the information. Given the nature of the decision, how long would it reasonably take the person to consider and reach a decision?

Weighing or Using Information

To test the person's ability to use and weigh up information, if possible speak to the person about what is important to them and how they have come to the decision. Keep in mind that individuals may give different weight to different factors. For example, a person may legitimately value independence and familiarity over physical safety or comfort.

Insight and Unwise Decisions – the Third Principle of the Act

The mental capacity act does not rely on "lack of insight" and this does not feature in the functional test. Decisions the person has made based on a lack of understanding of risks or inability to weigh up the information can form part of the assessment – particularly if someone repeatedly makes decisions that put them at risk. However, you cannot conclude that a person lacks capacity based solely on evidence of unwise decisions.

Records of Capacity Assessments

Records of capacity assessments should form part of an assessment or the person's health or social care records. They should always include the following information.

- People consulted as part of the assessment
- The specific decision to be made
- Does the person have an impairment of/or disturbance in, the functioning of the mind or brain?
- Details of impairment and how it effects on decision-making
- What steps were taken to maximise the person's ability to make the decision?
- Is the person able to understand information relevant to the decision? Provide examples.
- What is the relevant information and how was it explained to the person?
- Can the person retain the information in their mind for a sufficient period? Provide examples.
- Can the person use or weigh that information to reach a decision? Provide examples.
- Can the person communicate their decision in any way? Provide examples.
- Is the person likely to regain capacity to make this decision in the near future?
- If so, can the decision be safely delayed until that time? Why not