Guidelines on the Assessment of Capacity

1. Who these Guidelines are for

- Staff in the community, hospitals and care homes, who may make an informal assessment of capacity for the people with whom they are working. Staff in such settings may well be the first to become aware that a person may be losing their capacity
- Doctors, including GPs and Consultants, who will make a formal assessment which may result in a Certificate or Report of Incapacity. Such assessments may be informed by the assessments mentioned above and below
- Clinical Psychologists who may carry out psychometric assessments. Such assessments will use formal methods, and may be relied upon when Certificates or Reports of Incapacity are being completed
- Relatives and carers of people who lack capacity may find these guidelines helpful, either to assist in deciding whether or not to ask for further help, or as an aid to understanding how decisions about incapacity are reached

2. The Adults with Incapacity Act gives the following definition of incapacity:

An adult over the age of 16 incapable of

1. **Acting**; or
2. **Making decisions**; or
3. **Communicating decisions**; or
4. **Understanding decisions**; or
5. **Retaining the memory of decisions**

by reason of mental disorder or inability to communicate because of physical disability, may be deemed to lack capacity, *even if only one of the above applies.*

Any assessment of capacity must take the above definition into account, and in addition, the **Principles** must be adhered to:

- Any action should be of benefit to the adult
- Least restrictive intervention
- Take account of the adult's wishes and feelings
- Take account of the views of relevant others
- Encourage independence

3. Decision-Making

Capacity should be assessed for major decisions that affect peoples' lives, including the following:

Finance/Property	**Welfare**
-Day-to-day finances	-Residence
-Income and expenditure	-Activities of daily living
- Assets	-Medical Treatment
	-Safety/Risk-Taking

More than one assessment may be required when separate decisions have to be made, e.g. a person with dementia may be able to give informed consent to treatment for their heart condition, but may not be able to manage their financial affairs. As a result, different approaches may have to be taken when assessing for the capacity to make different types of decisions.
Someone with impaired abilities can be assisted in the making of a decision by following a sequence of steps, and looking at the pros and cons at each stage.

4. Communication

Being able to communicate is clearly essential when decisions have to be made.

Where the communication difficulty is because of **physical reasons** such as stroke or head injury, every effort should be made using aids to facilitate communication such as alphabet boards, visual aids, etc. Speech and language therapists may also be of assistance. Only when this has clearly failed should the person be deemed to lack capacity.
Where the adult has a **mental disorder** such as dementia or learning disability, such aids may also help. However, the mental disorder itself may prove to be the main barrier to communication, and in such cases aids are unlikely to be successful.

There are two main areas of communication to consider:

(a) Receiving information

Some people with impaired capacity may have difficulty processing information in the first place. In such cases, assistance should be given to help the person understand the information better (see above and Section 5 below). If the adult is still unable to process the information needed to make an informed decision they may be deemed to lack the capacity to make that decision.

(b) Communicating information and decisions

Others may be able to process information, but have difficulty in communicating themselves. Again, every effort should be made to assist communication, and only if such efforts have failed should a decision about incapacity be made.

5. **Understanding**

Being able to understand the need for decisions to be made, and the nature of decisions, can be problematic when capacity is impaired. Some people may be able to make decisions, but be unable to understand the consequences, e.g. during an acute episode of mania, decisions may be made regarding finances that the person would not make normally.
Every effort should be made to assist the person in their understanding of any decision which needs to be made.
The following advice may be helpful:

- Try to speak at the level and pace of the person's understanding, and 'processing' speed
- Repeat information, clarify further, and repeat again if necessary
- Ask the person to repeat information in their own words
- Be careful in the use of language – no jargon
- Try to ensure that the person is not overwhelmed by choices
- Use family and friends to assist in providing information about whether the person can make a decision, and what their wishes might be
- Take literacy into account
- Assess the ability to weigh up the advantages and disadvantages of a decision, and the alternatives
- Use 'open' questions, not 'closed' ones to which the answer will be yes or no
- The body language of both interviewer and interviewee may be crucial in helping understanding

6. **Memory**

Some people may be able to make decisions quite adequately, but be unable to recall them soon afterwards. Others may be unable to recall the initial information which would enable them to make the decision. For others, memory may be patchy and variable – very good some days, but poor otherwise.

- If a person is able to make a decision, but is unable to recall it, an attempt should be made to enable the decision to be made again, using the same information. If the same decision is again reached, it can be argued that capacity may be present. Consistency in decision-making is more likely to mean capacity, despite a lack of retention of memory, but the person may still be deemed incapable because of other factors
- In assessing capacity, there is a distinction to be drawn between short- and long-term memory loss. Short-term memory loss is more likely to lead to incapacity because of the nature of the decision-making process. However, an assumption should not automatically be made that someone with short-term memory loss is incapable of making a decision.
- Tests, such as the 'Mini Mental State Examination', are available to test memory. These are useful as a guide, but they are not tests for capacity.
- An in-depth assessment may be required in assessing memory impairment and its effect on decision-making, particularly when crucial decisions are being considered.

7. Duration

Incapacity can be temporary, indefinite, fluctuating or permanent. Its duration and strength will depend on the individual and the reason for the incapacity. For example, during episodes of mental illness, capacity may be impaired for a few weeks, before being fully restored. Head injury may result in a period of years before capacity returns, whilst dementia is likely to see a gradual decline from full capacity to being unable to make simple decisions.

The duration and nature of the incapacity may give a clue to the best type of intervention. Reference should be made to the Act itself, the Codes of Practice and other guidance.

Incapacity is not ‘all-or-nothing’, and will vary from decision to decision.

8. Diagnosis

Dementia is the commonest cause of incapacity, followed by learning disability and then physical causes such as stroke or head injury. A small but significant number will have a severe and enduring mental illness such as schizophrenia or manic depressive illness.

Diagnosis may be a guide to potential incapacity, and to its duration, but assumptions should not be made. For example, someone with a learning disability is not automatically unable to make decisions, and may be very capable in some areas whilst having difficulty in others.

9. Conclusion

The assessment of capacity relating to decision-making is an art still in its infancy. There are no tests as such. These guidelines should provide some assistance, but assessments will always depend on professional judgement and consultation. The information provided by relatives, carers, professionals, and others is also vital. Previous beliefs, culture and behaviour should also be taken into account.

It should be stressed that a person deemed incapable of making decisions still has the right of refusal, for example to medical treatment.

Finally, assumptions are often made about incapacity based on diagnosis and initial observation. In many cases people who at first sight appear to lack capacity can be helped to make informed decisions with encouragement and the right approach.

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