

Capacity | frequently asked questions



What is 'capacity'?

Capacity is the ability to make a decision for yourself about a particular matter. To have capacity a person must be able to:

- understand the information given to them about a particular decision
- retain that information long enough to be able to make the decision
- weigh up the available information to make the decision
- communicate their decision, whether by speech, sign language, or simple movements such as blinking or squeezing a hand

People are said to lack capacity when illness or injury prevents them from being able to make personal decisions, temporarily or permanently.

Capacity is not 'fixed'. It can change over time, and according to the decision to be made. For example, a person may have capacity to make simple decisions such as what to eat, but not complex decisions about managing their finances or medical treatment.

What is the Mental Capacity Act?

The Mental Capacity Act (MCA) is the law in England and Wales that protects and supports people who aren't able to make complex decisions for themselves; it deals with the assessment of their capacity, and acts by their carers.

There are five key points that govern the application of the MCA:

- A person should always be assumed to have capacity to make a decision until it is proven they do not.
- Before deciding that a person doesn't have capacity to make a particular decision, every effort should be taken to help them make that decision for themselves whether that includes taking more time to explain things, or using props to help them to understand etc.
- Because someone makes a decision that seems unwise or eccentric to someone else, it does not mean they are incapable of making that decision.
- Any decision taken on behalf of a person that lacks capacity must be taken in their best interests.
- If options are available, whoever is making the decision on behalf of the person should always seek to take the least restrictive option for their rights and freedoms.

The MCA is very important for people affected by brain injury or their carers. Many people who have suffered a brain injury might appear perfectly 'normal' when in fact they face a range of complex, sometimes subtle problems that can combine to have a devastating effect on their ability to make decisions for themselves. Assessing the capacity of individuals with a brain injury to understand decisions they might have to make, or that will affect them, can therefore be extremely difficult and the results can fluctuate for a number of reasons.

Who decides whether someone has capacity?

A family member might decide if someone is able – or has capacity - to make ‘everyday’ decisions for themselves, eg. when and what to eat, without the need for a formal process.

Health or social care professionals may be called on to assess an individual’s capacity to make more complex decisions, perhaps relating to medical treatment or where they are cared for, in consultation with their family and carers.

Before any assessment is considered, the person must be given as much help as possible to make the decision themselves, which could involve trying different ways of breaking down and communicating information to them.

How is capacity assessed?

The MCA sets out two linked tests to determine capacity; both tests must be met for a person to be said to lack capacity.

The ‘diagnostic test’ asks whether a person is suffering from an impairment or disturbance in the functioning of the brain (which may be due to a long-term condition, or a more temporary state such as confusion or unconsciousness).

If they are, the ‘functional test’ seeks to assess whether they can understand, retain, weigh up and communicate information relevant to a particular decision. If they are unable to perform any of these functions, they will have failed the test and be said to lack capacity to make the decision.

Who makes the decision for someone who doesn’t have capacity?

An everyday decision is likely to be made by a family member present at the time. If the decision concerns finances, care or treatment, the family or carer may have to consult with either an appointed attorney or deputy (if the person has one), or a professional involved in their care.

If the person has an attorney or deputy for property and financial affairs, they will be asked to make relevant decisions. If there is no Lasting Power of Attorney in place, the family may have to apply to the Court of Protection to appoint a deputy.

If the person has an attorney or deputy for health and welfare matters, decisions about where they live and receive care will be referred to them. Otherwise a doctor or social worker might take the decision.

Decisions relating to life-sustaining treatment will be made by an appropriate medical practitioner with reference to any health and welfare attorney, next of kin and other family members.

Can a capacity assessment be challenged?

Yes – perhaps if someone feels a person had the capacity to make a decision but was not allowed to do so or, conversely, made a decision they didn’t have the capacity to make. The person themselves or a relative, friend or professional might challenge the assessment.

To challenge an assessment, first speak to the person that carried it out, ask for their reasons, and explain why you disagree. If you still disagree, you can ask for the decision to be reviewed either by the person that made the assessment or by the organisation involved. If you are still unhappy, you could consider making a formal complaint through the relevant channels.