

Mental Capacity Act 2005

An Aid to applying the Act in practice

(This Aid is not a substitute for reading the Act and the Code of Practice nor for seeking advice from your manager, etc)

Starting Point: A person struggling to make a specific decision about any health or welfare matter may trigger concern about his/her mental capacity to make that decision. The triggers might be the person's behaviour or circumstances; concerns raised by someone else, or, existing and known lack of capacity.

The Act should be applied before any health, personal care or welfare act is done to or decision made on behalf of someone lacking mental capacity. A decision could be large, small, daily or infrequent. The person making a decision could be paid, unpaid, qualified or unqualified.

Many daily decisions will be made without 'formal' capacity assessments. However, the principles and practice of the Act must be applied.

The more serious the decision to be made is and where there is disagreement between people about a particular decision, the more formal the assessment and recording processes especially:

If an NHS body is proposing:

- Serious medical treatment
- A stay of more than 28 days in hospital or 8 weeks in a care home
- To change a person's accommodation to another hospital for more than 28 days, or more than 8 weeks in a care home

If a local authority is proposing:

- To change or to provide residential or supported accommodation for more than 8 weeks

Adult protection:

Where either the abused person or the alleged abuser lacks capacity

Factors to consider before applying the Act

- If a person has capacity, you cannot use this Act
- If the person is under 16 (s2), you cannot use this Act
- Decisions about family and personal relationships are excluded from this Act , such as:
 - Consenting to sexual relationships
 - In-vitro fertilization
 - Agreeing to marriage
 - Mental health issues
 - Voting
- Will the person regain capacity and can the decision wait until then? (incapacity can be temporary, fluctuating or permanent)
- Can the person make a decision with support?
(Have you offered all the support available?) (s4)
- Is there a Lasting Power of Attorney or deputy with written authority to make this decision instead of the decision maker?
- Is there an advance decision to refuse treatment that must be abided by? (s24)
- If the person lacks capacity, and if there are no family/informal carers to consult, and if the decision is a serious one as detailed on page 1, you must by law involve an Independent Mental Capacity Advocate (IMCA) from the area where the person is residing (s36-40)
- If there are conflicts or disagreements, consult the Code of Practice
- For complex or serious decisions, you may want to seek legal advice

Actions to Undertake

- Is the person over 16?
- What is the specific decision that needs to be made (s2)
- Identify the decision maker/s (s4)
- Decision maker/s co-ordinates the two stage capacity assessment (s2+3: page 4)
- Decision maker/s decides whether the person needs an IMCA
- Decision maker/s apply best interests criteria throughout (s1+4: page 5)
- Decision maker/s consults with relevant people where practicable and appropriate (s4: page 5)
- Decision maker/s check the proposed action is protected from liability (s5) or is financially permissible (s7/8)
- Is restraint needed to carry out a decision? Is the proposed restraint necessary to prevent harm and is it proportionate (s6)
- Is there 'reasonable belief' that your decision is in the person's best interests (s4(9))
- Decision maker undertakes the act to or on behalf of the person – the act might be delegated.
- Record who was involved in the decision making, what the decision was, when it was made and objective reasons for the decision.



Principles - Section 1 (MCA 2005)

The five principles must be applied throughout an assessment of capacity and in any decision made or action taken. These are:

1. A person must be assumed to have capacity unless you establish that he/she lacks capacity.
2. A person cannot be treated as unable to make a decision unless you take all practicable steps to help him/her do so without success.
3. A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.
4. An act done, or decision made, must be in the person's best interests.
5. Before the act is done, or the decision is made, you must ensure you choose the least restrictive option of the person's rights and freedom of action

2 Stage Test of Mental Capacity - Section 2 & 3 (MCA 2005)

A person cannot be considered unable to make a decision due to age, appearance, medical condition or behaviour.

All people must be treated equally.

Stage 1: Diagnostic Test: Establish that an impairment of, or a disturbance in the functioning of, the mind or brain is preventing the person making a decision in relation to the matter at the material time.

Stage 2: Functional Test: A person is unable to make a decision for him/herself if he/she is unable to:

- understand the information relevant to the decision
- retain that information
- use or weigh that information as part of the process of making the decision
- communicate his/her decision (whether by talking, using sign language or any other means)

N.B. Capacity is decided on the balance of probabilities.

You have a duty to consult or seek assistance from appropriate others including any attorney, deputy or professional support to assist people at each stage.

Best Interests Criteria – Section 4 (MCA 2005)

If making a decision on behalf of someone lacking capacity, you must consider and weigh up all the relevant circumstances (s4(2+11)), as far as is reasonably ascertainable, including:

- the person's past and present wishes and feelings (including any relevant written statement made by him/her when he/she had capacity)
- the beliefs and values that would be likely to influence his/her decision if he/she had capacity, and
- the other factors that he/she would be likely to consider if he/she were able to do so.

Where practicable and appropriate, you must obtain the views of:

- anyone named by the person as someone to be consulted on the matter in question or on matters of that kind
- anyone engaged in caring for the person or interested in his welfare
- anyone (donee) having a lasting power of attorney granted by the person and authorised by the Public Guardian.
- Any deputy appointed for the person by the Court of Protection.



For further information, including:

- Code of Practice
- Booklets about the Act (including an 'easy-read' version)
- Court of Protection
- Lasting Powers of Attorney (LPA)

Go to:

www.publicguardian.gov.uk

Tel: 0845 330 2900

Contact details of Independent Mental Capacity Advocacy Service:

Cambridge House,
131 Camberwell Road,
London, SE5 0HF

Tel: 020 7358 7000 (ask for Duty IMCA)

Fax: 020 7703 2903

E-mail: imcareferrals@ch1889.org

Website: www.ch1889.org