



**Comisiynydd Pobl Hŷn Cymru**  
**Older People's Commissioner for Wales**

# **Mental Capacity**

**An Easy Guide**



**An independent voice and champion  
for older people throughout Wales**

# **The Older People's Commissioner for Wales**

The Older People's Commissioner for Wales is an independent voice and champion for older people throughout Wales.

The Commissioner is taking action to protect older people's rights, end ageism and age discrimination, stop the abuse of older people and enable everyone to age well.

**The Commissioner is working for a Wales where older people are valued, rights are upheld and no-one is left behind.**

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## Introduction

The term 'Mental Capacity' is often used within health and social care services, but there is often confusion about what it means and the ways in which it can influence decision-making and the approach that is taken. The purpose of this guide is to provide a greater understanding of what is meant by 'Mental Capacity'.

## What is it that can cause a person to lack Mental Capacity?

It is estimated that approximately two million people in England and Wales lack capacity to make some or all decisions for themselves. A lack of mental capacity could be due to:

- A stroke
- Brain injury
- Dementia
- A mental health problem
- A learning disability
- Substance misuse
- Confusion, drowsiness or unconsciousness due to illness or the treatment for the illness

It cannot be assumed that someone cannot make a decision for themselves just because they have a particular medical condition or disability.

## Fluctuating Capacity

Some people are intermittently or temporarily unable to make a decision for themselves. Wherever possible, decisions should be delayed until the person regains capacity, but treatment may be provided to preserve the person's life or health in urgent cases.

## Mental Capacity Act 2005

The Mental Capacity Act 2005 came into force in 2007 and applies to England and Wales. It promotes and safeguards decision-making within a legal framework.

The Act includes a Code of Practice that provides guidance for those working with people who may lack capacity. This applies to professionals and/or paid carers, who have a legal duty to comply with the Code.

## When is it established that a person lacks mental capacity?

The Mental Capacity Act states that a person lacks capacity if an impairment of, or a disturbance of their mind or brain stops them from making decisions when they need to be made. Whilst there is a presumption that everyone has capacity unless it is proved otherwise, the law says that someone lacks capacity when they are unable to do **one or more** of these four things:

- Understand information given to them
- Retain that information long enough to be able to make the decision
- Weigh up the information available to make the decision
- Communicate their decision – this could be by talking, using sign language or even such actions as blinking an eye or squeezing a hand

It is important that every effort is made to find ways of communicating with someone before deciding that they lack capacity. Family, friends, carers or other professionals (e.g. Independent Advocate) should be involved in this process. The Act requires that every effort is made to help people make the decision for themselves.

It is also important to understand that although some people have difficulties with their cognitive function (e.g. memory problems) this does not necessarily mean that they lack mental capacity.

The term ‘having capacity’ could mean that a person (such as someone living with dementia) may have capacity to make decisions about their welfare requirements but lack capacity to make decisions regarding the management of their finances.

## Testing for Capacity

A two-stage functional test is used to determine whether a person has capacity:

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

## When does capacity need to be assessed?

A person may need to have their capacity assessed if a decision has to be taken about their health or welfare and there is some doubt about their capacity. The lack of capacity may not necessarily be a permanent condition.

There are **five key principles** that need to be considered when assessing capacity:

**1. A presumption of capacity** – every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. This means it cannot be assumed that someone is unable to make a decision for themselves just because they have a particular medical condition or disability.

**2. Individuals being supported to make their own decisions** – a person must be given all practicable help before anyone treats them as not being able to make their own decisions. This means every effort should be made to encourage and support people to make decisions for

themselves. If lack of capacity is established, it is still important that the person is involved as far as possible in making decisions.

**3. Unwise decisions** – people have the right to make decisions that others might regard as unwise or eccentric. People cannot be treated as lacking capacity for this reason. Everyone has their own values, beliefs and preferences which may not be the same as other people.

**4. Best interests** – anything done for or on behalf of a person who lacks capacity must be done in their best interests

**5. Less restrictive option** – someone making a decision or acting on behalf of a person who lacks capacity must consider whether it is possible to decide or to act in a way that would interfere less with the person's rights and freedom of action (e.g. using anti-psychotic medication to such an extent that it stupefies a person may not be the least restrictive option). Can the outcome be effectively achieved in a way which is less restrictive of the person's rights and freedoms (e.g. if a decision is being made about whether a person lacking capacity should return home following a hospital admission, professionals should consider how appropriate support measures could be put in place to enable the person to return to their home, as this would be the least restrictive option for the individual).

## What are 'Best Interests'?

The Mental Capacity Act provides a non-exhaustive checklist of factors that decision-makers must work through in deciding what is in a person's best interest.

Some of the factors decision-makers need to take into consideration are:

- Do not discriminate. Do not make assumptions about someone's best interests merely on the basis of the person's age or appearance, condition or any aspect of their behaviour.
- Take into account all relevant circumstances.
- If faced with a particularly difficult or contentious decision, it is recommended that decision-makers adopt a 'balance sheet' approach which provides a coherent format for considering the available options which is both robust and transparent.
- Will the person regain capacity? If so, can the decision wait?
- Involve the individual as fully as possible.
- Take into account the individual's past and present wishes and feelings, and any beliefs and values likely to have a bearing on the decision.
- Consult as far and as widely as possible including anyone previously named by the person as someone



to be consulted. In addition, unpaid carers, close relatives and friends who take an interest in the person's welfare including anyone holding Enduring or Lasting Power of Attorney or any Deputy appointed by the Court of Protection should be consulted. Bear in mind that a Lasting Power of Attorney or a Deputy may have the authority to make the decision on behalf of the individual.

## **What you can do to ensure your 'Best Interests' are considered should you lose capacity?**

It is important to understand that your next of kin/family will not always be able to make decisions on your behalf. If you lose mental capacity it may be appropriate to have an Independent Advocate. It may also be necessary to have an appropriate legal document in place. Without such, it can make it difficult for your voice to be heard and your wishes to be respected.

## **Lasting and Enduring Power of Attorney (LPA & EPA)**

Having a Lasting Power of Attorney (LPA) allows people to formally appoint a person/people they trust to look after their health, welfare and/or financial or property decisions in the future if they lack capacity to make those decisions for themselves.

Further information about LPA can be found at:

<https://olderpeople.wales/resource/an-easy-guide-to-lasting-powers-of-attorney/>

An Enduring Power of Attorney (EPA) was introduced prior to LPAs. An EPA will only be relevant to property and financial affairs: they do not apply to health and welfare decisions.

If you already have an Enduring Power of Attorney and do not want to change it, you don't need to apply for an LPA. However, you will need to apply for an LPA if you want to change an existing EPA.

If you don't have mental capacity, you cannot make an LPA; nor can anyone else do it for you. The only other way someone else can act on your behalf is if they apply to the Court of Protection to become your Deputy.

## **Deputies**

You can apply to become someone's Deputy if the person lacks mental capacity and is unable to make decisions for themselves at the time it needs to be made.

There are two types of deputies:

- Property and financial affairs deputy
- Personal welfare deputy.

A property and financial affairs deputy is able to pay a person's bills and manage their finances. A personal welfare deputy can make decisions about medical treatment and how someone is looked after, but their precise powers to decide may be set out by the Court of Protection.

A deputy has similar powers to a Lasting Power of Attorney. However, a deputy must send a report to the Office of the Public Guardian and pay a fee every year. Their costs will come out of your assets. It's a lot more time-consuming and expensive than having an LPA.

## **Advance Decisions to refuse treatment (sometimes referred to as a Living Will)**

The Mental Capacity Act creates statutory rules with clear safeguards so that people may make a decision in advance to refuse treatment if they should lack capacity in the future.

It will only be used if you lack capacity to make a particular decision. Advance Decisions are legally binding in England and Wales, as long as they meet certain requirements. However, in certain circumstances an advance decision will not apply.

If for example, the doctor has reasonable grounds for believing that circumstances now exist which the person did not anticipate when they made the advance decision and which would have affected the decision. However, doctors will place great emphasis on any advance decision as it is a statement of what the person actually wants. If the advance decision includes end of life decisions, certain formalities have to be met.

