

It should be noted that sexual relations are included in the list of decision making powers that are expressly excluded under the Mental Capacity Act 2005 by Section 27. An attorney cannot consent for a person lacking capacity to enter into sexual relations with another.

Sections 1-3 of the Mental Capacity Act 2005 must be applied to assessing capacity to consent to sexual relations. The following points may be of assistance

📌 **Consequences of not having capacity?**

- 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

📌 **What is the test?**

- There have been recent decisions of the Court that come to different conclusions on the proper test to be applied.
- The key area of difference between them is whether capacity to consent to sexual relations is to be considered in the abstract or whether capacity in concern is to be assessed by reference to the specific circumstances
- It is not a high or complex test
- The degree of understanding of the 'relevant information' is not sophisticated and has been described as 'rudimentary'
- The requirement to 'use and weigh' the information is unlikely to figure materially
- Consent to sexual relations requires an awareness and an understanding of:-

(1) the mechanics of the act;

(2) sexual relations can lead to pregnancy; and

(3) that there are health risks caused by sexual relations

- The necessity of a person's own consent is fundamental to having capacity
- Consent is the exercise of capacity and not the relevant information
- An individual must be able to understand that they have a choice and that they can refuse
- The consent of a partner does not form part of the capacity test

The information contained in this document has been provided by Argo Life & Legacy Ltd for use at the Hot Potato Conference on 4 July 2016. Other providers of information and advice can be consulted. It provides background information only and should not be relied upon as an exhaustive list of the legal issues involved.