

## Guidance on assessing mental capacity in different ways during COVID-19

An assessment of mental capacity is often central to decisions which follow, in Adult Social Care.

Knowing whether the person is able to make their own decisions (our starting point), whether they are making unwise decisions or whether in fact they lack capacity for some decisions is often a key component to moving forward.

These are difficult times and therefore require us to respond in new and creative ways.

Any method used during these times must uphold the principles of the MCA and must promote the persons rights. Alternative assessment methods should not equal watered-down rights which is likely to mean the assessment could be regarded as unlawful.

The following methods and means are by way of assistance and assume face to face direct contact is prohibited.

### Virtual assessments

The next best thing to a face to face contact is a remote assessment. Many of the people we support in ASC already use technology really well. So can the assessment be carried out by any one of the virtual platforms available including:

- Skype
- Facetime
- Zoom

If this is possible you will need to give particular thought to how the discussion will take place. You will also need to give thought to what the person being assessed will see in the call. Do they need to see your library shelf of books or your lovely flowery wallpaper? In some cases, this would be an unnecessary distraction and possible bring an unhelpful sense of informality. Perhaps a plain backdrop is best.

Make sure you have tested the technology and know which buttons to press, and when and that both you and they can be heard. Some people will be very confused by small screens and images of themselves. The technology will need explaining.

Noises can be very distracting and if you are working from home you need to give thought to this. A dog barking in the background does not send a professional message. Practice using your microphone and also practice muting when not in use to avoid background noise.

If using Microsoft there is an option to blur the background. There is also an option to record the meeting, this would need consent though.

Be clear to arrange a time for this interview to take place, explaining how long it will take.

### Telephone assessments

A remote assessment may not be the right method for the person you need to assess. The next option would be to speak with the person by telephone. Can the setting support the person to do this? It is also imperative that we confirm we are speaking with the correct person. Is it possible for more than one person to be on the call? In some circumstances it might be possible to record calls, but advice will be needed on GDPR and the persons consent should be obtained. It might be helpful

if this method is used to have your pre prepared list of questions which you can then share with family, support workers and others who know the person well.

Make sure that the person is able to hear you and that they are not going to be overheard.

#### Evidence gathered by others on your behalf

If you are not able to directly communicate with the person, then others may be able to. Once you have completed your preparation and therefore know the questions to ask and the kind of evidence you are looking for this could be shared with someone who knows the person well and is in contact with them. This might be a family member, a carer, a support worker or advocate.

Consider also that you can communicate with the person visually or in writing. Can you send your questions to them for others to record their answers? Can you record a series of questions on DVD or sound file?

Can you prepare a visual representation with images or symbols which can be shared with the person and discussed with the support of family, carers or others?

In this situation triangulation of evidence is key to prevent or minimise bias. This means asking the same questions of others and interrogating evidence that you may already hold such as CoP 3 provided for Health and Welfare Power of Attorney, previous capacity assessments for same or similar decisions and Care Act documents such as assessments and support plans. Consider also evidence that may be held by the DoLS team. If there is a DoLS or a Community DoL Order in place there will be a capacity assessment which might hold valuable detail.

#### Evidence gathered from recordings and sources

The final option is recommended only if none of the above is possible. However, there is a requirement that the evidence gathered rebuts the presumption of capacity. The assessor should always strive to undertake the most effective assessment possible using one or a combination of the methods described to do this. If it proves impossible to meet the legal threshold at the current time, then it may simply not be possible to rebut the statutory presumption

This might be the case where the person has no means of communication at all. This can be enough to establish a reasonable belief of a lack of capacity provided you are able to evidence that all practicable steps have been taken to support the person to make the decision and these have not been successful. In some cases of profound and multiple learning disability this may be the case and also those with advanced dementia. This conclusion must be supported by evidence and that evidence can be drawn from all the sources suggested above.

Alternatively, the person may have limited communication, but the above measures are simply not suitable. In these extreme cases evidence to provide a reasonable belief may be drawn exclusively from existing evidence and recording. It must be triangulated by confirming with a variety of professionals, family and carers. Ideally there will be existing capacity assessments to draw on.

#### Planning

As with any assessment your work begins before the assessment.

1. What do I already know about the persons communication?
2. What do I already know about the persons history of decision making?

3. What is the question or decision to be made?
4. What support has the person been given to make this decision themselves?
5. What would someone need to understand in order to make this decision?
6. What are the questions I need to ask to test this?
7. What do I know about the diagnosis and how it impacts the person?

In a remote assessment it is more important than ever to have completed all this preparation, before speaking with the person.

You can gather much of this detail from ASC records, by speaking with an allocated social worker (if that isn't you) by speaking with a key worker in the setting, by speaking with family and carers.

Once you have the clearest possible picture of the person you can start to compile your questions and consider how to present them.

At this point it should be clear to you whether a virtual assessment method is best, or whether you need to move on through the list suggested above.

### Proceeding

Once you have a clear set of questions you will need to be creative in choosing how to present them.

Can you consider

- Filmed questions
- Written questions accompanied by symbols
- Photographs

Whichever method of assessment you are using you will need to triangulate evidence. This could be by preparing the same set of questions (bearing in mind confidentiality, you don't need to give information, instead you are requesting it) and sending to a varied set of people such as

1. Another professional
2. A key worker
3. A family member or advocate

You will be looking to avoid risk aversion or being overprotective, by checking the consistency of agreement. For example are all professionals clearly in agreement that the person lack capacity for the particular decision.

So, you might for example have a skype interview with the person, send a written set of questions to their carer and do a telephone interview with care staff.

In all cases you must clearly record how/what method you used to reach your assessment decision Attach any additional documentation/questions that were sent out etc onto LAS as supporting evidence.

### Pondering

Once you have gathered information as with any assessment of capacity it is for you to conclude whether there is a reasonable belief that the person lacks capacity in relation to the specific matter. Does the information and evidence you have support a functional inability to either understand, retain or use or weigh the relevant information.

Are you sure that you have eliminated bias as far as possible by gathering evidence objectively and not preferring the version that simply accords with your views?

Finally, the issue of causality must be addressed. You must still determine that the inability is because of the mental impairment. These are difficult times and most of us are afraid of COVID-19 whether we have a mental impairment or not. Is it fear preventing the person from making a decision? Is it illness unrelated to their mental impairment i.e. Covid-19 related symptoms? For this to be a lack of mental capacity the persons functional inability in one or more areas must be because of their mental impairment. You must establish this in the conclusion of your assessment.

#### Other useful resources

<https://www.39essex.com/mental-capacity-guidance-note-brief-guide-carrying-capacity-assessments/>

<https://www.birmingham.ac.uk/Documents/college-artslaw/ptr/perfect/Mental-capacity-brief.pdf>