Part 3: Mental Capacity Act: principles and practice

Capacity can be assessed and tested using the principles of the Mental Capacity Act 2005 (MCA 2005).

Individuals may lack capacity to make a specific decision if they are unable to:

U – Understand
R – Retain or
U – Use/weigh up or
C – Communicate their decision

If 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.

The MCA provides a statutory framework both for people who lack capacity to make decisions for themselves and for those who have capacity, but want to make preparations for a time when they may lack capacity in the future. It also 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 2005 Code of Practice for more detailed guidance, this section provides an outline only.

Principles

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.

The Mental Capacity Act Code of Practice test of capacity

There is a two-stage test for mental capacity which relies on both functional information (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).

The following questions can help you to assess an individual's ability to make a decision:

1. Does the person have a general understanding of the decision they need to make and why they need to make it?
2. Does the person have a general understanding of the likely consequences of making, or not making, this decision?
3. Is the person able to understand, retain, use and weigh up the information relevant to this decision?
4. 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.

It is also helpful to remember there are 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, anyone considering using powers under the Mental Capacity Act 2005 needs to be clear that the inability to make a decision is because of the impairment of the mind or brain (**see Part 2 on common forms of Cognitive Impairment**).

Fluctuating capacity and other diagnostic considerations

In some cases, establishing a potential form of impairment that could affect capacity around specific decisions may be relatively straightforward; for example, forms of brain injury and dementia constitute cognitive impairment and will be diagnosed following tests in clinical settings by specialist doctors.

However, issues like fluctuating capacity through substance use may bring particular challenges. While someone with substance use problems may be able to understand the consequences of a behaviour or decision, they may not be able to apply this understanding in the context of their addiction (see Safeguarding Adults Review, Newcastle, 2022). Decision-making ability may also deteriorate over time, meaning that a longitudinal perspective is useful (Safeguarding Adults Review, Surrey 2022). Involvement of expertise and a multi-disciplinary team are recommended when considering such decisions.

There may also be problems with establishing diagnosis of potential impairments, due to a previous diagnosis not clearly recorded, a lack of information sharing, or because a diagnosis has not yet been made. Sometimes, substance use can mask an underlying impairment, for example brain injury and dementia. Again, these cases benefit from a multi-agency approach.

Wider considerations

The individual's abilities and functioning needs to be considered in terms of their cultural, relationship and environmental context, and with reference to the individual's development and learning opportunities. It is therefore important to have a wide range of background information.

This 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.

This background information is particularly relevant when considering whether someone may be subject to **coercion**. **See Section 4** for further discussion of this issue.

In some cases, to fully assess capacity, an extended amount of time may be required and a multi-disciplinary assessment may be required.

Where substance misuse is a concern, a further capacity assessment may be completed after detox. While you may want to assess capacity at a time of day when someone is not using substances, if someone is under the influence of substances the majority of the time, this also needs to be considered.

If there is concern about the individual's safety and the need for immediate assessment and safeguarding action, it may not be possible to have an extensive conversation with the referrer or find out an appropriate range of information prior to the assessment. It is important to ensure that potential perpetrators of exploitation or other forms of abuse are not aware the assessment is taking place.

Have you supported the person to make informed decision?

You will need to consider if the person has been supported and empowered to make an informed decision themselves. Someone can be supported to have capacity, and there are ways of considering how you can do that when carrying out an assessment:

- Is the person clear on your role and remit? Do they have clarity on where their information will be shared?
- If the person is not from the UK, do they have an understanding of relevant systems in the UK?
- Is an interpreter needed?
- Is the person concerned about their immigration status? Do they understand their rights and access to potential support systems?
- Is the person aware of their options and alternatives should they decide to leave an abusive and exploitative situation? For example, access to accommodation and support services?
- Have you met with the person outside of the environment of potential abuse? For example, consider using a GP surgery or other independent space.
- Consider whether an independent advocate is needed at the assessment, and whether any other communication aids are needed – for example, use of an interpreter.
- Sometimes follow on questions are needed, for example: Can they explain what healthy friendship/relationship is?

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. Consideration should be given as to who has access to electronic files and if access needs to be restricted.

Particular attention should be paid to the ways in which electronic records are kept. It may be helpful for agencies to routinely record information such as impairment, impact of impairment, communication requirements, marital status of service 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 people with lived experience holistically.

Recording needs to meet specific discipline guidelines and be in agreement with practitioner requirements of the NHS 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 securely and confidentially in accordance with NHS Trust and Local Authority policies and in full compliance with GDPR. The court may order to obtain this material.

We've completed the Mental Capacity Act assessment: what next?

If your finding is that an adult in a suspected situation of exploitation has capacity for a relevant decision, this does not detract from a responsibility to consider their safeguarding needs.

See Part 4 for wider considerations relating to 'consent'.

See Part 5 for suggested courses of action following a capacity assessment.