

Mental Capacity Assessment Guidance

Forward

Please note these notes are intended as a Quick Guide and are not designed as a substitute for the Code of Practice. Expert (Legal) Guidance should be sought if there is likely to be dispute about the findings or there are life changing consequences and time is not an issue.

Short Summary

The IGP provides clinical care in limited clinical environments and unlike standard General Practice our direct involvement with Mental capacity assessment may not be as frequent and in the same depth.

iHub: We generally see patients as part of their overall care by their GPs. We are unlikely to be involved with decision making over mental Capacity in patients who because of a chronic disease such as dementia, develop impaired mental capacity. They should be referred to a Multi-Disciplinary team decision together with close working with relatives.

The exception arises in patients **who have become acutely ill**, either by confusion, secondary to an acute illness, infection or substance abuse. In these circumstances, the patient should be seen in more acute care and we would not be involved. However, a patient still could present with a deteriorating condition and who by the time seen, is confused, maybe resistant to suggested treatment and management. If there is time **(and the patient is not suffering from a life endangering condition that needs urgent referral to the Emergency Room)** then the following should happen:

1. In these circumstances the clinician would **do his/her best to ensure that all had been done to enable possible understanding.**
2. **Encouraging co-operation of relatives or carers.**
3. **Assessment of capacity** had been completed and documented.
4. **If urgent and relevant then restraining treatment might be required**, and this has to be documented
5. The mental capacity of the patient might improve or is complex and requires assistance from necessary social or legal opinions and /or **the decision could be deferred then consider delaying** to when GP services are available. Such episodes might require personal communication later with the GP.
6. If details of advance decisions are available, then these should guide treatment.

Community Gynaecology/ ENT:

All these appointments are pre-booked. The commonest situation will be patients who have known problems of mental capacity and should be supported **by one of the Key Role individuals below. However, it is possible that patients could present in a number of circumstances without proper possible Mental Capacity support.** Examples include:

- Patients with **relatives that have not realised that their informal arrangements do not afford the clinician the consent** to start and or continue treatments.
- That the patient's **mental condition has deteriorated** since the appointment was made.
- The patient has been using confusion causing substances.

In these circumstances the above as detailed under the iHUB would apply.

CHIN and community activities:

In principle this is more like standard general practice and the general principles set out below would apply.

Core Principles

The Mental Capacity Act applies in England and Wales to everyone who works in health and social care and is involved in care.

- A person is assumed to have capacity. A lack of capacity has to be clearly demonstrated
- No one should be treated as unable to make a decision unless all practicable (reasonable) steps to help them have been exhausted and shown not to work.
- A person can make an unwise decision. This does not necessarily mean they lack capacity.
- If it is decided a person lacks capacity then any decisions taken on their behalf must be in their best interests.
- Any decision taken on the behalf of a person who lacks capacity must take into account their rights and freedom of action. Any decision should show that the least restrictive option or intervention is achieved.

Record Keeping

All professional staff – nurses, doctors, physiotherapists, social workers - involved in the care and treatment of the person who may lack capacity must keep a record of long-term or significant decisions made about capacity.

The record should show:

- What the decision was

- Why the decision was made
 - How the decision was made – who was involved? What information was used?
- Such records provide evidence for staff if they face civil or criminal charges or complaints.
No formal assessment procedures are required for health care assistants or support staff.
For example, Mrs B who is not able to decide what food she wants and so is helped to choose by a health assistant, it is sufficient to record: “Mrs B was helped to decide her choice of meals for the day.”

Key Roles

Independent Mental Capacity Advocate (IMCA)

Independent Mental Capacity Advocates will be appointed to represent the interests of those who have been or are being assessed as lacking capacity to make the decision about treatment or care AND

- Have no one else to speak to them, i.e. they are unbefriended.
- Their care is arranged by their local authority or health service
- Have been in hospital/care home for more than 12 weeks
- May need to have their interests looked after in adult protection case when carer is implicated or involved.

Lasting Power Of Attorney (LPA)

A person can set up a lasting power of attorney to allow someone to act on their behalf with regard to their finances, welfare and health care. In order to be valid a Lasting Power of Attorney must be registered with the Public Guardian on the prescribed form.

Deputy appointed by Court of Protection

A deputy appointed by the Court of Protection makes ongoing decisions about a person who lacks capacity. The Court of Protection will have defined the remit of their powers.

The Public Guardian

The Public Guardian has a number of roles. They keep a register of people with Lasting Power of Attorney, keep a register of orders appointing deputies, supervising deputies appointed by court, directing Court of Protection visitor, receiving reports from attorneys, providing reports to courts and dealing with enquiries and complaints about the way deputies or attorneys use their powers.

Decision-maker

The decision-maker is the person who is deciding whether to take action in connection with the care or treatment of an adult who lacks capacity or who is contemplating making a decision on their behalf:

- Where the decision involves medical treatment – the doctor proposing the treatment is the decision maker.
- Where permanent residential/Nursing Care it may be the Social Worker.
- Outside hospital, that is likely to be care workers and family members. Most people have the capacity to make most decisions themselves.

Assessment context

What triggered the need for this assessment?

Any lack of capacity must be clearly demonstrated as a person is assumed to have capacity.

No one should be treated as unable to make a decision unless all practicable steps to help them have been exhausted and shown not to work.

Doubts about a person’s capacity can occur because of:

- The person’s behaviour
- Their circumstances
- Concerns raised by someone else

What is the nature of the decision? (If this is a review, detail previous decision about capacity)

At this stage there may be a clearly recommended course of action. However, on other occasions the need for a decision has been identified; but a number of courses of action may need to be balanced.

Going through this process gives the identified decision-maker the authority to make a decision on the behalf of the person.

Even if there is a clearly recommended course it still needs to be checked against the best interest checklist to ensure it is the right decision for the person and may therefore need to be amended .

Who was consulted about decision?

Please identify who was consulted about the decision.

If someone significant was not consulted please identify who and why.

A person ought to be represented by a person close to them, someone with lasting power of attorney, a deputy appointed by the Court of Protection or an Independent Mental Capacity Advocate.

If a case conference was held detail who attended. Obviously if a person's representatives agree with recommendations of the lead professionals; then it is not necessary for them to attend any such meeting and they can signal their agreement in advance.

Assessment of Capacity

A lack of mental capacity could be due to:

- A stroke or brain injury
- A mental health problem
- Dementia
- A learning disability
- Confusion, drowsiness or unconsciousness because of illness or the treatment for it
- Substance misuse

Mental capacity should be assessed in with regard to the specific decision. The two stage test of capacity must have been followed:

- Is there an impairment of, or disturbance in the functioning of the person's mind or brain?
- Is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?
Are they able to
 1. To understand the decision
 2. To retain information about the decision (Just for long enough to do 3 & 4, below, could be sufficient)
 3. The ability to use and assess information about the decision
 4. The ability to communicate their decision

A failure to do any of these means they may lack the capacity to make this specific decisions ,not that they lack capacity as a general determination - an assessment must be made on the balance of probabilities.

Note any documentation referenced. Remember: an unwise decision does not of itself indicate lack of capacity. A person may be unable to make a complex decision about like where they should live; but is perfectly capable of making decisions about what they eat, drink and wear.

Anyone caring for or supporting a person who lacks capacity could be involved in this assessment. The more significant the implication of the decision the more people you may feel it necessary to involve. In most circumstances this will not be necessary and the decision maker, the family and an IMCA are likely to know the person best.

Sources of help could be:

- Specialist Mental Health Social Worker/CPN
- Clinical psychologist
- Speech and language Therapist
- Psycho – geriatrician
- Brain Injury Team Worker
- Senior Nurse

[CLICK HERE TO VIEW ANNEX A – THE MENTAL CAPACITY ASSESSMENT CHECKLIST](#)

Can the decision be delayed because the person is likely to regain capacity in the near future?

Careful consideration needs to be given to whether a person is likely to regain capacity with the time limits required by a decision. For example, is the person's understanding better at different times of the day or in particular contexts? Are they able to make decisions when they are in a comfortable environment, perhaps with loved ones in attendance? Consider the effects of medication over the course of the day.

Advance decisions

A competent adult who is capable of understanding the implications of his or her decisions has a legal right to refuse treatment in advance (Not demand specific treatment). An advance decision does not need to be in writing unless life-sustaining treatment is being refused.

Is there an advance decision relevant to the decision?

An advance decision is applicable if:

- The proposed treatment is specified in the advance decision
- The circumstances are similar to those set out in the advance decision.

What was the decision?

Give details. If advance decision was verbal, detail to whom, in what circumstances

Is this advance decision still applicable?

An advance decision is no longer applicable if:

- It is withdrawn (This does not need to be in writing. If verbally retracted, detail to whom, in what circumstances)
- There are reasonable grounds for believing that circumstances have now arisen, which the individual did not anticipate when s/he made the advance decision and would have affected his/her decision had s/he known.
- A lasting power of attorney was granted to allow someone to act on behalf of a person with regard to their finances, welfare and health care. In order to be valid an LPA must be registered with the Public Guardian on the prescribed form.
- The person has subsequently done something inconsistent with the advance decision.
- The person is being detained under the Mental Health Act 1983.

Determination of best interest

If it is decided a person lacks capacity then any decision made on their behalf must be in their best interests.

Views of the lead professional?

Include name and role

Views of other professionals?

Include names and roles.

As far as it can be identified what is most important to the person with regard to this decision?

Wherever possible what is of most importance to the individual should be taken into account.

A person may also have made an advance statement. An advance statement outlines an individual's needs and preferences (how they would like to be treated and cared for), for example, to be cared for at home rather than hospital if dying of a terminal illness. This type of advance statement is not legally binding but should be used to assist in planning care and treatment for individuals. An advance statement that is written down has more weight.

Views of people close to the person / IMCA?**Describe any possible conflicts of interest with regard to this decision?**

It is important to identify any possible conflicts of interest with regard to the decision. This is particularly the case if a decision is in dispute e.g does anyone gain from the persons death.

Assessment summary**Does the decision require arbitration?**

If there is a dispute then it should be clearly identified. If there is a dispute then the following things can assist the decision maker:

- Involve an advocate who is independent of all parties involved
- Get a second opinion
- Hold a formal or informal case conference
- Go to mediation
- An application can be made to the Court of Protection for a ruling

Some decisions are extremely complex. Seeking independent arbitration is sometimes necessary. This can be an independent arbiter agreed by the conflicting parties.

A more formal application to the Court of Protection can be made.

Courts of Protection are being set up nationwide to provide a higher court for capacity and best interest decisions.

Decisions that need to be brought before the court of protection are as follows:

- The proposed withholding or withdrawal of artificial nutrition and hydration from patients in a permanent vegetative state.
- Cases involving organ or bone marrow donation by a person lacking capacity to consent.
- The proposed non-therapeutical sterilisation of a person lacking capacity to consent to this (e.g. for

contraceptive purposes).

- Some termination of pregnancy cases
- Other cases where there is doubt or dispute about whether a particular treatment will be in the person's best interests.

Considering all the factors what final decision has been reached?

Give details as the final decision. This decision and the assessment as a whole should show that the decision maker as made a decision on the best available evidence and has taken into account conflicting views.

The MCA provides legal protection from liability for carrying out care if:

- The principles of the MCA have been observed
- The decision maker can demonstrate they assessed capacity
- The decision maker reasonably believes the person lacks capacity with regard to the decision
- The decision maker reasonably believes the action is in the best interests of the person

Ordinarily a person representing the interests of the person should be consulted before making a decision. However, in emergency situations it will be often in the best interests of the person to provide urgent care without delay.

This decision is the least restrictive option or intervention possible

Any decision taken on the behalf of someone who lacks capacity must take into account their rights and freedom of action. Any decision should show that the least restrictive option or intervention is achieved.

Restraint should only be used as a last resort or in exceptional circumstances. The way in which it might be used must be recorded in a person's care plan and all instances of restraint must be recorded.

Conditions that may justify restraint:

- The person taking action must reasonably believe that it is necessary in order to prevent harm
- That the act is a proportionate response (in terms of both the degree and duration of the restraint)

Children and young people

The MCA only applies where the person lacking capacity is 16 years or older. Any decisions for children younger than 16 can be made with the consent of people with parental responsibility. The Court of Protection has the powers to make decisions about the property and affairs of people under the age of 16.

Only people who have reached the age of 18 can make LPA's, Advance decisions and wills.

Whilst 16 or 17 year olds who have capacity may give or refuse consent to treatment at the time it is offered they cannot make advance decisions. However, their views expressed when they have capacity should be taken into consideration.

Notifying the CQC of Persons detained or liable to be detained under the Mental Health Act 1983 taking unauthorised Leave of Absence

IGPF is required to notify the CQC of any absence without leave (AWOL) of a person detained or liable to be detained under the Mental Health Act 1983.

There is a dedicated notification form to report this absence which can be accessed from the cqc website <http://www.cqc.org.uk/content/notifications>

Notifying the CQC of the death of a patient detained or liable to be detained under the Mental Health Act

IGPF is required to notify the CQC WITHIN THREE WORKING DAYS of the death of a patient detained or liable to be detained under the Mental Health Act when:

- a) The death occurred whilst a regulated activity was actually being carried out (e.g. during a GP's home visit, or during the patient's visit to your surgery),

OR

- b) The death occurred as a result of a regulated activity being carried out,
AND
The Patient had seen their GP in the two weeks before the death,
AND
The death was avoidable / related to inappropriate care and treatment.

There is a dedicated form to report this death which can be accessed from the cqc website - <http://www.cqc.org.uk/content/notifications>

The patient's own GP Practice is responsible for notifying the CQC of an occurrence of these two types of incident.

IGPF

Mental Capacity Assessment Checklist

A person's capacity may be dependent on many factors. It can fluctuate and may vary depending on the subject matter involved.

Incapacity arises if a person is unable to make a decision because of an impairment of, or a disturbance in the functioning of the mind or brain.

A Checklist for assessing Mental Capacity is as follows:

1. CAPACITY TEST		
Is the person able to understand the information relevant to the decision?	YES	NO
<u>Consider how to improve comprehension:</u> <i>Checking literacy, simplify language:</i> <i>Use of visual aids:</i> <i>Controlling noise in the environment:</i> <i>Use of translator:</i> <i>Giving information slowly – in small chunks:</i> <i>Choose time of day when Patient is most alert:</i>		
Is the person able to retain that information?	YES	NO
<u>Consider how to improve retention of information:</u> <i>Use of written or drawn material:</i> <i>Multiple repetitions of information:</i> <i>Patient rehearsing material in their own words:</i> <i>Choose time of day when Patient is most alert:</i> <i>Taping verbal material to play back:</i> <i>Friend present to lower anxiety:</i>		
Is the person able to use or weigh that information as part of the process of making a decision?	YES	NO
<u>Consider how to help evaluation:</u> <i>Give all options, including non-desirable ones:</i> <i>Encourage systematic methods e.g. listing pros & cons:</i> <i>Choose time of day when Patient is most alert:</i> <i>Use a decision tree:</i> <i>Check reasons for choice as these can lead to more options or choices e.g. worry about using a bus might lead to refusing a hospital appointment. Check alternatives.</i>		
Is the person able to communicate his / her decision?	YES	NO
<u>Consider how to help communication:</u> <i>Use of Translator:</i> <i>Friend present to lower anxiety:</i> <i>Use of appropriate communication support e.g. computer:</i> <i>Ask open, rather than closed questions:</i> <i>Check on more than one occasion if decision remains stable:</i> <i>Is the Patient talking to someone they feel able to tell?</i>		
If the answer to any of these questions is "No" then the person lacks capacity.		
Therefore based on the above test does the person have Capacity?	YES	NO

2. WHAT IS THE POSITIVE EVIDENCE UPON WHICH THE DECISION REGARDING THE PERSON'S LACK OF CAPACITY IS BASED?

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3. WHO HAS MADE THE DECISION ABOUT THE PERSON'S CAPACITY?

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Who did that person discuss the matter with?

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**Was an additional opinion sought?
If so from whom?**

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Name:

Signed:

Date: