

# Capacity assessments and **best interests** decision making

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## A refresher

How providers apply the Mental Capacity Act 2005 is a key aspect of any CQC inspection and can mean a drastic difference in enforcement, rating and future inspection timetable.

This article provides a refresher of the key points of this legislation in terms of capacity assessments and best interests decision making. We also offer some key considerations which arise mainly from our experience of CQC reports and enforcement action.

## The core principles

- 1) A person must be **assumed to have capacity** to make his own decisions 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, on behalf of a person who lacks capacity must be in his **best interests**
- 5) Before the act is done, or the decision is made, regard must be had to whether its aim can be as effectively achieved in a way that is **less restrictive** of the person's rights and freedom of action

## Assessing capacity

A capacity assessment should be criteria-focussed, evidence-based, person-centred and non-judgmental.

There are the following questions to ask in assessing capacity:

### 1) Is the person able to make a decision?

A person cannot make a decision for himself if he is unable to:

- **Understand** the information relevant to the decision
  - relevant information includes the reasonably foreseeable consequences of the decision including not taking any action
  - they need not understand every aspect of the decision but should understand the salient factors
- **Retain** that information for long enough to make the decision
- **Use or weigh** that information in order to make the decision
- **Communicate** the decision by any means

### 2) Is there an impairment or disturbance in the functioning of the person's mind or brain?

This is usually a clinical question although the impairment or disturbance does not need to be a formal or permanent diagnosis. For instance, it can include the symptoms of drug or alcohol abuse.

### 3) Is the person's inability to make the decision because of the impairment or disturbance of the mind?

Questions 1 and 2 above have to be linked together in order to lead to a lack of capacity. If your capacity documentation or proformas do not include the requirement for this link then you may wish to consider amending them.

## Making a decision in a person's best interests

Who is the decision maker is not a simple question. When a decision relates to treatment, care arrangements or accommodation, this might be a doctor, nurse, social worker or, in some cases, the court. For day-to-day care, it will be the carer responsible for that care provision. If there is a lasting power of attorney or court appointed deputy, they may be the decision maker.



For assessing best interests, there is a non-exhaustive checklist of considerations as follows:

- Assumptions should not be made on the basis of age, appearance, condition or behaviour
- The person's wishes, feelings, beliefs and values (current and those expressed before losing capacity to make the decision, including within an advance decision or statement)
- Whether the individual will regain capacity and when
- Encouraging the person to participate in the decision as fully as possible
- A decision must not be motivated a desire to bring about death
- The views of anyone named by person as someone to be consulted
- Whether there is a lasting power of attorney or deputy

#### **Key issues and considerations**

It is not for a service user to prove they have capacity. They are presumed to have capacity in relation to a specific issue until an assessment demonstrates that they do not.

Be wary of generic capacity assessments. "Miss X lacks capacity" on its own is of little assistance and will not go down well with CQC inspectors. Capacity is time and decision-specific and documentation should reflect this.

Be clear in your documentation especially in relation to:

- The decision at issue
- The options for moving forward
- The salient details of the decision
- The efforts taken to maximise capacity and encourage the person's involvement

- The elements of the capacity test including the link between the inability to make a decision and the impairment/disturbance
- The chronology of a best interests decision and the key players

Whilst consistency of understanding and implementation is important, it would be too onerous and disproportionate to employ exactly the same process for each capacity assessment and best interests decision. For instance, for everyday and relatively trivial interventions, it would not be necessary to demonstrate a detailed capacity assessment and best interests process for each and every intervention. The more serious the decision and its consequences, the more thorough the capacity assessment and best interests process and the more detailed the recording.

If you would like further information or to arrange bespoke training, please contact a member of our social care team.

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Much of Helen's caseload involves mental health and mental capacity issues. She regularly acts on behalf of care providers and commissioners in complex proceedings before the Court of Protection concerning deprivation of liberty and best interests.