

Assessing Mental Capacity When Making Decisions

What is mental capacity?

Mental capacity is the ability to make specific decisions for yourself. People who cannot make decisions for themselves are said to 'lack capacity'. This could be due to a lifelong condition such as a learning disability, or it could be short term; for example, if someone is in a coma from which they later recover.

A person could have capacity to make simple decisions, such as what to wear each day, but lack capacity to make more complex decisions such as how to manage their finances.

What is the Mental Capacity Act 2005?

The Mental Capacity Act 2005 (MCA) is a piece of law which, (amongst other things), sets out how to assess when people can make decisions for themselves and what to do when people are found to lack capacity to make decisions. MCA is based on five key principles:

1. Every adult has the right to make decisions for themselves. It must be assumed that they are able to make their own decisions, unless it has been shown otherwise.
2. Every adult has the right to be supported to make their own decisions. All reasonable help and support should be given to assist a person to make their own decisions and communicate those decisions, before it can be assumed that they lack capacity.
3. Every adult has the right to make decisions that may appear to be unwise or strange to others.
4. If a person lacks capacity, any decisions taken on their behalf must be in their best interests.



5. If a person lacks capacity, any decisions taken on their behalf must have the lowest impact on their rights and freedoms, thus be the 'least restrictive' option.

How is capacity assessed?

You must assume that everyone is able to make a decision for themselves, until it is proven that they cannot. The law says that the way to establish this is to assess whether a person has the ability to make a particular decision at a particular time.

It is important that before assessing a person's capacity to make a particular decision, they are given as much help as possible to make the decision for themselves. For example, you might provide information in an easy read format, break information down into small chunks, and think of different ways to describe things. These are all ways that can make it easier for someone to weigh up information and make a decision.

In addition, you should not assume that because a person lacks capacity to make one decision that they lack capacity to make all future decisions about that or other issues.

When assessing someone's capacity, there are a number of stages which guide the assessor and help them decide if the person they are talking to has capacity to make a specific decision at a particular point in time.

1. Is the person able to make a decision? If the person cannot make a decision:
2. Is there an impairment or disturbance in the way the person's mind or brain works? (Does the way the person's brain works make it harder for them to make decisions?)
3. Is the person's inability to make the decision because of the identified impairment or disturbance?

In addition to the outcome of the questions listed above, to prove someone does not have capacity it has to be shown that they are **unable** to do any **one** of the following tasks:

- Understand information that is relevant to the decision; or

- Retain information given to them; or
- Use the information given to them to make the decision and weigh up what is good and bad about it; or
- Communicate their decision (this can be verbally by talking, non-verbally such as by blinking, pointing or using sign language or any other way the person communicates for example using an ipad).

Who can assess capacity?

Who makes the decision will depend upon the circumstances. For example, if a person is found to lack capacity to make simple decisions such as what to wear each day, then their carer or family member who helps them to dress can make that decision for them.

For more complex decisions, such as where a person will live, or what medical treatment they should receive, a professional – for example, a social worker or the person’s GP depending on the circumstances – should make the judgment, with input from the person’s family or carers. For complex decisions such as these, it would be appropriate to formally document the process and outcome of the assessment.

The assessment of capacity should be proportionate to the decision being made. Therefore, if a family member is deciding whether a person has capacity to decide what to wear that day, they are not expected to go through a formal process or make notes each time the decision is made.

Where no appropriate person is available to make decisions on behalf of the person, a local authority can appoint an Independent Mental Capacity Advocate (IMCA). The role of an IMCA is to speak on behalf of the person and communicate their wishes. An IMCA can also be appointed where concerns exist about whether family members or carers making decisions on behalf of the person are doing so in that person’s best interests.

Can I challenge the outcome of a capacity assessment?

Capacity assessments can be challenged. A person can raise a challenge for a number of reasons including if the person carrying out the assessment did not give appropriate support to the person being assessed to allow them to take part in the process. Alternatively, an assessment may not have been carried out when it should have been. The decision not to carry out a mental capacity assessment can be challenged.

If you wish to challenge the outcome of a capacity assessment, start by speaking to the person that carried out the assessment. If you wish to challenge the decision to not carry out a mental capacity assessment speak to the person who has responsibility for the capacity assessment or their manager. In both cases – whether you believe an assessment to be wrong or one has not been carried out - you should ask for reasons and explain why you disagree. If this does not help, you can ask for the decision to be reviewed, either by the person that made the initial assessment, or by the organisation or public body involved – for example, social services or a hospital.

If you are still not satisfied, you could formally complain using the organisation's complaints procedure. If you are still unhappy with that decision, you may be able to complain to an ombudsman.

Depending on the circumstances, you may be able to challenge the decision at the Court of Protection. However, there are strict time limits and procedures for doing this, so you should seek specialist legal advice as soon as possible to ensure that you do not miss any important deadlines for making the challenge.

How are decisions made?

If a capacity assessment has been carried out and it has been decided that the person lacks the capacity to make a certain decision, the decision must be made for them, if it needs to be made at that time.

Who makes the decision will depend upon the circumstances. For example, if a person is found to lack capacity to make simple decisions, such as what to

wear each day, then their carer or family member who helps them to dress can make that decision for them.

If there is a more complex decision – such as where a person should live – then the person's deputy (if they have one) should have an input in the decision. A local authority can appoint an independent mental capacity advocate (IMCA) to speak on behalf of the person if there is nobody suitable to make the decision for the person, or in more complex situations; for example, if the local authority does not believe that family members are acting in the best interests of the person in question.

How are decisions made in the person's best interests?

When a decision is made on behalf of a person who lacks the capacity to make it themselves, it must always be made in the person's best interests and be the least restrictive suitable option.

This ensures that the person's rights are respected, and that the decision is the best one for them. It should never be made in the best interests of the person making the decision. For example, it should never be made just to make things easier for the carer or professionals involved.

Even if a person is found to lack capacity to make a decision, then when appropriate to do so, they should still be included in the process, and may still have views on their preferences, which should be taken into consideration by the decision-maker.

Family, friends, and carers also have a right to be involved in the decision, where appropriate. They often know the person best and can share what they feel is in the person's best interests, as well as what the person's preferences and views are.

Best interests meetings

Where particularly complex decisions have to be made on behalf of someone, for example, where they will live there will be a 'Best Interests Meeting.' This meeting will be made up of all relevant people involved in the care of the

person and can include family or representatives. Where family are not invited to attend, their views – and most importantly that of the person - should still be considered in the meeting. How this is done is dependent on the situation. For example, views could be submitted in writing, or via someone else such as an IMCA. Alternatively, the person or their carer could meet with a professional before the meeting is held to share their views.

In more complex cases, or where there are important issues at stake (such as if a person should receive life sustaining medical treatment), and if there is disagreement that a decision that has been made is in the best interests of the person, the case may be referred to the Court of Protection for it to decide.