CARD 6
What part does mental capacity play in safeguarding?
Capacity is a vital concept in relation to the care and treatment of adults who may be at risk. Retaining control means that competent adults have the right to assess and manage risks to which they are exposed, and support will normally involve talking through those risks and offering support where appropriate.

In the absence of serious crime and of significant risks to third parties, competent adults retain the right to make decisions about how they wish to direct their lives. Neglecting or violating these decision-making rights, even where the intention is to protect the individual, can itself be a form of abuse.

A key feature of adult safeguarding is considering how best to balance respect for agency – or the ability of adults to make informed choices about their lives – with the provision of support to help them manage risks. In ethical terms, the challenge is managing a respect for autonomy with the requirement to act to prevent avoidable harms. Support and advice should be offered as appropriate, but basic freedoms cannot be infringed.

**Adults with capacity**

Adults have the right to make decisions on their own behalf, and are assumed to have the capacity to do so. This is known as the ‘presumption of capacity’. It extends to decisions that entail personal risks and may not be in accordance with an objective view of their best interests. Where there are doubts about capacity, the responsibility for demonstrating that an individual lacks capacity falls to the person challenging it.
The fact that an adult is regarded as ‘at risk’ is not by itself evidence that capacity is lacking, and care must be taken to avoid any such assumption. Where an adult has capacity in relation to a specific decision, such as a health intervention, consent is required and his or her decision must be respected unless treatment is being provided under mental health legislation.

Where a health professional believes an adult with capacity is at risk of harm, but they refuse assistance, health professionals should ordinarily respect this decision but keep an accurate and contemporaneous record of the support offered and the reasons for refusal. Such decisions should also be kept under review and ongoing support should be offered.

For example, where an adult is offered a protective measure but refuses, the situation is likely to be challenging to health professionals. Where possible, the options available to the individual and the nature of the professional’s concerns should be discussed in detail, including presenting a range of options to manage risk. Where a competent adult explicitly refuses any supporting intervention, however, this should normally be respected. Exceptions are where a criminal offence may have taken place or where there may be a significant risk of harm to a third party. If, for example, an abusive adult is in a position of authority in relation to other adults, it may be appropriate to breach confidentiality and disclose information to a relevant authority. Where a criminal offence is suspected, it may also be necessary to involve the police or take legal advice. Ongoing support should also be offered.
An adult should not be lost to or abandoned by relevant services because they initially refused the offer of assistance. The situation should be monitored and the individual informed that they can take up the offer of assistance at any time.

**Good practice example – assessing capacity**

*Mrs Jones’ relatives were concerned that she was sliding into dementia as she seemed increasingly confused, acted out of character, dressed strangely and appeared rude, giving bizarre answers to questions. The family also reported that her confusion had led to her being exploited by a door-to-door salesman who had talked her into agreeing to £10,000 worth of unnecessary building work. Her GP was asked to carry out an assessment of mental capacity with a view to admission to a specialist care home. The GP had known her for years and was familiar with her reluctance to admit to health problems or ask for help.*

*After careful discussion with Mrs Jones, she concluded that her declining hearing was behind her bizarre answers as she often misheard the question. Macular degeneration was affecting her eyesight and led to her making unusual clothing choices, ignoring friends and greeting strangers. Fear of incontinence had also led her to start refusing liquids, resulting in dehydration and some mental confusion. Although appropriate treatment rectified her confusion, her failing eyesight meant that she required a higher level of support than she could receive in her home. Rather than being diagnosed with dementia she was instead assessed as being partially sighted. Given her needs, she agreed to move to a supported care environment near her relatives.*
Safeguarding in this context involved a careful clinical assessment and an identification and treatment of factors that were impairing capacity. This reduced the risk of further exploitation. Following appropriate clinical support, Mrs Jones was identified as having capacity in relation to the decision to move to a care home. The provision of additional social support enabled her to regain a high level of independence.

Where there are doubts about a person’s capacity
As discussed above, although an adult with relevant capacity has the right to make decisions, including those that involve risk, difficulties arise where some capacity exists but its extent is uncertain. In these circumstances, difficult decisions may need to be made involving a balance between respecting the decision-making freedom of adults and the requirement to intervene.

Where there is doubt about an adult’s capacity, a formal assessment should be undertaken. The more serious the decision – and this will include identifying the scale and seriousness of any risks their decision may expose them to – the more formal the assessment of capacity is likely to be.

Depending on the circumstances it may be appropriate to refer the patient to a psychiatrist or psychologist with experience in assessing capacity. Where there are doubts about a person’s capacity that cannot be resolved using more informal methods, the court of protection can be asked for a judgement.
What do you do when an individual refuses to be assessed?
Occasionally an individual whose capacity is in doubt may refuse to be assessed. In most cases, a sensitive exploration of the consequences of such a refusal, such as the possibility that decisions may be challenged later, will be sufficient for people to agree. In the case of an assessment for testamentary capacity, for example, pointing out that a person’s wishes may be contested in the absence of such an assessment can be persuasive. If the individual flatly refuses, however, in most cases no one can be required to undergo an assessment.

Good practice example – managing a potentially abusive situation
Mrs Carmichael was experiencing an episode of mental illness. Although she had briefly been an in-patient she was now being treated at home. Largely because of her mental illness, there were times when she was verbally aggressive to her husband to an extent that at times amounted to psychological abuse. On one or two occasions she had also struck him. Mr Carmichael was in his 80s, and although physically not strong he had only experienced some minor decline in his cognitive abilities. During a routine visit to his GP, Mr Carmichael discussed the problems he was experiencing with his wife. Although distressed, he was very clear that he wanted to continue living with and supporting his wife, despite recognising that there were abusive aspects to her behaviour.

Mr Carmichael clearly had the capacity to make decisions about the kind of behaviour he could manage and the risks he was willing to accept.
After some discussion, Mr Carmichael agreed that the GP would contact social services on his behalf to consider the possibility of providing him with some support, such as respite care. In this way, Mr Carmichael’s decision-making freedom was respected, but help was offered to mitigate some of the potential harms.

**Key points**

– All adults are presumed to have the capacity to make decisions on their own behalf.

– Exceptions to the obligation to respect adults’ informed decisions include where the decision or action results in a threat of significant harm to a third party.

– An assessment of mental capacity is decision-specific – it relates to the specific decision that needs to be made at that time.

– Where there is doubt about an adult’s capacity, a more formal assessment should be made.