



Factsheet

Future planning: Mental capacity

There may be a time when you need someone to make decisions for you because of ill health.

This factsheet explains what mental capacity is, the way it is assessed and what rules are there to protect you if you're unable to make or communicate decisions for yourself.



Call free on **0800 319 6789**
Visit **[independentage.org](https://www.independentage.org)**

About Independent Age

No one should face financial hardship in later life.

Independent Age is a national charity providing support for older people facing financial hardship. We offer free impartial advice and information on what matters most: money, housing and care.

We financially support local community organisations across the UK through our grants programme. We campaign for change for older people struggling with their finances.

You can call us on freephone **0800 319 6789** (Monday to Friday, 8.30am to 5.30pm) or email helpline@independentage.org to arrange to speak to one of our advisers.

To donate or help support our work, please visit independentage.org/support-us.

In this factsheet, you'll find reference to our other free publications. You can order them by calling **0800 319 6789** or by visiting independentage.org/publications.

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1. What is mental capacity?

Mental capacity means having the ability to understand, remember and use information so that you can make and express decisions about your life. If you are assessed as lacking mental capacity, it means you are no longer able to make and/or communicate a decision when you need to.

This might be a decision about an everyday thing, like choosing what to wear or when to pay a bill, or a more important decision like deciding whether to move into a care home. You may have the ability to make some decisions but not others.

Loss of mental capacity isn't always permanent. It could be temporary or it may change over time. If you lack mental capacity to make a decision at the time it needs to be made, someone else may need to make it for you.

Mental capacity is not only based on your age, behaviour or health conditions. There could be lots of reasons for not having mental capacity, including:

- being unconscious as a result of an accident or illness
- suffering a stroke
- having a degenerative disease
- having late-stage dementia.

The Mental Capacity Act

If you live in England or Wales, the Mental Capacity Act 2005 sets out how people who lack mental capacity should be protected and treated. There are five main principles that must be followed by someone who could make a decision on your behalf. They must:

1. assume you have capacity, until it's shown that it's more likely than not that you don't
2. take all practical steps to help you make your own decisions before anyone decides you're unable to do so

3. not treat you as unable to make a decision simply because you make an unusual, unwise or odd decision, or a decision they disagree with
4. make sure that any decision or action taken on your behalf is made in your best interests – see [page 8](#) to find out more about best interests decisions
5. consider less restrictive options – for example, whether the decision has to be made right away or if the decision could be delayed. They should consider all options and try to choose the one that is in your best interests.

For more information, see the Mental Capacity Act Code of Practice ([gov.uk/government/publications/mental-capacity-act-code-of-practice](https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice)).

Adults with Incapacity (Scotland) Act 2000

If you live in Scotland – or own a property in Scotland – the Adults with Incapacity (Scotland) Act 2000 sets out how people who don't have mental capacity are protected and should be treated. It also gives five main principles that must be followed by someone who is making a decision for you, which are that:

1. any action or decision taken has to benefit the person who doesn't have capacity. The decision must only be made if it is the only way to get this benefit for the person without capacity
2. any action or decision should be the option that restricts the person's freedom the least
3. when someone is deciding something for someone without capacity, all the present and past wishes and feelings of the person have to be taken into account
4. the decision maker should listen to the views of others who care about the person's welfare, like family and friends
5. the decision maker should encourage the person to use existing skills and develop new skills around managing property, financial and personal welfare matters.

2. Mental capacity in England and Wales

How is mental capacity assessed?

A wide range of people may need to assess whether you have the mental capacity to make a decision. This includes family members and care workers who may make routine decisions, such as what you will eat or what clothes you will wear. If someone is assessing your capacity, they must be able to give reasons why they've decided you have or lack capacity.

Sometimes a formal assessment by a professional may be needed. For example, there may be a disagreement about whether you lack mental capacity, or the decision that needs to be made may be complex or have significant consequences.

This assessment could be done by a/an:

- GP
- psychiatrist
- psychologist
- speech and language therapist
- occupational therapist
- social worker.

Anyone making a decision on your behalf will need to take reasonable steps to be sure that you lack mental capacity. They can do this by following the Mental Capacity Act Code of Practice ([gov.uk/opg/mca-code](https://www.gov.uk/opg/mca-code)), which uses a two-stage assessment.

The first stage looks at whether the functioning of your mind or brain is impaired or disturbed in any way – for example, because of an injury, illness or drug or alcohol abuse.

The second stage looks at whether this impairment or disturbance means you're unable to make a specific decision when you need to. This is also known as fluctuating capacity. You will be treated as unable to make a decision if, even with appropriate support, you can't do one or more of the following:

- understand the information you need to make a decision
- remember that information
- use or weigh up information as you make the decision
- communicate your decision in any way.

The assessment will need to consider whether:

- it's possible that you could get your capacity back, and whether the decision can be delayed
- you understand what decision you need to make and why you need to make it
- you understand the likely consequences of making, or not making, the decision.

Every effort should be made to help you to have capacity and communicate your decision.

Challenging mental capacity assessments

If you – or a friend or relative – disagree with the outcome of a formal capacity assessment, you might want to challenge it. For example, you might think you could have made a decision yourself but weren't allowed to. If you think decisions are being made for you without assessing your mental capacity beforehand, you can challenge this too.

Start by talking to the person who carried out the assessment. Ask them to explain why they believe you lack the capacity to make a decision and for any evidence they used to come to this decision. If a record of the assessment was made, ask for a copy of this. They should be able to give you reasons why you or someone you know lacks capacity, and also give evidence to show this. If you're not satisfied by what they show you, you can ask them to review their decision.

If this doesn't help, you could ask for a second, independent opinion from someone with expertise in mental capacity assessments, like a GP, psychiatrist, clinical psychologist, therapist or mental health nurse. If this person agrees with the original findings of the assessment, then the outcome might not change. But, whatever happens, you will have more information about your health and the best way forward.

You could also consider making a formal complaint using the complaints procedure of the organisation involved. However, if the disagreement can't be resolved, you may need to apply to the Court of Protection and ask it to decide if you lack mental capacity.

Visit our webpage independentage.org/get-advice/health-and-care/taking-action/complaints-about-care-and-health-services to find out more.

If you are worried about the cost of this, you may be able to get free legal advice. Contact Civil Legal Advice (CLA) ([0345 345 4 345](tel:03453454345), [gov.uk/civil-legal-advice](https://www.civil-legal-advice.gov.uk/civil-legal-advice)) for advice.

Making best interests decisions

Any decision made on behalf of an adult who lacks mental capacity must be made in their 'best interests'.

To do this, the decision maker must:

- not make any assumptions about you simply based on your age, appearance, condition or behaviour
- consider whether you might regain the ability to make the decision for yourself
- do everything they can to involve you in making the decision
- try to find out any past and present views, beliefs and values that might influence a decision you would make
- try to find out the things you would have taken into account when making the decision

- if practical and appropriate, speak to others interested in your welfare – such as your friends, relatives or carers – to find out what you would want to happen.

They should then weigh up all this information to work out what is in your best interests. They must also look for options that restrict your rights the least.

A best interests decision must not be based on the decision maker's feelings about what they would want for themselves in the same circumstances.

Who can make a best interests decision?

Anyone acting on behalf of a person who lacks mental capacity can make a best interests decision. For small, daily decisions like what to wear or eat, this could be your family or a carer. For decisions about medical treatment or care, health or social care staff may need to be involved.

If someone is a court-appointed deputy for you, or they have a lasting or enduring power of attorney, they must make the decisions on anything they've been appointed to deal with. They must also act in your best interests.

For more information on deputies and powers of attorney, read our factsheet [Future planning: Managing my affairs](#).

Sometimes a formal best interests meeting may be needed if it is a big decision, if there are multiple options or if there is any disagreement about what is in your best interests. The person leading the meeting should record what the decision was, how it was made and why they think it is in your best interests. It may also be useful for you, your family or your carer to keep a record.

There must be a reasonable belief that the decision being made is in your best interests. This means the decision maker must be able to give reasons for their decision if it is later questioned or challenged. For this reason, it is best to keep clear records of the actions taken and why.

If you disagree with a best interests decision made by a health or care professional

It may help to ask for any record made of the decision. If a formal meeting hasn't yet been held, ask for one to be arranged at a time you can be involved. You could also ask if the decision could be referred to another professional for a second opinion.

You could make a formal complaint to the organisation that employs the person or people who made the decision. Complaints should be made within 12 months of the decision or of when you became aware of it. Visit our webpage independentage.org/get-advice/health-and-care/taking-action/complaints-about-care-and-health-services to find out more.

You could ask for an independent advocate to act on your behalf. For more information, read our factsheet [Helping you get your voice heard: Independent advocacy](#).

In some circumstances, it may help for an independent mediator to be appointed to support any ongoing discussions. You can contact the Civil Mediation Council (**07841 017905**, civilmediation.org/mediator-search) to find a mediator. You may have to pay to use their services.

If there is no other way of resolving the dispute, you may need to make an application to the Court of Protection so it can decide what is in your best interests. You can call our Helpline (**0800 319 6789**, advice@independentage.org) to arrange to speak to an adviser.

3. Mental capacity in Scotland

How is mental capacity assessed?

People who can assess your capacity include:

- health or social care managers who carry out community care assessments
- health and social care staff, including clinical psychologists
- medical practitioners, like your GP.

The person assessing your mental capacity must assume you have it, until they can prove that you don't. They also have to use a capacity assessment as a last resort, after they have tried all other reasonable ways of helping you make a decision. This can include using a communication aid or an independent advocate. For more information on independent advocacy, read our factsheet [Helping you get your voice heard: Independent advocacy](#).

Anyone assessing you is not allowed to say you do not have capacity just because you have made an unusual or unwise decision.

If they do think that they should assess your mental capacity, they must ask themselves these questions:

- Does this person have a mental disorder (like a mental illness, learning disability, dementia or brain injury) or communication difficulty because of a physical disability (for example, following a stroke)? Dependency on alcohol or drugs does not count as a mental disorder, but you might be assessed as not having capacity if you are on drugs or drunk during the assessment.
- Can this person not make decisions at the moment because of their mental disorder or communication difficulty?

In the mental capacity assessment, not being able to make a decision means you can't do one or more of the following:

- act on a decision
- communicate a decision
- understand a decision
- weigh up options
- remember making a decision.

Anyone who is assessing your capacity must follow the Adults with Incapacity (Scotland) Act 2000 Code of Practice. You can see a full copy of the code at gov.scot/collections/adults-with-incapacity-forms-and-guidance.

Challenging mental capacity assessments

If you, or a friend or family member, disagree with the result of your mental capacity assessment, there are ways you can try to change it.

There are lots of reasons why you might want to challenge a mental capacity assessment. For example, you might think you could have made a decision yourself but weren't allowed to. If you think decisions are being made for you without assessing your mental capacity beforehand, you can challenge this too.

Talk to the person who carried out the assessment. They should be able to give you reasons for their decision and give evidence to support this.

If you still disagree with the decision, you could get a second opinion from an independent professional who specialises in mental capacity assessments. This could be a GP, psychiatrist, clinical psychologist, therapist or mental health nurse. You could also talk to the Mental Welfare Commission for Scotland (**0800 389 6809**, mwcscot.org.uk) for support. If this person agrees with the original decision, the outcome might not change. But, whatever happens, you will have more information about your health and the best way forward.

You could also consider making a formal complaint using the complaints procedure of the organisation involved.

If you still disagree with the outcome, you may be able to apply to the Court of Session, who can decide whether you have capacity. However, this could be expensive. You may be able to get free legal advice – contact the Scottish Legal Aid Board (**0131 2267061**, slab.org.uk) for advice.

Visit our webpage independentage.org/get-advice/health-and-care/taking-action/complaints-about-care-and-health-services to find out more.

Decision-making after a mental capacity assessment

If the assessment finds that someone has lost mental capacity, decisions about their health, wellbeing and finances will be made by somebody else. Who makes these choices depends on the decision.

- A financial guardian or someone with power of attorney will make decisions around finances and money.
- A welfare guardian or someone with power of attorney will make decisions around health and personal welfare.

Guardians are appointed by the sheriff court to manage someone's affairs after they lose capacity. They could be a family member, a friend, a carer of the person who has lost capacity, or a professional such as a solicitor.



To do

If you're planning for the future, you may want to think about who will manage your affairs, and how you would like them to do it. Read our factsheet **Future planning: Managing my affairs** for more information.

Whoever is in charge of managing your affairs must follow these principles when they make decisions on your behalf:

- any decision must be taken to benefit you – the person who has lost capacity – and must be the only way to achieve that certain benefit
- the decision must restrict you as little as possible
- your past and present wishes must be taken into account, and you must be given a chance to communicate your views – it can be helpful if you have already written down your wishes while you have capacity, either as an advance directive/decision or an advance statement (visit independentage.org/get-advice/end-of-life/advance-decisions-and-advance-statements)
- people close to you should be asked their opinion about the decision – including your family, close friends, carers or any other people you have named
- you should be encouraged to help make the decision as much as possible – the decision maker has to try to help you use or gain any skills that might help you make the decision yourself, which could include trying different communication aids or explaining the facts of the decision in a way you can understand better.

If you disagree with a decision made by a health or care professional

The reasons for every decision made for you have to be recorded. If you are unhappy with a decision that has been made, it may help to first request any record made of the decision. If a formal meeting hasn't yet been held, ask for one to be arranged at a time you can be involved. You could also ask if the decision could be referred to another professional for a second opinion.

You could make a formal complaint to the organisation that employs the person or people who made the decision. Complaints should be made within 12 months of the decision or when you became aware of it. Visit our webpage independentage.org/get-advice/health-and-care/taking-action/complaints-about-care-and-health-services to find out more.

You could ask for an independent advocate to act on behalf of the person who lacks capacity. Read our factsheet [Helping you get your voice heard: Independent advocacy](#) for more information.

In some circumstances, it may help for an independent mediator to be appointed to support any ongoing discussions. You can contact Scottish Mediation (**0131 556 8118**, scottishmediation.org.uk/find-a-mediator) to find one. You may have to pay to use their services.

If there is no other way of resolving the dispute, an application may need to be made to the Court of Protection so it can decide what is in the person's best interests. You can contact our Helpline (**0800 319 6789**, advice@independentage.org) to arrange to speak to an adviser to find out more about this process.

4. Useful contacts

If you're unsure about anything that you have read in this factsheet and would like to talk to someone about it, call our Helpline to arrange to speak to one of our advisers (**0800 319 6789**).

Civil Legal Advice (CLA)

To find out if you can get legal advice or representation for free in England and Wales.

- **0345 345 4 345**
- [gov.uk/civil-legal-advice](https://www.gov.uk/civil-legal-advice)

Civil Mediation Council

If you live in England and Wales, you can get information about mediation if you disagree with a capacity assessment or with a decision that has been made for you.

- **07841 017905**
- [civilmediation.org/mediator-search](https://www.civilmediation.org/mediator-search)

Compassion in Dying

To find out about advance decisions/directives (living wills).

- **0800 999 2434**
- [compassionindying.org.uk](https://www.compassionindying.org.uk)

The Law Society of England and Wales

To find a solicitor and set up a guardianship in England and Wales.

- **020 7320 5650**
- [solicitors.lawsociety.org.uk](https://www.solicitors.lawsociety.org.uk)

Law Society of Scotland

To find a solicitor and set up a guardianship in Scotland.

- **0131 226 7411**
- lawscot.org.uk

Legal Aid Agency

If you live in England and Wales and need help paying for legal advice.

- **0300 200 2020**
- gov.uk/government/organisations/legal-aid-agency

Mental Welfare Commission for Scotland

If you live in Scotland and you're worried about the welfare of someone who does not have mental capacity.

- **0800 389 6809**
- mwscot.org.uk

Office of the Public Guardian

If you live in England and Wales and you're worried about the welfare, finances or property of someone who does not have mental capacity. Also for information about becoming a deputy or setting up a power of attorney.

- **0300 456 0300**
- gov.uk/government/organisations/office-of-the-public-guardian

Office of the Public Guardian (Scotland)

If you live in Scotland and you're worried about the finances or property of someone who does not have mental capacity.

- **01324 678398**
- publicguardian-scotland.gov.uk

Older People's Advocacy Alliance (Opaal)

To find out about independent advocates for people who need support to have their say.

- opaal.org.uk

Scottish Legal Aid Board

To find out if you can get legal advice or representation for free in Scotland.

- **0131 2267061**
- slab.org.uk

Scottish Mediation

If you live in Scotland, you can get information about mediation if you disagree with a capacity assessment or a decision that has been made for you.

- **0131 556 8118**
- scottishmediation.org.uk

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The sources used to create this publication are available on request. Contact us using the details below.

Thank you

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How did we do?

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Contact us

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Email helpline@independentage.org

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