

## **Mental capacity and Consent**

The Mental Capacity Act 2005 (MCA) provides the statutory framework to empower and protect people who may lack capacity to make decisions for themselves and establishes a framework for making decisions on their behalf.

The Act states that a person lacks capacity in relation to a matter if at the material time he/she is unable to make a decision for him or herself in relation to the matter because of an impairment of, or disturbance in the functioning of the mind or brain.

The presumption is that adults have mental capacity to make informed choices about their own safety and how they live their lives.

All interventions need to take into account the ability of adults to make informed choices about the way they want to live and the risks they want to take.

### **Definition of lack of capacity**

The MCA sets out a two-stage test of capacity:

Stage 1 - There must be an impairment of, or disturbance in the functioning of, the mind or brain.

Stage 2 - There must be an inability to make the decision in question as a result of the impairment of, or disturbance in the functioning of, the mind or brain.

Further, a person is not able to make a decision if they are unable to:

- understand the information relevant to the decision or;
  - retain that information long enough for them to make the decision or;
  - use or weigh that information as part of the process of making the decision.
- or
- communicate their decision (whether by talking, using sign language or by any other means such as muscle movements, blinking an eye or squeezing a hand).

Mental Capacity Act: making decisions Further information can be found in the Mental Capacity Act Code of Practice available at: [Mental Capacity Act: making decisions](#)

## **Mental capacity and safeguarding**

Issues of mental capacity and the ability to give informed consent are central to decisions and actions in the safeguarding adults' procedure.

All decisions taken in the safeguarding adults' process must comply with the five core principles of the Mental Capacity Act 2005:

- a person must be assumed to have capacity unless it is established that he lacks capacity;
- a person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success;
- a person is not to be treated as unable to make a decision merely because he makes an unwise decision;
- 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;
- 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 effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

This means that:

- an adult at risk has the right to make their own decisions and must be assumed to have capacity to make decisions about their own safety unless it is shown otherwise;
- there should always be the assumption that an adult at risk has capacity to make the decision in question.

If there is evidence to suggest that a person may lack capacity, then a formal assessment of capacity should be carried out. This includes their ability to:

- understand the implications of their situation
- take action themselves to prevent abuse or protect themselves from abuse
- participate to the fullest extent possible in decision making about interventions

### **If the adult at risk does not have capacity**

If it is established through assessment that the adult at risk lacks capacity and they have no family or friend who can be consulted regarding their best interests, an advocate or an independent mental capacity advocate (IMCA) should be instructed in line with the local IMCA referral policy.

An IMCA should be instructed if it is felt that it will be beneficial to the adult at risk, even if they have family, friends and carers available to consult.

If the person has a lasting power of attorney, their attorney or court appointed deputy should be consulted unless they are implicated in the allegation.

## **If the adult at risk has capacity**

If the adult at risk has mental capacity then they have the right to make decisions about their safety and the safeguarding investigation.

It is important to:

- ensure the adult at risk understands the risk and what help they may need to support them to reduce the risk if that is what they want;
- be satisfied that their ability to make an informed decision is not being undermined by the harm they are experiencing and is not affected by intimidation, misuse of authority or undue influence, pressure or exploitation if they decline assistance.

## **Consent**

It is always essential in safeguarding to consider whether the adult at risk is capable of giving informed consent in relation to the investigation and safeguarding plan. If they are, their consent should be sought. This includes an awareness of the risks of disclosing that an investigation is being undertaken.

Where an adult at risk with capacity has made a decision that they do not want action to be taken and there are no public interest or vital interest considerations, their wishes must be respected.

The adult at risk must be given information and have the opportunity to consider all the risks and fully understand the likely consequences of that decision over the short and long term.

If, after discussion with the adult at risk who has mental capacity, they refuse any intervention, their wishes will be respected unless:

- there is a public interest, for example, not acting will put other adults or children at risk;
- there is a duty of care to intervene, for example, a crime has been or may be committed.

However consent may need to be considered in relation to the adult at risk's participation in activity that may be abusive. If consent to abuse or neglect was given under duress, for example, as a result of exploitation, pressure, fear or intimidation, this apparent consent should be disregarded with a safeguarding adults investigation going ahead in response to the concern that has been raised.

## **Ill treatment and wilful neglect**

Section 44 of the MCA makes it a specific criminal offence to wilfully ill-treat or neglect a person who lacks capacity.

An allegation of abuse or neglect of an adult at risk who does not have capacity to consent on issues about their own safety will always give rise to action under the safeguarding adults' process and subsequent decisions made in their best interests in line with the MCA and Mental Capacity Act Code as outlined above.