

Guidance Note: Assessing Capacity - Engagement Challenges

Introduction

1. A problem that can be encountered in practice is where it is difficult to engage the person in the capacity assessment. The following note can be used to assist practitioners when encountering this problem.

Unwilling or Unable to Engage: Knowing the Difference and What you must do

2. It is important to distinguish between the situation where the person is **unwilling** to take part in the assessment, and the one where they are **unable** to take part. As Justice Hayden emphasised in **QJ v A Local Authority & Anor**: *“[i]t is important to emphasise that lack of capacity cannot be established merely by reference to a person’s condition or an aspect of his behaviour which might lead others to make unjustified assumptions about capacity (s.2(3) MCA). [In this case, a]n aspect of [the person’s] behaviour included his reluctance to answer certain questions. It should not be construed from this that he is unable to. There is a good deal of evidence which suggests that this is a choice”*.
3. However, as Justice Poole emphasised in **AMDC v AG & Anor**: *“If on assessment P does not engage with the expert, then the expert is not required mechanically to ask P about each and every piece of relevant information if to do so would be obviously futile or even aggravating”*. Instead, what you do need to do is:
 - To consider what steps could be taken to assist the person to engage in the process; and
 - To record what steps were taken and what alternative strategies have been used.
4. Justice Poole went on to emphasise: *“the report should record what attempts were made to assist P to engage and what alternative strategies were used. If an expert hits a “brick wall” with P then they might want to liaise with others to formulate alternative strategies to engage P. The expert might consider what further bespoke education or support can be given to P to promote P’s capacity or P’s engagement in the decisions which may have to be taken on their behalf. Failure to take steps to assist P to engage and to support her in her decision-making would be contrary to the fundamental principles of the Mental Capacity Act 2005 ss 1(3) and 3(2)”*.
5. Only by taking these necessary steps can you distinguish whether it is the person’s choice to not engage or because they are unable.
6. It is also important to think of ways in which you can persuade the person to take part, for instance by explaining to them that helping you – the assessor – is likely to help them, because it will maximise the chances that you will find that they are able to make the decisions.

Examples of creative solutions to problems with engagement

It is often helpful to liaise with others about what alternative strategies might help. Solutions in reported cases have included:

- identifying whether the reason for non-engagement is embarrassment about particular issues and finding ways of assessing capacity which do not require confronting the person with the issue (see [Re FX \[2017\] EWCOP 36](#)); and
- giving the person an element of choice as to who will carry out the assessment (see [Wandsworth Clinical Commissioning Group v IA \[2014\] EWCOP 990](#))

Remember that you could be the problem and that it may not be your fault: you could simply be the “wrong” gender or from the wrong cultural background.

Difficulty due to Coercion and Control

7. If you think that the difficulty is because someone else is putting the person under pressure not to talk to you or engage with you, you may need to think about asking the High Court for help under its **inherent jurisdiction**. However, you should always remember that the Court of Protection can (under [S.48 MCA](#) – interim orders and directions) make an order requiring the person, who is in the way, to allow access where it has reason to believe that the person may lack capacity (see [Re SA; FA v Mr A \[2010\] EWCA Civ 1128](#)).
8. Ultimately, however, it is not possible to force a person to engage in a capacity assessment. You will therefore need to consider whether you have enough surrounding evidence to come to a reasonable belief about capacity or incapacity.

Next Steps if the Person is Unwilling to Engage

9. Once all avenues have been established, explored and exhausted, it is then down to the assessor and any associated professionals to determine if it is the person’s choice to decline, or a lack of capacity to engage with the assessment/decision. If the former, the person should be informed of their rights and it should be clarified if any other legislation would be appropriate to refer to and correct processes to follow depending upon the decision at hand.

Next Steps if the Person is Unable to Engage

10. If the person is deemed to lack capacity to engage then a Best Interest decision should be pursued and the assessment process **thoroughly reported**. An assessment of capacity will need to be made based upon the available information from these interactions and any surrounding evidence, with emphasis on support, presentation and the response of the person. Depending upon the situation, you may need to make an application to court to decide whether the person has or lacks the capacity to make the relevant decision.

Further Guidance (more detail)...

Obtaining Consent to Assess

11. Obtaining consent from the person to assess their capacity by explaining what a mental capacity assessment is, supporting the individual to know what is going on and why ensures they are actively involved in the process and are aware of their rights. It provides some initial insight into the person's ability to process and understand information, while also helping to establish a professional therapeutic working relationship, increasing the chances of engagement.
12. This process gives the individual the opportunity to consent to be assessed. This is both a necessary and important part of any healthcare treatment or intervention, and is part of the **ethical codes of practice** for healthcare professionals.
13. The best form of consent is informed consent, which means the individual is aware of what the decision is, they can understand the relevant information and retain it to weigh up the risks and benefits to make a decision. This is determined based on the balance of probabilities in terms of where this threshold lies.
14. A lesser form of consent is known as "implied" consent. This is the action of choosing to take part or engage in a process, implying some form of agreement. An example might be an individual choosing between two options such as tea or coffee. By gesturing towards the choice for "coffee", there is implied consent to the process of making a decision between the two.
15. If the individual does not engage, and does not give either form of consent, there are many possible reasons for this e.g., there may be an issue with the specific context of the situation, the individual's health conditions, the professional's approach to the test, or even the adaptations that have been made to support.

Context

16. Context is important, as it helps to aid understanding and communication on both sides. This means considering a range of wider factors including:
 - What is their first language and how do they best communicate? Is an interpreter required?
 - Can they hear adequately? Do they wear hearing aids or need to sit in a different environment in order to take part?
 - Are they unwell with an infection or other health condition?
 - Do they prefer a particular time of day?
 - What is the physical environment like? Are there any distractions or influences on engagement? What is the individual's preferred routine?
 - Has something happened to cause decreased motivation or mood?
 - Where would the individual prefer to speak? Do they prefer more structure? Had they been aware you were attending?
 - Do they prefer to "walk with purpose" to aid processing and engagement? Do they require a dynamic assessment on the move?

- Does the individual take time to trust a new person? Would they prefer a chosen person (who is not a part of the decision being assessed or a known influence) to attend to provide emotional support?
- What else may be impacting their engagement?

Supporting Capacity

17. Supporting capacity can take many forms and is a core principle of the Mental Capacity Act that **must** be upheld. Therefore, every effort must be made to consider all possible factors that may be affecting a person's engagement with the process, and steps should be taken to enable participation.
18. Each adaptation should be documented in the assessment report – whether the adaptation is successful or not. This helps to build a picture of the person's needs and provides evidence of the process of supporting capacity.
19. There is no formal limit on how many times an assessment should be attempted. However, I would suggest an assessor make as many attempts as reasonably possible to support engagement.