



2016 CHAPTER 18

PART 1  
PRINCIPLES

*Establishing whether a person has capacity*

**Meaning of “lacks capacity”**

3.—(1) For the purposes of this Act, a person who is 16 or over lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself about the matter (within the meaning given by section 4) because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter—

- (a) whether the impairment or disturbance is permanent or temporary;
- (b) what the cause of the impairment or disturbance is.

(3) In particular, it does not matter whether the impairment or disturbance is caused by a disorder or disability or otherwise than by a disorder or disability.

**Meaning of “unable to make a decision”**

4.—(1) For the purposes of this Part a person is “unable to make a decision” for himself or herself about a matter if the person—

- (a) is not able to understand the information relevant to the decision;
- (b) is not able to retain that information for the time required to make the decision;

- (c) is not able to appreciate the relevance of that information and to use and weigh that information as part of the process of making the decision; or
- (d) is not able to communicate his or her decision (whether by talking, using sign language or any other means);

and references to enabling or helping a person to make a decision about a matter are to be read accordingly.

(2) In subsection (1) “the information relevant to the decision” includes information about the reasonably foreseeable consequences of—

- (a) deciding one way or another; or
- (b) failing to make the decision.

(3) For the purposes of subsection (1)(a) the person is not to be regarded as “not able to understand the information relevant to the decision” if the person is able to understand an appropriate explanation of the information.

(4) An appropriate explanation means an explanation of the information given to the person in a way appropriate to the person’s circumstances (using simple language, visual aids or any other means).

### **Supporting person to make decision**

**5.—**(1) A person is not to be regarded for the purposes of section 1(4) as having been given all practicable help and support to enable him or her to make a decision unless, in particular, the steps required by this section have been taken so far as practicable.

(2) Those steps are—

- (a) the provision to the person, in a way appropriate to his or her circumstances, of all the information relevant to the decision (or, where it is more likely to help the person to make a decision, of an explanation of that information);
- (b) ensuring that the matter in question is raised with the person—
  - (i) at a time or times likely to help the person to make a decision; and
  - (ii) in an environment likely to help the person to make a decision;
- (c) ensuring that persons whose involvement is likely to help the person to make a decision are involved in helping and supporting the person.

(3) The information referred to in subsection (2)(a) includes information about the reasonably foreseeable consequences of—

- (a) deciding one way or another; or
- (b) failing to make the decision.

(4) For the purposes of providing the information or explanation mentioned in subsection (2)(a) in a way appropriate to the person's circumstances it may, in particular, be appropriate—

- (a) to use simple language or visual aids; or
- (b) to provide support for the purposes of communicating the information or explanation.

(5) The reference in subsection (2)(c) to persons whose involvement is likely to help the person to make a decision may, in particular, include a person who provides support to help the person communicate his or her decision.

(6) Nothing in this section is to be taken as in any way limiting the effect of section 1(4).

### **Compliance with section 1(2)**

**6.—**(1) In proceedings under this Act or any other statutory provision, any question whether a person who is 16 or over lacks capacity in relation to a matter (within the meaning of this Act) is to be decided on the balance of probabilities.

(2) Subsection (3) applies where, other than in such proceedings, it falls to a person to determine for any purpose of this Act whether another person who is 16 or over (“P”) lacks capacity in relation to a matter.

(3) If—

- (a) the person making the determination has taken reasonable steps to establish whether P lacks capacity in relation to the matter,
- (b) the person reasonably believes that P lacks capacity in relation to the matter, and
- (c) the principles in section 1(3) to (5) and section 5 have been complied with,

for the purposes of section 1(2) the person is to be taken to have sufficiently “established” that P lacks capacity in relation to the matter.

(4) In this section “proceedings” includes proceedings before a tribunal and proceedings of any panel constituted under Schedule 1 or 3.