

- A structured functional assessment to determine the person's specific abilities (as listed above) with respect to the decision in question;
- Standardised measures where available and relevant to establish cognitive ability and/or mental state.

Evidence for 'an impairment of, or disturbance in, the functioning of the mind or brain' may be an established diagnosis (e.g. dementia or learning disability) or evidence of an abnormal mental state (e.g. delirium, psychosis, a mood or anxiety disorder, or the consequences of sedation or illicit drug or excessive alcohol use, etc.).

Best interests

In considering what is in someone's best interests when making a decision, the following should be considered:

- Whether and/or when the person is likely to regain capacity and whether the decision or the act to be undertaken can wait;
- How to encourage and optimise the participation of the person in the decision;
- The past and present wishes, feelings, beliefs, values of the person and any other relevant factors;
- Views of other relevant people.

Independent Mental Capacity Advocates (IMCAs):

where a person lacks the capacity to make decisions about a change in accommodation or about serious medical treatment and has no family or friends there is a duty to appoint an IMCA to help inform the determination of 'best interests'.

Final key points

- The decision about a person's capacity to make a particular decision is a judgement made on 'the balance of probabilities'. The Act does not provide the authority to act but rather a justification for the decision made or act undertaken and thereby protection from liability.
- The views expressed by a person holding a Lasting Power of Attorney or by a Deputy appointed by the Court of Protection and Advance Decisions to refuse treatment must be respected providing they are valid and applicable to the decision in question
- The person requiring a decision to be made must have due regard to the above depending on the urgency of the decision in question. Where there are conflicting views as to what is in a person's 'best interests' attempts should be made to resolve disagreements. Second opinions may be appropriate. The Court of Protection is the ultimate arbiter where disagreements cannot be resolved.

Useful reference material

- Code of Practice for MCA (2005). Available from www.dca.gov.uk
- BPS Interim Guidance on Assessing Capacity in Adults (2006). Available from www.bps.org.uk
- Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (2004) (2nd ed.). British Medical Association and The Law Society. BMJ Books.
- Grisso, T. & Appelbaum, P.S. (1998). *Assessing Competence to consent to treatment: A guide for physicians and other health professionals*. New York: Oxford University Press.



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MENTAL CAPACITY ACT 2005

SHORT REFERENCE GUIDE FOR PSYCHOLOGISTS AND PSYCHIATRISTS

This leaflet provides a very brief summary of the main points of the Act and is intended as a brief guide to its implementation for clinicians

The Mental Capacity Act (2005)

The Mental Capacity Act (2005) provides a legal framework for decision-making on behalf of adults (16 years or older) who lack the capacity to make specific decisions for themselves. It also provides the means for adults aged 18 or over, with the capacity to do so, to plan ahead in the event of future incapacity in areas of:

- general health and social care;
- financial affairs;
- refusal of specific treatments.

Planning ahead can be by the making of a Lasting Power of Attorney (LPA) for any of the above, formal Advance Decisions to refuse treatment, and by informal statements indicating preferences and wishes in the event of future incapacity. The first two of these, providing they are valid and applicable to the particular situation, have a statutory force. Statements of preferences and wishes must be considered under 'best interests', but are not binding. The Act also covers involvement in research and innovative treatment where the person lacks capacity to consent.

The Principles set out at the beginning of the Act guide the process of assessment and of substitute decision-making

- A person must be assumed to have capacity until it is established that s/he lacks capacity.
- A person is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because s/he makes an unwise decision.
- When decisions are made on behalf of someone who lacks capacity, they must be made in his/her '**best interests**'.
- When decisions are made on behalf of someone who lacks capacity, the less restrictive alternative must be considered to attain the goal specified.

The Act defines capacity as follows

An adult can only be considered unable to make a particular decision if:

1. He or she has 'an impairment of, or disturbance in, the functioning of the mind or brain', whether permanent or temporary;
AND
2. He or she is unable to undertake any of the following steps:
 - 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 the decision made (whether by talking, sign language or other means).

The Functional Approach

A functional approach must be taken. This means that someone's ability to make a decision is determined by assessing whether they can undertake the steps above; it is not determined by their diagnosis nor by the apparent wisdom of their decision. Decision-making capacity is decision-specific and time-specific.

Unwise decisions

The law recognises the right of individuals to make unwise decisions. Such decisions might alert to the possibility of incapacity but they are NOT sufficient to determine a person's lack of capacity to make that specific decision.

Understanding and retaining the information

It is the responsibility of the person requiring the decision to be made to provide the information in an appropriate form in order to optimise understanding (e.g. drawings, photographs). The need for alternative forms of communication must be considered (e.g. signs or symbols). The person needs to be able to broadly understand the information and retain it for long enough to make the decision in question.

Using and weighing information

The assessor (usually the person requiring the decision to be made) should consider the following issues in judging whether someone has the ability to understand and weigh up the information:

- Appreciation of the wider consequences of the decision on themselves and others (degree of insight and awareness may influence this);
- Evidence of reasoning processes;
- Consistency between expressed beliefs and decision reached;
- Ability to weigh the risks and benefits of different options;
- The possible influence of pressure from others;
- The importance to the person of religious and cultural beliefs that may have influenced and/or may account for the decision taken.

More serious decisions generally require a greater level of understanding.

Communication of the decision

The person needs to be able to:

- To produce a response (not necessarily verbal) that indicates choice.

What type of assessments might be used?

Different approaches will be required to establish:

(a) the presence of an impairment of, or disturbance in, the functioning of the mind or brain; and (b) the inability to make the decision in question. The following would normally be required. The individual's responses and your conclusions should be clearly documented:

- Information from records, from direct assessment and/or investigations as to the nature and severity of mental disability;
- Interviews with client and relevant others with respect to life experiences, suggestibility, and his/her abilities in this and other areas of decision-making;