Assessing a person's capacity to make a decision

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http://pathways.nice.org.uk/pathways/decision-making-and-mental-capacity
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This document contains a single flowchart and uses numbering to link the boxes to the associated recommendations.

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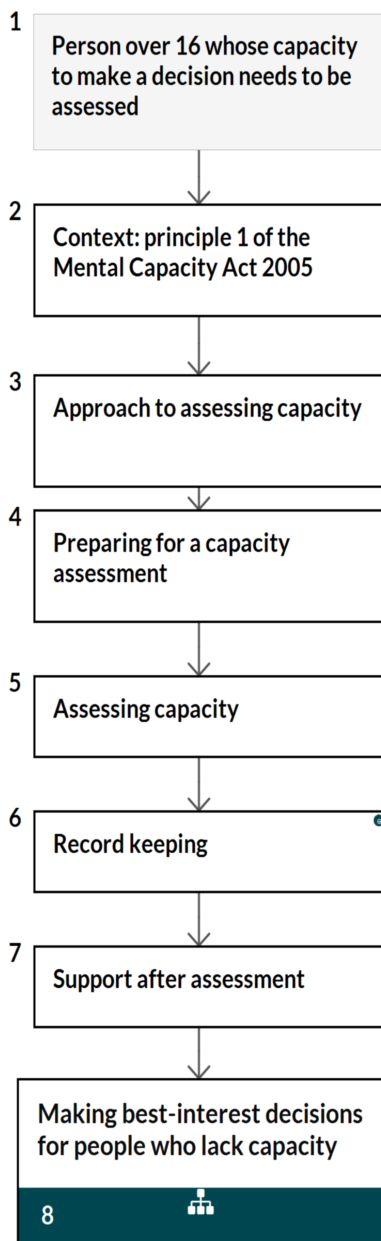

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1 Person over 16 whose capacity to make a decision needs to be assessed

No additional information

2 Context: principle 1 of the Mental Capacity Act 2005

'A person must be assumed to have capacity unless it is established that he lacks capacity.' (Principle 1, section 1(2), Mental Capacity Act 2005 [See page 10])

Mental capacity within the meaning of the Mental Capacity Act 2005 involves being able to make a particular decision at the time it needs to be made (section 2 of the Mental Capacity Act 2005, and Chapter 4 of the Code of Practice).

Under the Mental Capacity Act 2005, capacity is decision-specific, and an individual is assumed to have capacity unless, on the balance of probabilities, proven otherwise. The concept of capacity under the Mental Capacity Act 2005 is relevant to many decisions including care, support and treatment, financial matters and day-to-day living. However, the Mental Capacity Act 2005 does not cover all decisions, and there are some decisions that are subject to a separate capacity test.

To lack capacity within the meaning of the Mental Capacity Act 2005, a person must be unable to make a decision because of an impairment or disturbance in the functioning of the mind or brain. That is, the impairment or disturbance must be the reason why the person is unable to make the decision, for the person to lack capacity within the meaning of the Mental Capacity Act 2005. The inability to make a decision must not be due to other factors, for example, because of undue influence, coercion or pressure, or feeling overwhelmed by the suddenness and seriousness of a decision.

A lack of capacity cannot be established based merely by reference to the person's condition or behaviour. It can only be established if their condition also prevents them from understanding or retaining information about the decision, using or weighing it, or communicating their decision. It cannot be established unless everything practicable has been done to support the person to have capacity, and it should never be based on the perceived wisdom of the decision the person wishes to make.

Effective assessments are thorough, proportionate to the complexity, importance and urgency of the decision, and performed in the context of a trusting and collaborative relationship.

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3 Approach to assessing capacity

Health and social care practitioners should take a structured, person-centred, empowering and proportionate approach to assessing a person's capacity to make decisions, including everyday decisions. If the assessment concludes that a person would, with appropriate support, have capacity to make their own decisions, the assessment should establish which elements of the decision-making process the person requires assistance with, in order to identify how decision-making can be supported.

Use of single tools (such as the Mini-Mental State Examination) that are not designed to assess capacity may yield information that is relevant to the assessment, but practitioners should be aware that these should not be used as the basis for assessing capacity.

Health and social care practitioners must take a collaborative approach to assessing capacity, where possible, working with the person to produce a shared understanding of what may help or hinder their communication and decision-making. This may include involving an interpreter, speech and language therapist, someone with sensory or specialist communication skills, clinical psychologists or other professionals to support communication during an assessment of capacity.

Considering the emotional impact

Practitioners should be aware that people can be distressed by having their capacity questioned, particularly if they strongly disagree that there is a reason to doubt their capacity.

Practitioners must take all reasonable steps to minimise distress and encourage participation.

When the person does not wish to be assessed

If a person refuses to engage in some or all aspects of a capacity assessment, the assessor should try to establish the reasons for this and identify what can be done to help them participate fully. This may involve consulting with others involved in their care and support, reviewing records or giving the person a choice about who else can be involved.

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4 Preparing for a capacity assessment

Choosing an assessor

Assessors should have sufficient knowledge of the person being assessed (except in emergencies or where services have had no previous contact with the person) to be able to:

- recognise the best time to make the decision
- provide tailored information, including information about the consequences of making the decision or of not making the decision
- know whether the person would be likely to attach particular importance to any key considerations relating to the decision.

Gathering information to facilitate the assessment

In preparing for an assessment, the assessor should be clear about:

- the decision to be made
- if any inability to make a decision is caused by any impairment of or disturbance in the functioning of the mind or brain in that person
- the options available to the person in relation to the decision
- what information (the salient factors [See page 10]) the person needs in order to be able to explore their options and make a decision
- what the person needs in order to understand, retain, weigh up and use relevant information in relation to this decision, including the use of communication aids
- how to allow enough time for the assessment, giving people with communication needs more time if needed
- how to introduce the assessment and conduct it in a way that is respectful, collaborative, non-judgmental and preserves the person's dignity
- how to make reasonable adjustments including, for example, delaying the assessment until a time when the person feels less anxious or distressed and more able to make the decision
- how to ensure that the assessment takes place at a location and in an environment and through a means of communication with which the person is comfortable
- how to identify the steps a person is unable to carry out even with all practicable support
- whether involving people with whom the person has a trusted relationship would help the assessment.

The assessor should take into account the person's decision-making history when preparing for an assessment, including the extent to which the person felt involved and listened to, the

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possible outcomes of that assessment, and the nature and outcome of the decisions they reached.

Where consent has been provided, health and social care practitioners should identify people who could be spoken with in order to inform the capacity assessment. For example, this may include the individual's family or friends.

Information gathered from support workers, carers, family and friends and advocates should be used to help create a complete picture of the person's capacity to make a specific decision and act on it.

External help and tools

Where the person has identified communication needs the assessor should also think about communication using tools to help with the assessment.

See assessing capacity: tools, in service organisation, for further information on tools.

Organisations should ensure that assessors can seek advice from people with specialist condition-specific knowledge to help them assess whether, on the balance of probabilities, there is evidence that the person lacks capacity – for example clinical psychologists and speech and language therapists.

5 Assessing capacity

Assess mental capacity in line with the process set out in section 2 and section 3 of the Mental Capacity Act 2005 [See page 10].

While the process applies to all decisions that fall within the scope of the Mental Capacity Act 2005, both large and small, the nature of the assessment and the recording of it should be proportionate to the complexity and significance of that decision.

Practitioners should use accessible language or information in an accessible format to explain to the person:

- that their capacity to make a particular decision is being assessed
- why their capacity is being assessed
- the outcome of that assessment
- what they can do if they are unhappy with the outcome.

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When assessing capacity, practitioners must take account of the principle enshrined in section 1(4) of Mental Capacity Act 2005 and not assume that the person lacks capacity because they have made a decision that the practitioner perceives as risky or unwise.

Practitioners should understand that the person has to retain information only for the purposes of making the specific decision in question, and for the period of time necessary to make the decision.

Practitioners should be aware that a person may have decision-making capacity even if they are described as lacking 'insight' into their condition. Capacity and insight are 2 distinct concepts. If a practitioner believes a person's insight/lack of insight is relevant to their assessment of the person's capacity, they must clearly record what they mean by insight/lack of insight in this context and how they believe it affects/does not affect the person's capacity.

Additional considerations for people with executive dysfunction

Practitioners should be aware that it may be more difficult to assess capacity in people with executive dysfunction [See page 10] – for example people with traumatic brain injury. Structured assessments of capacity for individuals in this group (for example, by way of interview) may therefore need to be supplemented by real-world observation of the person's functioning and decision-making ability in order to provide the assessor with a complete picture of an individual's decision-making ability. In all cases, it is necessary for the legal test for capacity as set out in section 2 and section 3 of the Mental Capacity Act 2005 to be applied.

6 Record keeping

Organisations with responsibility for care and support plans should record whether a person has capacity to consent to any aspect of the care and support plan.

The assessor should record any differing views on the person's capacity and how the outcome of the assessment addresses or answers those differing views.

If, following the assessment of capacity, the practitioner finds no evidence to displace the assumption of capacity, this should be documented.

If the outcome of the assessment is that the person lacks capacity, the practitioner should clearly document the reasons for this. The documentation should also make clear what impairment/disturbance of the mind or brain has been identified, the reasons why the person is unable to make a decision (with reference to section 3 of the Mental Capacity Act 2005 [See

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page 10]) and the fact that the person's inability to make a decision is a direct consequence of the impairment or disturbance identified.

The person assessing mental capacity should record:

- the practicable steps [See page 10] they have taken to help the person make the relevant decision for themselves and any steps taken by other parties involved
- whether the person has capacity to make the decision
- if the person is assessed as lacking capacity, why the practitioner considers this to be an incapacitous decision as opposed to an unwise decision.

All assessments of mental capacity must be recorded at an appropriate level to the complexity of the specific decision being made at a particular time. This may be as a stand-alone assessment document, contained within the individual's health or social care record or in care and support plans, following local policy. The timescale for review of the assessment should be specified and recorded.

Quality standards

The following quality statement is relevant to this part of the interactive flowchart.

3. Assessment of capacity

7 Support after assessment

Provide the person with emotional support and information after the assessment, being aware that the assessment process could cause distress and disempowerment.

When giving information about a decision to the person:

- it must be accessible, relevant and tailored to their specific needs
- it should be sufficient to allow the person to make an informed choice about the specific decision in question
- it should be supported by tools such as visual materials, visual aids, communication aids and hearing aids, as appropriate.

See service organisation for information on resolving disputes.

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8 Making best-interest decisions for people who lack capacity

See Decision-making and mental capacity / Making a best-interest decision on behalf of someone who lacks capacity to make that decision

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Mental Capacity Act 2005

The Mental Capacity Act 2005 is designed to protect and empower people who may lack capacity to make their own decisions about their care and treatment. It is a law that applies to people aged 16 and over in England and Wales and provides a framework for decision-making for people unable to make some or all decisions for themselves.

Practicable steps

'Practicable steps' links to principle 2 of the Mental Capacity Act 2005 (and Chapter 3 of the Code of Practice), which states that 'all practicable steps' should be taken to help a person make a decision before being treated as though they are unable to make the decision. There are obvious steps a person might take, proportionate to the urgency, type and importance of the decision including the use of specific types of communication equipment or types of languages such as Makaton or the use of specialist services, such as a speech and language therapist or clinical psychologist. Practicable steps could also involve ensuring the best environment in which people are expected to make often significant decisions – for example giving them privacy and peace and quiet or ensuring they have a family member or other trusted person to provide support during decision-making, if this is their wish.

Salient factors

(Section 3(1) of the Mental Capacity Act 2005 makes clear that a person will be unable to make a decision for themselves if they are unable to understand the information relevant to the decision. Case law has confirmed that the information to be provided to the person regarding the decision does not have to include every single detail relating to the decision, but must include the 'salient factors'. The salient factors are those which are most important to the decision to be made. This would include information that is subjectively important to the person being assessed (for example, information relating to the likely level of disability a person would have if they did/did not undergo the treatment in question) and also key pieces of objective/factual information relevant to the decision to be made (for example, the side effects of a particular treatment, or the known complications or survival rates of a particular surgical procedure). The seriousness of the decision, and the timeframe within which it must be made, will impact on the nature and amount of information that will need to be provided to the person.

Executive dysfunction

The completion of tasks that involve several steps or decisions normally involves the operation

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of mental processes known as 'executive functions'. If these executive functions do not develop normally, or are damaged by brain injury or illness, this can cause something called 'executive dysfunction'. This involves a range of difficulties in everyday planning and decision-making, which can be sometimes hard to detect using standard clinical tests and assessments.

Glossary

Consent

(the voluntary and continuing permission of the person to receive particular treatment or care and support, based on an adequate knowledge of the purpose, nature, likely effects and risks including the likelihood of success, any alternatives to it and what will happen if the treatment does not go ahead; permission given under any unfair or undue pressure is not consent – by definition, a person who lacks capacity to consent does not consent to treatment or care and support, even if they co-operate with the treatment or actively seek it)

Sources

Decision-making and mental capacity (2018) NICE guideline NG108

Your responsibility

Guidelines

The recommendations in this guideline represent the view of NICE, arrived at after careful consideration of the evidence available. When exercising their judgement, professionals and practitioners are expected to take this guideline fully into account, alongside the individual needs, preferences and values of their patients or the people using their service. It is not mandatory to apply the recommendations, and the guideline does not override the responsibility to make decisions appropriate to the circumstances of the individual, in consultation with them and their families and carers or guardian.

Local commissioners and providers of healthcare have a responsibility to enable the guideline to be applied when individual professionals and people using services wish to use it. They should do so in the context of local and national priorities for funding and developing services, and in light of their duties to have due regard to the need to eliminate unlawful discrimination, to

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advance equality of opportunity and to reduce health inequalities. Nothing in this guideline should be interpreted in a way that would be inconsistent with complying with those duties.

Commissioners and providers have a responsibility to promote an environmentally sustainable health and care system and should assess and reduce the environmental impact of implementing NICE recommendations wherever possible.

Technology appraisals

The recommendations in this interactive flowchart represent the view of NICE, arrived at after careful consideration of the evidence available. When exercising their judgement, health professionals are expected to take these recommendations fully into account, alongside the individual needs, preferences and values of their patients. The application of the recommendations in this interactive flowchart is at the discretion of health professionals and their individual patients and do not override the responsibility of healthcare professionals to make decisions appropriate to the circumstances of the individual patient, in consultation with the patient and/or their carer or guardian.

Commissioners and/or providers have a responsibility to provide the funding required to enable the recommendations to be applied when individual health professionals and their patients wish to use it, in accordance with the NHS Constitution. They should do so in light of their duties to have due regard to the need to eliminate unlawful discrimination, to advance equality of opportunity and to reduce health inequalities.

Commissioners and providers have a responsibility to promote an environmentally sustainable health and care system and should assess and reduce the environmental impact of implementing NICE recommendations wherever possible.

Medical technologies guidance, diagnostics guidance and interventional procedures guidance

The recommendations in this interactive flowchart represent the view of NICE, arrived at after careful consideration of the evidence available. When exercising their judgement, healthcare professionals are expected to take these recommendations fully into account. However, the interactive flowchart does not override the individual responsibility of healthcare professionals to make decisions appropriate to the circumstances of the individual patient, in consultation with

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the patient and/or guardian or carer.

Commissioners and/or providers have a responsibility to implement the recommendations, in their local context, in light of their duties to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity, and foster good relations. Nothing in this interactive flowchart should be interpreted in a way that would be inconsistent with compliance with those duties.

Commissioners and providers have a responsibility to promote an environmentally sustainable health and care system and should assess and reduce the environmental impact of implementing NICE recommendations wherever possible.

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