

## 8 CAPACITY AND CONSENT:

- 8.1 Mental capacity is the term used to describe a cluster of mental skills that people use in their everyday lives in making decisions. It includes memory, logic, the ability to calculate and the flexibility to turn ones attention from one task to another.
- 8.2 Issues of capacity and consent are often central to our understanding and exploration of adult abuse. Wherever possible, it is essential that vulnerable adults understand the nature and effects of the alleged abuse and the choices and possible outcomes facing them.
- 8.3 One of the first questions often raised in investigations into allegations of abuse is: *'Did the person understand what they were doing when they gave a gift, transferred property or consented to an action by another person - was coercion, trickery or undue influence employed?'*
- 8.4 Denying a vulnerable adult has capacity when in fact they do, can itself be characterised as abuse. If there are concerns about mental capacity of the vulnerable adult or the alleged perpetrator, assessment of mental capacity must form part of the investigation.
- 8.5 In the context of adult abuse, there are two stages at which the capacity to give consent requires consideration:
  - (i) Did the vulnerable adult have the capacity to consent to the act, relationship or situation that constitutes the allegation of adult abuse?  
And
  - (ii) Does the vulnerable adult have the capacity to give consent to any actions that professionals wish to take to investigate the matter further and to take steps to prevent further abuse?
- 8.6 Although a person may not have consented to the abusive act, they may not agree to any agency intervention as a consequence. In circumstances where the vulnerable adult is adjudged to 'lack capacity', professionals and others are required to act in the 'best interests' of the individual concerned. This should apply even when there are doubts about an individual's capacity to make such decisions.

**New Mental Capacity Act:** In view of the fact that current law on decision-making for mentally incapacitated adults is fragmented and relatively inconclusive, new legislation in the form of a Mental Capacity Act is likely to be enacted in the next few years. This new legislation is likely to address many of the issues that currently exercise practitioner's minds and will provide some clarity in law of what our expectations are when someone loses capacity and when others have to help that person make decisions (See boxed text on page 134 for further details on this new Act).

## 8.7 'Capacity' – the Basic Principles:

8.8 The basic principle which underpins both current law and medical practice with regard issues of mental capacity, is that people should be 'enabled and encouraged to take for themselves those decisions which they are able to take'

*(Law Commission Report No.231 (1995) - para.2.46)*

8.9 Every adult has the right to make his/her own decisions and must be assumed to have capacity to do so unless proved otherwise. In approaching the issue of capacity, the following principles should be borne in mind:

- The need to promote an individuals autonomy and freedom by being encouraged and enabled to make their own decisions or to participate as fully as possible in decision making by being given help and support to make and express choice.
- The need for an individual to be given information in a way that facilitates their comprehension and that promotes their understanding.
- The need to be clear about the specific matter about which a person needs to make a decision.
- That the mental capacity of an individual is not a global absolute. That it is a decision specific is to say that a person may have capacity to make some decisions and not others. Some people may have more or less capacity from one day to another.
- In protecting an individual's autonomy and freedom, professionals look for least restrictive alternatives – interventions that cause the least disruption or change in the person's circumstances. At the same time, the right to make what might seem to be eccentric or unwise decisions must be protected.

8.10 The Law Commission has carried out a lengthy consultation on the subject of mentally incapacitated adults and has published a draft that defines a person lacking mental capacity:

If at the time –

- The person is unable to by reason of mental disability to make decisions for themselves on the matter in question; or
- The person is unable to communicate their decision on that matter because they are unconscious or for any other reason'

8.11 The Law Commission further states that a person should be regarded as unable to make a decision because of mental disability if the disability is such that, at the time that the decision needs to be made, the person is:

- Unable to understand or retain the information relevant to the decision; or
- Unable to make a decision based on that information.

8.12 This definition reflects the current legal position that capacity must be assessed in relation to the particular decision the individual purports to make.

8.13 Therefore the test of capacity to give consent to medical treatment varies from the test of capacity to make a gift or draw up a will for example. **It is essential that in situations where the vulnerable adult is thought to lack capacity, both medical and legal advice is sought at the earliest opportunity.**

8.14 Having said this however, it is possible to establish some key principles in assessing capacity. An individual must have the ability to:

- Understand and retain the information relevant to the decision in question; and
- Believe that information; and
- Weigh that information in the balance to arrive at a choice.

8.15 Therefore to demonstrate capacity, individuals should be able to:

- Understand in simple language what is being proposed, its purpose and nature and why it is being suggested;
- Understand the principle benefits, risks and alternatives;
- Understand in broad terms what will be the consequences of not pursuing the option(s) being suggested;
- Retain the information for long enough to make an effective decision; and
- Make a free choice (see next sub-section on 'consent')

## 8.16 **'Consent' – The Basic Principles:**

8.17 Borrowing from the 'Mental Health Act (1983): Code of Practice'  
– The term 'informed consent' can be defined as:

'The voluntary and continuing permission of the adult to agree to a course of action or inaction, based on adequate knowledge of the purpose, nature, likely effects and risks of the 'proposed action/inaction' including the likelihood of its success and any alternatives to it. Permission given under any unfair or undue pressure is not consent'.

8.18 The above definition refers to 'Undue pressure or influence' which has received increasing attention in preventing the abuse of vulnerable adults. 'Undue influence' exists when an individual who is stronger or more powerful gets a weaker individual to do something that the weaker person would not have done otherwise. The stronger person uses various techniques or manipulations over time to gain power and compliance. They may isolate the weaker person, promote dependency or induce fear and distrust of others. It is typically the courts that make determinations of whether or not undue influence has been exercised.

8.19 When considering whether to disclose personal information, many of the data protection issues surrounding disclosure can be avoided if the informed consent of the individual has been sought and obtained. Consent must be freely given once the alternatives and consequences are made clear to the person from whom permission is being sought.

## 8.20 **In the 'Best Interests' of the Vulnerable Adult:**

8.21 In situations where the vulnerable adult is judged to lack capacity in relation to the decision that is in need of being made, decisions can be made in the 'best interests' of the adult concerned.

8.22 In the context of determining whether or not medical treatment should be provided, or what kind of medical treatment should be given to someone who lacks capacity, the House of Lords has defined 'best interest' as medical treatment which is:

'Necessary to save life or prevent a deterioration or ensure an improvement in the patient's physical or mental health; and in accordance with a practice accepted at the time by a responsible body of medical opinion skilled in the particular form of treatment in question' (*Code of Practice: Mental Health Act 1983*)

- 8.23 In other aspects of decision-making, the law is less clear. However the Law Commission has recommended that in deciding what is in a person's best interests; consideration should be given to the following:
- a) So far as ascertainable, the person's past and present wishes and feelings and the factors that they would consider if they were able to do so;
  - b) The need to permit and encourage that person to participate, or to improve their ability to participate, as fully as possible in anything done for and any decision affecting them;
  - c) If it is practicable and appropriate to consult them, the views as to that person's wishes and feelings and as what would be in their best interests of:
    - Any person named by them as someone to be consulted on those matters;
    - Anyone (whether their spouse, a relative, friend or other person) engaged in caring for them or interested in their welfare;
    - The holder or any continuing power of attorney granted by them;
    - Any manager appointed for them by the Court.
  - d) Whether the purpose of which any action or decision is required can be effectively achieved in a manner less restrictive of their freedom of action:

'In the case of anything done or a decision made by a person other than the court it shall be sufficient if that person reasonably believes that what they do or decides is in the best interests of the person concerned'

*(Law Commission Report No.231)*

#### 8.24 **Consent and the Sharing of Information:**

- 8.25 The advice from the Association of Chief Police Officers of England, Wales and Northern Ireland regarding 'consent' and the 'sharing of information' is as follows:
- 8.26 **Consent** – Many of the Data Protection issues surrounding the disclosure of information can be avoided if the informed consent of the individual has been sought and obtained. Consent must be freely given after the alternatives and consequences are made clear to the person from whom permission is being sought.
- 8.27 If the data is classified as sensitive data, the consent must be

explicit. In this case, the specific detail of the processing should be explained, the particular types of data to be processed, the purposes of the processing and any specific aspects of the processing which may affect the individual e.g. disclosures.

8.28 **Where an overriding public interest exists** - If informed consent has not been sought or sought and withheld, the agency must consider if there is an overriding public interest of justification for the disclosure being made to a third party. In making this decision and compliant with the Human Rights Act, the following questions may be considered:

- Is the disclosure necessary for the prevention or detection of crime, to protect public safety or to protect the rights and freedoms of others?
- Is the disclosure necessary for the protection of young or vulnerable people?
- What risk to others is posed by this individual (alleged offender)?
- What will be the impact of the disclosure on the offender?
- Is the disclosure proportionate to the intended aim?
- Is there an equally effective but less intrusive alternative means of achieving that aim?

8.29 Having due regard to the seriousness of the abuse and the potential risk to others, disclosure in such circumstances would be justified. It is important that it is made clear to the alleged victim and their relatives (if appropriate) that in these cases there is a necessity for the police an/or agency to investigate due to the possible risk to other vulnerable persons.