



Take Action to Prevent Abuse of Older Adults

Counterpoint Tools

Resources to Enhance Practice

Failing to seek consent in certain circumstances is a form of elder abuse.

Who gives consent?

A capable adult has the right to give or refuse consent. If an adult lacks capacity you need to get consent from the appropriate SDM. The SDM could be a legal guardian, a formally appointed SDM for health care, or a default SDM (usually next of kin who meets specific criteria). The list of default SDMs is set out in your provincial or territorial health care consent law.

In specific urgent circumstances you can provide treatment without consent. Exceptions are set out in your provincial or territorial health care consent law. You need to be aware of these exceptions. If you are providing services to an adult who is mentally incapable ask whether the person has a SDM.

If you are providing services to an adult who is mentally incapable of giving consent, ask whether the person has a SDM.

How can consent be given?

Consent can be expressed (either verbally or in writing) or implied by the consenting adult's behaviour.

Can an older adult refuse or withdraw consent?

Any adult with capacity has the right to refuse services or treatment. A capable older adult may refuse services or treatment that a professional considers warranted. A capable older adult may also withdraw consent at any time.

When is it necessary to seek consent?

Consent is required each time a health care or social service worker wishes to initiate services or treatment, except in emergencies where the law prescribes otherwise. As the services or treatment evolve, or as new information becomes available, consent may need to be reaffirmed. Consent may also be required to share an adult's personal or health information.

See the *Confidential Patient and Client Information: Responding to Elder Abuse and Neglect* brochure for more information.

Mental Capacity and Consent

Responding to Elder Abuse and Neglect

This material contains information and guidance for practice. The information is not legal advice. In many instances it will be your obligation to ensure that an older adult gets legal advice as soon as possible. All material provided is up to date as of August 31, 2010.

What is mental capacity?

Mental capacity ("capacity") is an adult's ability to make a decision.

In general, a mentally capable adult is able to understand:

- information
- consequences of a decision

Most adults have capacity throughout their lives. Some medical conditions (e.g. dementia) can impair the ability to make decisions. However, the law says that all adults have mental capacity unless otherwise established.

The ability to make one's own decisions is a fundamental human right and the loss of this right can be devastating.



Capacity and disability

The ability to make a decision may be impaired by an underlying health condition.

A medical diagnosis or disability does not mean that a person is legally incapable.

Decision-specific capacity

Mental capacity is decision-specific.

A person may be capable of making some decisions, but not others. For example, a legal declaration that an adult does not have capacity may be limited only to financial decisions or certain personal care decisions. Always ask: “Capacity for what?”

Fluctuating capacity

An adult might have fluctuations in mental capacity. For example, at certain times of the day, an older adult might be better at making decisions. An older adult might also experience longer episodes of reduced or improved capacity, depending on health, medication and other circumstances.

Improving capacity

Health care and social service workers may be able to enhance decision making. For example, meeting at a good time of day, using assistive devices (e.g. hearing aids, visual aids), or having a conversation in a place where an older adult will feel most at ease can help.

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Capacity and ageism

Nobody should be mistreated because of old age. Making assumptions about or discriminating against a person because of age is called ageism.

It is ageist to assume that an older adult will lose capacity, simply because of age.

Right to make unwise decisions

Adults have the right to make unwise or risky decisions. For example, older adults who have been habitual gamblers cannot be prevented from continuing to take financial risks just because of their age. In the absence of a court order, capable adults retain the right to choose the people with whom they live or associate—including people who may be abusive.

Disrespecting or ignoring an adult’s choices because of age is a form of ageism.

Who assesses capacity?

In the context of day-to-day practice, many of us make informal judgments about capacity when we are seeking consent or are determining whether or not to refer a client to support services.

In some jurisdictions, doctors or other members of the health care team also participate in capacity assessments in connection with a court action to have a substitute decision-maker (SDM) put in place.

Capacity and elder abuse

Health care and social service workers may need to consider whether an adult has capacity limitations when responding to elder abuse, neglect or risk.

The law applies differently, depending on which province or territory the older adult lives in. In some provinces and territories, there are legal obligations to respond to abuse or neglect of older adults who are unable to seek support or assistance, or care for themselves. A lack of capacity could affect older adults’ ability to access support or assistance, or care for themselves.

Capacity and consent

Consent means giving someone permission to do something that impacts you. An adult must have capacity to give consent or refuse services or treatment. Otherwise, consent is not valid.

Health care and social service workers will need to consider capacity when obtaining consent from an older adult. Disregarding the right of a capable adult to consent to treatment, by failing to seek consent or by forcing an advance care plan on someone, is a form of elder abuse.