

CAPACITY

2.1 The term capacity describes a person's ability to make a specific decision at the time that this needs to be made. A key principle of the Capacity (Bailiwick of Guernsey) Law 2020 is the presumption of capacity. It should be assumed that the person has the capacity to make their own decision, unless it can be established that they lack capacity.

2.2 This includes simple decisions such as what to wear or what to eat, as well as more complex decisions such as those regarding medical treatment, where to live or making a Lasting Power of Attorney.

Lack of capacity

2.3 Section 4 (1) of the Law states: 'For the purposes of this Law, a person (P) lacks capacity in relation to a matter, if at the material time –

- (a) P is unable to make a decision in relation to the matter, and
- (b) P's inability is due to an impairment of, or disturbance in the functioning of, the mind or brain, whether the impairment or disturbance is permanent or temporary.

2.4 An assessment of P's capacity must be based on their ability to make a specific decision at the time it needs to be made, and not their ability to make decisions in general. The impairment or disturbance in the functioning or disturbance of the mind, does not have to be permanent. A person can lack capacity to make a decision at the time it needs to be made even if:

- the loss of capacity is temporary or
- P's capacity changes over time.

A person may also lack capacity to make a decision about one issue but not about others.

2.5 The person assessing P's capacity to make a decision, must never base the outcome on unjustified assumptions about the following:

- P's age, gender, sexuality, disability, race or appearance or
- P's condition or their behaviour.

2.6 The term 'appearance' refers to all aspects of the way people look. This includes, but is not limited to, the physical characteristics of certain conditions (for example, facial features related to Down's syndrome or muscle spasms

caused by cerebral palsy), the colour of a person's skin as well as aspects of appearance like tattoos and body piercings, or the person's clothing. ^[L]_[SEP]

2.7 The term 'condition' includes physical disabilities, cognitive impairment, learning difficulties and disabilities, brain injury, age related illness, as well as temporary conditions (for example, an infection, intoxication or unconsciousness).

2.8 Aspects of behaviour might include shouting or gesticulating, talking to oneself or avoiding eye contact. It may include aggressive behaviours.

Scenario: identifying whether a person may be unable to make a decision

Mr Andrew Seymour is 54 and has a mild learning disability. He lives in his own flat, within a supported accommodation service. Mr Seymour has support with shopping, preparing his meals, laundry and managing his tenancy. His support workers notice that Mr Seymour has started to have some difficulty with his sight and has some minor accidents, such as bumping into furniture and spilling drinks. They support him to see an optician who advises that Mr Seymour will need some specialist tests at the hospital.

The optician explains to Mr Seymour what tests he will need and why these have to be carried out in hospital. Mr Seymour appears quite confused by the explanation and tells the optician that he does not want to go to hospital. Although the optician and the support worker reassure Mr Seymour that this is simply an appointment for tests, he continues to appear confused. The optician decides to carry out a mental capacity assessment to establish whether Mr Seymour can make his own decision about having the recommended tests.

Evidence required by the Law in relation to lack of capacity

2.9 The first principle of the Law is the assumption of capacity. In order to state that P lacks capacity to make a specific decision, it is necessary to provide evidence to support this. A capacity assessment should show, *on the balance of probabilities*, that P lacks capacity to make the specific decision. The person, completing the capacity assessment, should demonstrate that they have a 'reasonable belief' (see 2.52) that an individual lacks capacity to make the relevant decision.

When should capacity be assessed?

2.10 Assessing capacity well is important for everyone affected by the Law. A person who is assessed as lacking capacity will have specific decisions made for them. Equally, P could make a decision without understanding the consequences, and this then leads to them being abused or exploited. For example, P may pay excessive amounts for repairs to their property, even though this work is not necessary. It is important therefore to carry out an assessment when P's capacity is in doubt. It is also important that the person who undertakes the assessment can justify their conclusions.

2.11 There are a number of reasons why someone might question P's capacity to make a specific decision. These include:

- P's behaviour or their circumstances means that the decision maker has doubts about P's capacity to make their own decision,
- a situation where P demonstrates the inability to make a specific decision,
- someone who knows P raises concern about their capacity, and
- P has a diagnosis of a mental disorder and has already been assessed to lack capacity to make other decisions.

The presumption of capacity is not a licence to avoid assessing P's capacity. If there is a reason to investigate then you should do so.

2.12 If P has previously made decisions which were based on a lack of understanding of the risks or the inability to weigh the information, these can form part of a capacity assessment, particularly if P repeatedly makes decisions that puts them at risk or results in significant harm. A capacity assessment can also consider evidence of P's actual decision making in their day to day life as well as the information from the assessment interview¹. For example P may say one thing but act differently.

2.13 Capacity is decision and time specific. It may therefore be necessary to review P's ability to make a decision if their condition changes. A person with a brain injury who is undergoing rehabilitation may regain capacity over time. Likewise, a person with a progressive condition may lose capacity as their health declines. P may lose the ability to make some complex decisions, such as admission to a care home or consent to treatment, however they may still be able to make less complex decisions, such as what to wear and what to eat.

¹ See NICE guidance: Decision Making and Mental Capacity 3rd October 2018 <https://www.nice.org.uk/guidance/ng108>

2.14 The decision maker (see 2.15) should provide evidence to support their assessment that P lacks capacity to make a specific decision on the balance of probabilities. The core principle is the presumption of capacity.

Who should assess capacity?

2.15 The person who assesses an individual's capacity to make a particular decision will usually be the person who is involved in that decision, for example the doctor proposing treatment. This person is known as the **decision maker**. For many day-to-day decisions, the decision maker would be P's carer. For example, a care worker may need to assess whether P can consent to have help to shower or to take their medication.

2.16 A capacity assessment does not need to be completed by a person who is professionally qualified. The same principles and processes apply to every person completing a capacity assessment. It is important to be able to demonstrate how the decision maker reached their conclusion. Some decisions may require additional support to ensure that the person has been fully supported to participate.

2.17 If a doctor or healthcare professional proposes treatment or medical tests, and P is not able to make their own decision regarding the proposed treatment, the healthcare professional must assess P's capacity to make this decision. If P is assessed to lack capacity to make the specific decision, the healthcare professional must follow the best interests process to decide whether the proposed treatment should be given.

2.18 For a legal transaction (for example, making a will or selling a house), the advocate should assess their client's capacity to make the decision to issue instructions, if there is any doubt as to whether they can make this decision.

2.19 In some situations, it may be necessary to involve a professional to support P's involvement in the assessment. This could be, for example, a psychiatrist, psychologist, speech and language therapist, occupational therapist or social worker. However, whilst such professional opinion may contribute to the assessment, the final decision about P's capacity must be made by the decision maker (the person intending to provide the care or treatment or to act on a legal matter).

2.20 If P is expressing different views to different people (perhaps they are trying to please everyone or tell people what they think they want to hear), this may indicate that they are unable to understand or to use the relevant information and

the likely foreseeable consequences of deciding one way or the other. In such circumstances it may be helpful to seek the advice of a professional who has relevant expertise.

Assessing Capacity

2.21 To determine whether P has capacity to make the specific decision, the Law provides a two stage test. This requires consideration of whether

- (i) P is able to make the decision (**the functional assessment**) and,
- (ii) if they are unable to do so, whether this inability is due to an impairment of, or a disturbance of the functioning of the mind or the brain (**the diagnostic assessment**).

It is not for P to prove they have capacity to make the relevant decision. It is for the assessor to show that P does not have capacity.

2.22 The assumption of capacity is the first core principle. The capacity assessment should be completed due to P's inability to make the decision, before considering any disorder or impairment.

2.23 A lack of capacity can only be established if the inability to make the decision is due to an impairment of, or a disturbance in the functioning of the mind or the brain.

Functional Test

2.24 To have capacity to make a decision, P must be able to do all of the following:

Understand the information relevant to the decision
Nature (what) + Purpose (why) – Consequences/risk



Retain the information
long enough to make the decision



Use or weigh the information to make the decision
Take account of the information when making the decision



Communicate the decision
NB this does not need to be by speech

If P is unable to do any one of these elements, P lacks capacity to make the specific decision.

Understanding the relevant information

2.25 The ability to understand means that P understands the nature and purpose and reasonably foreseeable consequences of deciding one way or another. It also includes the reasonably foreseeable consequences of failing to make the decision. In order to assess whether P understands the information they must be provided with the relevant information in a way that is appropriate to support the person to understand.

Relevant information for medical treatment

2.26 P needs to understand:

- the nature, purpose and effects of the proposed treatment. It is not necessary for P to understand every detail of the options however, the

healthcare professional must provide information about the potential risks of, (as well as those of not) having that treatment.²

Relevant information for residence

2.27 P needs to understand:

- the different options of where they would live, including the type of accommodation (whether this would be supported living or residential/nursing home placement, what sort of property this will be)
- where each property will be and any risks of living in that area
- the difference between living somewhere and simply visiting it
- the activities available to P in each option
- whether P will be able to see friends and family in each place
- there may be rules or restrictions, such as those of a tenancy agreement
- who P would be living with at each option
- the sort of care P would have in each place
- that P may be living with other people
- that P may be limited in their access to the community
- there may be set meal times with limited choices of meals
- that staff administer medication
- that P may have a loss of privacy

Relevant information for care

2.28 P needs to understand:

- which areas P needs support with
- what sort of support P needs
- who will provide the support P needs
- what may happen to P if they do not have support or if P refuses this (such as risk of harm)

Relevant information for contact with others

2.29 P needs to understand:

- whom the contact will be with
- the relationship between P and that person
- the nature of the contact. (e.g will this be in a private place or in the community? How long will it be for? Will a support worker be present?)
- the pros and cons of contact with the person

² *Montgomery v Lancashire Health Board [2015] UKSC 11*. Adult health and social care starts with consent. **Consent** equals understanding the **Nature** (what) plus the **Purpose** (why) plus the **Consequences** (risks) and it is **freely given** (not coerced)

- any risks posed by the contact, including any criminal convictions held by them

Significant restriction of P's personal rights and freedoms

2.30 P needs to understand the main elements of the restrictions which P will be, or is, subject to. This would need to be specific to P's situation but could include:

- P would be confined to a care home or property
- P may not be able to go out unescorted
- P would not be free to leave the relevant place to live elsewhere
- Meals and drinks may be provided at set times, with limited choice
- Staff may administer medication
- P may be living with people they do not know
- P may have limited privacy
- P may have regular checks by staff or have sensors and/or CCTV in place monitoring P's whereabouts
- P may not have the freedom to do things when they want, for example if P is dependent upon staff to help P to get out of bed or to wash

2.31 The important issue is that P has sufficient information to support their decision making. Information should be provided in a way that is appropriate to meet the individual's needs and circumstances. For example:

- a person with a learning disability may need somebody to read information to them. They might also need visual aids to support them to understand what is happening. It might also be helpful for them to discuss the information with someone who can support them, such as a family member or an Independent Capacity Representative
- a person with anxiety may find it difficult to reach a decision about proposed treatment, whilst in a meeting with professionals. They may prefer to read the relevant documents in private. This way they can come to a conclusion and ask for support if necessary
- some individuals might need to be given information several times and to check that they can understand the information. If P has difficulty understanding, it might be useful to present information in a different way (for example, different forms of words, pictures or diagrams). Written information, audio information and the use of technology can all support people to remember information. Consideration should also be given to whether there is a time of day when P may be best able to understand the

information.

2.32 Relevant information must include what the likely consequences of a decision would be. In some cases, it may be enough to give a general explanation using simple language. If a decision could have serious or grave consequences, a person will need more detailed information or access to advice.

2.33 When assessing capacity, the decision maker should document why they believe that the person could not understand the information, for example, what information was provided and how the person responded to this.

Scenario - Supporting people to understand the relevant information

Ms Arabella Jackson is 50 years old and has a mild learning disability. She has no verbal communication but uses Makaton, a form of sign language used by people with learning disabilities. She lives in supported accommodation. Ms Jackson has been invited for routine breast screening, due to her age.

As this is routine screening and there are no current concerns about Ms Jackson's health, her carers know that they can spend time supporting her to make her own decision, as far as she is able. Ms Jackson's carers use Makaton and pictorial aids to explain the reasons for the test and the process for carrying this out. They explain the potential risks of not having the test at this time. Her carers provide the information over a period of time, so as not to overload Ms Jackson. Her carers are confident that Ms Jackson has understood the information provided. When she attends her appointment, Ms Jackson is accompanied by a Makaton interpreter. Ms Jackson confirms that she is in agreement to the screening test going ahead.

Retaining information

2.34 P must be able to hold the information in their mind long enough to be able to use it to make the decision. People who can only retain information for a short period cannot automatically be assumed to lack the capacity to decide. Items such as notebooks, photographs and computers can support people to record and retain information.

Scenario - Retaining Information

Mr Meadows has been diagnosed with advanced dementia. Although he can still communicate verbally, he has difficulty understanding information and his short-term memory is noted to be poor. He previously smoked for many years

and has recently developed a bad cough. His GP believes that he should have a chest x-ray.

Mr Meadows attends the appointment with his wife to support him. The GP explains the reason she thinks Mr Meadows should have the X-ray and the potential risks of not doing so. She repeats the information several times and asks Mr Meadows whether he wishes to have this test. Mr Meadows appears to understand the doctor's explanations but, each time the GP asks whether he is willing to have the X-ray, Mr Meadows asks the reason for this test. Mrs Meadows tells the GP that her husband is not able to retain information for even short periods and that he had asked her several times about why he had been coming this appointment. The GP concludes that Mr Meadows is unable to retain the relevant information for long enough to make his own decision and therefore he lacks capacity.

Using or weighing information

2.35 For a person to be deemed to have capacity to make a decision, they must be able to use or weigh the relevant information. This means that P has accepted the information provided and has taken account of this. Sometimes people can understand information but an impairment of, or disturbance in the functioning of the mind affects their ability to use this. In other cases, the impairment or disturbance leads to a person making a specific decision without using the information they have been given.

2.36 For example, a person with dementia may not understand the effect that condition has on their ability to manage their activities of daily living. As a consequence, they may not be able to weigh up the information to decide how best to meet their care needs. To be able to use information refers to the ability to apply it in practice.

2.37 P can disregard any information that they disagree with when making a decision, even if this is contrary to the views of others. Unless the basis for disregarding the information is due to an impairment or condition affecting the mind or brain, this may simply be an unwise decision and not an indication of a lack of capacity. For example, a person may choose to continue smoking cigarettes despite the evidence regarding health risks, however a person with

Prader-Willi syndrome³ may be unable to stop eating excessively, despite the impact on their weight and health. This is because their condition affects their ability to use the relevant information. P may not agree with the advice or recommendation of the professional but this does not mean that P lacks capacity.

2.38 If P is able to use the relevant information, the weight they attach to information in the decision making process is for P to decide. This requires care when assessing P's capacity to ensure that the decision maker does not confuse the way that P applies their own values (which may be different from those of the decision maker) with the inability to use or weigh information. The assessor should seek to find out P's values and beliefs.

2.39 If P does not believe the information provided this may indicate a lack of capacity. For example, if P does not believe that they have a particular condition, they will not be able to use or weigh that information to make the decision.⁴

Scenario – using or weighing information

Mrs Jones has been diagnosed with dementia. She lives alone with the support of carers, who visit three times a day. As her condition has declined, Mrs Jones has suffered a number of falls, resulting in admission to hospital. Each time she has been insistent that she can manage and that she does not want to move to a care home. Consequently, she has been discharged back home. One day Mrs Jones' carers visit in the morning to find her lying on the floor. She is dressed in the clothes she had been wearing the previous day. Mrs Jones is admitted to hospital where she is found to be very confused and dehydrated. It is thought likely that she had fallen the previous evening and had therefore been lying on the floor all night.

The hospital social worker visits Mrs Jones on the ward to discuss whether it is safe for her to return home or whether she should be admitted to a care home.

³ Prader-Willi syndrome is a rare genetic condition which causes learning difficulties and excessive appetite and overeating, which can easily lead to dangerous weight gain

⁴ See *MM [2007] EWHC 2003 (Fam)* Munby J stated "if one does not believe a particular piece of information then one does not, in truth, comprehend or understand it, nor can it be said that one is able to use or weigh it." In other words, the specific requirement of belief is subsumed into the more general requirements of understanding and the ability to use and weigh information.

When he is talking with Mrs Jones he notes that she is quite confused and does not seem able to make her own decision, therefore he completes a capacity assessment. Mrs Jones is able to respond to the social worker's questions and he assesses her to be able to understand and retain the information. However, when he talks with her about the risk of further falls, Mrs Jones is adamant that she will be safe and denies that she has ever had any injuries from falls, even when the social worker shows her the information regarding her current hospital admission. The social worker assesses that Mrs Jones is unable to weigh or use the relevant information and therefore she lacks capacity to make her own decision regarding her accommodation.

Communicating the decision

2.40 The final stage of the capacity assessment is for P to be able to communicate the decision. Occasionally it is not possible for a person to communicate at all. This will apply to very few people, but includes:

- people who are unconscious or in a coma, or
- those with 'locked-in syndrome', who are conscious but cannot speak or move at all

2.41 If P cannot communicate their decision in any way at all, the Law states they should be treated as unable to make that decision. ^[1]_{SEP} Before deciding that P is unable to communicate their decision, it is important to make all practical and appropriate efforts to support them to do so. This could include involving a speech and language therapist or other professionals. ^[1]_{SEP}

2.42 Communication by simple muscle movements can show that P can communicate and may have capacity to make a decision. For example, a person might be able to blink an eye or squeeze a hand to say 'yes' or 'no' however particular care should be taken in that situation.

Lack of capacity

2.43 If P is unable to do one of the above four elements then it should be considered whether this inability is due to an impairment of, or disturbance in the functioning of the mind or brain.

Diagnostic test

2.44 This stage requires evidence that the person has a mental disorder which can be either temporary or permanent. If a person does not have an impairment of, or a disturbance in the functioning of their mind or brain, they will not lack

capacity under the Law.

2.45 Examples of an impairment of, or a disturbance in the functioning of their mind or brain include the following:

- conditions associated with some forms of mental illness
- dementia
- significant learning disabilities
- brain injury
- physical or medical conditions that cause confusion, drowsiness or loss of consciousness
- delirium
- concussion following a head injury
- the symptoms of alcohol or drug use

Causative Nexus

2.46 The Law states that for a person to be assessed to lack capacity the inability to make the decision must be “due to an impairment of, or disturbance in the functioning of, the mind or brain, whether the impairment or disturbance is permanent or temporary.” The decision maker must be able to demonstrate that the reason that P cannot make their own decision is as a result of a mental disorder. This is known as the **causative nexus**.

2.47 Capacity assessments must link the inability to make a decision to the impairment or disturbance in the functioning of the ^{SEP}mind or brain. It is not sufficient to rely on the fact that there is a diagnosis or condition or that it ‘may be’ related to the inability to make the decision. The Law states “due to” to ensure there is an identified link between the inability to make the decision and the impairment or disturbance in the functioning of the mind or brain.

Scenario – the causative nexus

Mr Singh was diagnosed with dementia in Alzheimer’s Disease seven years ago. He had previously been a University lecturer. His condition is declining and he is now having difficulty walking safely. He has been provided with a frame to support his mobility but he often forgets to use it and has had a number of falls, although thankfully he has not sustained any serious injuries. His family want him to use a wheelchair for his safety. The Occupational Therapist talks to Mr Singh but his responses are out of context with the subject. The Occupational Therapist completes a formal mental capacity assessment and notes that Mr Singh is unable to understand the information she provides as to why he would be safer using a wheelchair. She repeats the information several times but it is clear that Mr Singh is unable to understand

or retain this information for even the briefest of time. She assesses Mr Singh to lack capacity to make his own decision.

The occupational therapist knows that the symptoms of Alzheimer's Disease increase over time and that a decline in mobility can come in the later stages of the disease. Communication is also affected at this stage of the disease, including memory problems. The occupational therapist knows that Mr Singh had previously been able to understand complex information and to communicate well (as a lecturer) but his family advise her that this has declined over the past two or three years. As a decline in communication and understanding information is a symptom of dementia, she is of the opinion that Mr Singh's inability to understand the relevant information is due to his diagnosis of Alzheimer's Disease.

Completing capacity assessments

2.48 Carers and family members would not usually need to follow formal processes, such as involving a professional to make an assessment. However, if somebody challenges their assessment, they should be able to describe the steps they have taken. They must also have clear reasons for believing that P lacks capacity. Paid carers may wish to make note of capacity assessments in case notes.

2.49 When assessing capacity the assessor should:

- start by assuming that P is able to make their own decision. (Is there anything to suggest otherwise?)
- consider how best to communicate with P so that they have the best possible chance to participate,
- consider whether the decision could be delayed in order to help P to make their own decision or to give time for the person to regain capacity,
- give P all the information they need to be able to make the decision and
- be aware that simply because P agrees with you or to the proposed act, this does not necessarily mean that they have capacity. Compliance is not informed consent.

Factors to consider for capacity assessments

2.50 It is important to assess P when they are most able to engage in the process. This may be a particular time of day when P may be more alert or able to communicate well or in a particular setting where P may feel most comfortable and able to participate. This may not always be possible, depending on the nature and urgency of the decision to be made, however consideration should be

given to how to support P to participate as far as they are able to do so.

2.51 Anyone assessing capacity must not assume that P lacks capacity simply because they have a particular diagnosis or condition. There must be evidence that the impairment or disturbance in the functioning of the mind or brain directly affects the ability to make the specific decision at the time it needs to be made.

What is a 'reasonable belief' of a lack of capacity

2.52 Carers (whether family carers or other carers) are not expected to be 'experts' in assessing capacity. However, to have protection from liability when providing care or treatment, they must have a 'reasonable belief' that any person they care for has, or lacks, capacity to make the relevant decisions about their care or treatment. To have a reasonable belief of a lack of capacity, the person assessing capacity must have taken appropriate steps to establish that P lacks capacity to make the decision or consent to an act, at the time the decision needs to be made. This means following the steps in the Functional Test (2.24).

Involving professionals

2.53 It may be necessary for the decision maker to seek professional support and guidance, for example if the decision is particularly complex. If P has a particular condition or disorder, it may be appropriate to involve a specialist or other professional with experience of working with people with that diagnosis. The person carrying out the act, or providing the care or treatment, is still the decision maker. When other professionals are consulted, this is to support the assessment, for example by supporting P's ability to communicate or to provide information about how P's condition may affect their cognitive abilities.

2.54 Professional involvement might be needed if:

- the decision is very complex or has serious consequences
- an assessor concludes that a person lacks capacity, but P challenges the finding
- family members, carers and/or professionals disagree about P's capacity
- there is a conflict of interest between the assessor and P
- P is assessed to have capacity but repeatedly makes decisions that put them at risk or could result in them suffering significant harm

2.55 In some cases, it will be necessary to complete a further, formal assessment of a person's capacity to make a particular decision. Such cases would include:

- if P's capacity to sign a legal document could later be challenged

- if P or their family/carers challenge a capacity assessment and the matter has been referred to the Mental Health and Capacity Review Tribunal⁵
- if there has been a referral to the Committee for Health and Social Care's Safeguarding Team⁶ due to concerns about P's capacity to make a Lasting Power of Attorney.

What practical steps should be taken to support P when assessing capacity?

2.56 P must be supported to participate in the assessment. The assessor should consider which steps are relevant and should:

- be clear about the decision to be made and explain the reason for the assessment,
- take all reasonable steps to minimise distress and encourage participation, consider whether there is a time of day when the person is more alert or able to participate,
- explain the options available to P in relation to the decision. The assessor should consider what information P needs to be able to explore the options and to make a decision. To do so they may need access to certain relevant documents and/or background information to provide P with the relevant information.⁷ See also 2.25-2.29.
- consider P's communication needs. Does P need an interpreter or use communication aids or equipment? The assessor should use clear language and avoid the use of jargon.
- allow enough time for the assessment, including giving people with communication needs more time, if needed. A capacity assessment does not necessarily need to be completed in one session. Some people may need information provided over time. If a decision is not urgent, consideration should be given to conducting this in more than one session, if that would be appropriate, or delaying it until P feels less anxious and may be more able to make the decision.

⁵ The Mental Health and Capacity Review Tribunal will be introduced at a later date.

⁶ This includes the Sark Safeguarding Officer.

⁷As Theis J noted in judgment in *LBX v K and ors* [2013] EWHC 3230: "In *CC v KK* [2012] EWHC 2136 in the Court of Protection Baker J. emphasised the need to present the options to the person concerned and not to start the assessment with a blank canvas. He adopted the words of Macur J. in *LBL v RYJ* [2010] EWHC 2664 that it was not necessary for a person to weigh up every detail of the options but rather to consider the salient features. He also stressed at paras.64 to 65 of the *CC v KK* decision that it was crucial to recognise that different individuals gave different weight to facts and professionals must not conflate a capacity assessment with a best interests assessment."

- introduce the assessment and conduct it in a way that is respectful, collaborative, non-judgmental and which preserves P's dignity, and ensure, as far as is reasonably possible, that the assessment takes place at a location and in an environment where the person is comfortable
- identify the steps a person is unable to carry out even with all practicable support
- consider whether involving people, with whom the person has a trusted relationship, would help the assessment.

2.57 When preparing for an assessment, consider P's decision-making history, including the extent to which P felt involved and listened to, the possible outcomes of that assessment, and the nature and outcome of the decisions reached.

People with fluctuating or a temporary lack of capacity

2.58 Fluctuating capacity means that P has times when they can make decisions and times when they are not able to. This can be because P has an illness or condition that gets worse at times, affecting their ability to make decisions. Temporary factors that may also affect someone's ability to make decisions include acute illness, severe pain, the effect of medication, intoxication, and distress after a death or shock.

2.59 Some people's capacity can fluctuate on a reasonably predictable basis, for example a person with dementia may be able to function quite well in the morning but may be very confused in the afternoon. Other people's capacity may fluctuate unpredictably or over days or weeks.

2.60 An assessment should only examine P's capacity to make a particular decision, at the time when it needs to be made. With some, one-off non-urgent decisions, it may be possible to delay until P has the capacity to make their own decision. If P's ability to make decisions changes at different times of the day, it would be advisable to speak with P at the time when they are at their best.

2.61 It may be helpful to make a distinction between one-off decisions, such as making a will or a Lasting Power of Attorney and repeated decisions which are taken on an ongoing business, such as managing one's affairs. As Sir Mark Hedley stated "The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent."⁸ This is known as the longitudinal view. The judge noted that "When P was relaxed and in a good place he might well be regarded as having capacity. However, when

⁸ *Cheshire West and Chester Council v PWK* [2019] EWCOP 57 para 18.

he became anxious his position could be very different.”

2.62 Managing a health condition involves making many decisions daily or weekly. Considering P’s ability over the course of the day or week can provide a clearer picture. Is P mostly able to make decisions during the day or week or are there only limited periods when P is able to do so? If there are only very limited times when P can make the necessary decision, it would most likely be appropriate to conclude that they lack capacity. Case law has described this as consideration at a macro level, or a series of micro-decisions. In a judgment regarding capacity with regard to diabetes management, the judge concluded (Para 48):

“a) on the assessment of capacity to make decisions about diabetes management, in all its health consequences, the matter is a global decision, arising from the inter dependence of diet; testing her blood glucose and ketone levels; administration of insulin; and, admission to hospital when necessary in the light of blood glucose levels. And

b) that [the person] lacks the capacity to make those decisions, and having regard to the enduring nature of her personality disorder which is lifelong and therefore unlikely to change.”⁹

2.63 It may not always be possible, or appropriate, to delay making the decision. A decision may need to be made on P’s behalf, based on the balance of probabilities, that P lacks capacity to make the decision, at that time. ^[11]_[SEP]The decision maker should explain why they had a reasonable belief that P has or lacks capacity.

Refusal of assessment

2.64 It is important to be aware that P could be distressed by having their capacity questioned, particularly if they strongly disagree that there is a reason to doubt their ability to make the specific decision. P may refuse to undergo an assessment of capacity or refuse to be examined by a doctor or other professional. In these circumstances, it is important to explain to P why the assessment is needed and the likely consequences of such refusal. If P continues to refuse to participate, the assessor will need to base their conclusions on the balance of probabilities. In such cases, this will require involving the person’s family, friends and/or carers to provide information and consideration of previous decisions made by the person.

⁹ *Royal Borough of Greenwich v CDM* [2019] EWCOP 32

Scenario – assessing capacity when a person refuses to participate.

Mrs Pamela Brown lives alone in a second floor flat. There is no lift access. Mrs Brown is unsteady on her feet but does not use a walking stick. When she goes out, she holds on to walls and hedges to avoid falling. She was diagnosed with dementia a year ago. The police contact the social work team as Mrs Brown has repeatedly been found wandering at night, without suitable clothing for the weather. There are reports that she has stopped strangers in the street and asked for help to find her way home.

The social worker, Chris Henry, visits Mrs Brown at her flat. Mrs Brown refuses to let Chris Henry in although she agrees to speak with him at her front door. The social worker observes that the flat is very cluttered and dirty. Mrs Brown appears very unsteady and holds on to the door whilst she is talking with Chris, although she denies that she has any problems with her mobility when he asks about this. He is very concerned that she does not seem to be aware of her situation or the risks she faces. He explains that he needs to complete a capacity assessment to assess whether she has capacity to decide about the risks of remaining in her own home. When he explains this, Mrs Brown becomes angry and says that she is not prepared to have an assessment and shuts the door. She refuses to open this, even though Chris politely requests that she talk with him.

Chris returns the following day at a different time to see whether Mrs Brown is more willing to talk with him, however she refuses to talk with him. Chris has had a further report from the police that they had had to return her home the previous night and were concerned that she was finding it difficult to use the stairs safely. Chris decides that the assessment cannot wait, due to the potential risks to her safety. He consults with Mrs Brown's GP, the police officer who has brought her home and with her son, who lives in England. The GP says that she has noticed that Mrs Brown has not attended the surgery recently even though she has been invited for a regular health check. This is unusual as she has previously kept her appointments. The police officer said that Mrs Brown appeared confused and distressed. She did not seem to understand what he was saying when he spoke with her and this was why he had contacted the social work team. Mrs Brown's son advises the social worker that his mother's communication has declined significantly over the past few weeks. He had visited her three weeks ago and suggested that she should move to a care home or have carers to help her in her home, but his mother had been very angry and told him to leave. Most importantly, he tells the social worker that he does not believe that his mother understands the

risks she is facing at home.

Chris takes account of all this information and gives weight to Mrs Brown's son's views as he knows his mother well. Chris also notes that Mrs Brown had demonstrated an inability to weigh information when he had spoken with her (denying that she has mobility difficulties). His opinion is that, on the balance of probabilities, he has a reasonable belief that Mrs Brown lacks capacity to make her own decision about how to meet her care needs and to maintain her safety.

2.65 Nobody can be forced to participate in an assessment of their capacity to make a decision. The assessor should consider whether they have enough surrounding evidence to come to a reasonable belief about capacity or incapacity. If the stakes are high, for the person or others, it may be necessary to make an application to the Mental Health and Capacity Review Tribunal to decide whether the person has or lacks the capacity to make the relevant decision. If there are serious worries about the person's mental health, it may be more appropriate to consider the Mental Health (Bailiwick of Guernsey) Law 2010, but refusing a capacity assessment does not in itself justify using the Mental Health Law.

Maintaining a record of assessments

2.66 It is good practice for a professional carrying out an assessment of P's capacity to make the relevant decision, to record the findings in their relevant professional records. Assessments of P's capacity to make day-to-day decisions do not require a formal assessment or recorded documentation. It would be good practice however, for paid care workers to keep a record of the steps they have taken to consider P's capacity when caring for P. <sup>[L]
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Challenging a finding of lack of capacity

2.67 There may be occasions when P or P's friend or family member may wish to challenge the outcome of a capacity assessment. If the challenge comes from P, they might need support from family, friends or an Independent Capacity Representative¹⁰ (for decisions relating to serious medical treatment, accommodation, safeguarding or a Protective Authorisation). P or P's representative should ask the assessor to provide evidence to support their conclusion that P lacks capacity to make the relevant decision

2.68 The assessor must show they have applied the principles of the Law and

¹⁰ Independent Capacity Representatives will be introduced at a later date.

that the capacity assessment is objective.¹¹ All people making decisions for a person who lacks capacity will need to show that they have also followed the guidance in this chapter. This includes attorneys and family as well as all professionals.

2.69 If a disagreement cannot be resolved, the person who is challenging the assessment may refer the matter to the Mental Health and Capacity Review Tribunal (MHCRT) or the Royal Court, depending on the situation.¹² The MHCRT and the Royal Court have the authority to request a further assessment and to rule on whether P has capacity to make the specific decision.

15th March 2022

¹¹ In “KK v STCC [2012] EWCOP 2136 (26 July 2012) Baker J notes “Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person – including, of course, a judge in the Court of Protection – may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective. On the other hand, the court must be equally careful not to be influenced by sympathy for a person's wholly understandable wish to return home.”

¹² The Mental Health and Capacity Review Tribunal will be introduced at a later date.