

Principles of the Mental Capacity Act 2005

The following principles apply for the purposes of this Act:

- (1) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (2) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (3) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (4) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (5) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

(Mental Capacity Act 2005:

http://www.legislation.gov.uk/ukpga/2005/9/pdfs/ukpga_20050009_en.pdf)

When does a person lack capacity?

- 'The Act requires that any decision that a person lacks capacity must be based on a 'reasonable belief' backed by objective reasons.'
- 'Lacking capacity to make a decision should not exclude an individual from participating in the decision-making process as far as is possible.'

'For the purpose of the Act a person lacks capacity if, at the time the decision needs to be made, he or she is unable to make or communicate the decision because of an 'impairment of, or a disturbance in the functioning of, the mind or brain'. The Act contains a two-stage test of capacity:

- 'Is there an impairment of, or disturbance in the functioning of, the person's mind or brain? If so;
- 'Is the impairment or disturbance sufficient that the person is unable to make that particular decision?'

'The assessment of capacity is "task-specific". It focuses on the specific decision that needs to be made at the specific time the decision is required. It does not matter if the incapacity is temporary, or the person retains the capacity to make other decisions, or if the person's capacity fluctuates. The inability to make a decision, however, must be a result of the impairment or disturbance already mentioned.'

(British Medical Association, 2008)

The common law 'functional' test of capacity under the Mental Capacity Act 2005

'The Act makes use of a "functional" test of capacity, adapted from the common law, which focuses on the decision-making process itself. First it must be established that the person

being assessed has “an impairment of, or a disturbance in the functioning of, the mind or brain” which may affect their ability to make the decision in question. Under the Act, a person is regarded as being unable to make a decision if, at the time the decision needs to be made, he or she is unable:

- ‘To understand the information relevant to the decision;
- ‘To retain the information relevant to the decision;
- ‘To use or weigh the information; or
- ‘To communicate the decision (by any means).

‘Where an individual fails one or more parts of this test, then they do not have the relevant capacity and the entire test is failed.’

(British Medical Association, 2008 – includes paraphrase of Mental Capacity Act 2005, section 3)

When to assess capacity

‘If there is doubt about a person’s mental capacity, consideration needs to be given as to whether the person lacks capacity to make that particular decision, as they may have capacity to make some decisions but not others. This does not necessarily mean that a person’s mental capacity has to be reassessed each time a decision needs to be taken. If there is a reasonable belief that the person lacks the capacity to make a decision based on prior knowledge of that person then the decision can be made by a parent or representative, as appropriate.’

(0-25 SEND Code of Practice, 2015, Annex 1)

List of resources on best-interests decision-making under the Mental Capacity Act 2005

British Medical Association (2008) Mental Capacity Act Toolkit. London: BMA. [Online at: <http://bma.org.uk/>-

[/media/files/pdfs/practical%20advice%20at%20work/ethics/mental%20capacity%20act%20tool%20kit_full.pdf](http://bma.org.uk/media/files/pdfs/practical%20advice%20at%20work/ethics/mental%20capacity%20act%20tool%20kit_full.pdf); accessed: 14.3.15]

Gov.UK (2014) ‘Mental Capacity Act: making decisions’. [Online:

<https://www.gov.uk/government/collections/mental-capacity-act-making-decisions>; accessed: 14.3.15]

Mental Health Foundation (n.d.) ‘Best-interests decision-making?’. [Online:

<http://www.bestinterests.org.uk/>; accessed: 14.3.15]

NAAPS (n.d.) ‘Handout 3: best decisions checklist’. London: Social Care Institute for Excellence. [Online at: <http://www.scie.org.uk/publications/mca/resources/naaps.asp>; accessed: 14.3.15]

(0-25 SEND Code of Practice, 2015 (CoP), section 1.8)

Social Care Institute for Excellence (n.d.) ‘MCA resource - training resources: NAAPS’.

[Online at: <http://www.scie.org.uk/publications/mca/resources/naaps.asp>; accessed: 14.3.15]

Social Care Institute for Excellence (n.d.) ‘MCA resource - all resources’. [Online at:

<http://www.scie.org.uk/publications/mca/resources/list.asp>; accessed: 14.3.15]