



My Marriage  
My Choice

Safeguarding vulnerable adults from  
forced and unlawful marriage  
[mymarriagemychoice.co.uk](http://mymarriagemychoice.co.uk)

# Toolkit for Assessing Capacity to Consent to Marriage

# My Marriage My Choice Toolkit

This toolkit is based on independent research commissioned/funded by the NIHR School for Social Care Research. The views expressed are those of the authors and not necessarily those of the NIHR School for Social Care Research or the Department of Health, [NIHR](#) or NHS.

This guidance specifically addresses assessing capacity to consent to marriage and draws upon research undertaken as part of the **My Marriage My Choice**<sup>1</sup> project led by Rachael Clawson with the research team, Dr Anne Patterson, Dr Rachel Fyson, Dr Michelle McCarthy and Dr Deborah Kitson at the universities of Nottingham and Kent and with partners the Ann Craft Trust and Respond. It was funded by the National Institute for Health Research, School for Social Care Research in recognition of the particular needs of people with learning disabilities who may be, or have been, forced into marriage. This practice guidance is part of a suite of resources which also includes: Summary of Findings ([full](#), [short](#) and [easy read](#) versions); [Case Studies Collection](#) ; [Awareness Films](#); [Workbook for people with learning disabilities](#) and [Workbook for families](#). The research team wish to thank the expert group for their assistance in authoring this document. We also wish to thank the many individuals who found the time to share their views and experience with us at the seminar.

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**This toolkit uses some case-examples.**

**These are fictitious and any similarity to real people is coincidental.**

## Introduction

The UK Government regards forced marriage as an abuse of human rights, a form of domestic violence, and a form of violence against women and men, it is also against the law. Forced marriage can affect any person, regardless of gender, age, disability, ethnic origin or sexual orientation.

The UK Government [Forced Marriage Unit](#) (a joint Home Office/Foreign and Commonwealth Office Unit set up to tackle the issue) defines forced marriage as follows - ‘forced marriage is where one or both people do not (or in cases of people with learning disabilities, cannot) consent to the marriage and pressure or abuse is used.’

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This practice guidance has been developed to assist practitioners working to support people with learning disabilities to recognise and take appropriate action when there is a risk of forced marriage.

This guidance specifically addresses assessing capacity to consent to marriage and draws upon research undertaken by the University of Nottingham, in partnership with the Ann Craft Trust, the University of Kent and Respond. The research was funded by the National Institute for Health Research, School for Social Care Research in recognition of the particular needs of people with learning disabilities who may be, or have been, forced into marriage.

This practice guidance can be used by any frontline practitioner involved in assessing capacity to consent to marriage. This includes (but is not exclusive to) social workers, psychologists, clinical psychologists, psychiatrists, speech and language therapists, occupational therapists and learning disability nurses. Assessing capacity is a complex process and may necessitate the involvement of a range of practitioners using a multi-agency approach. This document should be read in conjunction with [HM Government \(2014\) Multi-agency practice guidelines: Handling cases of Forced Marriage](#). It seeks to supplement the existing multi-agency guidelines and provide resources and tools to aid practitioners in assessing capacity to consent to marriage.

Practitioners are advised that they must also adhere to their specific professional guidelines and Local Authority and Health Trust policies relevant to this area of their practice, practitioners are also advised to keep abreast of current case law.

### Learning disability

The term 'learning disability' is used throughout this document as this is the term most frequently used by practitioners in the UK. Learning disability is defined as:

- A significantly reduced ability to understand new or complex information, to learn new skills (impaired intelligence) with;
- A reduced ability to cope independently (impaired social functioning);
- Which started before adulthood, with a lasting effect on development.  
[['Valuing People' White Paper 2001- DOH](#)]

A learning disability is a permanent impairment, not to be confused with mental ill health or other conditions which can fluctuate or be temporary, although of course people with learning disabilities can also experience these conditions.

### Understanding the issues around forced marriage of people with learning disabilities

There is no "typical" picture of a person forced into marriage. The majority of cases of forced marriage reported to date in the UK involve South Asian families; this is partly a reflection of the fact that there is a large, established South Asian population in the UK. However, it is clear that forced marriage is not solely a South Asian issue and there have been cases involving people from a wide range of backgrounds including East Asia, the Middle East, Europe and Africa. Some forced marriages take place in the UK with no overseas element, while others involve a partner coming from overseas or a British national being sent abroad. Each year the Forced Marriage Unit collate statistics on the cases reported to them. Almost 10% of all cases reported involve someone with a learning disability (FMU 2016). For more details on the FMU statistics go to <https://www.gov.uk/government/statistics/forced-marriage-unit-statistics-2016>.

Research also indicates that the forced marriage of people with learning disabilities is likely to be vastly underreported and can differ from the way in which forced marriage presents generally, in terms of motivators and consequences. It may be difficult for practitioners to recognise when someone is at risk as it is difficult to obtain any exact figures for the number

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of people with learning disabilities who are forced to marry. However we already know that substantial numbers of people with a learning disability are affected by this issue and, despite underreporting, in 2016 there were 140 cases involving people with a learning disability known to the FMU.

### Motives prompting forced marriage

There are a range of motives that drive family members to seek a spouse for someone with a learning disability who either does not want to marry or is unable to consent. Many families are not aware that organising marriages for their relative with learning disabilities who may lack capacity to consent could potentially be forcing them into marriage and be against the law. Parents who force their sons or daughters to marry often justify their action as protecting their children, building stronger families and preserving traditions. They often do not see anything wrong in their actions. When marriage involves a person with a learning disability family members often believe it is the right or only option and therefore may be open about their intentions with practitioners.

Some key motives for forced marriage that are specific to people with learning disabilities include:

- ▶ Obtaining a carer for the person with a learning disability
- ▶ Obtaining physical assistance for ageing parents
- ▶ Obtaining financial security for the person with a learning disability
- ▶ Believing the marriage will somehow 'cure' the disability
- ▶ A belief that marriage is a 'rite of passage' for all young people
- ▶ Mistrust of the 'system', mistrust of external (e.g. social care/health) carers

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- ▶ A fear that younger siblings may be seen as undesirable if older sons or daughters are not already married
- ▶ Often seen as the only option or the right option (or both) – no alternative

<https://www.anncrafttrust.org/research/forced-marriage/>

There are other factors which may make someone with a learning disability more vulnerable, particularly when obtaining a carer is viewed as a key factor in the person getting married. For example a lack of suitable support services and day time activities may isolate a potential victim, in addition families from some communities may choose not to access, or not know how to access, support services.

There is never any justification for a family to force someone to marry or for a professional not to take safeguarding action. Professionals may be concerned about being culturally insensitive but such concerns are never an excuse for failing to provide the assistance that potential victims of forced marriage may require.

### **The difference between forced marriage and arranged marriage**

There are clear differences between a forced marriage and an arranged marriage. In arranged marriages, the family of both spouses take a leading role in arranging the marriage but the decision to accept the arrangement or not remains with the prospective spouses. In forced marriage one or both spouses do not, or due to lack of capacity cannot, consent to the marriage. The giving of consent by both parties is essential to all marriages. In some marriages the non-disabled spouse may not have all the information they need to make an 'informed' decision. They might not have met their prospective spouse before the marriage ceremony and might not know they are marrying a person with a learning disability. Practitioners coming across marriages that have already taken place may need to

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consider if the spouse is also vulnerable and in need of signposting for support or a safeguarding referral.

### The Law

The act of forcing someone to marry became a criminal offence under the [Anti-social Behaviour, Crime and Policing Act 2014](#) punishable by up to seven years in prison and an unlimited fine. This Act makes it an offence to force someone to marry, it also criminalises the breaching of a forced marriage protection order. A forced marriage protection order (FMPO) is a civil rather than criminal remedy given by the court under the [Forced Marriage \(Civil Protection\) Act 2007](#).

Crucially, for people with learning disabilities, the Act specifically makes clear that:

*In relation to a victim who lacks capacity to consent to marriage, the offence under subsection (1) is capable of being committed by any conduct carried out for the purpose of causing the victim to enter into a marriage (whether or not the conduct amounts to violence, threats or any other form of coercion) (s.121 (2)).*

The law is clear that the marriage of anyone deemed not to have capacity to consent would be classed as forced, **therefore where there are clear reasons to think that capacity is lacking and where capacity to consent is unknown an assessment should be considered and reasons for it should be recorded.** Assessing capacity to consent to marriage is complex and decisions made can have far reaching implications for both the person being assessed and family members. For example, in some circumstances a person with a learning disability may want to marry but be assessed as lacking capacity to make that decision. In such circumstances support should be given to maximise the person's opportunity to develop capacity. Or therapeutic support may be required for the individual

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and family members to help them to come to terms with the fact that marriage is not possible.

A person's capacity to consent can change. For example, with the right support and knowledge, a person with a learning disability may move from a position of lacking capacity to consent to marriage, to having capacity.

Some people with learning disabilities are given no choice and/or do not have the capacity to give consent to marriage and all it entails. This may include engaging in a sexual relationship, having children and deciding where to live. In order to understand the unique features of forced marriage of people with learning disabilities it is necessary to have an awareness of the role that their sense of impairment and experience of disability plays in their everyday lives. For example their experience of stigma, low self-esteem, lack of opportunity to make own decisions, wanting 'ordinary' lives.

### Legal Position

Compelling, inciting or facilitating a person with impaired capacity to engage in sexual activity without consent is an offence under the [Sexual Offences Act 2003](#). Men and women are likely to be subjected to sexual activity that is sexual assault and/or rape and women may be subjected to continual rape until they become pregnant. Some people with learning disabilities may not understand they are being raped. If a person lacks capacity to consent to sex then any sexual act with that person needs to be constituted as abusive, even if the person appears compliant.

If the person lacks the capacity to consent to the marriage one course of action is for the local authority to make an application to the Court of Protection for declarations and orders.

The [Mental Capacity Act 2005](#) provided for a new Court of Protection to make decisions in relation to the property, affairs, healthcare and personal welfare of adults who lack capacity. This Court also has the power to make declarations about whether someone has the capacity to make a particular decision. The court can also grant injunction(s) to restrain family members from arranging a marriage or to prevent someone being taken overseas for the purpose of marriage. A person who lacks litigation capacity, including those with a learning disability, can act with the assistance of a litigation or next friend. The court can

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appoint anyone to be a litigation friend, for example: a parent or guardian, a family member or friend, a solicitor or a professional advocate, e.g. an Independent Mental Capacity Advocate (IMCA).

### Information required and action to be taken in all cases

Reports of possible forced marriage may come from a concerned friend, relative, partner, service or professional, teacher or carer, or they may come from the victim themselves. Cases of forced marriage can involve complex and sensitive issues that should be handled by a child or adult safeguarding specialist with expertise in forced marriage. Ideally, the information should be gathered by a police or social worktrained specialist. However there may be some occasions, for example when a person is going overseas imminently, where other professionals may need to gather as much information as possible from the victim and/or their representative. In these cases, the information should be passed on to police, social care services and the Forced Marriage Unit as soon as is possible. All practitioners working with victims of forced marriage and honour-based violence need to be aware of the “one chance” rule (see appendix 4).

The [statutory guidance on forced marriage](#) states that agencies should have a lead person with overall responsibility for safeguarding children and adults at risk of being a victim of domestic abuse and the same person should lead on forced marriage. Although front line staff should contact this specialist as soon as possible, there may be occasions when they will need to gather some information from the person or their supporter to establish the facts and assist the referral. Where the forced marriage involves a person with a learning disability that person may need additional support and guidance to remain safe. In taking the necessary action set out below you should consider whether the person with a learning disability needs someone present to assist them in representing their views. Consideration should also be given as to whether this needs to be reported as a safeguarding issue.

### Capacity to consent and the Mental Capacity Act 2005

The test of capacity to consent to marriage can be complex to undertake. If a person does not consent or lacks capacity to consent to a marriage, that marriage is a forced marriage and against the law, whatever the reason for the marriage taking place. In cases where the person lacks capacity to consent to marriage, even if they are saying they want to marry or are seemingly happy at the prospect this is a forced marriage. Capacity to consent to marriage can be assessed and tested using the principles of the [Mental Capacity Act 2005](#) (MCA 2005).

Individuals may lack the capacity if they are unable to:

- ▶ **U** – Understand
- ▶ **R** – Retain or
- ▶ **U** – Use/weight up or
- ▶ **C** – Communicate their decision

The MCA 2005 applies to all people aged 16 and over. It aims both to empower people to make decisions for themselves and to protect those who lack capacity to do so. The Act is time and decision specific, this means that ‘blanket decisions’ of capacity cannot be applied. The Act also allows for persons with capacity to make unwise decisions. The Act starts from the premise that, unless proved otherwise, all adults have the capacity to make decisions.

Generally where someone is found to lack capacity in relation to a particular decision, other people may be permitted to make decisions on behalf of that person, so long as any such decision is made in the *best interests* of the person who lacks capacity. For example, family members or practitioners might decide that it is in a person’s best interest to live in a certain place, even though the person themselves lacks the capacity to consent to such a decision.

**There are certain decisions which cannot be made on behalf of another person and this includes the decision to marry. There is therefore no legal basis on which someone can agree to marriage, civil partnerships or sexual relations on behalf of someone who lacks the capacity to make these decisions independently.**

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However, families sometimes do believe they have the 'right' to make decisions regarding marriage on behalf of their relative.

The MCA provides a statutory framework both for people who lack capacity to make decisions for themselves and for those who have capacity and want to make preparations for a time when they may lack capacity in the future. It sets out who can take decisions, in which situations, and how to act if a capacity assessment is required. It is advised that you refer to the Mental Capacity Act Code of Practice for more detailed guidance, this section provides an outline only.

### **The five statutory principles which underpin the legislation are:**

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because they make an unwise decision.
4. An act done or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

### What does 'lacks capacity' mean?

[The MCA Code of Practice](#) uses the term 'a person who lacks capacity' to mean a person who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken. This reflects the fact that a person who lacks capacity to make a decision for themselves at a certain time may be able to make that decision at a later date. This may be because they have an illness or condition that means their capacity fluctuates or changes.

Finally it also reflects the fact that, while some people may always lack capacity to make some types of decisions due, for example, to a condition or severe learning disability that has affected them from birth, others may learn new skills that enable them to gain capacity and make decisions for themselves. This includes capacity to consent to marriage.

### The victim

Isolation is one of the biggest problems facing all those trapped in, or under threat of, a forced marriage. The person may not feel there is anyone they can trust and have no one to speak to about their situation – some may not be able to speak the language of those around them or may have additional communication needs.

These feelings of isolation are very similar to those experienced by survivors of other forms of domestic abuse and child abuse. People with learning disabilities are even more likely than non-disabled people to be isolated and dependent on family members to meet their everyday care needs. They may not have a trusted person to tell and may not have the words or other means of communication to describe what is happening. Only rarely will someone disclose fear of forced marriage.

### Consequences of forced marriage

For people with learning disabilities the consequences of forced marriage can be the same as those for people without a learning disability, for example, repeated rape, domestic violence from a partner or extended family members or being forced to undertake

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household chores for the family. However, for people with a learning disability and the spouses they are forced to marry there can be additional consequences, for example:

- Abandonment – the non-disabled spouse may not want to provide their care/support and reject the person with learning disabilities
- The non-disabled spouse may not realise they are committing a criminal offence by having a sexual relationship with a person without capacity to consent to sex, although that is not an excuse
- The non-disabled spouse may be subject to violence from their in-law's family should they seek to leave the marriage
- The person with a learning disability will face more difficulties should they wish to leave the marriage

[www.anncrafttrust.org/research/forced-marriage](http://www.anncrafttrust.org/research/forced-marriage)

For all victims of forced marriage, leaving their marriage, family and community may be their only option; many will require additional support to do this. People with learning disabilities may require greater levels of support for longer periods of time. Leaving the family and community is always a difficult decision to take for anyone forced into marriage; for many people with learning disabilities it can be something they find very difficult to think about and they may have no experience outside the family and no financial, physical, social or emotional support. For those requiring high levels of support, leaving home becomes almost impossible. In addition, leaving their family (or reporting them to the police or simply approaching statutory agencies for help if they are able to) may be seen as bringing shame on their honour and on the honour of their family in the eyes of the community. This may lead to social ostracism, harassment and other forms of honour based violence from the family and community. For many people, this is simply not a price they are prepared to pay.

Research indicates that men with learning disabilities are at significantly higher risk of forced marriage than that of the general male population. This will have implications for both the practice of frontline professionals and service provision; it also indicates that men with

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learning disabilities may be more vulnerable as their risk of being involved in a forced marriage is less likely to be recognised.

Those who do leave often live in fear of their own families who will go to considerable lengths to find them and ensure their return. Agencies need to consider how records, especially for high-risk cases, are stored, particularly where they may be easily accessible to a wide audience.

### Potential warning signs or indicators

For people with learning disabilities potential warning signs may include:

- Person talking about marriage, jewellery, wedding clothes (they could present as happy, anxious or worried about this)
- Family member raising concerns that a relative may be/has been forced into marriage or informing a professional that their relative is to be married
- Family member asking a front line professional to sign a passport application form or visa immigration form
- Being taken away from the school or day centre/out of the country without explanation
- Change in emotional/behavioural presentation, e.g. becoming anxious, depressed, frightened and emotionally withdrawn or exhibiting joy/excitement
- Family members refusing social care support

It must be remembered that these signs may not in themselves mean a forced marriage is about to happen but may mean further investigation is required.

### The risks of family counselling, mediation, arbitration and reconciliation

The risks of pursuing family counselling, mediation, arbitration and reconciliation in all cases of forced marriage are very high.

For victims with learning disabilities, there may be occasions when it is necessary to involve the victim's family in discussions about short-term safeguarding and long-term care. This may be because of the level of care the family provide for the victim, the fact that the family have freely provided the information about an impending marriage, the victim themselves tells their family about agency involvement or because of the motivation behind forcing a marriage. **However, action to involve the victim's family in this way should only be done by professionals with specialised knowledge, in exceptional cases. It should not be done routinely as this could put the victim at increased risk of harm which could result in a serious threat to their life.**

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### Grace

Grace is a 16 year old girl with autism and a moderate learning disability. She attends a special school, has short breaks at a residential unit and support from a social work assistant from the local authority Disabled Children's Team. The social work assistant has only visited Grace at home when her parents have been present. He believes they are a loving, caring family who support Grace very well. He receives a phone call from Grace's class teacher late on a Friday afternoon, the teacher tells him Grace has been quite excited in school today as her parents are taking her away on holiday and she will be having a great party with all her family, Grace has also said she will be getting married like her sisters. The teacher is concerned but has allowed Grace to go home as she did not know what else to do. The social work assistant thinks it would be quite unlikely that Grace is the one to be married; he knows she often makes up stories about having a boyfriend and believes she must be attending the wedding of a sister. He contacts Grace's mother by telephone to ask what the situation is and is told Grace has been making it up. Satisfied that she is not at any risk he takes no further action. Grace does not ever arrive back at school, all attempts to find her and her family fail.

If the social work assistant had referred her case to a trained specialist and had not contacted the family directly to discuss the situation, then he may have prevented the family from taking Grace out of the country.

### Duress

Duress, be it physical or emotional, is a common feature of forced marriage cases, including those involving people with learning disabilities. It needs to be recognised however that duress does not feature in all forced marriages of people with learning disabilities.

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This is important because in some cases involving people with learning disabilities, the person may be led to believe or say that the marriage is what they want but they may not fully understand the implications of that decision. This could be for a variety of reasons including the person wanting to please their family, to do what their siblings have done, to trust their family and because they lack understanding of the implications. Furthermore, in some cases there is evidence that the potential/actual spouse may be subject to duress themselves.

### In all cases:

- ✓ Consider the issue with regard to both the person with a learning disability and their partner
- ✓ See the person on their own. Ask questions that allow them to consider their own needs and choices and not just those of their family
- ✓ Explore with them what they understand about getting married
- ✓ Discuss with them their reasons for agreeing to the marriage

### Do not:

- ✗ Assume that they understand the implications of what they are doing
- ✗ Assume consent just because they are agreeing to this course of action, or seem pleased about it

**Remember:** Where an individual lacks capacity then the need to consider the presence of duress as a reason for intervening does not arise because they cannot consent to the

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marriage. However if a person has capacity but is experiencing duress then it is a forced marriage.

### Good practice in recording

All practitioners should follow the recording policy of their own agencies or organisations and those of Local Safeguarding Children/Adults Boards. Information should always be recorded in such a way as to not place either practitioners or victims and their supporters at any further risk of harm.

Particular attention should be paid to the ways in which electronic records are kept. The [Ann Craft Trust's 'Disabled Children and Abuse' Report](#) found that basic information relating to the child was often missing from files thus making it difficult for local authorities to adequately protect them from harm. It may be helpful for agencies to routinely record information such as impairment, impact of impairment, communication requirements, marital status of services users and whether they have children (living with them or not). Clearer and more consistent recording of this information makes it easier for agencies to plan for services and adequately meet the needs of service users holistically.

### What to do if the person informing is also the person organising the forced marriage

#### In all cases:

- ✓ Contact the police if you consider the victim may be at risk of harm
- ✓ Discuss the case with a child or adult safeguarding specialist with expertise in forced marriage
- ✓ Establish whether the person with the learning disability has capacity to consent to marriage, wants to be married and is of a legal age to do so
- ✓ If they do not have capacity/do not want to be married/are not of a legal age explain to the family why the marriage should not happen **if this will not put them at greater risk**
- ✓ Explore the alternative range of options
- ✓ Explain to the family any legal implications of continuing to organise a marriage, **if this communication will not put the victim at greater risk**
- ✓ Explain to the family any safeguarding concerns, **if this will not put the victim at greater risk**
- ✓ If necessary implement child or adult safeguarding procedures

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### Do not:

- ✗ Ignore the issue
- ✗ Assume the family will stop organising a marriage because of discussions with them
- ✗ Fail to obtain the person's views
- ✗ Take the person's views at face value if coercion is suspected
- ✗ Place the person at risk of harm
- ✗ Place yourself at risk of harm
- ✗ Lose contact with the family or person

In cases involving people with a learning disability the forced marriage may come to light due to the parent/family member informing a professional that they are organising a marriage for their child/relative. This may particularly be the case where families do not consider what they are doing to be wrong or that the marriage of the person without capacity to consent to marriage will be a forced marriage. These situations may be extremely complex and discussions with any family member will require careful consideration so as not to put the potential victim at increased risk of harm.

### Use of Mental Capacity Act 2005 to determine capacity

The Mental Capacity Act begins with the presumption of capacity, meaning that everyone over the age of 16 is presumed to have full capacity to make decisions unless it can be established that they lack capacity. Note that, for 16 and 17 year olds, this is qualified by a

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requirement for the consent of others in certain situations. Professionals are advised to obtain expert legal advice for more information on this on a case by case basis. Parental responsibility remains until a child reaches the age of 18.

Although a person cannot make a decision regarding marriage on another's behalf, the principles of the Act can be used to determine whether or not a person with a learning disability who is to be married or has been married has the capacity to give consent.

### **Geeta**

Geeta is a woman in her 30s with a severe learning disability; she lives in the family home with her parents and younger sister. Her father visited their GP and told her that he and the rest of the family were taking Geeta to Bangladesh to be married. Recognising that Geeta may not have the capacity to consent to marriage the GP informed the community nurse and social worker.

Geeta's father also visited the day centre she attended and asked a member of staff to sign Geeta's passport application form. The member of staff asked her father if they were planning a holiday and was told they were going to Bangladesh and Geeta would be staying there indefinitely.

Recognising this as a potential warning sign the day centre manager reported this to the social worker who invoked safeguarding adult procedures which eventually led to an application to the Court of Protection. Geeta was found to lack capacity to consent to marriage and the court made an order which, among other things, prevented her from travelling overseas. The marriage was prevented.

The motivation to get Geeta married was the provision of long term care; the family was open about their intentions as they did not view what they were doing as wrong.

### The Mental Capacity Act Code of Practice outlines a test of capacity: Assessing ability to make a decision

#### Assessing ability to make a decision:

- ▶ Does the person have a general understanding of the decision they need to make and why they need to make it?
- ▶ Does the person have a general understanding of the likely consequences of making, or not making, this decision?
- ▶ Is the person able to understand, retain, use and weigh up the information relevant to this decision?
- ▶ Can the person communicate their decision (by talking, using sign language or any other means)? Would the services of a professional (such as a speech and language therapist) be helpful?
- ▶ If any one of the above is absent then the person lacks capacity to make that particular decision at that point in time.

#### Assessing capacity to make more complex or serious decisions:

- ▶ Is there a need for a more thorough and formal Mental Capacity assessment (perhaps by another experienced professional)?

### Ongoing support

If a person does not wish to or cannot remain living with their family then their ongoing support needs must be met. This may include meeting needs in relation to housing, shopping, managing finances, getting dressed, personal care, accessing social/leisure activities, accessing health care, maintaining relationships and accessing education/work etc.

For many people with learning disabilities, the reality of their situation is that they will require ongoing support in one, some or all of the above areas. A full assessment of needs should be undertaken and identified needs which fall within the Care Act 2014 thresholds should be met.

Many people without learning disabilities who flee forced marriage may also initially require support but are less likely to require long term ongoing support.

### What to do if the person is already married with/without children

#### Sanjita

Sanjita is a young woman with a learning disability; her parents told her social worker that they plan to take her to India to be married. The social worker questioned whether Sanjita had capacity to consent to marriage and worked with her to try and establish initially what her understanding of marriage and having a sexual relationship might be. The social worker used questions such as:

- What is a husband/wife?
- What is a marriage?
- What is different about being married/unmarried?
- Can you name your body parts including intimate parts of the body?
- Do you know what different body parts are used for?
- Which are sexual/non-sexual parts?

After speaking to her the social worker was left with concerns about Sanjita's understanding and decided to refer to an experienced professional who advised that an assessment should be considered.

In some cases, professionals may come across cases where people with learning disabilities are living in a forced marriage. These marriages sometimes come to light many years after they have taken place and children may have been born within the marriage. These situations can be highly complex with issues relating to capacity, consent and quality of relationship being central. Each case should be dealt with individually and sensitively, looking at the needs of the person with the learning disability, their spouse and any children. Risk of harm should be considered in relation to all household members including children. A best interest decision about whether or not to apply to have an established marriage annulled will need to be made and the case referred to the Court of Protection.

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Research also highlights a number of key factors which differentiate forced marriages of people with learning disabilities from those without. For example:

### **Person without a learning disability**

### **Person with a learning disability**

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Duress always a factor,

Duress not necessarily a factor or may manifest itself differently. Person may even appear happy about forthcoming marriage,

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Victim often reports they may be/have been forced into marriage,

May report themselves or may need support to report. May be reliant on others to recognise what is happening and report/take action. The vast majority of cases come to the attention of statutory agencies through a third party.

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More females than males reported to be forced into marriage. Majority of support services in relation to forced marriage focussed on meeting needs of females.

Rates of males/females with learning disabilities being forced into marriage are similar. Services need to address needs of males and females,

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Has the capacity to give or withhold informed consent to marriage.

May lack capacity to give consent to marriage. May not understand they are being forced into marriage. May be more easily coerced into marriage.

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May be able to obtain support for themselves if they leave their family/community e.g. help to find housing, to find work, to apply for benefits, to meet medical needs etc. However, they often need help to access accommodation and other support in the short term.

Often need ongoing support from a range of professionals in order that daily living needs are met (such as personal care, helping to eat, shopping, finances, social/leisure activities, work etc). May need specific and specialist support if placed in a refuge. Males may find it difficult to find a place of safety given the limited availability of refuges that meet the needs of men with or without a learning disability.

[www.anncrafttrust.org/research/forced-marriage](http://www.anncrafttrust.org/research/forced-marriage)

# Conducting a Formal Assessment of Mental Capacity for Marriage and Sexual Relations

## Pre-assessment discussion

Once a person has been referred to a professional for a formal Mental Capacity Assessment a pre-assessment discussion may be helpful prior to the formal assessment.

This is good practice when an initial concern about an individual's capacity for marriage and sexual relations is raised or when a referral requesting a mental capacity assessment is received. The professional may also find that it would be useful to carry out an interim assessment prior to this particularly if there is a tight timeline for the assessment and information about this can be found below.

Meeting with the professional making the referral and finding out about the referral context and the range of concerns is very helpful in understanding the individual's needs. The referrer and any other members of the team are also likely to have important information about the person and family including about the best way to work with them to facilitate their engagement in the current assessment and in future interventions.

Assessing capacity to consent is a highly complex and anxiety-provoking area of practice, particularly given the possibility that a criminal offence may have been committed. It is always important that the Mental Capacity Assessment is carried out with the skilled support of the multi-agency team or other experienced practitioners and that the assessor feels supported by operations and policies. Discussions and meetings within the team about the assessment are an important part of the professional system and an essential part of good practice.

Pre-assessment discussion is very important. This work helps to ensure that the formal Mental Capacity Assessment is ethical, valid and effective, and that it makes full use of all available professional expertise.

### Aims of pre-assessment discussion

- To establish the need for an assessment by having conversations with the referrer. Ask the question ‘is there a “reasonable belief” that the individual lacks capacity’ and ask the referrer to state why they think this is the case, i.e. what evidence do they have that a Mental Capacity Assessment is needed. If there is any lack of clarity about the answer to this question then together with the referrer agree on what further information would be helpful.
- To clarify the referral and establish the assessment focus by having conversations with the referrer and others who know the person. A clear assessment focus will lead to knowing what the capacity issue is that is to be assessed and how to frame this in a meaningful way for the individual. These conversations will also clarify the context of the assessment (including who is concerned about what) and the range of concerns about the individual’s situation.
- The range of concerns also includes the current risks. Information about current risks leads into decisions and agreement concerning the urgency of the assessment and the timescale for the assessment and reporting on this. It may also inform whether or not action needs to be taken to safeguard the individual.
- To gain further relevant information to facilitate the assessment by having conversations with the referrer and other members of the team and by consulting documentation. This information will also help the assessor to maximise the opportunity the individual has to demonstrate their capacity therefore helping the assessment be fit for purpose, both in practice and clinical terms and also legally. This may include issues to do with the venue, support network, time of day and general conditions that are most likely to be associated with the best possible functioning for the individual. Good background information is therefore essential.

If it is decided that an assessment of capacity is not required then both this decision, **and the reason for making this decision**, should be recorded.

### Interim assessment

At times an interim assessment may be appropriate when a comprehensive capacity assessment cannot be made but, because of safeguarding issues, there are urgent questions about capacity being asked. Therefore it is appropriate to give some statement about capacity and potential coercion at this point. The use of an interim assessment always needs to be negotiated with the referrer and legal team as appropriate. Interim assessments for good reasons have been supported by the Court of Protection.

An interim assessment can take place where there are complex features that need to be resolved prior to stating a clear opinion concerning capacity. This may include, for instance, when there is the need for work around communication skills, or recovery from acute physical health problems, or when the person refuses to engage with assessment at this stage and some broad statement about likely capacity is needed now.

If capacity is lacking at the time of the interim assessment then the individual should be referred for appropriate support or intervention from appropriate multidisciplinary team colleagues for developmental work and learning opportunities, for instance to Community Nursing for sex education and/or to Speech and Language Therapy for communication work.

Sometimes the pre-assessment discussion phase will lead to a decision that the individual is likely to have capacity and that an assessment is unnecessary.

#### Practice tip

Professionals are most effective when they are working in a team which supports an approach that is thoughtful and thorough. Wherever possible, time needs to be found to discuss in detail the need for a mental capacity assessment and to gain a range of information about the individual and the focus and context of the assessment.

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### Reflective Exercise

Team involvement, support and skilled supervision is a pre-requisite for professional action that is accountable. However, a professional may be asked to carry out a Mental Capacity Assessment when these conditions are not met.

In this context, should you refuse to undertake a Mental Capacity Assessment?

What are the implications of refusing?

What are the implications of going ahead?

### Background Information

The range of important background information can include (but is not exclusive to) the following:

- Individual, developmental and educational history
- SEND statements/ Education Health and Care (EHC) Plan
- Culture of individual and their family member
- Accommodation/living situation
- Support network including services provided
- Multi-disciplinary reports in all areas relevant to current functioning
- Mental health, physical health, formal diagnoses, substance abuse
- Cognitive and adaptive functioning
- Communication skills and language needs
- Past and current vulnerability and risk.

At this stage the individual's learning needs concerning the area being assessed are likely to be identified and recommendations made for learning opportunities prior to the assessment

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being undertaken. Being aware of the individual's opportunities for learning and attaining capacity in the specific area being assessed is crucial. Under the provisions of the Mental Capacity Act, when assessment takes place, practitioners have a duty to offer interventions that aim to maximise capacity and to conduct the assessment in a way that gives the individual maximum opportunity to demonstrate their capacity.

### Models

Although the two-stage test for capacity relies on both functional (is the individual able or unable to make that specific decision) and diagnostic information (is the individual able or unable to make that decision because of an impairment of mind or brain), there is agreement from both professional and legal bodies that a mental capacity assessment should be conducted within the functional approach. It is helpful to remember the 3 elements to deciding an individual lacks capacity: is the individual unable to make the decision, do they have an impairment of mind or brain, are they unable to make the decision because of this impairment.

In other words, are you satisfied that the inability to make a decision is because of the impairment of the mind or brain?

This approach requires that the design and conduct of the assessment, and the interpretation of its findings, are carried out in a way that means that decisions about capacity do not rely on the individual's status in terms of diagnostic groups nor on general statements about their capacity.

The individual's abilities and functioning needs to be considered in terms of their cultural, relationship and environmental context, with reference to the individual's development and learning opportunities. This is consistent with the Mental Capacity Act as its foundations are holistic and individual-centred. It is therefore important to have a wide range of background information.

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Sometimes, because of concern about the individual's safety and the need for immediate assessment and safeguarding action, it is not possible to have an extensive conversation with the referrer or find out an appropriate range of information prior to the assessment.

### Practice tip

When an emergency assessment has to take place it is good practice to discuss the case in depth and find out further information as soon as possible after the assessment as this will help establish intervention needs and may also have implications for future decisions concerning capacity.

## Contact with families

There are likely to be complex social and emotional issues within any family that advocates for their son or daughter with a learning disability who lacks capacity, or is likely to lack capacity, to get married. In addition, the involved professional must consider that plans concerning marriage may also be associated with factors such as financial and immigration benefits to the family. The emotional issues can be associated with intense anxieties about future care. The professional team working with the person and family needs to sensitively acknowledge and work with any sense of difference and stigma and with emotions such as grief, anxiety and anger that may be experienced, particularly when an assessment establishes that the person lacks capacity to consent to marriage. The family may benefit from being offered therapeutic help. This however can sometimes be difficult as they may not frame their distress in this way and only consider that it will be alleviated if their son or daughter can marry.

### Reflective Exercise

Consider how to help families understand that they may benefit from therapeutic work and support.

### Points to consider in practice

For all professionals there is a dilemma about carrying out a Mental Capacity Assessment; this will have different implications for different disciplines/practitioners but the risks associated with conducting an assessment need to be considered.

### Khalid

Khalid, a young man with a learning disability, was referred to social services by his GP. His parents had been to the surgery seeking a letter stating that Khalid would be able to financially support his fiancé should she come to the UK. The GP was concerned that he was likely to lack capacity to consent to marriage.

Professionals considered they urgently needed to reduce the risks that Khalid might face. They visited the family to discuss capacity to consent to marriage and explained to them that the legal definition of forced marriage included a marriage where someone lacks capacity. Khalid's parents were shocked about this as they said their son wanted to marry and they thought that marriage would be in his best interests. His parents agreed that Khalid would not marry at the present time.

Although they initially agreed for their son to have a mental capacity assessment they then ceased taking him to the sessions. Two systemic meetings with Khalid, his parents, the GP and professionals took place and gave an opportunity for different voices to be heard. Khalid's parents spoke about their frustrations, their distress and struggle to come to terms with Khalid's learning disability and their anxiety about future care provision for their son. Their positive intentions for Khalid were acknowledged and this appeared very important to them. Professionals were able to offer different perspectives to parents' hopes that marriage would 'cure' the disability and his parents showed interest when Khalid talked about the activities he enjoys. Khalid's parents then agreed to bring him to all further assessment appointments. By the time the team were ready to feedback to the parents that Khalid lacked capacity, his parents had come to the conclusion that marriage would not be right for their son at this time. The family and Khalid were offered therapeutic support concerning their emotional needs in relation to these changes and they were left to consider whether they wanted to take this up.

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Consideration needs to be given whether or not to allocate the case to a practitioner of the same or different cultural, religious and language community. If from the same cultural, religious and language community this may be helpful in terms of understanding the needs of the person and family and may facilitate good communication and engagement. However this practice also runs the risk of a family expecting that the professional will be “on their side” and so will state that the individual has capacity, leading to an intense hostility and rejection of the professional and service when capacity is found to be lacking and the professional communicates this. This is very stressful for the person, the family and the professional. A case by case approach should be taken with regard to the ethnicity and the gender of the professional.

For all practitioners there is a dilemma concerning the impact of this work on the relationship with the family. The relationship may have been longstanding and have been experienced previously as positive.

Safeguarding should be considered when conducting a Mental Capacity Assessment. The assessment aims to balance both empowerment/ increasing independence and protection for vulnerable individuals. Sometimes, the practitioner role is more weighted to interventions aimed at empowerment/increasing independence so work concerning MCA can represent a significant shift.

If practitioner resources allow, it can be helpful to allocate two team members to take different roles and carry out different interventions with the family member (for instance one carrying out the assessment and the other therapeutic or skills development work).

Forced Marriage Guidance states mediation with family is never advised. It is clear that contact with families cannot be made when there are immediate risks (and risk must always be assessed and constantly reviewed) but for people with learning disabilities it can be necessary to work in a sustained way over time, with the person and their family member.

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It is not unusual for a practitioner to feel less confident about who to talk to, and when, about emotional and safeguarding concerns relating to forced marriage. The practitioner may be de-skilled in an area they may not have previously encountered and therefore reluctant to discuss the complex feelings aroused in carrying out this work. Practitioners may fear being perceived as racist or culturally insensitive. Managers and supervisors need to be aware of these issues and encourage reflection in a supportive way.

### Reflective Exercise

Practitioners may feel under pressure from management and legal teams to carry out the Mental Capacity Assessment in a short timescale even when they are aware that this may make co-operation of the family member, as well as the person, less likely. Consider how you could manage this situation,

## Who to involve in an assessment

The Mental Capacity Assessment should ideally be conducted by a multi-disciplinary team. Where a social worker is not already involved discussion with the social work team needs to take place at an early stage and a referral for an allocated social worker be made. The individual's safety and needs and skills in different areas of functioning relevant to the MCA should be discussed.

Support staff from provider services may also be involved in the assessment. Support workers may be involved in assessment sessions or and should be prepared for the work. This may include explaining how they can encourage engagement and participation in the assessment without leading the individual in their responses. Some support staff and other practitioners may advocate marriage when the individual lacks capacity, it is important to

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recognise when this is taking place and to ensure it is not influencing the assessment or appropriate action being taken.

Practitioners may sometimes need support to understand specific issues relating to culture and consideration should be given as to appropriate ways in which this can be provided. It is also crucial that an adequate interpreting service with experienced and skilled interpreters is identified at the pre-assessment point. Wherever possible the interpreter needs to be involved from an early stage so that they can be briefed about the assessment as a whole and also be available for pre and post-session briefings and feedback at every stage of the assessment. The interpreter should be skilled in adapting their communication in line with the person's communication profile.

### Practice tip

Some families, may express fears about the interpreter being an influential figure within their community. The interpreter should be a qualified practitioner who will maintain confidentiality and work with this fear and reassure the person and family member.

## Safeguarding referrals

When concerns about an individual being or getting married are raised or when there is a referral for a Mental Capacity Assessment, it is important to urgently consider the possibility of forced marriage whether because of lack of capacity or because of duress.

The safety of the individual must be of paramount concern. As noted above a referral for a social worker needs to be made and a decision then made within the practitioner group about whether or not the information concerning the individual's situation warrants safeguarding action at this stage.

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It may also be appropriate to consult with or involve the local authority and/or health trust legal team concerning whether or not there is a need for court action to protect the individual.

As noted above, where there are safeguarding concerns and concerns about forced marriage there may be a need for an interim assessment of capacity.

### **Reflective exercise**

Consider how, as a practitioner, you can work in a way that maintains the relationship with the family member whilst carrying out a safeguarding referral associated with the capacity assessment.

### Sayeda

Sayeda is a 21 year old woman. At a social care review with her parents present, she suddenly starts saying that she is going to marry Ahmed who lives in her home town and that she is very happy and will have a big party soon. Her parents laugh and do not comment. Sayeda presents as an individual with a severe cognitive impairment and intense support needs and her communication is in short phrases only and fragmented in both English and her family member language.

After the review meeting an urgent meeting takes place between the involved practitioners and the team manager. It is agreed that a safeguarding alert will be raised for Sayeda and that an assessment needs to be carried out urgently. The social worker and clinical psychologist arrange to do a joint home visit to gain further background information and to begin a conversation about capacity and the law around marriage and explain what a capacity assessment entails and the need to do this. The family member says they are not planning for Sayeda to marry just yet and also agree to the capacity assessment taking place. It is clear from the assessment that Sayeda lacks capacity to consent to marriage and sexual relations and this is explained to her and her family member.

At the day service Sayeda continues to say she will get married soon. Her parents become evasive concerning contact with practitioners. The practitioners consult the local authority legal team and it is agreed that an application needs to be made to the Court of Protection for a Forced Marriage Protection Order and this is gained. In addition the local learning disability service remain involved to monitor and review Sayeda's situation and attempt to offer her the interventions she had been assessed as benefiting from.

### Recording

Recording needs to meet specific discipline guidelines and be in agreement with practitioner requirements of the Health Trust, Local Authority or any other organisation involved. Each contact with the person, family member, support network and other practitioners relevant to the mental capacity assessment needs to be logged at the time in the relevant (electronic) recording system.

When conducting the assessment thorough notes of all that is said and done need to be taken. Verbal capacity questions and verbal responses should be recorded verbatim and any other action or behaviour should be recorded clearly. This will then form the data on which the written report of the assessment outcome is based.

All assessment material (including handwritten notes, which can be scanned if necessary) should be stored confidentially for a period consistent with Health Trust and Local Authority policies and be GDPR compliant. The court may order to obtain this material.

### Reporting the outcome

The details of the assessment, the practitioner opinion, the discussion and conclusions and recommendations need to be put into a clear and concise written report.

Wherever possible, the timescale for the assessment should be negotiated and agreement gained as to whether an interim assessment is to be carried out (specific timescales will always depend on agreements at a local level). All reports should be treated as Court reports as it is never clear whether or not the mental capacity assessment will be part of information submitted to the Court of Protection.

### Hints and tips concerning recording and reporting

- ▶ Log all contact relevant to the mental capacity assessment,
- ▶ Record all observations, both verbal and non-verbal, during the assessment and keep this record securely and for the length of time according to Trust/Local Authority guidelines.
- ▶ State clearly the reason for referral and the question about capacity being investigated so that the focus of assessment is understood.
- ▶ Date the report and give the dates of referral and the assessment sessions and any associated meetings.
- ▶ Be clear throughout about who did what, where and with whom.
- ▶ Describe the assessment process and tools used.
- ▶ Write the outcome of assessment “straight”, using understandable terms and not jargon.
- ▶ Don't go beyond the facts by speculating.
- ▶ Refer to evidence concerning all statements about how an individual functioned during the assessment.
- ▶ Make sure all your opinions are clearly evidenced. Make it clear how you have reached your professional/practitioner opinion.
- ▶ Remember you are giving a well-based professional/practitioner opinion which other people can weigh up.

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- ▶ Stress reasonable adjustments and adaptations you have made in your assessment to maximise the chance that the individual can demonstrate their capacity in this area.
- ▶ State any limitations of the assessment of which you are aware including those associated with areas you were unable to investigate, stating why.
- ▶ Have a section for discussion of the assessment outcome and then clearly state your conclusions.
- ▶ Make recommendations as appropriate (do not be prescriptive or directive), including conditions for aftercare and further interventions.
- ▶ Discuss the need for developmental work and learning opportunities arising from the outcome. If you think that the individual's capacity needs to be clarified by the assessment being repeated after these interventions then state this clearly and say why.
- ▶ Remember that, even when the individual's case goes to the COP, there are likely to be further assessments as the court will not state that an individual lacks capacity permanently.

In addition to the assessment being planned and carried out within a functional approach it should also adhere to any relevant practitioner Guidance (eg for Clinical Psychologists this will be [BPS Guidance](#)) and the [Forced Marriage Guidance for practitioners](#).

### Being Proportionate

Proportionate responses are a key consideration throughout when planning and/or carrying out assessments related to capacity and potential forced marriage situations.

Consider the relationship and balance between the various areas being explored, ensuring an objective approach that considers the evidence but also takes into account the context of the situation. This should be weighed up against the relevant legislation and guidance in this area.

### Any actions taken should be the least restrictive necessary to the situation

- The principle of proportionality is the idea that an action should not be more [restrictive of a person's rights](#) than is [necessary](#)
- Ensure you have sufficient evidence to reach a decision and to evidence and support the decision made.
- Needs to be acknowledged and adopted throughout each of the stages ie pre-assessment, planning, actual capacity assessment, actions following assessment.
- Needs to be proportionate in the questions you ask and the depth you go into.

#### Reflective practice

Safeguarding an individual from forced marriage is important whatever the culture factors and beliefs of the person and their family. However, practitioners need to be mindful that they must always take culture and beliefs into account when completing the assessment.

# Capacity assessment

## Before you start

When preparing to undertake a mental capacity assessment regarding marriage there are a number of key considerations including;

- What do I need to consider as a practitioner in order to complete the assessment and reach a conclusion?
- What information do I need to obtain in order to be able to reach a conclusion?
- What is the context of the assessment?

## Information needed about personal history

- Any relevant information regarding the individual's developmental, educational and personal history
- Communication skills and sensory abilities
- Physical and mental health
- Current living situation and regular activities
- Any previous assessments completed or concerns relating to capacity to consent to marriage
- Understanding of the situation and weighing up the risk
- Consideration of the impact of the situation including family members and the local community
- Previous assessment work completed and the recommendations of this. Remember however that this must be shown to be related to the decision that is being made today which needs to be time and decision specific.

## Practitioner considerations

As a practitioner you need to have an evidence base to support the decision you are making and take all reasonable steps to obtain this. Any decision made where it is of reasonable belief an individual lacks mental capacity to make the decision to marry needs to be

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evidence based rather than judgement based, all of which needs to be relevant and proportionate to the decision being made.

### Practice tip

Consider whether you have access to colleagues with experience in this area

Ensure you have access to appropriate supervision, this should include clinical supervision and operational support, for example, planning timescales and prioritising work required for report writing.

- Consider who else will need to be involved, for example, colleagues from Speech and Language Therapy, Psychology or Occupational Therapy or Social Work. There may already be colleagues involved who will need to be included. Obtaining a range of information and offering a range of interventions will maximise the individual's decision making ability in this situation.
- Review individual history and update knowledge as appropriate with reference to cultural and social considerations to aid understanding of the context of the situation.
- What guidance is available to help with preparation? This may include local and national guidance, such as briefings/information on Mental Capacity Act and in carrying out capacity assessments, information from the Forced Marriage Unit and any relevant guidance that is available from respective practitioner and professional bodies.
- Consider current practitioner role with the individual concerned and potential implications of carrying out this assessment for on-going work/intervention with the

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individual and their family member/friends.

- Review best practice examples and consider any points that may support planning while taking into account that every situation is different and specific to the individual concerned.
- Maintain a non-judgemental and proportionate approach.
- Record keeping needs to be accurate, clear and concise.
- Consider questioning techniques and styles and possible use of pictures and photos, symbols, DVD's etc.
- Open questions encourage longer answers. They usually begin with what, why, how. An open question would help in obtaining the individuals thoughts, feelings and wishes in relation to the decisions being made without any influence from others.
- 'TED' i.e. "Tell me", "Explain" and "Describe" can also be used in the same way as open questions.

A variety of questioning styles may be needed, from open questions to more direct questioning.

- It is important to obtain clarification and check back with the individual what they have said or are describing.
- Think about what is reasonable and proportionate for the individual to know about getting married, what are the key considerations?
- Plan the questions you will be asking and what topics areas you wish to cover during the capacity assessment. Every capacity assessment with regards to deciding if an individual can marry will be different due to the adult's own needs, situation and

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circumstances.

- It is important to identify and plan what information is relevant to the particular decision. You should also record this information and explain which aspect(s) the adult is either able or unable to understand, or retain, or use and weigh up.
- You must take all reasonable steps to support the adult before concluding whether they are able or unable to make a decision.
- You need to record and report how you came to this decision.

# The Assessment

## Assessing an individual's mental capacity to consent to marriage

This section provides guidance areas for consideration when doing an assessment. It is non-exhaustive and where appropriate you should refer to the most recent case law and gain expert legal advice from Local Authority/Health Trust legal team to determine the domain you need to refer to. Assessing for capacity does not just involve assessing for knowledge. Broadly speaking this is the understanding part and there are 3 other aspects/abilities to look at—retention, weighing up and communication. A Mental Capacity Assessment is a multi-stage test involving the assessor showing that there is a lack of ability in any of these areas and the lack of abilities are linked to an underlying impairment of mind or brain.

Each individual's circumstances are different so this is guidance only. This section has been based on current case law. For example, assessors should be aware that there have been debates within case law about whether tests should be 'person-specific' (e.g. 'does the person have capacity to have a sexual relationship with person Y') or 'act-specific' (e.g. 'does the person have capacity to consent to sexual relationships irrespective who the other is'). The position at the time of writing this guidance is that assessments should generally be orientated towards act-specific assessments, although it has been suggested that there might be a stronger case of a person-specific assessment in contexts in which a marriage has already taken place.

The assessment needs to involve an understanding of the mechanics of sex, the reasonably foreseeable consequences of sex (e.g. physical and mental health, emotional and consequences including pregnancy, birth, sexually transmitted infections, contraception and protective methods), and that the person has a choice to have sex or not.

This section begins with an overview of the domains to be covered in the capacity assessment, before going into more detail about the understanding and ability required for each aspect. The section concludes with some guidance around use of questions.

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### Practice Tip

Explore the most recent case law and, if appropriate, gain expert legal advice from Local Authority/Health Trust legal team to gain information about how that will inform how you will conduct the assessment.

Based upon the most recent case law available (eg [LB Southwark v KA](#)), capacity assessments for marriage need to consider both:

- i. Understanding and reasoning in relation to the marriage contract
- ii. Understanding and reasoning in relation to sexual relationships. In order to have capacity to consent to marriage, the individual also needs to have capacity to consent to sexual relationships.

Those involved in assessments should have access to qualified legal advisors as it is very difficult to interpret the legal context without a legal training. Guidance is required from the relevant Local Authority and/or Health Trust legal team about recent legal judgements relating to assessing mental capacity.

The following subsections provide guidelines concerning the minimum threshold for understanding the above areas. Following the principles of the MCA an individual's ability to retain, 'weigh up' and communicate their decision are also relevant to consider.

Practitioners should also explore the individual's desire to get married across each assessment session, even if this has been asked about prior to the assessment: people might change their minds and/or become less anxious about expressing a view that they do not wish to marry.

If an individual does not want to get married then any attempts to marry that individual need to be construed as forced marriage, irrespective of the individual's capacity (best

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interests decisions **cannot** be made for an individual to marry). Appropriate safeguards should be put in place. Although a capacity assessment might not be warranted, practitioners might consider whether risk would be reduced if an assessment was undertaken, e.g. if there are concerns the individual is susceptible to coercion to marry.

### Areas to consider concerning marriage

#### Marriage as a contract

- ▶ Does the individual have a basic awareness that marriage involves a form of contract between two people?
- ▶ Are they aware that the signing of a contract and their spouse-to-be also signing is part of the process of getting married?
- ▶ Are they aware that marriage follows a wedding ceremony?
- ▶ Would they be able to recognise they were participating in a wedding?

In order to have capacity an individual would not be expected to give any further information about the content of the written document or describe legal details in more depth. Such knowledge would be unlikely to be demonstrated by many people who would not warrant the functional test of the MCA. Similarly, the individual would not be expected to demonstrate a detailed knowledge of the wedding ceremony, just an awareness that weddings are part of the process of becoming married. Assessors should be mindful that there are cultural differences in the rituals involved in weddings and learn about the likely wedding ceremony of the cultural and religious group that the person being assessed belongs to so that this can be discussed sensitively during the assessment.

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### Responsibilities of marriage

- ▶ Does the individual have an awareness that marriage involves each of the spouses having responsibilities to the other partner?

Assessors should be respectful that expectations will be affected by the cultural and familial context of an individual. Assessors need to avoid imposing their own ideals about responsibilities of marriage onto the assessment. For example, answers suggestive of gendered beliefs concerning tasks ('my wife will cook and clean for me, I will help her by laying the table') are not inherently relevant to capacity. However the personal constraints on behaviour outlined within British law are relevant to an understanding of the contract of marriage. Although it is recognised that not all marriages are sexually monogamous, adultery is a grounds for divorce within UK law. It is recommended that assessors explore whether the individual has an awareness that the expectation would be that neither they nor their spouse would have intimate sexual relationships with another individual whilst married. Although, again, the following areas are not inherently relevant to capacity they do contribute to the overall picture of the person's understanding. It may be helpful to gain the person's views about how they might negotiate roles and behaviour within the marriage, their ideas about resolving conflict and their understanding of the problems and consequences associated with coercive control and domestic violence.

### Awareness of changes as a result of marriage

- ▶ Is the individual aware that marriage will result in changes to their life in some ways?

An individual should have some awareness that marriage will result in changes to their life in some way, for example, that their spouse would begin living with them, that they might share a bed with their spouse. It is also important that the person understands that there are likely to be expectations from one or both of the partners to have a sexual relationship and that

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this is seen as an essential part of marriage and that there is also likely to be a desire to have children.

The individual being assessed should not be expected to predict with accuracy how things will be when they get married (people with capacity will not be able to do so), however they should be able to demonstrate an awareness that their life will alter following the marriage. They should also be able to demonstrate an understanding that some of these changes might be desirable for them, and that some of the possible changes and consequences might be undesirable.

### Awareness of choice to marry or not

- ▶ Is the person aware that it would be their choice alone whether they consent to get married including to a given person?

Many people with capacity consent to a marriage when their spouse has been introduced by others, such as an arranged marriage with the involvement of the family, in which they choose to participate.

At the same time it should be recognised that, for some people with capacity, the choice to get married might partly be made because they want to please relatives and that, when this choice is freely made, this does not constitute coercion or a forced marriage. Questions could be asked to check if the person recognised that they still had a choice even if a relative or respected person told them they wanted them to marry.

Again, the focus should be on assessing whether the individual is aware that it is **their** choice if they consent to a marriage, and the assessor would need to think carefully about what pressures would constitute coercion and whether this would warrant a referral to safeguarding. **A marriage would be regarded as forced if the individual was experiencing coercion to marry someone they did not want to, whether they have capacity or not.**

Example questions for this domain are offered in **Appendix 1**.

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### Awareness of divorce

- ▶ Does the individual have an understanding of divorce?

The individual needs to have an awareness that there is a formal process that can end the marriage contract. The person needs to understand that this process does not happen instantly and that it has to be agreed by the relevant authorities. In order to be assessed as having capacity to marry, the person would not be expected to know the full details regarding which systems would need to be involved for a divorce and what processes they would need to undertake. The individual needs to be aware that only they or their spouse-to-be could request a divorce and it should be the individual's own choice to request this (i.e. other people should not make an individual request a divorce or prevent them from requesting a divorce).

Example questions for this domain are offered in **Appendix 1**.

### Areas to consider when carrying out a mental capacity assessment concerning sexual relations

#### Understanding of the mechanics of 'the act' including awareness that an act is sexual

- ▶ Is the individual able to identify different body parts including male and female genitals and do they know that they have a sexual function?

It is generally helpful to assess the person's ability to name parts of the body including body parts that have a sexual function as this contributes to the assessment of the person's understanding of overall bodily functioning and sexual functioning and behaviour.

The individual would not be necessarily expected to correctly name each of these parts of the body, and assessors should be aware the individual might use slang words or non-

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English terminology. At the very least, it is advised that the individual should be able to recognise that the penis and vagina have a sexual function.

- ▶ Is the individual aware of the 'basic mechanics of the act'?

Once it has been established that the individual has an awareness of these parts of the body, further questions (augmented by communication aids and pictorial material as appropriate to the person's needs and functioning) can then be used to explore their understanding of the mechanics of sex utilising the language the individual has used to name the body parts as appropriate. To date the majority of cases of potential marriage have been between women and men and so assessors have usually only enquired about understanding of heterosexual vaginal-penetrative sex as this has been the sexual act considered most relevant to the test of capacity to marry in UK case law. However there may be cases of individuals who require knowledge about alternative sexual acts – this needs to be considered in the pre-assessment stage.

- ▶ Is the individual able to identify acts as sexual?

Not all sexual contact will fit with the acts referred to above. To help gain further information about the person's understanding of sexual relations it is recommended that the person's ability to recognise whether an act is sexual or not is also assessed although they would not be expected to be able to name or describe each act.

It may be helpful to refer to their history of sexual relationships and sexual activity in order to ascertain their knowledge in this area.

Example questions for this domain are offered in **Appendix 1**.

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### Understanding that they have a right to give and withhold consent

- ▶ Is the person aware that it is their decision whether or not they consent to sexual relations including to a given sexual act with a given person?

“The ability to understand the concept of and the necessity of one’s own consent is fundamental to having capacity: in other words that P “knows that she/he has a choice and can refuse” [*reference to [A Local Authority v H](#)*].

In addition to questions enquiring about whose choice it would be as to whether the individual engaged in a sexual act, vignettes can be used to assess the individual’s awareness of the importance of people giving or withholding consent for sexual acts (see appendix).

- ▶ Is the individual aware that their spouse would need to consent to all sexual acts between the couple?

Although this domain is clearly of social and ethical importance it is not as prominent within case law concerning mental capacity, however if criminal proceedings are thought of as a ‘reasonably foreseeable’ consequence of sexual acts with a non-consenting partner, then it would be important for the individual to be aware of the rights each individual has to give or withhold consent.

Example questions for this domain are offered in **Appendix 1**.

### Understanding of the reasonably foreseeable consequences of sexual relations including usual risks

- ▶ Is the individual aware that vaginal-penetrative sex can result in pregnancy and that pregnancy means the woman is going to have a baby?

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The person would need to understand the basic mechanics of the sexual act and its links with pregnancy and also show some understanding of the nature of pregnancy (that the baby grows inside the woman's tummy) and of birth.

Again, it should not be expected that the individual knows the correct terminology.

It should also be explored whether the person is aware that men cannot become pregnant as this will give useful information concerning the nature of their understanding.

It is suggested that the assessor consider whether the person is aware that the baby would be the daughter or son of the man and woman who had the sexual relations resulting in the pregnancy.

- ▶ Is the individual aware that sexual relations can result in the transmission of sexually transmitted infections (STI's)?

It is important that the individual being assessed has some knowledge that there are infections that can be caught and transmitted through sex with someone who has an infection. However, based upon current case law, they would not be expected to know the names of specific STI's or their effects.

- ▶ Is the individual aware that the risks are significantly reduced by receiving and acting upon sexual education and knowledge?

Is the person aware that the likelihood of STI's can be significantly reduced through use of appropriate protective methods? Condoms are the only form of contraception that lower risk of STI spread during penetrative sex involving the penis, so assessors should explore awareness of the existence and function of condoms with the people they are assessing.

Assessors should be aware that in some religions condom use is forbidden. This is an important cultural factor that assessors might need to be sensitive towards, however this should not prevent exploration of the person's understanding of condoms; nor should it mean that the person should not be expected to demonstrate understanding of means of reducing risks.

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- ▶ Is the person aware that in addition to the risk of pregnancy and STI's that the sexual act and sexual relations can have emotional consequences?

It is important to give some time to explore the person's awareness of the risks to their emotional well-being and mental health and their own and others' emotional vulnerability as a consequence of sexual relations. This contributes to building up a holistic picture of the person's functioning and wellbeing and is helpful to the assessor forming a professional opinion about the person's capacity to consent to marriage and sexual relations and to professional awareness of the person's needs including safeguarding needs.

Example questions for these domains are offered in **Appendix 1**.

### **Ability to retain relevant information**

Throughout the assessment the assessor needs to observe the person's ability to retain the information relevant to the decision at the time that the person is attempting to make the decision. The assessor always needs to record the person's abilities in this area for different areas of the assessment including when using verbal and non-verbal/pictorial material and vignettes.

In addition to observing the person's retention within a session and within the decision-making process, it is helpful to observe how the person retains relevant information (e.g. from sex education) across assessment sessions. On occasion it may be helpful for specialist memory assessment to be carried out with the person to augment and inform the observations made during the capacity assessment.

### **Ability to weigh up information**

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- ▶ Is the individual able to use relevant information about the potential ‘good’ and ‘bad’ foreseeable consequences of marriage to make a decision about whether or not they want to marry?
- ▶ Is the individual able to use relevant information about the benefits and risks of having sexual relations in order to make a decision about whether or not they should engage in a sexual act?

This is a very complex area to assess particularly in terms of considering what act-specific rather than person-specific reasoning is relevant. To date, case law has given little guidance about what evidence is relevant in deciding that a person lacks capacity due to a deficit in this area that is associated with the presence of a specific “impairment of mind or brain”. However some questions can be posed that explore the person’s ability in this area and contribute to the overall assessment outcome.

Case law ([IM v LM & Ors, 2016](#)) has suggested that ‘weighing up’ information is of less relevance to the test of capacity to have sex because such decisions are often made with little reasoning in people who would be presumed to have capacity. However, it is suggested that if a person is observed to be unable to weigh up information in a hypothetical situation about whether they should or should not have sex, this may be relevant to outcome. The ability to weigh up and reason with relevant information remains important.

It can be common for people to be aware of the knowledge relevant for marriage and sex but struggle to reason with this information in order to make an informed decision. Helpful questions could consider what the individual thinks are ‘good’ and ‘bad’ reasons for an individual to marry or have sex, and the individual’s own reasons for wanting to marry can be revisited. In keeping with the principles of the MCA, the assessor should not conclude someone lacks capacity because the individual suggests a decision or grounds for a decision that the assessor regards as unwise. The focus needs to be on exploring the individual’s ability to identify and utilise relevant information to come to a decision. Presenting the individual with simple vignettes in which people are asked to make a decision about whether to go through with a marriage or engage in a sexual activity can be a useful way of exploring whether the individual is able to identify and reason with relevant factors. The individual can be asked to communicate what they would do in a similar situation.

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Example questions and materials are available in **Appendix 1**.

At all points in the assessment detailed records of all observations and the person's responses need to be kept as these are relevant to the professional opinion about capacity and the assessment report.

### **Ability to communicate the decision by any means**

The assessor needs to assess and document how the person communicates their understanding and reasoning about the decision in question. And, as already outlined, to adhere with the principles of the MCA, the assessor must ensure that the person being assessed is given all possible opportunity to communicate their decision by any means. This means that the assessor has a responsibility to find out about the person's communication needs and to adapt the assessment process to maximise the person's communication within the assessment both in terms of communicative comprehension and expression.

Because of the social context of communication it is also always helpful to consider how emotional factors may be affecting communication and all efforts need to be made to help the person feel confident and at ease during the assessment.

# Appendix 1

## Use of questions

It is suggested that a variety of question forms are considered and that the format and content used are selected to best match the abilities, interests and educational and cultural background of the person being assessed. It can be helpful to use open questions first, before multiple choice or closed question in order to “scaffold” the person’s understanding. It is also helpful to repeat questions within and across sessions in order to observe the consistency of responses and to give further information about retention and understanding. Basic issues concerning questionnaire design relevant to validity and reliability need to be considered e.g. altering the order in which multiple choice responses are presented.

Asking other questions about the person’s life and family/activities, as well as their hopes/worries about the assessment, before starting the assessment can be helpful. And at times other material, for instance pictorial, can be used in conjunction with verbal questions. Vignette content needs to be creatively developed to reflect the person’s situation and the person can be asked what they would do if they were in that situation.

The ability to ‘weigh up’ information to make a decision can be more difficult to assess than whether someone understands the relevant information. In addition reasoning can often present more of a challenge to people with learning disabilities compared to simply being able to recall acquired knowledge. Therefore presenting the person with vignettes and other potential scenarios is recommended as a way of exploring the person’s ability to identify and weigh up relevant information in their decision making.

Across each domain assessed, it is important to explore the person’s ability to apply understanding and reasoning to their own experience. It has been the clinical experience of the authors that at times a person is able to demonstrate that they understand key concepts and can reason in relation to the material within vignettes relating to other people but that they struggle to apply the information or to demonstrate consistent decision-making for themselves (e.g. identifying that it is the character in a vignette’s choice whether

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they have sex with an individual, but then saying that their own parents should choose if they themselves have sex or not.).

You may decide not to have a fixed set of questions for each assessment but rather adapt your specific questions and way of asking them to the needs of a particular individual. In this way you can adjust and individualise a question to ensure that the person understands what you are asking. It is important if you do this that you write down the questions that you asked and evidence why you made any adjustments. It is useful to hold in mind the domains of knowledge and reasoning that current case law says we need to evidence in order to guide the questions you ask. When you ask questions, you may prefer to ask more open non-leading questions to begin with. If a person struggles to give a meaningful response you could then ask more specific questions to give the person a hint about the type of answer you are seeking. You could then ask multiple choice or yes/no questions if they still struggled to give an answer. You could repeat questions within and across different sessions to check if an answer has been given consistently, altering the order in which options are presented. But be careful that repeating a question does not give the person the message that the first time a question had been asked they had given the 'wrong' answer. You could also use drawings within the session to support some questions, as well as some role plays using dolls.

It should be noted that a number of these questions are to explore awareness that things will change but that failure to give an adequate response is not proof someone lacks capacity.

And finally although not related to capacity, you could ask other questions to identify additional risk and protective factors to contextualise the assessment. A person might have capacity to marry but be vulnerable to coercion.

# Appendix 2

## Mental Capacity Assessment

### Questions concerning Marriage

This is a flexible question schedule designed to explore the person's understanding of marriage and being married, both in general and in terms of their own potential marriage. The person should be asked about many issues to do with their understanding of the marriage contract and their expectations of marriage. It is particularly important that they have an understanding that they have a right to choose to get married and a right to refuse to get married.

Ask in positive manner and encourage discussion; avoid any suggestions of moral judgement.

For some people with good or poor understanding it may not be appropriate to ask all questions. You could consider asking the key questions and following up with supplementary questions as required.

Consider use of skilled interpreter or Makaton Sign Language as appropriate.

The assessor will need to use culturally-specific pictures and interview questions about marriage, for instance pictures or questions related to the relevant faith marriage contract and context.

Record verbatim what you asked the individual (and as appropriate any additional materials used) and any responses they make, both verbal and non-verbal.

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### General Knowledge

- What is marriage?
- What is good about marriage?
- What is bad about marriage?
- Do you know anyone who is married? Then ask “What about you... siblings, parents, uncles, aunts, friends?” etc.
- Have you been to a wedding and what happened when you were there?
- Do you know where marriages usually take place and what is a good place to get married?
- Do you know why people get married to each other? (You may want to provide a range of possible responses; “is it because of?” love, parents telling them to, wanting to have sex, wanting to have children or wanting to get presents etc).
- Do you know “who can marry each other?”. (You may again decide to provide some choices, “Can an X & X marry?”; Man & Woman, Man & Man, Brother & Sister, Father & Daughter etc).
- When a Man and woman get married what do they become? (Currently worded for heterosexual couples). Then provide a range of possible answers, “Do they become?”, e.g. brother and sister, aunt and uncle, husband and wife, mother and father etc.
- After a man and woman/two people get married what happens? Then provide a range of possible answers, “Does this happen?”, e.g. they have children, they eat meals together, they go to places together, they live/don’t live in the same place.
- Can you change your mind if you get married?
- What does a person do if they don’t want to be married anymore?

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- Where do the man and woman/two people live when they get married? Then provide a range of possible answers, "Do they live?", e.g. together, apart, in the family home, in their own home, in another country

### Individual Questions

1. Do you want to get married?
2. Who do you want to get married to?
3. Why do you want to get married? Then provide a list of possibilities to choose from, "Is it because you want?" e.g. love, money, presents, to have a party, to have sex, to have someone who is a friend. Also ask "Is it because?" parents said so, siblings said so, aunty and uncle said so, faith leader said so etc
4. Where do you want to get married? Provide some examples e.g. Church, Mosque, Temple, Synagogue, at home, on a beach, in specific country related to family culture.
5. Who wants you to get married? (You may ask who most wants them to marry and who does not). Why do you think they want this?
6. If you get married can you have another girlfriend/boyfriend or sex with another person? What do you think would happen if you do this?
7. What things do you do now? (e.g. watch TV, go to College, play computer, go shopping etc).
8. Would these things have to change if you became married? When you are married will you do the same or different things?
9. What will be the good things about being married/having a wife/husband?
10. What will be the bad things about being married/having a wife/husband?

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11. Can you change your mind if you get married?
12. Where would your wife/husband live when you get married?
13. Which room would she/he stay in?
14. Where would your wife/husband's clothes, jewellery, shoes go?
15. What things would you like your wife/husband to do for you?
16. What things would you not like her/him to do for you?
17. What happens if she/he did not do anything for you?
18. What things might your wife/husband ask you to do?
19. What things would you like to do with/for your wife/husband?
20. What things would you not like to do with your wife/husband?
21. What would happen if you did not do anything with your wife/husband?
22. What activities would you do with your wife/husband?
23. What activities would you not do with your wife/husband?
24. What would you call your wife/husband's mum and dad?

### Questions for parents/family

This item is only appropriate when it has been assessed that there are no current safeguarding issues arising from family wishes for the person with learning disability to get

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married. Discuss all question areas in detail to explore family views and plans. Use of skilled interpreter as appropriate.

Record verbatim what you asked and any responses they make, both verbal and non-verbal.

1. Do you want X to get married?
2. Who do you want X to get married to?
3. Why do you want X to get married?
4. What might change if X gets married?
5. Where do you want X to get married?  
In Registry Office/Church/Mosque/Temple/Synagogue, (according to religion and culture) and in this country or in specific country related to family culture and background?

### Questions concerning sexual relations

This is an area where any questions need to be highly individualised. The person will be asked about many issues to do with their understanding of sex. It is particularly important that they have an understanding that they have a right to choose to have sex and a right to refuse to have sex.

Ask in positive manner and encourage discussion; avoid any suggestions of moral judgement.

This area to be assessed in approach coordinated with any sex education work that is needed to maximise potential for capacity, e.g. longer-term work with community nurse. Reporting on this area of assessment is often integrated with outcome and report of community nursing intervention, as appropriate. Use of general and culturally-specific specialist materials (Sex and 3R's, pictures, cut out figures and dolls) as necessary.

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The assessment may take place over several sessions.

To have capacity to consent to sex a person has to have a basic understanding of:

- what is the sexual act (the mechanics of the sexual act)
- that there are health risks involved (such things as the risk of pregnancy or of sexual transmitted diseases or of emotional harm)
- that they have a right to choose to have or refuse to have sex.

The interview will need to cover:

- emotional attachment, sexual attraction and sexual feelings
- the sex act
- sexual health
- contraception
- pregnancy and birth
- the importance of consent to sex and the right to choose whether or not to have sex

Examples of questions about this may include:

- What do you understand when people talk about “having sex”? Show pictures and ask what is happening.
- What can happen because you have sex? Explore consequences.
- How does a woman become pregnant?
- Where does a baby grow and what happens at the end of pregnancy?
- How is a baby born?
- If a man and a woman do not want to make a baby when they have sex what can they do?
- If someone wants to have sex with you do you have to do this?

### Appendix 3

#### Information and Resources

##### Key Policy, Guidance and Legislation

Key policy, guidance and legislation for adults

- [Carer's \(Recognition and Services\) Act 1995](#)
- [Disability Discrimination Act 1995](#)
- Achieving Best Evidence 2002/2006/2015
- [Sexual Offences Act 2003](#)
- [Domestic Violence Crime and Victims Act 2004](#)
- [Mental Capacity Act 2005](#)
- [Safeguarding Adults, ADSS, Oct 2005](#)
- [Forced Marriage \(Civil Protection\) Act 2007](#)
- [Mental Health Act 2007](#)
- [Equality Act 2010](#)
- [The Anti-Social Behaviour, Crime and Policing Act 2014](#)
- [The Care Act 2014](#)
- [Controlling or Coercive Behaviour in an Intimate or Family Relationship Statutory Guidance Framework December 2015](#)

Key policy, guidance and legislation for children includes:

- [Children Act 1989/2004](#)
- Achieving Best Evidence 2002/2006/2015
- [Homelessness Act 2002](#)
- [Sexual Offences Act 2003](#)
- [Safeguarding Children: Working Together Under the Children Act 2004 \(WAG\)](#)
- [What to do if you are worried a child is being abused – HM Government 2006](#)
- [Safeguarding Disabled Children: Practice Guidance – DCSF 2009](#)

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- [Working Together to Safeguard Children – HM Government 2010/2015](#) (includes statutory guidance both on forced marriage and safeguarding disabled children)
- [Children and Families Act 2014](#)
- [Controlling or Coercive Behaviour in an Intimate or Family Relationship Statutory Guidance Framework December 2015](#)
- [Children and Social Work Act 2017](#)

Action can be taken for adults and children under the Forced Marriage (Civil Protection) Act 2007 which amended the Family Law Act 1996, and the Protection from Harassment Act 1997. These orders include:

- Forced marriage protection order (section 3.15.7 of this document)
- Injunction against harassment (section 3.15.10 of this document).
- Non-molestation order (section 3.15.8 of this document)
- Occupation order (section 3.15.9 of this document)

### Case Law

#### [IM v LM & Ors](#), (2016)

This decision of the Court of Appeal considers the test of capacity to consent to sexual relations.

#### [LB Southwark v KA](#) (2016)

In [LB Southwark v KA](#) [2016], the judge stated that: “It should suffice if a person understands that sexual relations may lead to significant ill-health and that these risks can be reduced by precautions like a condom” However, the judge stated that KA did not need to understand about condom use to have capacity.

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### Resources

[‘National Mental Capacity Act Competency Framework Written’](#) by Professor Keith Brown, Daisy Bogg and Michael Lyne, February 2017’.

The presumption of capacity should be the underpinning ethos of the interactions between health, social care and public sector workers whenever they are required to interact and/or build relationships with any member of the public. In some circumstances there may be concerns which lead staff across the full range of public service settings to work with individuals who may, for a whole host of reasons, be unable to decide for themselves. In these cases, staff need to understand, and apply, the framework of the Mental Capacity Act to their areas of responsibility, ensuring the individual’s rights in situations where someone needs additional support or safeguards to be put in place.

[Sex and the 3 Rs: Rights, Risks and Responsibilities](#) (4th edition) is a comprehensive guide to teaching sex education to people with learning disabilities.

AUTHOR(S): MICHELLE MCCARTHY AND DAVID THOMPSON

Sex and the 3 Rs: Rights, Risks and Responsibilities is a sex education resource that provides a framework for staff to undertake sex education work which acknowledges the realities of sexual relationships for many people with learning disabilities. An extensive range of issues relating to sexuality are discussed with suggestions for assessment, service responses to, and work around the issue. The pack directly tackles difficult subjects, including pornography, sexual abuse of children, consent in relationships and safer sex.

[A Practical Guide to the Mental Capacity Act 2005: Putting the Principles of the Act Into Practice Paperback](#) by Matthew Graham (Author), and Jakki Cowley (Contributor), 21 May 2015

This practical guide describes how to assess capacity and what a good assessment of capacity should look like, how to deal with conflicts and dilemmas, and the role of legal authority in decision-making. A Practical Guide to the Mental Capacity Act 2005 is an invaluable resource for any health and social care professionals working with individuals who lack decision-making capacity.

# Appendix 4

## One Chance Rule

### Responding to a disclosure of forced marriage

First of all, the issue should be dealt with as part of your existing safeguarding policies and procedures.

Report any such concerns to the safeguarding lead in your organisation.

They will share the information with the local police and social care services, and it is then their duty to investigate and protect the individual – not yours.

What to do and what not to do. More specifically, here are a few pointers for responding to a disclosure of forced marriage:

#### **Do:**

- Take them seriously
- Recognise and respect their wishes
- Reassure them about confidentiality (that you are not going to inform their family)
- Collect as much information as possible
- Seek further information and support from the Forced Marriage Unit
- Keep detailed records of what has been said and done

#### **Don't:**

- Dismiss what you've been told
- Approach members of the family or community to discuss the issue
- Breach confidentiality
- Try to be a mediator.

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### The One Chance Rule

The idea behind the One Chance Rule is that you might only have one chance to speak to a potential victim and, therefore, have one chance to save a life.

Chaz Akoshile, previous joint head of the Forced Marriage Unit, says

“The one thing we always say is to always implement the one chance rule in every case. It is important each case of forced marriage is taken seriously as you may get only one opportunity to make a difference to the potential victim’s life. After which time you may then never hear from them again.”

If the situation seems urgent, the One Chance rule should always be applied.

This effectively means getting as much information as possible about the person’s circumstances and referring them to the Forced Marriage Unit for immediate help.

### Further Resources

This document is part of a suite of resources which includes the following:

Summary of Findings ([full](#), [short](#) and [easy read](#) versions)

[Case Studies Collection](#) (real life experiences and challenges)

[Films](#) to raise awareness of the issues (in English, Hindi, Urdu and Sylheti)

[Workbook for families](#) to raise awareness of the issues

[Workbook for people with learning disabilities](#) to raise awareness of the issues

These were all developed as part of the **My Marriage My Choice** project led by Rachael Clawson with the research team, Dr Anne Patterson, Dr Rachel Fyson, Dr Michelle McCarthy and Dr Deborah Kitson at the universities of Nottingham and Kent.

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For further information contact [rachael.clawson@nottingham.ac.uk](mailto:rachael.clawson@nottingham.ac.uk) or visit the My Marriage My Choice project website:  
<http://www.nottingham.ac.uk/research/groups/mymarriagemychoice>

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