

Assessing mental capacity

Throughout this guidance note the person whose capacity being assessed shall be referred to as 'the person'.

Supported decision-making (this means you have taken all practicable steps to support the person in the process of making the decision for themselves and should be the starting point of any mental capacity assessment)

Please refer to the information provided in Guidance note 1 and the additional advice given below.

Think about.....

- **Environmental factors** – if at all possible, avoid talking to the person in a noisy environment. Is there somewhere quiet/private you can use instead to minimise any distractions? Sometimes, a person with dementia or learning disability for example may find it hard to focus on conversation and may become more easily distracted by things around them.
- **Communication issues** – consider whether the person has any hearing impairments for example that might impact on their participating in conversation. Sometimes it can appear a person doesn't understand because they cannot hear properly. Check whether they have a hearing aid and that it is working properly and turned on. Can you position yourself more closely to them, in their line of sight so they can lip read. Speaking slowly and clearly can also help. Consider whether it would help the person to write things down on paper for them to read instead.

Consider whether pictorial information could help the person to understand information more easily. For example, pictures of care routines, photographs of different types of accommodation, pictorial representations of different emotions and to indicate yes/no.

Consider your language use, as professionals we often use jargon such as medical terminology which can be confusing to others. Speak clearly and be mindful of body language or verbal cues given by the person themselves.

- **Managing anxiety**
As someone unfamiliar to them, the person may be anxious about speaking with you as a professional person and this can affect how well they engage with you in a

conversation, especially if it involves difficult topics. Consider whether they might feel more at ease with a family member or other familiar person to support them.

If someone has a cognitive impairment, or they are anxious it may take them longer to process what you are saying. It is also important to give appropriate time to the person to think about and respond to what you say/ask and be patient with them.

- **Recording your efforts to support decision-making**

It is important that you make a recording of how you have tried to support the person in making their own decision before assessing their mental capacity to make that decision. The nature of the decision to be made will guide how formal the recording should be. Decisions that are more complex or involve greater risk or serious consequences should be recorded more formally whereas more simple day to day decisions may be recorded less formally –for example, in care notes/hospital notes.

Assessing capacity stage one- The functional test

Is the person unable to understand the information relevant to the decision?

(In this section you need to record how you have tested whether the person can understand the information, the questions used, how you presented the information and your findings).

- Before testing capacity, work out what things the person needs to understand in order to make a decision
- The more complex the decision, the more they need to understand.
- Avoid using phrases such as ‘.....(the person) has failed to prove’ something. Avoid making generalised statements about the impairment. The adult only needs to understand the relevant/salient points¹ relating to the decision.
- You therefore need to be clear on what the important details are and ensure you actually give the person all of the relevant information before assessing their capacity. This should include the nature and purpose of the assessment².

¹ (1) See LBX v K L M [2013] EWHC 3230 (fam)(http://www.39essex.com/cop_cases/lbx-v-k-l-m/) for guidance on what would be considered relevant/irrelevant information in decisions concerning residence and care issues

² (2) See case of London Borough of Wandsworth v M and others (para 49 of Judgment). (https://www.familylaw.co.uk/news_and_comment/london-borough-of-wandsworth-v-m-and-others-2017-ewhc-2435-fam#.WyKAFU2osdU-

Things that are important to tell the adult whose capacity you are assessing:

- That a decision needs to be made and what that decision is exactly
- The likely consequences of deciding one way or another or not at all
- Ask yourself whether the person has a general understanding of the *nature* of the decision; *why* they need to make it; the likely *consequences*. The Courts have made it clear that we should not expect the person to know every detail and set the bar too high for them to achieve capacity³.

Further guidance on how to go about asking questions and ascertaining the person's understanding of their situation.

- Sometimes it's useful to use the environment around you as cues when discussing things (for example –pointing out key features/people in their immediate environment to orientate them and to help the person visualise what you are saying to them – for example if the person is in a hospital you could point to the nurses and ask- do you know who they are? Are they helping you with anything?).
- If the person finds verbal communication difficult or appears to have difficulty understanding what is being discussed you could try approaches such as use of closed questions and picture cards – e.g picture cards, with the words 'YES' and 'NO' written on them, asking the person if they could use hand to point to the answer they most agreed with. Holding up each card in turn so that they could point out reply and repeat the question "Does this person help you get washed and dressed?" Again, detail how the person responds to this. Can they respond or not? Do they indicate any understanding? You could try using cards with a smiley face and a sad face to see if they could indicate how they were feeling.
- Document what you have said to the person and what information you gave them and how they responded to evidence whether or not you felt they understood.

Examples of things you could say

- I am here to see you today as there have been concerns about
- Family/carers/health staff are concerned that.....
- Do you know what the concerns are about?
- Can you tell me what you understand?
- How do you feel about that?
- Can you tell me about your health? How does this affect you?
- I know that family/carers/nursing staff are helping you with.... What would happen if they were not there?
- How would you cope? How would you manage?
- A decision has to be made about.....(this is where the viable options should be put to the person)

³ See case of CC v KK & STCC (http://www.39essex.com/cop_cases/cc-v-kk-and-stcc/)

REMEMBER.....

The person only needs to understand the most important and relevant factors, i.e. -

1. A general idea of their current situation
2. What realistic options are there to decide between?
3. What the risks/potential harms are in each case?
4. What the positive consequences of deciding either way would be?

Example of how you may start off...

After introducing myself and explaining the purpose of wishing to speak to..... (the person) I asked..... if (s)he could tell me where (s)he was.....(ask yourself does the person have a general understanding of the function of the place if a hospital/care home for example- they don't necessarily need to be able to tell you exactly where it is). I then confirmed with (the person) that the place they are at is..... (does the person have a basic understanding of where they are after it has been explained or do they believe they are elsewhere)?

I informed (the person) of the information relevant to the decision which was (see above for ideas on relevant information).

Then discuss the person's responses to what you tell them. Does this indicate they understand the general points of their situation? Remember, they don't have to agree with you to still be able to understand the information you give them.

Remember to start from the assumption they have capacity and test them from the same level as anyone else, don't have unreasonable expectations. If they can understand the salient points then the requirements of this part of the assessment have been met. When recording this part of the assessment, end with a statement of whether, on balance, they understand or not.

Example-

I was unable to gain evidence in the assessment to indicate that (the person) understood the relevant information to the decision

or

I felt that there was evidence that (the person) did understand the information I gave them.

Is the person unable to retain the information relevant to the decision?

(in this section record how you tested whether the person could retain the information and your findings. Note that a person's ability to retain the information for only a short period does not prevent them from being able to make the decision).

Remember you can use aids to support the person's memory. They need to retain the information only long enough to make the decision (i.e. "at the material time").

You need to demonstrate in this section....

- How and when you had gone back to check retention – how long a time did you expect the adult to retain it for?

Examples of things you might say

- I was not able to demonstrate, or there was no evidence available to me to show that the person could recall the information given to them.
- The person was able to tell me what we had discussed earlier in the conversation so I concluded they could retain the relevant points.
- (the person) answered questions directly but appeared to repeat the last thing that was said to them indicating they had only retained this bit-not the whole context. For example, they said they were sad after they were asked if they were happy or sad, and at another point, when asked whether he was sad or happy, answered that they were happy.
-(the person) could sequence words and sentences correctly, however, they did not retain attention for any length of time to complete the sentences for example, began sentences but before completed had forgotten what they were saying or being asked.
- (the person) was given information such as..... and then immediately or several minutes later was asked to repeat back to me to check they had understood. However, they were unable to bring back to mind any of the important information.
- When prompted..... (the person) could not recall who I was and why I was there, giving instead the general reason as being to 'see how they were'.
- (the person's) short term memory is significantly impaired. They cannot retain new information and are unable to retain information relevant to the decision, namely (x y z).
- Give examples to illustrate what you say.

It can be helpful to give information in smaller chunks and then keep going back and ask the person to summarise what you have just discussed so you can check they understood (this is also evidence you have tried to support them in decision-making as well as a way of

checking their recall). Detail this in the assessment. Then at the end bring all the important bits together.

Is the person able to use and weigh the relevant information as part of the decision-making process?

(Record how you tested whether the person could use and weigh the information)

Again - you need to be clear about the relevant information that needs to be weighed up as part of the decision.

- Think of this stage as the person's capacity to actually engage in the decision-making process itself and be able to see the various parts of the argument and relate them to one another. – remember they only need to use and weigh the **salient details**.
- Do not assume because the adult is making an unwise decision, that they are unable to make one altogether. Why do you think it is an incapacitated decision rather than merely an unwise one?
- Beware of concluding, because of the way the person applies their own values and outlook (which may be very different from yours) that they are unable to use and weigh information⁴ (*It would be helpful to see the mental capacity assessment as a conversation and a way of gaining insight into the person's own values and life story as it relates to the decision in question*). Remember that people attach different weight to different things. The person whose capacity you are assessing may attach less significance than yourself to certain risks or consequences for example.
- Beware of cases where the person may be able to give a plausible and coherent response to questions of how they would manage or think of risks but their actions evidence that they cannot put these expressed intentions into effect (executive capacity). Do they understand if there is a mismatch between what they say they will do and what they then do in concrete situations?

Example of how you might record the person's ability to use and weigh information

- a)(the person) was not aware of her current circumstances or the level of supervision or support in place for her in order to meet her current needs; making it then impossible to develop a 'pro's and con's' approach to her continued stay ator in balancing this with.....wish to return home.

⁴ PC and NC v City of York Council [2013] EWCA Civ (para 54 of Judgment)
(http://www.39essex.com/cop_cases/pc-and-nc-v-city-of-york-council/)

- b) could not understand the important information and retain it and therefore this means she cannot use and weigh up that information to make a decision. This was evidenced by..... not understanding the links between their needs and how this will cause risk, not being able to see the pros and cons of each option and consider these against each other to come to conclusion.
- c) shows an inability to use and weigh up various information to make decisions. For example, when presented with two options and arguments has a fixed view so isn't able to develop a pros/cons approach. They are so fixed in their view they do not consider other sides of the argument at all.
- d) Although (the person) appears to understand their general circumstances, they deny any risks to their health/wellbeing so cannot bring this to mind in considering a decision.

Is the person able to communicate their decision (whether by talking, using sign language or any other means?)

(Record your findings as to whether P can communicate a decision)

In this section you need to make a clear statement of the practicable steps which you have taken to enable and support the person to participate in the decision-making process. Even where communication is difficult you should not leave the person out of the process. Describe how you have attempted to facilitate communication and involvement.

Examples of how you might record whether the person can communicate

- (the person's) first language is xxxxxx and they were able to communicate with me verbally using said language. *Record whether you needed to use an interpreter if the person's language is not English.*
- (the person) was able to make their needs known and express themselves verbally during our meeting
- Records indicate that they historically used pictorial methods of communication and has a tendency to answer by repeating the last word spoken.
- The person was able to communicate but this was not reliable. For example they used inappropriate words when talking about/describing things such as referring to an item (e.g bath, chair, bed, knife, fork) with a word that actually describes something else entirely). They appeared to have an element of dysphasia.
- (person) was able to communicate clearly with me so if they had been able to understand, retain and weigh the information I believe they could have communicated that to me.

Assessing capacity stage two– the diagnostic test

What is the impairment of, or disturbance in the functioning of the mind or brain?

The impairment can be diagnosed formally by a clinician but it doesn't have to be. It doesn't have to be as specific as a mental disorder diagnosis. It can be based on what you can see or observe about the person. An impairment of the mind or brain doesn't have to be permanent to satisfy this aspect of the test-it can be temporary such as because of an acute infection or the effects of substances or alcohol for example.

Examples of how you might record this part of the test:

- (the person) has a diagnosis of..... This is confirmed in medical paperwork
- (the person) was diagnosed at the memory clinic with Alzheimer's disease in.....
- There is no confirmed diagnosis of a mental impairment however there is evidence that they do have an impairment of the mind. For example, they have poor short term memory, are disorientated to time and place, fail to recognise key people in their life and have an inability to carry out activities of daily living

Assessing capacity stage three- The causative nexus

(This is where you need to make a link between the person's inability to make the decision (stage one) and the mental impairment (stage two). The Court made clear in the PC v York case that the person must be unable to make the decision **because of** their mental impairment to be deemed as lacking capacity under the terms of the Mental Capacity Act 2005.

Examples of how you might record the causative nexus

- I assessed(the person) to lack capacity regarding the decision ofat the time I saw them on the balance of probabilities because I was unable to find evidence that they could understand/ retain or use/weigh the information relevant to that decision and/or communication a decision to me. *(Remember that if there is evidence the person cannot do any one of these things then they must be found to lack capacity about that decision - for example, often a person may be able to understand but cannot retain or use the information).*

- I believe they could not make the decision because the mental impairment is affecting their ability to process the information properly and has affected their short term memory.