

More Information on Capacity

Capacity refers to an adult's ability to make a decision for himself or herself.

Health care practitioners have a legal and professional responsibility to get consent before treating any person. Generally, a person gives consent themselves. Before assessing whether a person has capacity to make decisions about specific treatment, the practitioner must provide the person with all relevant information about treatment options.

Under the law, you must presume that every adult has capacity, unless the evidence in front of you supports otherwise.

Generally, a person is said to have decision making capacity if they can:

- Understand the facts and choices involved;
- Weigh up the consequences; and
- Communicate their decision

Determining capacity is decision-specific. If you are attending to a patient whose decision-making is in question, you may need to decide frequently (each time a decision is needed) whether the person has capacity to make each and every decision.

A person's capacity can fluctuate and can be influenced by a number of matters:

- **Their health:** Does the person have an illness or condition that worsens from time to time and affects their capacity, such as a mental illness or the effects of drugs, alcohol or anaesthetics? For example, people with a mental illness may have fluctuating capacity; they are able to make decisions at certain times but not able to make some or all decisions at other times
- **The timing of the decision:** Is the person tired? Is the person more able to make decisions in the morning, for instance?
- **How much information** has the person been given, and what is their level of understanding about the information?
- **Communication between the assessor and the person:** Is there effective communication in place at the assessment so each person understands the other? For example, neutral interpreters or advocates may be required.

Some examples of where patients are not considered as having this capacity include: children too young to understand, some people affected by mental illness, dementia, brain damage or intellectual disability, and some people who are temporarily or permanently impaired by drugs or alcohol.

Efforts should be made to support patients to be able to make their own decisions.

Checklist on assessing capacity

- € Does the person understand the nature and effect of the proposed treatment **at the time that the medical decision is required**, not hours or days before or after it is made?
- € Does the person know the 'nature' of the treatment? That means, do they understand broadly and in simple language:
 - what the medical treatment is?
 - what the procedure involves?
 - why it is proposed?
 - that there are other options? If choosing between options, the person must understand what each option is, what it involves, the effect of each option, and the risks and benefits
 - what it means if they don't have the treatment?
- € Does the person understand the 'effect' of the treatment? Are they aware, in simple terms, of the main benefits and risks of the treatment?
- € Does the person have the ability to indicate whether they want the treatment? Can they communicate any decision made, with assistance if necessary?
- € Has the person made the decision freely and voluntarily?

Also consider that a person has a right to refuse treatment. What most people would decide to do in the situation is irrelevant. Consider the following:

- € Is refusal of treatment consistent with the person's views and values?
- € Is this behaviour usual for the person?
- € Has all the relevant information been given to the person in a way they can understand?

Tips on Questioning:

Remember, when assessing whether a person has the capacity to make medical decisions, it is important you:

- ✓ ask open-ended question
- ✓ do not ask leading questions
- ✓ frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker
- ✓ ensure it is the person being assessed who answers the questions. In some circumstances the person may need support from a neutral person such as an advocate or an interpreter

Note that interpreters can be organised if you can't understand the patient or have difficulty communicating with the person in English. An inability to speak English

does not mean that someone has no capacity to make decisions. The NSW Community Relations Commission (CRC) has information about interpreters on their website: http://www.crc.nsw.gov.au/services/language_services/fact_sheets. Or call the CRC on 1300 651 550.

Questions

Here are some specific questions you may ask as part of the assessment process to determine if the person has capacity to make medical decisions.

- Tell me about your health and why you need some medical treatment?
- What is the medical treatment that you might be having? Can you explain it to me?
- Where will you be having the treatment?
- How long will it take?
- How will the treatment help you? What are the good things about the treatment?
- Will there be any bad things about the treatment? What are they?
- How do you think you will be able to deal with these?
- What are the risks of having the treatment?
- Is there any other treatment you might be able to have? Can you tell me about it?
- How would this other treatment help you?
- What are the risks of having this other treatment?
- Which do you think is the best treatment? Why?
- What would happen if you didn't have any treatment at all?
- What do your family and friends think of the treatment?
- What do they want you to do? Why?

References:

The information on these pages is from *The Capacity Toolkit- A guide to capacity assessment when a person's ability to make decisions are in doubt*, Diversity Services Unit of the NSW Department of Police and Justice (2008)

http://www.diversityservices.lawlink.nsw.gov.au/divserv/ds_capacity_tool.html

NSW Health Policy Directive: *Consent to Medical Treatment - Patient Information* (2005)

http://www0.health.nsw.gov.au/policies/PD/2005/pdf/PD2005_406.pdf

More information:

For more information relating to capacity see [Capacity Australia](#).