

Avant factsheet:

Capacity: the essentials

Quick guide

1. Having capacity to make healthcare decisions requires patients to be able to understand, retain and weigh up information about the decision to be made.
2. In assessing a patient's capacity it is important to focus on their ability to make a decision.
3. Patients with limited capacity may still be able to make decisions with support. Wherever possible, supported decision-making should be preferred over substitute decision-making.

Capacity refers to a person's ability to make a decision for themselves, including about their healthcare. A patient must have capacity before they can provide a valid consent.

The word 'competence' may also be used for the same concept. If someone has the requisite capacity to make a decision they may be described as competent.

Capacity to make healthcare decisions

A person has capacity to make a healthcare decision if they are able to understand the nature and consequences of the decision to be made. A person must also be able to communicate their decision, verbally or by other means.

What must a person be able to do?

In determining whether or not your patient has capacity, you should consider if your patient has the ability to do the following with the information provided:

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| Understand | understand the information and consequences relevant to the decision. |
| Retain | hold the information and recall the details for long enough to make the decision. |
| Weigh up | use and evaluate the information throughout the decision-making process. |
| Communicate | relay their decision and understanding. |

Presumption of capacity

The law generally presumes that people have capacity to make decisions about their healthcare at 18 years of age (except in South Australia where capacity is presumed from 16 years of age). Before reaching this age, some children can develop the capacity to make decisions about their healthcare. For more information on this topic, please see Avant's factsheet: [Children and Consent](#).

This means you can presume adults have capacity unless there are particular circumstances or behaviours that may lead you (or another person) to believe your patient does not have the capacity required to make particular decisions.

A patient's capacity may fluctuate over time and could be influenced by factors ranging from lack of sleep or the time of day, to pain, being affected by alcohol or drugs (including medication), or brain injury or psychiatric illness.

Capacity is decision specific

Capacity is 'decision specific', and patients may have capacity to make some decisions but not others. For example, the capacity required to consent to a complex surgical procedure will be different to that required for a routine examination. When assessing capacity it is important to consider the specific decision to be made and seriousness of the risk.

What if a person has an intellectual disability or other illness?

A patient who has an intellectual disability, mental health issue, neurodegenerative disorder or other illness should not automatically be considered as lacking capacity to provide consent for their own healthcare. The legal test for capacity is based on what the patient is actually able to do, not their condition. People with disabilities and illnesses often have the capacity to consent to or refuse medical treatment, depending on the nature of the decision.

Capacity is about decision-making ability, not the actual decision

When assessing a patient's capacity to make decisions, it is important to focus on their abilities to make a decision (outlined above) rather than the actual decision they make. If you would not have made the same decision or you do not think it is a rational decision, it does not mean the patient lacks capacity.

However, you should not completely disregard decisions you think are unwise, unusual or out of character for your patient. This could be a flag to check your patient's capacity and to refer them for a formal assessment if necessary.

Assessing capacity

You could use the following steps as a guide when assessing whether your patient has capacity to make healthcare decisions:

1. Evaluate your patient's mental state and cognitive function

You could do this by using a cognitive assessment tool to quantify the presence and severity of cognitive impairment. This assessment can give you a sense of how to proceed with the rest of your discussion. It may indicate that a detailed and complex discussion about a particular decision is not possible at that time. Or it may indicate the person is capable of making some decisions, but not others.

2. Ask your patient to explain the decision at hand

After explaining the decision, ask the person to share in their own words, their understanding of why the particular decision needs to be made, what choices are available, what the benefits or risks are of the different choices, and what they understand or feel about the possible outcome of the choice. A simple "I understand" does not confirm that the person has understood our discussions. You should consider open questions, such as:

- Can you tell me why you are thinking about this treatment over the other options we discussed?
- What are the possible risks with the treatment and how might you deal with them if they occurred?
- What do your family and friends think of the treatment?

3. Assess your patient's ability to make a decision

Testing for capacity not only involves checking for understanding, but also for the ability to make a decision. Listening to the person's planning, reasoning and judgement will alert you to whether the person understands their choices and the possible consequences of their decision.

Make sure to carefully document your conclusions and the basis for them. If capacity is still unclear, it may be helpful to seek a second opinion from a medical practitioner who has experience in this area, such as a geriatrician or mental health specialist.

What happens if your patient does not have capacity?

Does the decision need to be made urgently?

Capacity can fluctuate. If the decision is not urgent and you think your patient may regain capacity, you may allow time for this to happen.

Supported decision-making

You may determine the patient's capacity is limited but they may be capable of making their own decisions with appropriate support. This may include using an interpreter or speaking in simpler language, using pictures or photos, writing things down

or starting your discussion by working through two simplified options rather than a full complex list of possibilities.

There is increasing recognition of the concept of supported decision-making including the role of a supporter to assist people with disabilities, to exercise their autonomy in decision-making to the greatest extent possible. Rather than substituting another person into the role of decision-maker, the person receives assistance with a supporter with understanding options, working out what their preference is and communicating the decision. If a person has capacity to make a decision with support then the person's decision is final even if it conflicts with their supporter's judgement.

If you find your patient lacks capacity even with support, you would then need to involve a substitute decision-maker.

Advance care directives

If your patient does not have capacity to provide consent themselves and is unlikely to regain capacity, you must consider other options. You must refer to an advance care directive (if there is one), or ask the correct substitute decision-maker to make the decision on the patient's behalf.

The laws regarding advance care directives are different across the country. It is important to make sure you understand the requirements where you practise or ask for assistance if you are unsure.

An advance care directive is a formal record of a person's preferences for future care if they lose capacity and therefore cannot provide consent to medical treatment. In a directive, a person provides an outline about how they would like to be treated. They can also appoint a person to make decisions on their behalf. An advance care directive is a written, legal document, recognised by common law or authorised by legislation.

Substitute decision-makers

There is a hierarchy of substitute decision-makers who can provide consent on behalf of a patient if that patient loses capacity and there is not a valid advance care directive in place. Each state and territory has different legislation that outlines who is the correct substitute decision-maker for these healthcare decisions.

The correct substitute decision-maker may be a family member or friend, an enduring guardian, attorney, guardianship tribunals or the Supreme Courts in each state and territory. It is not automatically a person's next of kin.

Additional resources

You can find additional resources including articles, podcasts and webinars in the Avant Learning Centre under Consent: avant.org.au/avant-learning-centre
Visit capacityaustralia.org.au for resources on decision-making capacity.

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