

# Making decisions

## What this is about

This information sheet has been written to support frontline staff working in the criminal justice system who come into contact with people with learning disabilities. It is important to remember that people with learning disabilities may have difficulties with making decisions that affect their day to day living. This may include housing, money, support with social care and health needs and health related interventions, as well as difficulties negotiating decisions around relationships and about criminal justice requirements.

The ability to make decisions is called mental capacity, and there is a law (Mental Capacity Act 2005) about helping people to make decisions themselves, how to assess if people are able to make decisions, and what should be done if the person cannot make a decision for themselves. This law applies to people living in England and Wales only.

## The principles of the Mental Capacity Act are:

- You must assume that a person has capacity unless you establish he or she does not (if you are unsure, you may need to assess their capacity)
- You must not treat a person as unable to make a decision unless you (or someone else) has tried all practicable steps to help him or her to do so, without success (this may form part of testing the person's capacity – see below)
- You must not treat a person as unable to make a decision just because they make an unwise decision (or one that you disagree with) – but this may be a reason for assessing their capacity
- Action you take or decisions you make under the Act for or on behalf of a person who lacks capacity must be done, or made, in his or her best interests (see p.2)
- Before you take action or make the decision, you must think about whether the purpose can be achieved as effectively in a way that is less restrictive of the person's rights and freedom of action (providing it is still in the person's best interests).

## Assessing capacity

If you are unsure if the person is able to make an informed decision, there is a two stage process to help you assess their capacity:

1. Does the person seem to you to have impaired functioning of their mind or brain, or disturbed functioning?

This could be due to having a learning disability, dementia, the symptoms of alcohol or drug use, some forms of mental illness or the long-term effects of brain damage. If a person does not have such a mental impairment, they will not lack capacity under the Mental Capacity Act.

2. Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?

First you must do all you can to make the decision easier to understand, to help the person make the decision themselves. For example, you could use easy words and short sentences. You could use pictures. See the fact sheet on 'Making information easier to read' for more ideas. If you are still unsure about their capacity, you should assess this.

A person is unable to make a decision if they cannot do one or more of the following things:

1. Understand information about the decision to be made
2. Keep that information in their head long enough to make the decision
3. Use or weigh up that information as part of the decision making process, or
4. Communicate their decision, in whatever way they communicate. (Make sure different ways have been explored. Get support from a speech and language therapist for specialist advice).

Other important factors to take into account:

- Remember that just because someone can't make a complex decision you should not assume they lack capacity to make other decisions. Capacity must be assessed for each decision, at the time the decision needs making.
- Anyone can assess capacity for ordinary decisions.
- As a frontline worker it is important to record the outcomes when you have had to assess capacity (but the law doesn't require any special forms to be filled in). You should also record how you arrived at your decision about the person's capacity.
- Professionals are more likely to have to assess capacity formally when decisions are more complex. For example, a doctor or other health professionals may assess capacity in relation to health care; if it is a legal decision, a solicitor may assess capacity.
- Avoid making assumptions about the person's capacity based upon their age, appearance, behaviour or condition.
- A similar test is used to assess if someone has 'substantial difficulty' in being involved in decisions around social care, under the Care Act 2014 – if they do, the person is entitled to an advocate under the Care Act 2014.

### Example

Mike has a mild learning disability and is being seen by his local drugs and alcohol service. His nurse consultant, Eddy, suggested he attend a community based detoxification programme because his drinking is getting him into trouble with the law. Mike said he didn't want to attend such a service. Wondering whether Mike had capacity to make the decision, Eddy decided to start by explaining more about the benefits of the service, using photos and easy to read material. Eddy got permission from Mike to contact Mike's girlfriend, father and housing support officer and they met with Mike to talk about their views on him getting treatment. Eddy also persuaded Mike to talk to his GP. Then Eddy talked to Mike again and thought Mike had capacity to make the decision because he understood the choices involved in making the decision. Mike agreed to give it a go.

## What happens if the person does not have capacity to make a decision?

If you think the person you are working with does not have capacity to make a specific decision (each decision should be treated separately), you should assess whether they might regain capacity and whether the decision can wait for that. If the answer to either of these questions is 'no', any decision made on the person's behalf should be made in the person's 'best interests'. If you do this you will be the decision-maker. Your role is:

- to gather the views of the person themselves and those who know the person (such as close family, friends and other services);
- find out about the circumstances;
- and use the best information you can to make the decision.

You will need to record how the decision was reached, the reasons behind it, who was consulted and what factors were taken into account. You should try to involve the person themselves, even though they cannot make the decision. You may need to hold a formal best interests meeting. Your decision must avoid discrimination and (as far as possible) avoid restricting the person's rights.

The person may be entitled to an Independent Mental Capacity Advocate (IMCA) if the decision is about changing accommodation (involving a hospital or care home), serious medical treatment, or safeguarding and they do not have someone else who can represent them. If you are the decision-maker, you may need to arrange an IMCA.

Put in here where to contact your local IMCA service:

## Further information

To find out more about the Mental Capacity Act 2005 see:-

For the law:

<http://www.legislation.gov.uk/ukpga/2005/9/contents>

For the Code of Practice:

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

For a brief guide:

<https://www.gov.uk/government/publications/health-and-social-care-workers-mental-capacity-act-decisions>

To find out about Independent Mental Capacity Advocates see:

<https://www.gov.uk/government/publications/independent-mental-capacity-advocates>

Please note this fact sheet does not cover the responsibility to involve an Appropriate Adult for children and vulnerable adults detained or interviewed by police under PACE 1984. For more information on this see the National Appropriate Adult Network:

<http://www.appropriateadult.org.uk>

It also does not cover decisions made in reference to the Mental Health Act 1983, for more information on this see:

<https://www.gov.uk/government/publications/code-of-practice-mental-health-act-1983>

This is part of a series of fact sheets for people working in the criminal justice system. They are how to spot signs that a person has a learning disability; finding out about other services that may help; communication; making information easier to read; making appointments; making decisions; useful information and resources. To download these or for more information see:

<https://www.mentalhealth.org.uk/learning-disabilities/our-work/rights-equality/criminal-justice-system/>