

The two stage test of capacity

If there are doubts about a person's capacity, this two stage test must be used—and records must show it has been used.

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 decision?

Incapacity defined

A person can only be deemed unable to make a decision if he/she is unable to:

- Understand the information relevant to the decision.
- Retain the information long enough to enable the making of a decision.
- Use or weigh that information as part of the process of making the decision.
- Communicate in any way.

Checklist for making decisions

Check the significance of the person's life history to determine:

- Is the person able to make a decision?
- What is the significance of this particular decision?
- What is known about the person's ability to communicate?
- Has information been presented in different formats?
- Is the setting appropriate?
- Who else needs to be involved, e.g. family, friends, professionals?
- How quickly is the decision required?

The Code of Practice and the Mental Capacity Act 2005

The Code of Practice is a guide to good practice. It is not the law. But remember that failure to comply with the code can be used in evidence before a court or tribunal in any civil or criminal proceedings.

If you do not comply with the code you will be expected to give good reason why you departed from it.

It is therefore imperative that anyone working with or caring for a person who lacks capacity, becomes familiar with the code.

Copies of the MCA and DoLS Codes of Practice and further information about the codes can be found on the Department of Health's website: www.dh.gov.uk.

This aide is a quick reminder of the key principles.

The five statutory principles

1. Assume the person has the capacity unless proved otherwise.
2. Do not treat people as incapable of making a decision unless you have tried all practicable steps to help them.
3. Do not treat someone as incapable of making a decision because their decisions may seem unwise to you.
4. Always do things or take decisions for people without capacity in their best interest.
5. Before doing something to someone or making a decision on their behalf, consider whether you could achieve the outcome in a less restrictive way.