

CARD 4

ASSESSING CAPACITY

1 Who should assess capacity?

The individual who wishes to make a decision on behalf of an incapacitated person is responsible for assessing his or her capacity. Where consent to medical treatment is required, the health professional proposing the treatment needs to decide whether the patient has the capacity to consent. The reasons why capacity is in doubt should be recorded in the medical record, as should details of the assessment process and its findings. The more serious the decision, the more formal the assessment of capacity is likely to be, and, where appropriate, it might be advisable to refer to a psychiatrist or psychologist for a second opinion.

2 How do you assess capacity?

The Act makes use of a 'functional' test of capacity, adapted from the common law, which focuses on the decision-making process itself. First it must be established that the person being assessed has 'an impairment of, or a disturbance in the functioning of, the mind or brain' which may affect their ability to make the decision in question. Under the Act, a person is regarded as being unable to make a decision if, at the time the decision needs to be made, he or she is unable:

- to understand the information relevant to the decision

- to retain the information relevant to the decision
- to use or weigh the information; or
- to communicate the decision (by any means).

Where an individual fails one or more parts of this test, then they do not have the relevant capacity and the entire test is failed.

In assessing capacity, consideration should be given, where appropriate, to the views of those close to the individual. Family members and close friends may be able to provide valuable background information, although their views about what they might want for the individual must not be allowed to influence the assessment. An assessment that a person lacks the capacity to make a decision must not be discriminatory. It must not be based simply on a person's:

- age
- appearance
- assumptions about their condition
- any aspect of their behaviour.

3 Uncertainties about capacity

Difficult judgements will still need to be made, particularly where there is fluctuating capacity or where some capacity is demonstrable but its extent is uncertain. This four-stage test is nevertheless well-established, and more detailed advice on practical procedures for assessing capacity is available from other sources. The Act requires that any decision that a person lacks capacity must be based on a 'reasonable belief' backed by objective reasons.

Where there are disputes about whether a person lacks capacity that cannot be resolved using more informal methods, the Court of Protection can be asked for a judgement.

4 What do you do when an individual refuses to be assessed?

Occasionally an individual whose capacity is in doubt may refuse to be assessed. In most cases, a sensitive explanation of the potential consequences of such a refusal, such as the possibility that any decision they may make will be challenged at a later date, will be sufficient for them to agree. However, if the individual flatly refuses, in most cases no one can be required to undergo an assessment.