

A Guide to the Mental Capacity Act

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Introduction

When we talk about having mental capacity we mean the ability to make a decision.

It is possible for a person to have capacity for one type of decision but not for another. For example, someone may have the ability to decide what they would like to eat, but not have the ability to make decisions about how to manage their money.

It is also possible for capacity to change over time. For instance, due to illness a person may temporarily lose capacity to make a particular decision, but could regain this capacity on recovery. Decision making capacity could also gradually deteriorate over a long period, for example due to certain illnesses such as dementia.

In the case of an individual with learning disabilities, it may be possible for them to acquire capacity which they never previously had. For example, by learning or coming to understand and communicate about a decision which they could not have previously made, such as one to do with their health or finances.

What is the Mental Capacity Act?

The Mental Capacity Act is the law which guides professionals in how to manage decision making for people over the age of 16 years, where the person is unable to make the decision for themselves. Examples of

these decisions include where they should live, how their money should be spent, or if they should have a particular medical procedure.

It also provides guidance for people over 18 years of age who want to make a plan for what should happen if they lose the capacity to make a decision in the future. This could be in relation to what should happen to their money, how their health care should be managed or where they should live. They may leave advance instructions for what they would like to happen which others must then take into account if the person lacks capacity in the future.

At Options Autism, we understand our duty to respect and treat every individual on the basis that they can make their own decisions and encourage them to do so with the appropriate support and help at all times.

How does the Mental Capacity Act Work?

There are five key principles at the core of the Mental Capacity Act:

1. The **first** underlying important principle is that every person is presumed to have the capacity to make every decision for themselves. If another person or authority believes the person does not have the capacity to make a particular decision, it is for that person or authority to demonstrate that there is a lack of capacity – in other

words everyone has capacity unless it can be proven otherwise. This is called the presumption of capacity.

2. The **second** principle is that people should be supported to make decisions for themselves in whatever way is most suited to them, for example with the use of additional information to assist them in decision making or with the use of communication aids to help them understand and communicate about the decision. This support must be provided and only after demonstrating that an individual cannot make the decision can it be concluded that a person does not have capacity.
3. The **third** principle is that everyone is entitled to make their own decision. You cannot consider a person lacks capacity to make a decision simply because it is an unwise or unusual decision.
4. The **fourth** principle is that those making a decision on behalf of another person must demonstrate the decision is in the person's best interests.
5. The **fifth** principle is that when making a best interest decision, the least restrictive option must be chosen, the one which allows the person most freedom.

How is Mental Capacity determined?

There is a two stage test to determine if a person has capacity.

1. Is there an impairment or disturbance in the functioning of the person's mind or brain?
2. Does that impairment or disturbance mean they are unable to make a particular decision?

In order to make a particular decision, a person must:

- be able to understand the information relevant to the decision;
- retain that information long enough to make a decision;
- weigh up the pros and cons regarding the decision;
- be able to communicate their decision in some way.

They must be given any available support to help them with this.

Can someone else make a decision?

For those aged 16 and 17, a parent or other person with parental responsibility can make a decision on behalf of the person who lacks capacity.

For adults, 18 years of age and over, parents do not have this authority and a best interest decision must be made. Best practice is to always involve family members in any decision making whenever possible.

Decisions vary in their significance from every day decisions about waking up, dressing, eating or going out, to major life decisions such as major medical treatment or where to live.

The person most involved in the decision is generally the most appropriate person to make the best interest decision; for example, a care worker may decide to purchase some new clothes for a person or ensure they brush their teeth.

However, where a decision is of greater significance, such as a major financial or medical treatment, or where to live, then there is paperwork which must be completed to show the best interest decision that was made.

When making a best interest decision account must be taken of what the person would have decided for themselves if they did have capacity. If they previously had capacity then any instructions they left about decisions to be made, with regards to their beliefs and culture, the views of significant others or currently expressed wishes and feelings, must be taken into account.

Are there decisions which cannot be made on behalf of another person?

Yes – decisions about the best interests of someone else with respect to sexual relationships, marriage, divorce, and voting – cannot be made.

As well as this, there are special rules that apply only to people in care homes and hospitals – these are called The Deprivation of Liberty Safeguards, or DoLS, for short.

These special rules apply to adults aged 18 years and older in care homes or hospitals if there is a decision to be made in the best interest of the person which may restrict their liberty. For example if doors are locked, or a person would be prevented from leaving a building or premises to keep them safe, or where restraint may be used to prevent someone from harming themselves or others. In these cases the hospital or care home must ask the Local Authority to authorise the deprivation of liberty, and the Local Authority will appoint a specially trained Best Interest Assessor to determine if the restrictions put in place are in the person's best interest.

There are new proposals to change the law in respect of this. Instead of DoLS there will be Liberty Protection Safeguards, or LiPS, for short. These will apply to any person age 16 years or older who resides in any social care or health setting. There will be a designated Responsible Body, which will usually be the Local Authority for social care and the NHS for most hospitals. This body would carry out an assessment to determine if the care arrangements were proportionate and necessary to meet the persons best interests. An independent reviewer, working for the responsible body but not otherwise involved in the person's care, would then look at the assessments to approve the arrangements.

Where the person is actively objecting to their care arrangements, or where they had previously left instructions indicating that they would have objected to their care arrangements if they did have capacity, Approved Mental Capacity Professionals will carry out an assessment to determine if the arrangements are in the person's Best Interest.

What happens if there is a disagreement about what is in someone's best interests?

Where agreement about what is in a person's Best Interests cannot be reached, it is possible to make a referral to The Court of Protection in England and Wales. The Court can make decisions on financial or welfare matters for people who lack the capacity to do so.

The Court of Protection can:

- Decide whether someone has the mental capacity to make a particular decision for themselves;
- Appoint deputies to make ongoing decisions for people who lack mental capacity – a financial affairs deputy would deal with decisions about money and property and a personal welfare deputy would deal with decisions about health and welfare;
- Give appropriate people such as family members permission to make one-off decisions on behalf of someone else who lacks mental capacity;
- Handle urgent or emergency applications where a decision must be made on behalf of someone else without delay;
- Make decisions about a lasting power of attorney or enduring power of attorney and consider any objections to this;
- Consider applications to make statutory wills or gifts;
- Make decisions about when someone can be deprived of their liberty under the Mental Capacity Act.

How does this impact on how we provide care?

Options Autism complies with the principles of the Mental Capacity Act by treating all of the people that we support on the basis that they are able to make their own decisions.

All reasonable efforts are made to help the people that we support to make and communicate decisions themselves wherever possible.

For people on the autism spectrum this means that they may need visual aids to help them understand information, and support in ensuring that they can communicate their preferences to us.

Wherever possible our clinicians support individuals to make decisions relevant to their own daily lives in a way that they can relate to. This may be as simple as developing the skill to make a choice from two

t-shirts, or two different boxes of breakfast cereal.

For more complex decisions best interest meetings are held and paperwork is completed, often involving our multi-disciplinary teams, and always including families and others concerned whenever possible. These decisions could be related to how best to meet special dietary needs, check a person's computer use, or weigh up the pros and cons of an individual spending their money on a particular item they may want.

Where significant restrictive decisions are made with regard to preventing access to certain areas, or where restraint may be used with someone to prevent injury to themselves, another person or damage to property, we ensure a DoLS referral is made to the Local Authority to carry out a Best Interests Assessment.

Wherever possible Options Autism encourages everyone in our care to make their own decisions, by helping them to understand the outcomes of a potential decision and how it may affect them in the future. We place the people we support at the centre of everything we do and ensure their best interests are being upheld at all times.

Useful Information

Useful Websites:

- www.carersuk.org
- www.mind.org.uk
- www.nhs.uk
- www.wales.nhs.uk
- www.scie.org.uk
- www.autism.org.uk

Advice and Support:

- Mind Legal Line – 0300 466 6463
- Local Mind – shop.mind.org.uk
- www.gov.uk
- www.lawsociety.org.uk
- www.revolving-doors.org.uk

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Our help sheets are produced monthly and written by our clinical team. If you would like us to cover any particular subjects around autism in future editions then please let us know by emailing info@optionsautism.co.uk

The complete series of help sheets can be found on our website www.optionsautism.co.uk/resources