

What is the Mental Capacity Act?

The Mental Capacity Act is an act of legislation in England and Wales designed to empower and protect individuals when a decision needs to be made. These can be small decisions – such as what clothes to wear – or major decisions, such as where to live. The Mental Capacity Act also resulted in the creation of the Court of Protection and covers other important matters such as Lasting Powers of Attorney, advance decisions to refuse treatment and the Deprivation of Liberty Safeguards (DoLS), for example.

The Mental Capacity Act 2005 applies to us all, but it is particularly relevant when supporting individuals who may have difficulty making decisions.

People who support individuals must act in accordance with the five statutory principles of the Act:

1. A presumption of capacity – a person must be assumed to have capacity to make their own decisions until it is established otherwise.
2. Supported decision-making – people must be given all appropriate help before anyone concludes that they cannot make their own decisions.
3. A person is not to be treated as unable to make a decision merely because he or she is making an unwise decision.
4. Best interests – anything done for or on behalf of people who lack capacity must be in their best interests.
5. Least restrictive intervention – anything done for or on behalf of people who lack capacity should be the least restrictive of their basic rights and freedoms.

Assessing Capacity

There may be several reasons why people might question a person's decision-making ability. The person's behaviour or circumstances may cause doubt as to whether they can make a decision, they might have been assessed as lacking capacity to make other decisions, or someone may be making a decision others may feel puts them at risk. A person's capacity should not be questioned solely on the basis that they make a decision which appears unwise to others.

The person who should assess the person's capacity is usually the one directly concerned with the person at the time the decision needs to be made. For day-to-day decisions, this may be the person's family or carer; for more complex decisions such as what treatment a person should have or where they should live, this would often be a professional.

Capacity is time- and decision-specific. People may be able to make some decisions and not others, or their ability to make decisions may change over time. Nobody should be assessed as lacking capacity purely based on their age, appearance, or a condition or aspect of their behaviour.

The process for assessing capacity, can be broken down into 3 stages, which should take place in the following order:

1. Is the person able to make the decision? In other words, are they able to understand, retain and use or weigh the information which is relevant to the decision, and communicate their decision?
2. If the person cannot make the decision because they are unable to do any one of the following; understand the information, retain it and use and weigh it to make the decision, then consider whether there is an

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impairment or disturbance in the functioning of the person's mind or brain.

3. If so, is the person's inability to make the decision because of the identified impairment or disturbance?

If a decision can be delayed and you suspect the person may regain capacity, then you should wait for the person to regain capacity to make their own decision where possible. If assessing capacity, it is the role of the assessor to take all practicable steps to enable the person to make the decision before establishing, on the balance of probability, that they lack capacity.

Best Interests

Any act done or decision made on behalf of a person who lacks capacity must be in their best interests. If there is another person with the legal authority to make decisions for the person, then they will be the decision maker. The Mental Capacity Act provides a checklist (contained within section 4 of the Act) of things to consider when trying to work out what is in someone's best interests:

- Working out what is in someone's best interests cannot be based on simply on their age, appearance, condition or behaviour.
- All relevant circumstances should be considered.
- Every effort should be made to enable the person to participate in the decision-making process.
- If there is a chance the person might regain capacity, can the decision wait?

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- The person's past and present wishes, feelings, values and beliefs should be taken into account.
- The views of other people who are close to the person should be considered.

Please see the Mental Capacity Act 2005 and the associated Code of Practice for more information about how the legislation is applied in practice - <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

Please note, as of August 2024, the Code of Practice contains some out-dated information which doesn't reflect case law, and other practice developments, since the Mental Capacity Act came into force in 2007. A summary of some of the ways in which the existing Code of Practice is no longer accurate are covered here:

<https://www.communitycare.co.uk/2022/03/22/guide-to-the-draft-mca-code-of-practice/>

Further Reading

The following websites also contain helpful Mental Capacity Act content:

- Essex Chambers Mental Capacity Resource page:
<https://www.39essex.com/information-hub/mental-capacity-resource-centre/mental-capacity-resources>
- Social Care Institute for Excellence (SCIE) Mental Capacity directory:
<https://www.scie.org.uk/mca/>

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Key Links

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>



<https://www.communitycare.co.uk/2022/03/22/guide-to-the-draft-mca-code-of-practice/>



<https://www.39essex.com/information-hub/mental-capacity-resource-centre/mental-capacity-resources>



<https://www.scie.org.uk/mca/>

