

Mental Capacity and Sexual Relations

The essential principles of any mental capacity assessment are set out in the Mental Capacity Act 2005 and the associated Code of Practice.

Mental Capacity Act 2005 – 5 principles

1. **A presumption of capacity**
 - Start by thinking I can make a decision
2. **Individuals supported to make their own decisions**
 - Do all you can to help me make a decision
3. **Unwise decisions**
 - You must **not** say I lack capacity just because my decision seems unwise
4. **Best interests**
 - Use a **best interest checklist** for me if I can't make a decision
5. **Less restrictive option**
 - Check the decision made **does not** stop my freedom more than needed



When should a capacity assessment be completed?

All adults have a legal right to make decision regarding their own life, and in accordance with Principle 1 of the Mental Capacity Act, there must be a presumption of capacity. However, it is important to carry out an assessment when an adult's capacity may be in doubt.

The Mental Capacity Act Code of Practice (para. 4.35) identifies a number of reasons why a person's capacity to make a specific decision may be questioned:

- The person's behaviour or circumstances cause doubt as to whether they have capacity to make a decision.
- Somebody else says they are concerned about the person's capacity, or
- The person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works, and it has already been shown that they lack capacity to make other decisions in their life.

There should not be delays in completing an assessment. Just because an adult has care and support needs, it does not diminish their desire for companionship, affection or intimacy. Any delays in the assessment

process may have a significant impact on the adult's relationship and well-being.

What should the capacity assessment cover?

The assessment of whether a person has the capacity to consent to sexual relations is an assessment that looks at an adult's general capacity to consent to sex, rather than being specific to any particular person.

The assessment of capacity with regard to sexual relationship does not apply to other expressions of affection such as kissing or holding hands. These may not be a matter of concern unless the actions are non-consensual, causing harm or distress or if one of both parties lack capacity. In these circumstances a capacity assessment and best interests decision will need to be considered.

Functional test –

Understand

When determining whether an adult can consent to engage in sexual relations, the assessor will need to demonstrate that the adult can understand the following relevant information:

- 1) The mechanics and nature of the sexual act
- 2) The adult has a choice whether to have sex and can refuse.
- 3) The other person must have capacity to consent to the sexual activity and must consent before and throughout the sexual activity.
- 4) The potential that sexual activity between a man and a woman can result in pregnancy
- 5) That there are health risks involved, such as sexually transmitted infections.
- 6) A basic understanding of contraception.

The salient information needs to be relevant to each adults' individual circumstances. For example, when assessing capacity around sexual relations in a same sex relationship or regarding a woman over child-bearing age, it may not be necessary to demonstrate that the risk of pregnancy is understood.

Retain

In accordance with the Mental Capacity Act Code of Practice, the adult must be able to hold the information in their mind long enough to use it to make an effective decision.

People who can only retain information for short periods of time must not automatically be assumed to lack capacity to make a decision.

Use and weigh

For someone to have capacity, they must have the ability to weigh up information and use that information to reach a decision.

Communicate

It is important to make all practical and appropriate efforts to help the person communicate.



If a person cannot communicate their decision by any means the Act says they should be treated as if they are unable to make a decision.

Diagnostic test – Does the adult have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works (this impairment or disturbance can be temporary or permanent)?

Does the impairment or disturbance mean that the adult is unable to make the decision in question at the time it needs to be made? (**Causal nexus**).

This is a complex area of practice and decisions should not be made in isolation. Any decisions should be made in the adult's best interests with the involvement of all involved in the adult's welfare and care provision. It may also be beneficial to seek the involvement of appropriate professionals.

Practitioners must assess both an adult’s decisional and executive capacity. Executive capacity describes where an adult may appear able to weigh information whilst discussing the situation but if they do not apply their reported knowledge and understanding to real life situations, they may lack mental capacity.

Decisional Capacity “Talk the Talk”	Executive Capacity “Walk the Walk”
 An illustration showing two teal-colored silhouettes of human heads in profile, facing each other. Above them are several overlapping speech bubbles in various colors: purple, blue, pink, teal, orange, green, light blue, and red. The background is a light grey with a subtle grid pattern.	 A black and white line drawing of a person walking. The person is wearing a long-sleeved shirt, trousers, and shoes. They are captured in a mid-stride, with one leg forward and arms slightly out to the sides. The drawing is simple and minimalist.

Professionals must take all practicable steps to help the adult before concluding that the adult is not able to make the decision in question.

Practicable steps could include:

- Making sure the adult has all of the relevant information they need to make the decision
- Making sure that the adult knows about all of the available options (if there are a range of choices)
- Explaining or providing information in the way that is easiest for the adult to understand (e.g. verbally, in writing or in pictorial form).
- Communicating with the adult in the way that works best for them.
- Considering the best time of day to complete the assessment.
- Considering the best location to complete the assessment.
- Would it benefit the adult to have another person present who could support them?
- Can the assessment be completed over a number of visits to give the adult time to consider the information or build rapport with the assessor?

What happens if a person is assessed as lacking capacity to make decisions about sex?

In the first instance it may need to be considered whether the adult may have capacity if assessed again following the provision of further information, education or support.

However, Section 27 of the Mental Capacity Act specifically excludes the making of best interests decisions in relation to sexual relationships.

Therefore, if an adult is assessed as not having capacity to make a decision about sexual relationships, no other party can make a decision that it is in the persons best interests to engage in a sexual relationship.

Remember: For some adults with care and support needs, their capacity to consent to sexual relationships may change. It is therefore important to regularly review the adult's capacity to consent.

Sexual abuse and exploitation

The Care Act (2014) defines sexual abuse as:

- rape
- indecent exposure
- sexual harassment
- inappropriate looking or touching
- sexual teasing or innuendo
- sexual photography
- subjection to pornography or witnessing sexual acts
- indecent exposure
- sexual assault
- sexual acts to which the adult has not consented or was pressured into consenting.

Indicators of Sexual Abuse

- Bruising, particularly to the thighs, buttocks and upper arms and marks on the neck
- Torn, stained or bloody underclothing
- Bleeding, pain or itching in the genital area
- Unusual difficulty in walking or sitting
- Foreign bodies in genital or rectal openings infections,
- Unexplained genital discharge, or sexually transmitted diseases

- Pregnancy in a woman who is unable to consent to sexual intercourse
- The uncharacteristic use of explicit sexual language or
- Significant changes in sexual behaviour or attitude
- Incontinence not related to any medical diagnosis
- Self-harming
- Poor concentration, withdrawal, sleep disturbance
- Excessive fear/apprehension of, or withdrawal from, relationships
- Fear of receiving help with personal care
- Reluctance to be alone with a particular person.

The Sexual Offences Act (SOA) 2003 categorises many different types of sexual abuse and also defines a number of sexual offences including rape and sexual assault.

The SOA makes it illegal for a care worker to:

- 1) Have any sexual activity with someone who has a mental disorder.
- 2) Cause or incite anyone with a mental disorder to have sexual activity
- 3) Have any sexual activity in the presence of someone with a mental disorder
- 4) Cause a person with a mental disorder to watch a sexual act.

A "relationship of care" exists where one person has a mental disorder and another person provides care. This applies to people working in both a paid and unpaid basis.

The offences in this Act apply whether or not the adult with care and support needs appears to consent, and whether or not have the capacity to consent.

What to do if you are concerned that an adult has been sexually abused?

Adult social care is not an emergency services - always call 999 if there is an emergency or immediate threat of abuse taking place.

If a criminal offence has occurred, or may occur, contact the Police force where the crime has occurred/may occur via 101 or online reporting mechanisms.

Secure any physical evidence such as clothing, bed linen etc – Refer to the information with the resource pack.

Refer any safeguarding concerns to the Local Authority for the area where the abuse took place by phoning the relevant contact centre;

If the abuse occurred in Stoke-on-Trent – Tel: **0800 561 0015**
(available during standard office hours)

To report concerns overnight, over a weekend or on a bank holiday, please contact the Emergency Duty Service on Tel: **01782 238770**

If the abuse occurred in Staffordshire – Tel: **0345 604 2719**
(available during standard office hours)

To report concerns overnight, over a weekend or on a bank holiday, please contact the Emergency Duty Service on Tel: **0345 604 2886**

Further reading:

39 Essex Chambers (2023) Carrying Out and Recording Capacity Assessments [Available here](#)

39 Essex Chambers (2024) Guidance Note: Relevant Information for Different categories of decisions. [Available here](#)

The British Psychological Society (2025). [Capacity to engage in sexual relations | BPS - British Psychological Society](#)

Mental Capacity Act Code of Practice (2007)
<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

The British Institute of Human Rights (2021). [guide mental-capacity-sexual-relations.pdf \(bihr.org.uk\)](#)