

Mental Capacity Act Factsheet

ASSESSING CAPACITY & BEST INTEREST DECISION MAKING

We must presume capacity unless proven otherwise. (Principle 1 of the MCA Statutory Principles)

However- if we think the person may not have capacity to make their own decision- we must **evidence** their lack of capacity by completing and recording a capacity assessment of their ability to make the specific decision at that time.



This assessment **must** take place at a time that will **maximise** the person's ability to make the decision as the Act requires that every effort is made to support a person to make their own decision.

The MCA test for capacity is called the **two stage test**.

STAGE ONE- THE DIAGNOSTIC TEST

Is there an impairment or disturbance in the functioning of the mind or brain?

For example does the person have dementia, a brain injury, learning disability etc.

STAGE TWO- THE FUNCTIONAL TEST

Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?

For a person to lack capacity to make a decision, the Act says their impairment or disturbance must affect their ability to make the specific decision when they need to. But first people must be given all practical and appropriate support to help them make the decision for themselves.

Stage 2 can only apply if all practical and appropriate support to help the person make the decision has failed.



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What does the Act mean by 'inability to make a decision'?

A person is unable to make a decision if they cannot:

- **U**nderstand the relevant information about the decision (information should be given in a way that they understand, in their preferred communication method, such as using pictures, signs etc.)
- **R**etain the information (for long enough to make the decision)
- **B**alance the information (weighing up the different options and what this means to or for them, understanding the consequences)
- **C**ommunicate their decision (by any method)

The first three should be applied together. If a person cannot do any of these three things, they will be treated as unable to make the decision. The fourth only applies in situations where people cannot communicate their decision in any way.

Detailed guidance on how to assess capacity using the two stage test is provided in chapter 4 of the Mental Capacity Act Code of Practice.

Anybody who claims that an individual lacks capacity must be able to provide proof. They need to be able to show, **on the balance of probabilities**, that the individual lacks capacity to make a particular decision, at the time it needs to be made. This means being able to show that it is more likely than not that the person lacks capacity to make the decision in question



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BEST INTEREST DECISION MAKING

Who makes the best interest decision?

Under the Act different people can be the **decision maker** when someone lacks capacity to make the decision themselves.



Who makes the decision will vary depending on what type of decision needs to be made.

For example:-

- Day to day best interest decisions could be made by the carer involved with the care at the time it needs to be given
- Medical treatment best interest decisions would be made by the doctor/ relevant health care professional proposing the treatment.

How is a best interest decision made?

The chapter 5 of the MCA Code of Practice includes a best interests checklist for when a decision needs to be made which includes-

1. Consider all relevant circumstances - try to identify the things that the person who lacks capacity would take into account if they were acting for themselves.
2. Consider whether the person may regain capacity - if so- can the decision be put off so that they can make the decision for themselves?
3. Involve the person in the decision as much as possible.
4. Consider the person's past and present wishes and feelings.
5. Consider any written statement made when the person had capacity
6. Consider the beliefs and values likely to influence the person's decisions.
7. Consult and take into account the views of key people such as friends, family and carers, Lasting Power of Attorneys, Court Appointed Deputies This can include instructing an Independent Mental Capacity Advocate to support the person if they have no family/friends and a life changing decision is being made
8. If the decision concerns life sustaining treatment - the decision shouldn't be motivated by a desire to bring about the person's death and assumptions shouldn't be made about the person's quality of life



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9. Avoid restricting the person's rights - are there other options that would avoid restricting the person's rights? These rights may include statutory rights for example under the Human Rights Act, but they may also include the right to a quality of life or to access treatment. This aspect of the checklist is finding a balance between the person's rights and their interests. The least restrictive option may also include making no decision at all
10. Avoid discrimination - the decision shouldn't be based on assumptions about the person's condition, age, gender, race, religion etc
11. Take all of this into account: weigh all this up in order to work out the person's best interest

The Act provides practitioners with protection from liability (see Chapter 6 of the MCA Code of Practice) where there is dispute about best interests if they can demonstrate they have followed the guidance within the Act and the Code of Practice- so it is essential that you record how you used the best interest checklist to make your decision.

Practitioners must have a 'reasonable belief' that the person lacks capacity, with evidence from the two stage test as outlined above, and 'reasonable grounds' for believing the action that have taken is in the person who lacks capacity's best interest.

Practitioners must have also demonstrated that they made every effort to help the person make their own decision.



This fact sheet was written in December 2016 and was correct at the time of writing.

