

Mental Capacity Act and Consent – Summary

The Mental Capacity Act 2005 provides a statutory framework for people who lack capacity to make decisions, or who have capacity and want to make preparations for a time when they may lack capacity in the future. It sets out who can take decisions, in which situations, and how they should go about it. The Act sets out how capacity should be assessed and procedures for making decisions on behalf of people who lack mental capacity. It applies to people aged 16 and over.

What is Consent?

Consent represents an agreement between the person receiving care or services and those responsible for its provision that nothing will be done to them without their permission and agreement. This is a vital concept in order to build trust in a working relationship.

What is Informed Consent?

In order for consent to be informed, the person must have adequate information given to them so they can understand all the issues involved and weigh up the pros and cons in order to make a valid decision. If somebody is not given adequate information, or does not understand the information, then it will be impossible for them to come to an informed decision and therefore cannot give informed consent.

In some cases e.g. if a person has an impairment or disturbance of the mind or brain, whether temporary or permanent, that impacts on their cognition and ability to reason, the person may be incapable of making an informed decision, even if they have adequate information and will rely on others making choices and decisions for them.

Where a person does not have the mental capacity to make their own decisions (including giving consent) they may be described as 'lacking capacity' and their rights are protected by the Mental Capacity Act (MCA).

Mental Capacity Act (MCA) 2005

The Mental Capacity Act includes five key principles which must be followed by all staff:

1. Adults must be assumed to have the capacity to make decisions for themselves unless proved otherwise.
2. Individuals must be given all available support before it is concluded that they cannot make decisions for themselves.
3. Individuals must retain the right to make what might be seen as eccentric or unwise decisions.
4. Anything done for or on behalf of individuals without capacity must be in their best interests.
5. Anything done on or on behalf of individuals without capacity should restrict their rights and basic freedoms as little as possible.

If a person lacks the capacity to give or withhold consent, professionals must act in their best interests at all times.

All staff providing support or care for a person must show that they understand the rights of the person under the law; and have used the two-stage test for assessing whether a person has or lacks the capacity to make an informed consent decision at a particular time.

The two-stage test asks:

1. is there an impairment of, or disturbance in, the functioning of the person's mind or brain?
2. if so, is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?

The test needs to be applied for each specific decision at that specific time. The assessment and outcome must be recorded.

MCA Best Interests checklist

- What is the proposed intervention?
- What are the benefits/justification for the intervention?
- What are the potential risks/adverse effects of carrying it out?
- Is there a less restrictive option or any alternatives to consider?
- Has the presumption of capacity been applied?
- Has the two-stage test been applied for assessing whether a person lacks capacity to take the decision?
- How has the person been involved in the decision-making process?
- How has their capacity been maximised?
- How has information about the intervention been shared with them?
- What are the individual's wishes and feelings?
- What are the views of other significant people involved in their life?
- Is there an advance decision?
- Is capacity likely to be regained in the future?
- Have assumptions based solely on the person's age, appearance, condition or behaviour been avoided?
- Details of final decision

Exceptions

According to the joint MA Safeguarding Adults Policy and Procedures (West Yorkshire, North Yorkshire and York) April 2018, exceptional circumstances when consent is not required e.g. to share personal and sensitive information, may include situations where:

- The adult lacks the mental capacity to make that decision;
- Emergency or life-threatening situations or other people are, or may be, at risk, including children;
- Sharing the information could prevent a serious crime or a serious crime has been committed;
- The risk is unreasonably high and duty of care has to be considered;
- Staff are implicated;
- There is a court order or other legal authority for taking action without consent.

Before overriding consent, staff should seek advice from managers in line with their organisations' policy, except in emergency situations. All decisions to dispense with consent should be explained and recorded.