

What is the Mental Capacity Act?

- The Mental Capacity Act 2005 (MCA) was implemented by parliament in 2007 and is a vitally important piece of legislation for England and Wales.
- Applying to all people over the age of 16 it offers the opportunity to plan ahead as to how decisions should be made about you if you ever lose the capacity to decide how you would want to be cared for or make decisions about medical treatment.
- The MCA is a framework and a safeguard for anyone who is currently unable to make decisions for themselves to ensure they are at the heart of decision making when decisions are being made on their behalf.
- Certain professionals are legally required to abide by it including doctors, nurses, paid carers, social workers and other health care professionals.

Family and friends have an important role to play in decisions taken on behalf of anyone who is unable to due to reasons of capacity which may stem from a learning disability, mental disorder, neurological condition, a brain injury, dementia or any other condition that might be affecting a person's ability to make their own decisions. However, contributing to decisions about serious medical treatment or where a person should be cared for can be very difficult – especially when choices have to be made about whether or not their loved one should be given invasive surgery or how aggressively to treat potentially life-threatening illness. Similarly decisions about where a person should live, perhaps a move to a care home is being considered can be particularly difficult and leave families feeling they have no say in this or that their loved one will blame them for decisions made.

What do I need to know about the Act?

Q: How must decisions be made for people that are deemed to 'lack capacity'

The Best Interests 'principle' underpins the Mental Capacity Act: This means that all decisions or acts carried out on behalf of a person to make certain decisions must be in their 'best interests'. There is no statutory definition of 'best interests' but rather a checklist of factors that must be considered when working out what is in a person's best interests.

It is good practice for healthcare and social care staff to record at the end of the decision making process why they think a specific decision is in the person's best interests. This is particularly important if healthcare and social care staff go against the views of somebody who has been consulted while working out the person's best interests.

Q: What is in the best interests checklist?

The checklist of factors that must be considered when working out what is in a person's best interests:

- Assumptions must not be made about someone's best interests merely on the person's age, appearance, condition or behaviour.
- Take account of all the circumstances that are relevant to the decision in question.
- Give consideration to a person's own wishes, feelings and values and any factors they would have considered if able to do so. This includes any written statements made by the person when they had capacity.
- Take account of the views of the family and informal carers, anyone with an interest in the person's welfare and anyone appointed to act on the person's behalf (such as an attorney or deputy). If there is no-one available to be consulted, an Independent Mental Capacity Advocate (IMCA) must be appointed and their views taken into account.
- Is it likely that the person will regain capacity? If so, can the decision be put off until then?
- Involve the person in the decision making process.

All of the above factors must be considered, if only to be disregarded as irrelevant to the particular decision.

It is also important to:

- Consider whether there is a less restrictive alternative or intervention and whether this might be in the person's best interests.
- Demonstrate that you have carefully assessed any conflicting views or evidence.
- Provide clear, objective reasons as to why the decision is deemed to be in the person's best interests

Q: I'm next of kin for my loved one, so I make decisions for them, don't I?

No, next of kin has no legal status with regards decision making. When a person is admitted to hospital they provide details of their next of kin, the person to be contacted in case of an emergency. This can be anyone and is a personal choice. The term next of kin however has no legal standing other than affording that person the right that their next of kin is contacted. Someone may nominate a next of kin although no longer have a relationship with the person but would wish him or her to be informed of an emergency situation.

Nobody can consent to treatment or care on behalf of another adult. The person responsible for decision making is the person responsible for providing the treatment or care, unless the person has formally nominated an Attorney or has a court appointed deputy.

Q: So what rights do I have as a carer, friend or family member?

If you are providing care on a day to day basis for someone that lacks capacity to make those decisions at home, you will be able to make decisions for them for daily living such as what a person can eat, or wear (if they are unable to themselves). However, the more formal and serious the decision, for example treatment in hospital or decisions about whether a person should live in a care home, the person that makes this decision will be a doctor or social worker, essentially the person that is responsible for carrying out that decision or is proposing the decision.

Examples of this are: -You support your family member or friend to go to their GP, the GP recommends a referral to hospital for treatment. The GP has the final decision as to whether this occurs but both you and your loved one have to be consulted with and this information about a person's beliefs, wishes and values as well as what decision they might have made if they had capacity has to form part of that decision. This is a best interest decision. -Your family member or friend is in hospital and there is a proposal of certain medical treatment or options available for treatment. the person responsible for the decision is the person that is carrying out the decision, this might be a surgeon or another type of doctor. But the final decision (unless it is an emergency) has to be based on all the circumstances at the time, and the person as well as you as someone in that person's life have to be consulted with.

Q: I don't understand why my family member is being deemed to lack capacity, they can clearly state what they want.

Capacity is decision specific and it is not about being able to express a view. A person may be able to clearly state what they want to occur but lack the capacity to make that decision.

The Mental Capacity Act has what is known as a '2 stage test of capacity'.

Stage 1 known as the 'diagnostic threshold' - Does the person have an impairment or disturbance in the function of the mind or brain? The impairment may be because of a brain injury, learning disability, stroke, dementia, mental disorder or due to the influence of drugs or alcohol.

Stage 2 asks - Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to.

To be able to make a decision a person needs to:

- Understand the information about the decision.
- Retain that information long enough to make a decision.
- Use or weigh up information relating to the decision (for example understand what the risks and benefits are)
- Communicate the decision.

If a person is unable to do 1 or more of the above, they are deemed to lack capacity.

Top tips for family members, carers or friends:

- If you don't understand how your family member or friend lacks capacity or dispute this, ask for specific information about how this decision was reached with regards stage 1 and stage 2 of the capacity assessment.
- Be familiar with the 5 principles of the Act and the best interests checklist, these govern decision making and knowing what they are and how they should be applied can ensure you feel part of the decision making process.
- If you are unclear about how a best interests decision had been reached, ask the staff providing care or treatment to explain what they did to make the decision. Ask if a best interests meeting can be held where the decision can be discussed.
- If you're not happy about what's been decided or if a decision isn't being made at all and you have concerns about your family member, you could:
 - Talk and/or write to the person responsible for making the decision telling them your concerns.
 - Ask how they are using the Mental Capacity Act.
 - Ask how they came to the best interests decision.
 - Ask for a best interests meeting to be held.
 - Talk to an advocate.
- If you feel you should be responsible for making decisions about your family member or friend you can apply to the Court of Protection to be a deputy. You can only be a deputy if the person themselves lacks capacity to make decisions about 'property and affairs' or 'personal welfare'. You can find further information about this and Lasting Power of Attorney (this is when a person has the capacity to name someone they would like to make decisions on their behalf if in the future they may be unable to) visit the Office of Public Guardian website:

www.justice.gov.uk/about/opg

The Five Statutory Principles of the Mental Capacity Act

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done or made, in his best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Following the principles and applying them to the Act's framework for decision-making will help to ensure not only that appropriate action is taken in individual cases, but also to point the way to solutions in difficult or uncertain situations.