

Leicester, Leicestershire and Rutland 'How to' assess Mental Capacity in specific situations

How to: Assess mental capacity to engage in sexual relations

Assessment of mental capacity to engage in sexual relations usually arises as a result of safeguarding concerns, when an adult at risk is in a sexual relationship and/or there are concerns about sexual exploitation. The assessment requires staff to balance three principles:¹

- **Autonomy:** This principle is integral to the Mental Capacity Act 2005 and is enshrined in article 1 of the UN Convention on the Rights of Persons with Disabilities 2006 '*to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*'
- **Protection:** The Mental Capacity Act Code of Practice expresses this in simple terms (at para 2.4): '*It is important to balance people's right to make a decision with their right to safety and protection when they can't make decisions to protect themselves.*'
- **The wider context:** The Mental Capacity Act 2005 and the Court of Protection are part of a wider system of law and justice. Within this system sexual relations can only take place with the full and ongoing consent of both parties.

The presumption of mental capacity and practicable steps

The starting point of the MCA is to presume a person has mental capacity to make a decision, including consenting to or refusing the intervention/assessment. Before concluding that a person lacks mental capacity to decide, it is important to take all practical and appropriate steps to enable the person to make the decision themselves (2nd principle of the MCA). Chapter 3 of the MCA Code of Practice gives detailed guidance on the steps that could be taken to support a person make a decision for themselves including: providing relevant information, communicating in an appropriate way, making the person feel at ease and supporting the person.

In relation to sexual relations, it is important to remember that capacity can be acquired, following a programme of sex education. Any education needs to be carried out in a timely way, without significant delays and with regard for the person's human rights.² Before carrying out the assessment, consideration should also be given to:

- The gender of the person carrying out the assessment.
- Cultural sensitivities around discussing sex.
- The use of pictures, visual aids and objects (particularly for people with learning disabilities).
- The involvement of a Speech & Language Therapist to support or facilitate tailored communication.

Relevant information

A recent ruling from the Court of Appeal has changed the approach to assessing mental capacity for sexual relations. Previous case law had focussed exclusively on the adult's mental capacity to consent to sexual relations. However, in [A Local Authority v JB \[2020\] EWCA Civ 735](#), the Court of Appeal recast the decision as to whether the adult has mental capacity to **engage** in sexual relations, which requires the ongoing consent of both parties.³ Expanding on previous case law the judge decided that the information relevant to the decision would include:

- *The sexual nature and character of sexual intercourse, including the mechanics of the act.*
- *The fact that the partner must have the capacity to consent to the sexual activity and must consent before and throughout the sexual activity.*

¹ See paragraphs 4-6 of [A Local Authority v JB \[2020\] EWCA Civ 735](#)

² See paragraph 16 of [CH v AMC \(2017\) EWCOP 12](#)

³ See paragraph 93

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- *The fact that the adult can say yes or no to having sexual relations and is able to decide whether to give or withhold consent.*
- *That a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant.*
- *That there are health risks involved, particularly the acquisition of sexually transmitted infections, which can be reduced by taking precautions such as using a condom (there is no expectation that the person is able to identify potential infections by name or understand condom use other than as a precaution).*

Not all five issues will be relevant to every capacity assessment. For example, the risk of pregnancy would not be relevant when assessing capacity to engage in sexual relations in a homosexual relationship or where the woman is infertile or post-menopausal.⁴

Previous judgements have also made clear that the following information is **not relevant** to the decision to engage in sexual relations:

- The risk that may be caused to the woman through pregnancy (as opposed to the risk of becoming pregnant), or the risk to future children.⁵
- An understanding of what is involved in caring for a child.⁶

Previous judgments also concluded that capacity to engage in sexual relations is general rather than person specific.⁷ However, recent judgments have cast doubt on this approach, indicating that identity of the sexual partner is **not** relevant when the adult is in a committed monogamous and exclusive relationship. For example, in [Re NB \(Consent to sex\) \[2019\] EWCOP 17](#), the Court of Protection considered whether a woman with a learning disability, who had been married for 27 years and had a daughter, had capacity to engage in sexual relations. The judge observed that ‘...the difficulty that presents in this case is that there is only one individual with whom it is really contemplated that NB is likely to have a sexual relationship i.e. her husband of 27 years. **It seems entirely artificial therefore to be assessing her capacity in general terms when the reality is entirely specific.**’⁸ In the same case, the judge indicated that the risk of sexually transmitted infections was **not** relevant when assessing capacity to engage in sexual relations in a committed monogamous and exclusive relationship.⁹ Similarly, in [A local authority in Yorkshire v SF \[2020\] EWCOP 15](#), the judge concluded that a woman with a mild learning disability and dementia had capacity to engage in sexual relations with her husband but not with others.¹⁰

Carrying out the assessment

A capacity assessment is a dynamic process of providing the relevant information to the person and then asking the person questions to assess their ability to understand, retain, use or weigh that information, and communicate their decision. It may be necessary to provide the relevant information more than once and in different formats. For example, if a person doesn’t understand something the first time, it would be appropriate to explain it in a different way using a different method. It may therefore be necessary to assess capacity over more than one visit.

⁴ See paragraph 31 of [A Local Authority v TZ \[2013\] EWCOP 2322](#) & paragraph 54 of [London Borough of Tower Hamlets v NB \[2019\] EWCOP 27](#)

⁵ See paragraphs 84-85 [IM v LM & Ors \[2014\] EWCA Civ 37](#)

⁶ See paragraph 61 of [A Local Authority v A \[2010\] EWHC 1549](#)

⁷ See paragraph 77 of [IM v LM & Ors \[2014\] EWCA Civ 37](#),

⁸ See paragraph 12

⁹ See paragraph 56 of [London Borough of Tower Hamlets v NB \[2019\] EWCOP 27](#)

¹⁰ See paragraphs 22-24

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It is fundamental to the assessment process that the person is informed of the purpose of the assessment.¹¹ This could simply involve informing the person that you need to check that their decision to engage in sexual relationships is informed and that they are not being exploited or harmed.

Understanding the relevant information

The case law is clear that the person doesn't need to have a particularly sophisticated understanding of sexual relations. For example, in [X City Council v MB & Ors \[2006\] EWHC 168](#), the judge stated: ‘...The question is whether the woman (or man) lacks the capacity to understand the nature and character of the act. Crucially, the question is whether she (or he) lacks the capacity to understand the sexual nature of the act. Her knowledge and understanding need not be complete or sophisticated. It is enough that she has sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent.’¹² Similarly, in [D Borough Council v AB \(Rev 1\) \[2011\] EWCOP 101](#) the judge noted ‘...the low level of understanding and intelligence needed to be able to consent to sex.’¹³

After giving the adult **the relevant information (see the box on the first page)**, potential questions to ask to assess the person's ability to understand it could include:

- What is sex?
- Describe what happens when two people have sex. What types of things do they do?
- For heterosexual relationships: How do a man and a woman have sex together?
- For homosexual relationships: How do a man and a man/woman and a woman have sex together?
- Why is it important to get the agreement of your partner/boyfriend/girlfriend before sex?
- How would you know whether your partner/boyfriend/girlfriend wanted to have sex with you or not?
- What would you do if your partner/boyfriend/girlfriend wanted to have sex but you didn't want to?
- How does a woman become pregnant?
- How are babies made?
- How do you prevent an unwanted pregnancy?
- What is safe sex?
- How does a condom protect you during sex?

Depending upon the adult's answers to the above questions, you may need to ask further probing questions or explain the relevant information in a different way. If the person struggles to understand your questions or has communication difficulties limiting their ability to answer open questions, it would then be appropriate to switch to closed questions requiring a yes or no response. For example:

- Does sex happen when a man puts his penis into a woman's vagina?
- Are you allowed to have sex if the other person doesn't agree?
- Are you allowed to have sex if the other person doesn't want to?
- Are you allowed to have sex with a person who doesn't understand what they are doing?
- Are you allowed to continue having sex with a person if they tell you to stop?
- Do you have the right to say no to sex?
- Can a condom protect you from sexually transmitted infections?
- Can a condom prevent you from getting pregnant?

¹¹ Paragraphs 47-49 of [LB Wandsworth v M & Ors \[2017\] EWHC 2435](#)

¹² See paragraph 74

¹³ See paragraph 37

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It is important when asking closed questions to check the consistency of the person’s replies. This could be achieved by asking the following true or false questions, for example:

- *Sex happens when two people hold hands*
- *You need agreement from the other person before you have sex with them*
- *You are allowed to have sex if the other person doesn’t want to*
- *You are allowed to have sex with a person who doesn’t understand what they are doing*
- *You are allowed to continue having sex with a person when they have told you to stop*
- *You have the right to refuse sex*
- *You could catch a sexually transmitted infection if you had sex without a condom*
- *You/your partner could get pregnant if you had sex without a condom*

Retaining the relevant information

Section 3(3) of the Mental Capacity Act 2005 states that *‘The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.’* Therefore, if information can be retained long enough for the adult to make the decision, that is sufficient, even if they cannot then retain that information for a longer period.

To assess the adult’s ability to retain information, it is likely that the same methods and tools used to provide the relevant information and assess understanding will need to be used again. For adults’ who have good verbal communication, it would be appropriate to ask them to recite the key points of the relevant information. For adults’ with communication difficulties, it would be appropriate to use written words or visual aids to establish whether the person recalls the key information a short while after it has been provided.

Use or weigh the relevant information

This part of the assessment will build upon questions asked to assess the adult’s understanding of the relevant information. The aim is to determine whether the person is *‘...able to **employ** the relevant information in the decision-making process and determine **what weight to give** it relative to other information required to make the decision.’*¹⁴ It is therefore necessary for the adult to be able to **apply the relevant information** to themselves and balance the benefits and harms of engaging in sexual relations. Another way of putting it is, can the person having understood the information, take account of it?

Previous case law has established that the ability to use or weigh information, while essential, is required at a low level in relation to sexual relations. In [A Local Authority v TZ \[2013\] EWCOP 2322](#), the judge stated that *‘the weighing up of the relevant information should be seen as a relatively straightforward decision balancing the risks of ill health (and possible pregnancy if the relations are heterosexual) with pleasure, sexual and emotional brought about by intimacy. There is a danger that the imposition of a higher standard for capacity may discriminate against people with a mental impairment.’*¹⁵

Potential questions to ask to assess the person’s ability to use or weigh the information:

- *What are the potential risks of sex without a condom?*
- *What would the consequences be if you had sex with someone without their agreement?*
- *What could happen to you if you carried on having sex with someone after they told you to stop?*
- *Why do you think others are concerned about your sexual behaviour?*
- *Has a sexual partner ever harmed you?*
- *How could you keep yourself safe when you meet men/women for sex?*

¹⁴ See paragraph 38 of [Kings College Hospital NHS Trust v C and V \[2015\] EWCOP 80](#)

¹⁵ See paragraph 55

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One potential area of difficulty is where the adult gives coherent answers to questions but is then unable to translate their intentions into actions due to executive dysfunction. In other words, the person says one thing but then does something else in practice. Executive functioning was recently described by a judge as, ‘...the ability to think, act, and solve problems, including the functions of the brain which help us learn new information, remember and retrieve the information we’ve learned in the past, and use this information to solve problems of everyday life.’¹⁶

It may be necessary to gather further collateral information and ask further probing questions if there appears to be a mismatch between the adult’s words and their actions. It would be legitimate to conclude that the adult lacks capacity to make a decision if they are unaware of, or deny the fact that they cannot implement their stated intentions, or deny that when needed they are unable to bring to mind the information required to implement a decision (e.g. due to impulsivity). However, it would only be legitimate to reach such a conclusion where there is clearly documented evidence of repeated mismatch.¹⁷ For example, if during assessment, a adult is able to understand, retain and use or weigh the relevant information, but acts differently in real-life, for example by impulsively or compulsively engaging sexual relations with strangers, it would be appropriate to explore the mismatch between their words and actions. The purpose would be to establish whether the person is able to use and weigh the fact that there is a mismatch between their ability to respond to questions during the assessment and to act in real-life situations. If the person is able to use and weigh this information but continues to have sex with strangers regardless, this would be deemed an unwise decision rather than a lack of capacity.

Communicate the decision

To have capacity to engage in sexual relations, the adults needs to have a method of communication that is consistent and reliable enough to respond to questions and eliminate any ambiguity. This is an area where it is particularly important to show that you have taken practicable steps to facilitate communication. For example, reproducing as best as possible the manner by which they usually communicate, providing all necessary tools and aids, and enlisting the support of carers, friends or professionals who may be able to facilitate communication.

After the assessment

Reflect upon the following points:

- Do you have enough information to displace the presumption of capacity?
- Do you need to carry out further visits to make a judgement?
- Remember the assessment of mental capacity is made on the balance of probabilities.
- Have you established the causative nexus (e.g. the causal link between inability to decide and the identified impairment of or disturbance in functioning of the mind or brain)? A formal diagnosis is not required.

Outcomes

1. The person has mental capacity to engage in sexual relations

That is the end of the MCA at this point. Staff can still support and provide advice and guidance, but the person can decide whether or not they wish to engage in sexual relation. Mental capacity can be fluid however, so it may be appropriate to re-assess a person’s mental capacity as new situations arise or the person’s condition changes.

If the adult **has** mental capacity to engage in sexual relations, have you considered whether their decision making is affected by coercion, constraint or undue influence? If so, it may be possible for the local authority to bring proceedings under the Inherent Jurisdiction of the High Court. Speak to your manager about this.

2. The person lacks mental capacity to engage in sexual relations

¹⁶ See paragraph 39 of [A Local Authority v AW \[2020\] EWCOP 24 \(20 May 2020\)](#)

¹⁷ See paragraph 58 of [39 Essex Street: Carrying out and recording capacity assessments \(June 2020\)](#)

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It is important to remember that sex without consent is a criminal offence under the Sexual Offences Act 2003. Therefore, any finding that an adult lacks capacity to engage in sexual relations should trigger a safeguarding adults enquiry, which **must** involve consultation with the Police at the earliest opportunity.

Section 27 (excluded decisions) of the MCA does not allow a best interests decision to be made authorising sexual relations on behalf of an incapacitated adult. Instead, the local authority **must** make an urgent application to the Court of Protection for the authority to prevent the incapacitated adult from having further sexual relations (e.g. by depriving a person of their liberty and providing 1:1 supervision).