

Capacity Assessment Tool

Introduction on Capacity to give Informed Consent to a Sexual Relationship

Definition of consent:

“A person consents if he agrees by choice, and has the freedom and capacity to make that choice.” (Sexual Offences Act 2003).

All capacity is decision specific, and focuses on a particular time when a decision has to be made and on the particular matter to which the decision relates. The Mental Capacity Act sets out clear guidance for assessing whether a person lacks capacity to take a particular decision at a particular time. The test is whether a person can

- Understand the information relevant to the decision.
- Retains the information.
- Use and weigh that information as part of the process of making the decision.
- Communicate the decision by any means.

These issues, and some guidance on how to assess whether or not an individual has these capacities, are covered in the Mental Capacity Act Code of Practice (2007).

CAPACITY ASSESSMENT FOR SEX

1.1 Consent to sex

Current legislation is designed to support individuals with a learning disability to have the same rights as others round sexuality issues; however there are also laws to protect individuals with a learning disability from violence or exploitation (Learning Disability, Sex and the Law, 2005).

According to current case law, capacity to consent to sex remains act specific. An individual will have capacity to consent to sexual relations if they have an understanding and awareness of:

- (1) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;

- (2) the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;
- (3) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;
- (4) that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;
- (5) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.

In relation to capacity to consent, case law develops over time. It is therefore essential that clinicians keep up to date with case law in this area so that they can apply the most recent and relevant test when they are asked to assess the capacity of an individual.

1.2 Good practice in further assessment

Firstly, the professional needs to ensure that they take a recent history including:

- Details regarding current behaviour patterns.
- Details around relevant risk issues.
- Details around previous relationships, how the ending of these was managed
- Details around any previous abusive relationships
- Details around whether the person with learning disabilities has received any sex education and also information as to whether they benefited from this.
- Does the person have an understanding of what is legal?
- Does the person understand whether what they are doing is legal?
- Do the individuals concerned understand that either person has the right to say no at any time?
- Do the individuals concerned understand that violence and coercion have no place in a consenting relationship?

1.3 How to use the Capacity Assessment Tool

The Capacity Assessment Tool was developed to cover the issues above, and can be used to assess capacity for sex with people who have heterosexual and homosexual relationships. The tool gives a guide to the knowledge that the person has and their understanding of the consequences of sexual acts. The use of the Capacity Assessment Tool does not replace the professional's judgement and experience.

The Capacity Assessment Tool has two parts. Part A looks at the main issues that the person needs to understand and communicate to be able to demonstrate capacity to have sex.

For each section, it is important to start with a general discussion about the issue. If the person demonstrates sufficient knowledge and understanding relevant to the situation being assessed then this is sufficient and you do not need to use the pictures. If you are unsure, then use the pictures. The professional needs to choose the appropriate pictures for the type of relationship being assessed.

The section on pregnancy is only relevant if the person is having a heterosexual relationship.

Part B should be completed if the person has capacity or may have capacity with further education. Although the person may have a good understanding of sexual issues, there may be concerns about whether they are choosing to keep themselves safe or unable to keep themselves safe with this particular person. This may not be sufficient to prevent sexual activity, but may precipitate further work with the person and their carers about risk prevention and safety.

Part B also aims to help identify the potential risks for the person. The appropriate areas to ask will depend on information gathered via interviews with the person with learning disabilities and/ or other individuals who support them.

Using the Capacity Assessment Tool will assist the professional in assessing:

- What the person with learning disabilities knows and understands absolutely
- Areas where person with learning disabilities has partial/incomplete knowledge and understanding
- Areas that the person with learning disabilities did not know or understand

It will also assist in looking at:

- Risks that are apparent should the person continue to engage in current behaviours
- Details of other risks that may have been identified via the assessment
- Consideration as to whether any form of sex education would be appropriate and if so recommendations as to what areas would need to be covered

1.4 Reporting the Results of The Capacity Assessment

Using the Capacity Assessment Tool will assist the professional in deciding whether the person has the capacity to consent to sex. The outcomes that are reported may include that the person with learning disabilities:

- Can consent to sex.
- Can't consent, but education may be beneficial. There will be a need to re-assess once the education has been completed in order to evaluate whether any knowledge and understanding gained has enabled the person now to have capacity to give informed consent.
- Can't consent, giving the reasons why this judgement has been made.

A further section should be included that looks at the person's knowledge in relation to other issues which may make them or others vulnerable to prosecution under other legislation e.g. Sexual Offences Act, or assault etc.

The outcome of the assessment should be discussed with the person first, and then with those supporting the person (with the person's consent). If the person is found to lack capacity to consent to sex even after education, then this may necessitate a discussion with the person's wider system and include a referral to safeguarding,

1.5 Inherent jurisdiction where someone's capacity might be impaired due to coercive /controlling behavior/ undue influence.

The High Court has an **inherent jurisdiction** to protect adults at risk whether or not they lack capacity. The Court can exercise this jurisdiction where it is lawful, necessary and proportionate to do so. If people are working with a client where they think that this is going to be required then please contact your trust legal department for advice and guidance.

Reference:

The case law is A Local Authority vDL [2-11] EWHC 1022 (Fam)

This was a case that went to the high court to consider the use of inherent jurisdiction to safeguard a vulnerable older couple from their adult son who was living with them. The judge stated:

"Each case will, of course, have to be carefully considered on its own facts, but if there is evidence to suggest that an adult who does not suffer from any kind of mental incapacity, that comes within the MCA but who is, or reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors they may be entitled to the protection of the inherent jurisdiction."

Capacity Assessment Tool for consent to a sexual relationship

Name

Address

Date of birth

Date of assessment

PRINCIPLES

As there should always be the assumption that all adults have the capacity to consent, the Capacity Assessment tool should only need to be completed when there is a suspected lack of capacity.

According to current case law, the process of judging capacity to sexual relations is act specific, not decision specific. This means that in order for the person to have capacity to have sex they need to have an understanding and awareness of:

- (1) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;
- (2) the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;
- (3) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;
- (4) that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;
- (5) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.

If however, the person is homosexual, then this would both change the nature of the information relevant to the decision regarding the mechanics of the Act; and issues of pregnancy do not apply.

If an individual is judged to be incapable to have sex through completion of The Capacity Assessment tool, this judgement cannot always hold for other decisions that need to be made.

Staff need to understand that we should not be requiring more exacting standards of decision making in people with learning disabilities than for other people.

It is also important to recognise that an individual's capacity may vary over time, and that any assessment of incapacity should not be presumed to hold for all decisions in the future. Temporary factors may affect someone's capacity to make decisions, such as acute illness, distress caused by bereavement, or acute mental ill-health. In such circumstances, consider if the decision can be put off until such time as the person has recovered.

The tool has been designed for two purposes. Firstly, so that an assessment of capacity to have sex can be determined. Secondly so that other issues can be considered within the person's support plan, particularly in the identification of any risk factors that may make them vulnerable to prosecution under other legislation.

PART A

This part of the Capacity Assessment Tool looks at the main issues that the person needs to understand and communicate to be able to have capacity to have sex.

For each section, it is important to start with a general discussion about the issue. If the person demonstrates sufficient knowledge and understanding then this is sufficient and you do not need to use the pictures. If you are unsure, then use the pictures from Exploring Sexual and Social Understanding (Dodd et al 2007).

Some sections / questions are optional and depend on whether it is a heterosexual or homosexual act that is being assessed.

Section 1: Identifying the private parts of the body.

In order to have capacity the person needs to be able to identify the private parts of their body and that of their partner. For a heterosexual relationship, the person must be able to identify both the male and female private body parts. For a homosexual relationship, the person must be able to identify the private body parts for their gender.

If the individual is unable to name these parts spontaneously then show the relevant pictures and ask them to name the appropriate parts of the body

If an individual uses a very unusual name then it might be beneficial to discuss other names they might use.

Part of the Body	Picture Numbers	Identify Yes/ Yes with picture/ No/ Not applicable	Comments
<u>Male</u>			
Penis	3.7		
Testicles	3.7		
Pubic Hair	3.7		
Chest	3.7		
Nipples	3.7		
Bottom	3.8		

Part of the Body	Picture Numbers	Identify Yes/ Yes with picture/ No/ Not applicable	Comments
<u>Female</u>			
Breasts	1.7		
Nipples	1.7		
Vulva/Vagina	1.7		
Pubic Hair	1.7		
Bottom	1.8		

Section 2: Identifying sexual behaviour

In order to have capacity the person needs to be able to identify and describe the mechanics of the act.

If the individual has difficulties expressing any ideas then the following pictures can be used to explore the issues further

Sexual Behaviour	Picture Numbers	Identify Yes/ Yes with picture/ No/ Not applicable	Comments

Kissing	5.3, 6.3, 7.5		
Touching	5.5, 6.5, 7.2		
Touch each others genitals	5.7, 6.6, 7.7		
Have sex together	5.8, 6.8, 7.10		
What happens when you have sex			
Vaginal intercourse	7.11		
Oral Sex	5.8, 6.7, 7.8, 7.9		
Anal intercourse	6.8, 7.12		

Section 3: Identifying issues related to Consent

There are 2 aspects of this issue.

1. The person must understand that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;
2. The person can say yes or no to having sexual relations and is able to decide whether to give or withhold consent.

If the individual has difficulties expressing any ideas then the following pictures can be used to explore the issues further

Consent	Picture Numbers	Identify Yes/ Yes with picture/ No/ Not applicable	Comments
a) Assessment of understanding about their own consent			
Is it ok to say yes or no to a kiss or a cuddle	5.1, 5.3, 5.11, 6.10, 7.5, 7.14, 7.15		

Is it ok to say yes or no to sex	5.13, 6.3, 7.10, 6.14, 7.20		
Is it ok for you change your mind at any time during kissing and cuddling?			
Is it ok for you to change your mind at any time during sex?			
What would you do if X touches you or does something to you that you don't like?	5.10, 6.12, 7.18		
b) Assessment of understanding about consent of others			
Do you know that the person you want to kiss or cuddle / have sex can say yes or no?			
How would you know that the person is saying yes?	15.2, 15.6,		
What can affect the other person being able to say yes or no? (alcohol, drugs, other person might not be able to understand)	16.6, 16.7, 16.9		

What would you do if you want to have a kiss/ cuddle/ sex but the person says No	5.12, 5.14, 6.11, 6.15, 7.14, 7.15, 7.21		
Does the person know that they need to stop if the person says no?			
Is it ok for the person you want to kiss / cuddle / have sex to change their mind?			
How would you know that the person has changed their mind?	15.3, 15.4, 15.7, 15.8, 15.10, 15.11		
What would happen to you if you did continue when they had said no or changed their mind?	12.1, 12.2, 12.3, 12.4		

Section 3: Identifying the Consequences of Sex

In order to have capacity the person needs to be able to demonstrate that they understand the consequences of sex, in terms of sexually transmitted and sexually transmissible diseases, and pregnancy if the act is between heterosexual partners.

If the individual has difficulties expressing any ideas then the following pictures can be used to explore the issues further.

Consequences of Sex	Picture Numbers	Identify Yes/ Yes with picture/ No/ Not applicable	Comments
Tell me what can happen if you have sex	5.8, 6.8, 7.10		
Pregnancy	11.6		
HIV/AIDS			
Sexually transmitted diseases (STDs)			
Prevention of pregnancy			
Prevention of HIV/ AIDS / STDs	18.1, 18.2,18.3, 18.4, 18.5, 18.6, 18.7		

WAS THIS ASSESSMENT COMPLETED IN ONE SESSION?

Yes No

Please outline below, the reasons why more than one session was necessary for this individual. (You should include the dates).....

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If at any point in the assessment the individual discloses possible abuse then this needs to be reported via the appropriate Safeguarding Procedures.

DETERMINING CAPACITY

If person has answered all questions appropriately and demonstrates a basic understanding of the sexual act and the consequences of that act, then consent should be regarded as valid.

PERSON HAS CAPACITY FOR SEX

**PERSON HAS SOME KNOWLEDGE AND UNDERSTANDING AND
MAY HAVE CAPACITY AFTER FURTHER EDUCATION**

If yes, please outline action

taken.....

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PERSON DOES NOT HAVE CAPACITY FOR SEX

Signature of Assessor(s) :**Date**.....

PART B

This part of the assessment should be completed if the person has capacity or may have capacity with further education.

Although the person may have capacity, there may be concerns about whether they are able to keep themselves safe. This is not sufficient to prevent sexual activity, but may precipitate further work with the person and their carers about risk prevention and safety.

The following sections aim to help identify the potential risks for the persons. The appropriate areas to ask will depend on information gathered via interviews with the client and/ or other individuals who support them.

Section 1: Identifying where it is and isn't appropriate to have sex

If the individual has difficulties expressing any ideas then the following pictures can be used to explore the issues further

Places to have sex	Picture Numbers	Identify Yes/ Yes with picture/ No/ Not applicable	Comments
Where is it okay to have sex (use as appropriate)			
Lounge	8.3		
Bathroom	8.4		
Bedroom	8.5		
Garden	8.6		
Office	8.7		
Car	8.8		

People carrier	8.10		
Public Bus	8.11		
Public Toilet	8.12		
Burger Bar	8.13		
Cinema	8.14		
Pub	8.15		
Restaurant	8.16		
Day centre	8.17		
Park	8.18		
Public toilet	8.29		
Changing Room	8.19		
Swimming pool	8.20		
Street	8.21		
Nightclub	8.32		
Supermarket	8.28		
Train	8.30		

Tram	8.31		
Work (office, factory or shop)	8.27, 8.33, 8.23		
Church	8.24		
Outside (alley)	8.25		
Outside in the street	8.21		

Section 2: Identifying Power Issues

If the individual has difficulties expressing any ideas then the following pictures can be used to explore the issues further.

Saying No	Picture Numbers	Identify Yes/ Yes with picture/ No/ Not applicable	Comments
Would you have sex with X if they offered you:			
money / £5	15.12		
cigarette	15.13		
sweets	15.10		
chocolate	15.11		
wine	15.14		
lager	15.15		
drugs	15.17		
Would you have sex with X if they say they will hurt you			

if don't agree?			
Would you have sex with X if they say they will get you into trouble if you don't have sex?			
Would you have sex if X wanted you to have sex with a third person while he/she watched?	5.15, 6.16, 7.22		

Section 3: Identifying issues around age / illegal relationships

If the individual has difficulties expressing any ideas then the following pictures can be used to explore the issues further.

Consequences of Sex	Picture Numbers	Identify Yes/ Yes with picture/ No/ Not applicable	Comments
What age can people have sex?	9.1, 9.3, 9.5, 9.6		
How can you tell someone's age?			
Is it okay to have sex with someone in your family? If so, which people?	12.1, 12.2, 12.3, 12.4		
Is it okay to have sex with staff/carers?	Use any in Section 11		

Section 4: Other risk issues

Risk	Person's response	Evaluation of risk
Stranger danger		
What is a stranger?		
What could happen if you have sex with someone on a first date?		
If a stranger smiles at you in a pub and buys you a drink, what could happen if you went back to his / her house?		
What could happen if you take a lift from someone you have only just met?		
Alcohol/drugs		
What happens if you drink too much alcohol/ beer/ wine?		
What can happen if you or X drinks too much?		
What can happen if you are offered drugs?		
Contraception		
What can happen if you have sex without using a condom?		
What can you do if this happens?		

Abuse/exploitation		
What can happen if you say Yes to sex when you would like to say No?		
Grooming/harassment		
What can happen if you follow people in the street?		
What can happen if you follow children?		
What can happen if people give you things to have sex?		
False Allegations		
What can happen if you don't tell the truth about things you do sexually?		
IT/Computers/Mobiles		
What can happen if you talk to others using a computer ?		
What can happen if you send photos of yourself or other people to others via a mobile/face book ?		
What can happen if you talk to others using facebook/twitter/social media?		
Pornography		
Is it ok to buy a porn magazine?		

At what age?		
Is it okay to show these to other people?		
Is it okay to show these to children?		
Is it okay to look at porn sites on the computer?		
Is it okay to look at pictures of children you don't know on the computer?		
Dating Agency		
What does it mean if you join a dating agency?		
What do you need to be careful of?		
Sex Workers		
Is it okay to pay for sex?		
What does it mean if you pay for sex?		