

Understanding Capacity



As the population ages GPs will be seeing more people who may lack the capacity to make their own decisions about medical treatment, accommodation or managing their finances. It is becoming increasingly important, therefore, to understand the importance of capacity. For example, to know whether a patient is able to give consent to treatment (or consent is required from a substituted decision maker) or needs protection from financial abuse.

A person is said to lack capacity when they cannot understand information given to them about a matter, reach a voluntary decision and communicate their decision in some way.

The following information is important to medical and health professionals and anyone involved in aged care, acquired brain injury, intellectual disability and the care of the mentally ill.

Serious consequences

Provision of health care without the patient's consent, or without the consent of someone lawfully authorised to consent on their behalf, or without any other lawful justification, is regarded at common law as a trespass and is unlawful.

- a. Ethical reasoning behind the requirement for consent is the concept of autonomy and self-determination, that patient's with capacity have the right to accept or refuse treatment, even if the consequences are quite serious.
- b. Consent can only be given by people who have capacity.
- c. Consent for people with impaired capacity must be obtained from a substitute decision maker
- d. Valid consent has practical benefits as it is more likely to increase treatment compliance by the patient.

Claims of negligence may arise when failing to treat patients who are thought to lack capacity, for example, patients may fail to request treatment.

Consent is not required in an emergency or urgent situation if there is imminent risk to life or health or there is significant pain or distress, and it is impracticable to get consent. In urgent or emergency situations it is necessary to clearly document why the situation was urgent.

Capacity is a legal term

However, doctors are usually the primary assessors of capacity. Substituted decision making requires doctors, health professionals and lawyers to work more closely together.

Legal standard required

Legally a patient is presumed to have capacity. Capacity is specifically linked to the particular issue or decision that has to be undertaken, such as surgery or appointing an enduring power of attorney.

Capacity is defined as:

- a. understanding the nature and effect of the decision
- b. freely and voluntarily making the decision
- c. demonstrating their understanding by communicating this in some way.

What to consider

Capacity is closely linked to understanding, and includes the ability of the patient to:

- a. receive, comprehend, retain and recall relevant information
- b. integrate the information received
- c. evaluate benefits and risks
- d. select an option and give reasons for the choice
- e. communicate their choice to others
- f. persevere with that choice, at least, until the decision is acted upon.

No particular specialty or professional group has complete responsibility or court endorsed standard for assessing capacity.

Practical guidelines for capacity assessment include:

- a. ensure a valid indication for assessing capacity is present
- b. inform the patient about the assessment
- c. discuss with the patient and others (e.g. family / carers) the relevant indications and circumstances
- d. provide clear communication and relevant information for decision-making
- e. document these
- f. assess the person's understanding of the issues and consequences available
- g. act according to the results of the assessment.

Capacity is specific to the issue or decision that is being considered

When a capacity assessment or report has been requested, ensure that you have been given the legal standard of capacity that is required for that particular decision. As a general rule, assess whether the decision that is being considered is simple or more complex.

The following should be included in capacity assessment reports.

- a. Can competency be improved? (Consider provision of patient education or review of medication).
- b. Is there a disorder present?
- c. Does the disorder fluctuate?
- d. Relevant psychological, environmental and social factors that may impact on decision making (cognitive strengths and weaknesses, social networks, etc).
- e. Consistency of functioning.
- f. Number and type of assessment methods used.
- g. Overall rating of reliability of assessment – how were assessment results obtained?
- h. Conclusion. Taking all above factors into account, including the decision the adult is considering, does the adult have the required capacity?

Enduring Powers of Attorney (EPA)

These are powerful documents that are able to be readily accessed and witnessed by JPs. To be valid, the person must have had capacity when they were executed. For example, once executed, a person who becomes an attorney for financial matters has full control over the adult's finances either immediately or when the person has impaired capacity.

- a. As a result of the extent of this power that Tribunal may be required to investigate whether the adult had capacity at the time the EPA was executed.

- b. Treating doctors may be asked by a tribunal to give their views as to a patient's capacity at a certain point irrespective of whether a formal assessment was completed at that time.

Advance Health Directives

These directives extend the patient's ability to consent to treatment or to refuse treatment at a time when they no longer have capacity to do so. These instruments are required to be witnessed by a doctor. The existence of an advance health directive is the first issue to consider when a patient with impaired decision making capacity needs consent for a health matter.

If patient is assessed to have impaired decision making capacity

If a patient is clinically assessed as having impaired decision making capacity and they are at risk or vulnerable, (i.e. they have a need for formal protection) a substitute decision maker is required.

- a. Substitute decision maker may be an attorney appointed under an Enduring Power of Attorney (for personal and/or health care decisions), or
- b. Guardian appointed for personal and/or health care matters, or
- c. May be a Statutory Health Attorney (SHA) – in order of preference, these people are:
- d. patients spouse (if relationship is close and continuing)
- patients primary carer (not paid)
 - a close adult friend or relative
 - Adult Guardian, as last resort.

The SHA may change on a decision by decision basis – e.g. an elderly person may move into a home of a family member, who then becomes a carer, or an only child may be overseas on holidays and a friend may become a SHA. The Adult Guardian can intervene if there is a dispute amongst the SHA's regarding a health care decision.

If there are concerns about the patient with impaired decision making capacity making detrimental decisions or being neglected or exploited, an application to the Guardianship and Administration Tribunal should be considered. An application may be for an appointment of a Guardian or Administrator.

Useful links

Government Agencies

Aged Care Assessment Teams – Queensland

www.health.gov.au

Guardianship and Administration Tribunal (GAAT)

www.justice.qld.gov.au/guardian/gaat

The Adult Guardian

www.justice.qld.gov.au/guardian/ag

Public Trustee of Queensland – www.pt.qld.gov.au

Professional Organisations

National Health and Medical Research Council

www.nhmrc.gov.au

Queensland Law Society – www.qls.com.au

The Australian Psychological Society

www.psychology.org.au

The Royal Australian College of General Practitioners

www.racpg.org.au

The Royal Australian and New Zealand College of

Psychiatrists – www.ranzcp.org

Information and Support Organisations

Alzheimer's Association Queensland

www.alzheimeronline.org

Alzheimers Australia – www.alzheimers.org.au

Sane Australia – www.sane.org

Legislation

Office of the Queensland Parliamentary Counsel

www.legislation.qld.gov.au.