

Assessing Mental Capacity When Making Decisions

What is mental capacity?

Mental capacity is the ability to make 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.

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 have lost 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 be the option least restrictive to their rights and freedoms.

Assessing capacity

It must always be assumed 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. You might do this by providing information in an easy read format, breaking information down into small chunks, and thinking of different ways to describe things.

In addition, it should not be assumed that because a person lacked capacity to make one decision that they lack capacity to make all future decisions about that or other issues.

When assessing whether a person has capacity to make decisions there is a two stage process which needs to be considered:

1. Does the person have an impairment or disturbance in the functioning of their mind or brain? If yes, then because of that impairment the person must be unable to satisfy the next part of the test.

2. To have capacity a person must be able to:
 - understand the information that is relevant to the decision they want to make
 - retain the information long enough to be able to make the decision
 - weigh up the information available to make the decision
 - communicate their decision by any possible means, including talking, using sign language, or through simple muscle movements such as blinking an eye or squeezing a hand.

Who can assess capacity?

For everyday decisions, such as what a person is going to wear or eat that day, it is likely to be the person's family, carer or care worker who will assess whether the person has the capacity to make that decision.

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.

The assessment 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.

However, if a professional was deciding whether a person has capacity to decide where to have potentially risky surgery a more formal assessment should be carried out, and it would be appropriate to document the process and outcome of the assessment.

Challenges to capacity assessments

You may want to challenge the outcome of a capacity assessment if, for example you feel that a person had the capacity to make a decision themselves but was not allowed to; or if a decision was made on someone's behalf without an assess of their mental capacity being made beforehand.

If you wish to challenge the outcome of a capacity assessment, or the lack of an assessment, it is best to start by speaking to the person that carried out the assessment or who should have carried out the assessment. You should ask them for their 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 body involved— for example, social services or a hospital.

If you are still dissatisfied, you could put in a formal complaint using the organisation's complaints procedure. If you are still unhappy with that decision, you may be able to bring your challenge to an ombudsman.

Depending on the circumstances, as an alternative to going through the complaints process and then taking your case to the ombudsman, 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 advice as soon as possible to ensure that you do not miss any important deadlines for making the challenge.

Please contact Mencap Direct if you want any further advice on challenging a failure to assess mental capacity or a failure to presume capacity.

Making decisions

If a capacity assessment has been carried out and it has been decided that the person lacks the capacity to make a certain decision, it must be made for them, if the decision 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 interest of the person with the learning disability.

Making decisions in the person's best interests

When a decision is made on behalf of a person who lacks the ability 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 consulted and 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.

Sometime, especially when complex decisions are being made, such as where a person will live, there may be a 'best interests meeting'. During a 'best interests meeting' all the different factors involved in the decision, including the views of the person and their family will be considered. Sometimes family or representatives of the person will be invited, but at other times they won't. Where they aren't, their views 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) if there is disagreement that a decision that has been made is in the best interests of the person then the case may be referred to the Court of Protection for it to decide.