

Mental Capacity Act Best Practice Mini-guide

Introduction

The Mental Capacity Act 2005 provides a statutory framework to empower and protect vulnerable **people who are not able to make their own decisions**.

The Act makes it clear who can make decisions, in which situations, and how they should go about this. It also enables people to plan ahead for a time when they may lose capacity.

The Act is underpinned by a set of 5 key principles stated at Section 1:

1. Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
2. The right for individuals to be supported to make their own decisions - people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
3. That individuals must retain the right to make what may be seen as eccentric or unwise decisions;
4. Best interests – anything done for or on behalf of people without capacity must be in their best interests; and
5. Least restrictive intervention – anything done for or on behalf of people without capacity should be the least restrictive option in order to preserve their rights and freedoms.

Finding out if a person lacks capacity

There is a two stage test:

1. Is there a disturbance in the functioning of the persons mind or brain?
2. If so, is the disturbance so severe that it prevents a person making a particular decision?

Assessing capacity – The Act sets out a single clear test for assessing whether a person lacks capacity to make a **particular decision** at a **particular time**. It is a “decision-specific” test. Based on a **person’s ability to understand, retain, weigh up information and make a reasoned choice**.

The assessment is based on a person’s understanding of the potential consequences of the decision, **not** whether it is a wise decision.

No one can be labeled ‘incapable’ as a result of a particular medical condition or diagnosis. Section 2 of the Act makes it clear that a lack of capacity cannot be established merely by reference to a person’s age, appearance, or any condition or aspect of a person’s behavior which might lead others to make unjustified assumptions about their capacity.

Every effort should be made to try to facilitate a decision, considering what assistance a person may need in communicating, creating the right environment and considering the most appropriate time to engage with someone who has fluctuating capacity.

Best interests decisions

Everything that is done for or on behalf of a person who lacks capacity must be in that person's best interests. The Act provides a checklist of factors that decision-makers must work through in deciding what is in a person's best interests. For life changing decisions need to be formally recorded.

Lasting Powers of Attorney (LPAs) –

The Act allows a person to appoint an attorney to act on their behalf if they should lose capacity in the future. This is like the Enduring Power of Attorney (EPA). Therefore as well as financial decisions the Act allows people to let an attorney make health and welfare decisions.

Advanced decisions

Advance decisions to refuse treatment – statutory rules with clear safeguards confirm that people may make a decision in advance to refuse treatment if they should lose capacity in the future.

Court of Protection

The new Court will have jurisdiction relating to the whole Act and will be the final arbiter for disputes over whether a person lacks capacity or challenges to best interests decisions. It has its own procedures and nominated judges.

IMCA

An Independent Mental Capacity Advocate (IMCA) is someone appointed to support a person who lacks capacity, but has no one to speak for them. The IMCA makes representations about the person's wishes, feelings and beliefs and values, whilst at the same time bringing to the attention of the decision-maker all factors that are relevant to the decision.

Criminal Offence

The Act has introduced a new criminal offence of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years.