

# Mental capacity and maternity care

# Mental capacity: the key facts

Being able to choose for yourself is called having **mental capacity**.

In law you have mental capacity unless it can be shown that you do not.

You must have mental capacity to give consent to any treatment or procedure during pregnancy or childbirth, or to make choices such as where to give birth.

If you are an adult and have mental capacity then your choice to consent to treatment, or refuse treatment cannot be overridden. Treatment given without your consent would be unlawful.

**It is very rare that someone does not have capacity.** There is a clear set of tests to decide if someone has mental capacity. These tests are set out in this factsheet.

If you do not have capacity, others will make choices for you in your best interests.

This factsheet sets out the law in England and Wales.

## Mental capacity: what are my rights?

### What is mental capacity?

Mental capacity means that you can understand the choice you need to make about treatment and can make a decision.

In law, everyone has mental capacity unless it can be shown that they do not. It is very rare not to have mental capacity.

This principle applies to people aged 16 or over.

The law for those who are under 18 years old is a little different to that applying to those age 18 and over. Different rules apply to consenting and declining care. You can read more about them in our factsheet [Consenting to treatment](#).

Very rarely, you may not be able to give consent to treatment because you are unable to make a decision you need to make even when it is very clearly explained. This is called not having mental capacity.

You may have capacity to make some decisions and not others. You may have capacity at some times but not others.

You should be supported to make your own decisions as far as possible. If you have lost capacity for a short time but are expected to regain it soon, and the decision can wait, then it should wait until you have regained capacity.

Having a diagnosis or being treated for a mental health condition does not mean that you automatically lack capacity to make your own decisions.

Having a diagnosis of a learning disability does not necessarily mean you lack capacity.

Being a young person who is or has been in local authority (social services) care does not mean that you will lack capacity.

Using drugs or alcohol does not necessarily mean that you will lack capacity, although it may impact upon your ability to make decisions whilst you are under the influence of drugs or alcohol.

A problem in the working of your mind can mean you do not have mental capacity at the moment. This could be, for example, because you have a serious brain injury, or are experiencing a psychotic episode. It might be because of

the impact of drugs or alcohol at that time.

Making a decision that health professionals do not agree with does not mean you do not have mental capacity. Even if health professionals think your decision is not right for you or your baby, they still cannot say you do not have mental capacity.

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### **How do people decide if I have mental capacity?**

If a healthcare professional is worried about whether you have mental capacity they can carry out a mental capacity assessment.

Anyone who says that a person lacks capacity should be able to provide proof. They need to be able to show that it is more likely than not that the person lacks the capacity to make the decision at the time it needs to be made.

Assessing capacity can involve getting expert psychological or psychiatric evidence.

An assessment that a person lacks capacity should never be based simply on their age, their appearance, assumptions about their condition, or any aspect of their behaviour.

- The [Mental Capacity Act Code of Practice](#) explains how mental capacity is assessed. There is a summary of the law and process on the [NHS website](#).

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### **Who makes decisions for me if I do not have capacity?**

If you do not have mental capacity, others, for example your doctor or healthcare team, must make decisions about your treatment. They must decide what will be best for you. This is called making a decision in your best interests. Ideally, they will work with you and with someone who supports you. They

must pay attention to your wishes, which could include a birth plan.

The law about mental capacity is found in the Mental Capacity Act 2005 in England and Wales. Mental capacity is complicated.

- If you need advice you can contact us using our [online form](#), or by emailing us on [advice@birthrights.org.uk](mailto:advice@birthrights.org.uk).

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### **I might lose capacity during pregnancy or labour: how do I make an advance decision?**

If you have a condition that might make you lose capacity you may be able to make an 'advance decision' about your treatment. This might affect you if you have an illness where you experience psychotic episodes, for example.

The law that covers this right in England and Wales is the [Mental Capacity Act 2005](#).

Your advance decision has the same power as the decisions you make in labour. Healthcare professionals must follow it. You can cancel it at any time while you still have capacity.

Your advance decision must be clear which treatments you refuse. You must sign it, and a witness must sign it. Anyone can be a witness.

In your advance decision you can only refuse treatments. You cannot ask for specific treatments to be given.

If you want to refuse treatment that will keep you alive when your life is at risk, you must make this clear in your advance decision.

A birth plan or other written statement of your wishes does not count as an advance decision. Healthcare professionals should use your plan or statement to guide them, but they are not bound in law to follow it unless it has been formalised as an advance decision.

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## What if I find it hard to communicate my wishes sometimes?

If you have particular communication needs or are worried about communicating, talk to your doctors and midwives so you can plan the best way for you to give or not give consent.

- You can read more about this on our factsheet *Disability and long-term health conditions: your right to reasonable adjustments in maternity care*.

# Law and guidance

## The law and mental capacity

It is always presumed that a person has the mental capacity to consent to treatment (or to decline it) unless it can be shown that they do not. In England and Wales, this principle is enshrined in the [Mental Capacity Act 2005](#) which governs decisions about whether a person lacks capacity and how they can be treated if they do.

There is a two-stage test to assess whether a person lacks capacity under the law.

- Stage 1 asks if the person has an impairment of, or a disturbance in the functioning of their mind or brain. If they do not, then they will not lack capacity.

An impairment or disturbance in the functioning of the mind or brain might include conditions associated with some forms of mental illness, significant learning difficulties, the long-term effects of brain damage, or symptoms of alcohol or drug use.

- Stage 2 asks if the impairment or disturbance means that the person is unable to make a specific decision when they need to. The law asks if they can:
  - Understand the information about the decision to be made
  - Retain the information in their mind for long enough to make a decision
  - Use or weigh the information as part of the decision-making process

- Communicate their decision (by talking, sign language, or any other means).

The person must first be given all the practical and appropriate support to help them make the decision.

A person might lack capacity in relation to some decisions and not others. Mental capacity can also fluctuate with time – someone may lack capacity at one point in time, but may be able to make the same decision at a later point in time.

Before a professional can decide someone does not have mental capacity they must go through a formal process. You can read about this in the [Mental Capacity Act Code of Practice](#), or a summary of the process on the [NHS webpage](#).

The fact that a pregnant person may have made a decision that health professionals believe is not in their own or their baby's best interests is not a reason to decide that they lack capacity.

If someone is deemed to lack capacity, decisions about their treatment must be made in their best interests. The Mental Capacity Act sets out the factors that should be taken into account in deciding someone's best interests. This includes taking account of any written statement of preferences or wishes, which could include a birth plan.

Where there is serious doubt or dispute about a person's capacity or best interests, health professionals may obtain expert psychological and/or psychiatric evidence about the person's state of mind. In some cases where there are concerns whether or not a proposed treatment is in a person's best interests, the Court of Protection can be asked to make a ruling. It may make a binding decision regarding treatment or may appoint a deputy to make decisions on behalf of the patient.

The [Mental Capacity Act 2005 Code of Practice](#) gives further detail on how the law should be applied.

If someone is being treated for a mental disorder under [the Mental Health Act 1983](#) that does not necessarily mean that they lack capacity in relation to decisions about their maternity care. They should be treated in the same way as any other person unless they have been assessed to lack capacity.

In Scotland the relevant law is the [Adults with Incapacity \(Scotland\) Act 2000](#).

There is information about the law in Northern Ireland [here](#).

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### Loss of capacity and advance decisions

A person can make an advance decision about their treatment under the Mental Capacity Act 2005. For example, they may want to do this if they have a condition that may cause them to lose capacity during pregnancy or labour.

This advance decision has the same effect as a contemporaneous decision (that is a decision made in labour by a person with capacity) and must be followed by healthcare professionals. It can be withdrawn at any time when the person has capacity.

An advance decision must meet certain criteria set out in the Mental Capacity Act 2005. It must, for example, make it clear which treatments someone is refusing and must be signed and witnessed. If an advance decision declines life-sustaining treatment when life is at risk, it must clearly state this. An advance decision cannot consent to specific medical treatment, it can only refuse treatments.

- The mental health charity Mind has [information and support about advance decisions](#).

A birth plan or written statement of wishes does not qualify as an advance

decision under the Act or legally bind a healthcare professional.

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### About Birthrights

Birthrights factsheets give you information about your human rights when you are pregnant and giving birth.

- Contact Birthrights for help on our [advice form](#) or by emailing [advice@birthrights.org.uk](mailto:advice@birthrights.org.uk).

Birthrights champions respectful care during pregnancy and childbirth by protecting human rights. We provide advice and information to women and birthing people, train doctors and midwives, and campaign to change maternity policy and systems.

We are a charity, independent of the government and the NHS.

[www.birthrights.org.uk](http://www.birthrights.org.uk)

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