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FACE Mental Capacity Assessment Guidance

Foreword

Please note this is necessarily simplified guidance with regard to the Mental Capacity Act as seems appropriate with assisting a professional complete the FACE Mental Capacity Assessment.

For a more detailed explanation of the Act we would recommend “Making Decisions: A guide for people who work in health and social care”. http://www.dca.gov.uk/legal-policy/mental-capacity/publications.htm

If this is insufficient then the code of practice should be consulted: http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf

Expert guidance should be sought if there is any dispute about the decisions or the person lacks advocates to represent their interests.

Applicability

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

Core principles

Core principles:

- 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 him or her have been exhausted and shown not to work.
- A person is entitled to 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 taken 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 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 mental 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. Completing the FACE Mental Capacity assessment appropriately would represent best practice and ensures you meet the requirements of the Mental Capacity Act.

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 **and either**:

- The decision is about serious medical treatment provided by the National Health Service (NHS) (but excludes treatment regulated under Part 4 of the Mental Health Act 1983).
- It is proposed by an NHS body or a Local Authority (LA) that the person be moved into long-term care of more than 28 days in a hospital or 8 weeks in a care home (where that accommodation or move is not a requirement of the Mental Health Act 1983) IMCA role applies to self-funders whose care is arranged by the local authority.
- A long-term move (8 weeks or more) to different accommodation is being proposed by an NHS body or LA for example, to a different hospital or care home (where that accommodation or move is not a requirement of the Mental Health Act 1983) IMCA role applies to self-funders whose care is arranged by the local authority.
- In addition, regulations on the expansion of the IMCA service provide that local authorities and NHS bodies may

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involve an IMCA in a care review if a change of accommodation that was arranged by the LA or NHS is being considered (and the person has already been in that accommodation for 12 weeks or longer).

Additionally regulations also provide that local authorities and NHS bodies may involve an IMCA 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 are involved in an adult protection case. In these cases alone the rule that the person is unbefriended does not apply.

An IMCA has the same rights to challenge a decision as any other person caring for the person or interested in his welfare. The right of challenge applies both to decisions about lack of capacity and a person's best interests.

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 nursing care is provided, the nurse is the decision-maker.
- For most day-to-day actions or decisions, the decision-maker will be the person must directly involved with the person at the time.
- 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 (reasonable) steps to help them have been exhausted and shown not to work.

Doubts about a persons capacity can occur because of:

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

However, age, appearance and condition do not by itself establish lack of capacity.

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 worth of various courses of action may need to be assessed. 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.

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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.

Determination of capacity

Mental capacity should be assessed in functional terms 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 persons mind or brain?

Is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?

Anyone caring for or supporting a person who lacks capacity could be involved in the test to assess capacity. This will include family members and carers as well as health and care staff. The more significant the decision the greater the number of people likely to be involved. Expert testing by doctors or psychologists will be required in some cases but, even when used, may not be the only form of assessment. Who is involved depends on individual circumstances.

Sources of help:

- Clinical psychologist
- Psycho-geriatrician
- Nurse consultant
- Specialist nurse, e.g. in dementia care or liaison psychiatry
- Senior nurse

The conclusions must show that this two-stage test has been applied. An assessment must be made on the balance of probabilities.

Remember, this is a specific, not general determination. 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 like where they should live; but is perfectly capable of making decisions about what they eat, drink and wear

Transient capacity must be considered. 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. A decision about capacity should not be pushed through when capacity is at its lowest.

Diagnostic test

The first question is a diagnostic test of a lack of mental capacity. A lack of mental capacity could be due to a number of circumstances. For example

- 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

Functional test

The second question is a functional test that applies to the following four areas:

- The ability to understand the decision
- The ability to retain information about the decision
- The ability to use and assess information about the decision
- The ability to communicate their decision

If a person lacks capacity in **any one** of these areas then this represents a lack of capacity.

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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 within the time limits required by a decision. This question is a checkpoint to ensure that mental capacity decisions are not unnecessarily rushed. However, in some cases, it will be in the best interests of the person that a decision is being made on their behalf even though it is expected the person's capacity will improve in the near future.

Advance decisions *(Note any documentation referenced)*

A competent (has capacity) and informed adult who is capable of understanding the implications of his or her decisions has a legal right to refuse treatment in advance. No individual, whether or not, s/he has capacity, has the right to demand specific forms of medical 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 which would have affected his/her decision had s/he known.
- A lasting power of attorney covering this decision was granted <u>after</u> the advance decision, to allow someone to make this decision. 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 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. Specific questions with regard to best interest have been added throughout the document.

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?

Though the person lacks capacity they may still retain wants and wishes relevant to the decision at hand. Identify what is most relevant to the individual who lacks capacity in the context of the decision being made. 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

Every effort should be made to communicate with someone. Very few people lack capacity based on this ground alone. Those who do might include people who are unconscious or in a coma, or suffer from a rare neurological condition known as 'locked in' syndrome. In many other cases simple actions such as blinking or squeezing a hand may be enough to communicate a decision. Input from professionals in communication is likely to be needed in this area.

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Views of interested others *(e.g. family, friends, carers, LPAO, IMCA, CPD. Give names and roles. If no-one justify)*

Include names and roles. Professionals are obligated to consult with people who are interested in the welfare of a person. If the person has no independent party representing their interests explain why and what is being done about this situation. For instance, a person may require emergency treatment and it is not possible to contact a person close to the person in time or arrange for them to have an IMCA or Court of Protection Deputy assigned to them.

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.

Assessment summary

Does the decision require arbitration?

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

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 case conference
- Go to mediation
- An application can be made to the Court of Protection for a ruling

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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)

Special considerations for life sustaining treatment have been considered or are not applicable

Where life-sustaining treatment may be in the person's best interests the person making the decision must not be motivated to bring about a person's death.

This decision is not been biased by age, appearance, condition, gender or race

Please refer to local protocols with regard to discrimination.

Every effort has been made to communicate with the person concerned

Irrespective of the person's disabilities every effort must be made to communicate with the individual concerned.

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 ahs 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.

Sources and references

- Making Decisions: A guide for people who work in health and social care; Published by the DCA. http://www.dca.gov.uk/legal-policy/mental-capacity/publications.htm
- Mental Capacity Act 2005: Code of Practise. http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf
- DCA – range of material including the statutes, leaflets and training materials. http://www.dca.gov.uk/legal-policy/mental-capacity/index.htm
- Department of Health – range of material, leaflets, training material. http://www.dh.gov.uk/en/AdvanceSearchResult/index.htm?searchTerms=mental+capacity+act
- Ashton, G,. Oates, L., Letts, P, and Terrel, M. (2006) Mental Capacity: The New Law, Bristol:
- The British Psychological Society (2006) Assessment of Capacity in Adults: Interim Guidance For Psychiatrists, Leicester, BPS
- Presentation: Mental Capacity Act 2005 by Dora Jonathon-Withers.
- Assessment and guidance developed in consultation with Dora Jonathon-Withers

Dora Jonathon-Withers bio

Ms Dora Jonathan-Withers, BSc (Hons) MSc (Clinical Psych) LLM.

Dora is a psychologist and until recently the CSIP WM Regional lead on mental health legislation and Mental Capacity Act and is a National trainer on Values Based Practice in Mental Health Practice.

She is a member of the MHRT Northern Region since 1996, member of the Tribunal National Training Committee and trains on transcultural aspects of Mental Health.

Dora has written on a range of topics on transcultural mental health issues and is one of the authors on 'Mental Health Service Provision for a Multi-cultural society'.