
Treat me well

An overview of the
Mental Capacity Act 2005



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The Mental Capacity Act 2005 sets out the law around supporting people with a learning disability to make decisions. Decisions about healthcare are some of the most important any of us will make, so it is vital that everyone who is involved in providing healthcare to people with a learning disability understands and follows the Mental Capacity Act.

5 principles of the Mental Capacity Act:

1. Everyone is assumed to have capacity to make decisions unless it can be established that they lack capacity.
2. A person should not be treated as unable to make a decision unless all practical steps to help them to do so have been taken without success (see information below on supporting someone to make a decision).
3. A person is not to be treated as unable to make a decision merely because they make what others might regard as an eccentric or unwise decision. (If capacity is in doubt at this stage, use the capacity test below.)
4. Any decision made on behalf of someone who lacks capacity must be made in their best interests (see best interest checklist below).
5. Before the decision is made, it must be considered whether the outcome can be effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Supporting someone to make a decision

Before deciding that someone lacks the capacity to make a decision, all practical and appropriate steps must be taken to help them make the decision themselves. The kind of support people might need to help them make a decision varies depending on their personal circumstances, the kind of decision that has to be made, and the time available to make the decision.

Always consider the following:

1. Provide relevant information

- Does the person have all the relevant information they need to make a particular decision?
- If they have a choice, have they been given information on all the alternatives?

2. Communicate in an appropriate way

- Could information be explained or presented in a way that is easier for the person to understand (for example, by using simple language or visual aids)?
- Have different methods of communication been explored if required, including non-verbal communication?
- Could anyone else help with communication (for example, a family member, support worker, advocate, interpreter, or speech and language therapist)?

3. Make the person feel at ease

- **Are there particular times of day when the person's understanding is better?**
- Are there particular locations where they may feel more at ease?
- Could the decision be put off to see whether the person can make the decision at a later time when circumstances are right for them?

Testing for capacity

Anybody who claims that an individual lacks capacity should be able to provide proof. They need to show that the person lacked the capacity to make the particular decision at the time it needed to be made.

The person who conducts the test of capacity will usually be the person that is with the individual at the time that the decision needs to be made. This person is called the 'decision maker' and should record this process as proof that the Mental Capacity Act has been followed.

There are two stages to testing for capacity:

Stage 1: Does the person have an impairment in the functioning of their mind or brain? Examples include significant learning disability, dementia, forms of mental illness, physical or medical conditions that cause confusion, drowsiness or loss of consciousness, and symptoms of alcohol or drug use.

Stage 2: Does the impairment mean that the person is unable to make a specific decision when they need to? The person must have been given all practical and appropriate support to help them make the decision themselves and stage 2 can only apply if this support has failed to help them make the decision.

An inability to make a decision means the person cannot:

- Understand information about the decision to be made
- Retain that information in their mind
- Use or weigh up that information as part of the decision-making process; or
- Communicate their decision (by talking, using sign language or communicating in whatever way they normally do).

If the person cannot do one (or more) of the four things in the list above, they have been found to lack capacity to make that particular decision at that particular time. The decision maker should now look to making a best interests decision and apply the best interests checklist.

If the person can do all four of the things in the list above, the person does have capacity to make that particular decision at that particular time, even if the person makes what others might regard as an eccentric or unwise decision.

Making a best interests decision

If, after all steps have been taken to support someone to make their own decision, the person is assessed as lacking capacity to make that particular decision, then a best interests decision can be made. The best interests checklist must be followed before any decision is made. Any best interests criteria that were attempted but could not be followed should be recorded.

Best interests checklist:

1. Consider past, present and future wishes. This will often help you understand what the person would want now if they had capacity to make the decision.
2. Will the person regain capacity? If so, consider whether the decision can be made at a later time.
3. Involve the person. It is vital that the person is involved as much as possible in any decision made on their behalf.
4. Consult all relevant people. This could include family members, support workers, friends, or other people who know the person well.
5. Consider all the information.
6. Do not make any assumptions.
6. The less restrictive option. It must be considered whether the required outcome can be achieved in a way that is less restrictive of the person's rights and freedom of action.

Where can I get more information?

There is lots more information out there on the Mental Capacity Act and how to support people to make decisions.

- Mencap's other Treat me well guides, including a more detailed guide on how to support decision-making
www.mencap.org.uk/TMWhospitalstaff
- Mental Capacity Act Code of Practice
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf
- Care Quality Commission's guidance for providers
https://www.cqc.org.uk/sites/default/files/documents/rp_poc1b2b_100563_20111223_v4_00_guidance_for_providers_mca_for_external_publication.pdf