



Using the Mental Capacity Act in the community

**A guide for health and social care
professionals and carers**

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Introduction to the Mental Capacity Act 2005

The Mental Capacity Act of 2005 requires that people who have an impairment or disturbance of the mind or brain, which affects their ability to make decisions, have the support they need to make these decisions.

This law requires professionals and carers to assume people are able to make their own decisions and to evidence any concerns about this.

Their wishes and feelings must be considered as part of the process, if they are assessed as being unable to decide.

A decision must then be constructed in their best interests; which must include consideration of the decision they would have made if they could.

This booklet and the 'Show How To Know How' film (<http://www.hrch.nhs.uk/mca-training-film>) explain the use of the simple principles of the Mental Capacity Act in everyday life and practice.

This ensures that everyone gets the very best care you can offer, to support their health and wellbeing.





Why and how is mental capacity assessed?

Capacity is not a diagnosis and no-one has to prove their own capacity.

Concerns about someone's capacity to make a specific decision (including consent to care) must be evidenced by the person who is concerned about that decision.

A professional seeking consent for a decision is responsible for that consent.

Valid consent must be well informed and given by someone who has capacity for that decision at that time.

Top Tip:

Ask the person,
"Tell me what
you have heard
me say about ..."

If an adult has an impairment or disturbance of the mind or brain, (whether permanent or temporary); that affects their ability to make a specific decision; then a capacity assessment may be needed.

This assessment should be proportionate to the significance of that decision. It is often as simple as a planned conversation.

A person who has capacity for a specific decision is able to

- Understand information about the options available to them and
- Retain this information long enough to
- Weigh it up and
- Communicate their decision (by any means).

Mental capacity – the principles

You must always assume a person has capacity to make a decision unless it is proved otherwise.

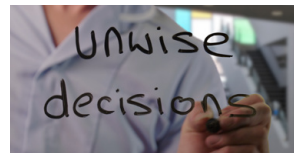
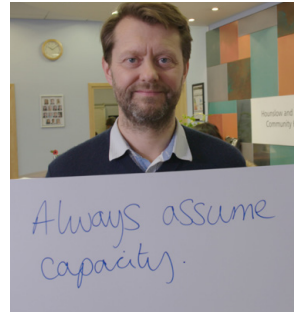
You must take all practicable steps to support people to make their own decisions.

- We all process information differently.
- People need different support and assistance for decision making.
- Delay the decision if helpful and appropriate.

A person must not be treated as unable to decide because they make an unwise decision.

Your duty of care does not necessarily end because someone makes an unwise decision not to accept advice or help.

Respect and record their decision and keep their options open.





Best Interests decisions – the principles

When there is evidence that someone lacks capacity to make a decision (such as consent to healthcare) the Mental Capacity Act states that:

- Any action done or decision made on behalf of a person who lacks mental capacity must be done in their best interests. This is not about what a reasonable person would decide, it is about considering what that person would decide if they could
- Any action taken should be the less restrictive option of those available
- Best Interests decisions for health and welfare can be made by someone who holds a valid Lasting Power of Attorney or Court appointed Deputyship (professionals should check and copy relevant documents)
- Valid advance decisions must be followed. Take advice if the decision is significant. Always consider rights to advocacy
- A significant decision may require a formally planned and recorded Best Interests meeting with relevant parties participating. An Independent Mental Capacity Advocate may be necessary to represent the person
- Good practice and recording can protect professionals and carers from liability for delivering care to people who lack capacity to consent
- The Court of Protection should be asked to make complex or disputed decisions for those who lack capacity to do so.



Exceptions to Best Interests decision making

There are some decisions about family and personal relationships which cannot be taken in someone's best interests, for example:

- **Consent to a marriage or civil partnership**
- **Consent to sexual relations**
- **Consent to in vitro fertilisation (IVF)**

Some decisions about 'serious medical treatment' would require a Court order, for example:

- Withholding or withdrawal of artificial nutrition and hydration
- Organ or bone marrow donation
- Non-therapeutic sterilisation or termination of pregnancy

A decision must be made by the Court of Protection

- Where there is a major disagreement regarding a serious decision
- When professionals have reason to doubt that an attorney or deputy is making decisions in a person's best interests.



Fair assessment of capacity

People may have capacity to make some decisions, but not others.

Capacity is also time specific. It is important to recognise when a decision can and should be delayed, to give the person the best chance of making that decision themselves.

As a professional or carer, you must be aware of the values you bring to a conversation about mental capacity.

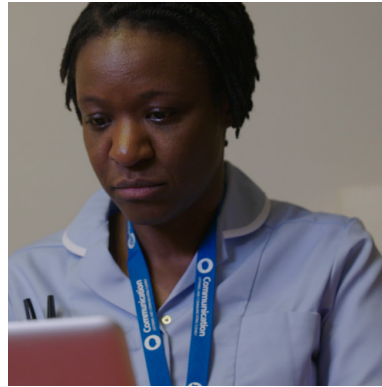
- Is the person making a valid decision which you consider unwise?
- Are they just refusing to engage?
- Do they really lack capacity to make that decision at that time?

Your recording should reassure you and others that you have taken an objective view.

Recording – top tips

As an excellent professional or carer, you need to evidence your good practice by recording any concerns about someone's capacity

- Why you were concerned
- How you supported the person to make a decision
- What your capacity assessment showed
- What you did about this



For example:

I had concerns about Dee's capacity to consent to personal care today. I talked to her about keeping her skin clean and staying well. She was not able to tell me what she had heard me say about this.

Her memory problems and confusion meant she was unable to understand why she needed to have a wash. Therefore I helped her to wash in her best interests. She complied with this.





Assessing capacity – the challenges

One size doesn't fit all when supporting people. Know the law but personalise your approach to each situation.

Good social skills may mask an inability to weigh up information. Difficulties in communicating a decision can be misinterpreted as a lack of capacity.

- Allow people time to process information
- Be flexible in your approach
- Be respectfully curious
- Give people the time they need
- Consider advocacy

People may have fluctuating capacity – capacity which comes and goes.

- Always ask yourself 'can this decision be delayed?'
- Make all reasonable efforts including more than one assessment of capacity

Record your evidence and seek advice if necessary.

Your aim is for the person to be supported to make their own decision. **Capacity assessment is a means NOT an end!**



Coercion and Control

Coercion, control or undue influence may prevent an adult from making use of their capacity to make their own decisions. Be mindful of any risk of violence. These situations may require legal advice.

The Serious Crime Act 2015 created an offence of controlling or coercive behavior which

- Takes place “repeatedly or continuously”;
- Where the victim and alleged perpetrator are “personally connected” at the time and
- Which has a “serious effect” on the victim

If an adult at risk retains mental capacity to make decisions but is unable to fully exercise this capacity due to evidenced coercion and control, an order can be sought from the High Court as a ‘safety net’ to allow them a period of decision-making without undue influence.

Adults at risk and safeguarding

Adults at risk are those whose needs for care and support mean they are unable to protect themselves from neglect or abuse (Care Act 2014)

To support an adult at risk it is essential to establish whether they understand the risks in question and are able to make decisions about staying safe.

Using the law in a person-centred way enables us all to make safeguarding personal.

It helps evidence the balance between risks and rights.

It supports adults at risk to achieve the outcomes they want from safeguarding.

Provision of advocacy if needed is a duty under the Care Act.



ADVOCATE





Children, Young People and consent

Informed consent to health and social care for children under 16 can be given by adults with parental responsibility (or Court appointed Guardians).

Children under 16 may be judged by health or social care professionals to be 'Gillick competent' to consent to treatment themselves, when they have sufficient maturity to understand and weigh up specific decisions.

The Mental Capacity Act applies to adults (from their 16th birthday) however:

- Court of Protection can make decisions about a younger child's property / finances (or appoint a deputy) if it is likely that the child will still lack capacity when they reach 18
- Offences of ill treatment / wilful neglect of a person who lacks capacity can apply to victims under 16
- Only people aged 18 and over can make a Lasting Power of Attorney, an advance decision to refuse medical treatment or a statutory will.

Summary

The Mental Capacity Act applies to everybody over the age of 16 who has an impairment, or a disturbance in the functioning of their mind or brain which affects their ability to make decisions.

Its simple principles and practice points can be adapted for every individual and situation.

Health and social care professionals and carers who follow and document these principles will deliver excellent care and support. This also gives protection from liability for delivering care to people who may be unable to consent.

Further information

To find out more about the Mental Capacity Act Code of Practice visit:

www.gov.uk/government/collections/mental-capacity-act-making-decisions

Telephone the Office of the Public Guardian

0300 456 0300 Monday to Friday, 09:00 to 17:00

(Textphone 0115 934 2778)

The National Mental Capacity Forum works to raise awareness of the Mental Capacity Act locally

www.scie.org.uk/mcadirectory

To find out about legal safeguards for adults who may be 'deprived of their liberty' because they are unable to consent to a care plan which restricts them in their best interests:

Social Care Institute for Excellence (SCIE)

www.scie.org.uk/mca/

Telephone SCIE on **020 7766 7400**



NOTHING
ABOUT ME
WITHOUT ME!



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**In conjunction with the 'Show How To Know How' film
Using the Mental Capacity Act in the community**
<http://www.hrch.nhs.uk/mca-training-film>