



Ensuring that all professionals act in accordance with their obligations under the Mental Capacity Act 2005 towards disabled adults

This leaflet has been produced by Ambitious about Autism, Mencap and the Challenging Behaviour Foundation in partnership with Irwin Mitchell Solicitors.

We are regularly contacted by individuals who feel that they are not being appropriately consulted about the welfare of their loved ones. For example, many parents phone to voice concern about decisions that social care or health professionals have made about their adult son or daughter, which they have not been involved in at all.

Broadly speaking, if an individual lacks the mental capacity to make a decision for themselves, that decision must then be made in their best interests in accordance with the requirements of the Mental Capacity Act 2005.

Examples of relevant decisions can include those around:

- where the individual lives
- what care is received
- contact with others
- medical treatment.

Importantly, the Mental Capacity Act requires all professionals, including those from local authorities and the NHS, to consult with family members when an adult lacks the mental capacity to make the relevant decision themselves.

We have prepared this leaflet in order to increase understanding of people's rights to be involved in 'best interest' decisions taken in accordance with the Mental Capacity Act.¹

¹ The rest of this guide refers to 'family members' for ease of reference, but in fact (as can be seen from the attached letters) the Act refers to anyone engaged in caring for the person or interested in his/her welfare.

Key points

- Family members retain their rights to be consulted when their relative is over the age of 18.
- Family members have a right to be consulted and do not need to be appointed as welfare deputies first.
- It is not the case that family members only need to be consulted when it is an important decision. Any decision made on behalf of a person who lacks capacity must be made in their best interests, and this requires consulting with family members before the decision is made.

The two template letters contained within this leaflet are intended to help family members who have not been involved, or are concerned that they will not be involved, in the best interests decision-making process. They have been written by Alex Rook in the public law department at Irwin Mitchell Solicitors, a nationwide law firm specialising in cases involving the Mental Capacity Act. It should however be noted that this leaflet and the template letters are a general guide and do not replace the need for legal advice on a specific case.

Template letter 1 is intended to be used when family members are concerned that they may not, in the future, be involved in best interests decisions in relation to their loved ones. It clearly sets out the legal requirement to involve them.

Template letter 2 is intended to be used when decisions have already been taken without family members' involvement. All the text in square brackets should be replaced with individual details.

The letters should be sent, by fax or email and post if possible, to the manager of the adult social care team and also to the individual's social worker (if there is one) and/or the relevant health professional involved at the NHS trust. Check with the council and/or NHS trust website or their telephone information line to find the relevant names and addresses.

The first step for family members is always to seek a best interests meeting and to try to work with the council and/or NHS to resolve the dispute. If there is no response to a letter based on the templates provided, or if agreement about an individual's best interests cannot be reached, it may be necessary for the dispute to be resolved in the Court of Protection. Before doing so, it is advised that family members take specialist legal advice.

Further information and advice

For general support and advice about learning disability:

Mencap Learning Disability Helpline

Email: help@mencap.org.uk

Call: 0808 808 1111

Go to: www.mencap.org.uk

For information about supporting individuals with a severe learning disability and behaviour described as challenging:

Challenging Behaviour Foundation

Email: support@theCBF.org.uk

Call: 0845 602 7885

Go to: www.challengingbehaviour.org.uk

For information about autism:

Ambitious about Autism

Email: info@ambitiousaboutautism.org.uk

Call: 020 8815 5444

Go to: www.ambitiousaboutautism.org.uk

For specialist legal advice:

Alex Rook, Irwin Mitchell LLP

Email: publiclawnewenquiries@irwinmitchell.com

Call: 0870 100 500

Go to: www.irwinmitchell.com

Or go to: <http://www.lawsociety.org.uk/choosingandusing/findasolicitor/action=lawfirmsearch.law> and search under 'Mental health and incapacity law'.

This pdf document and Word versions of the two letters can be downloaded from www.irwinmitchell.com/MCAletter

Template letter 1

YOUR NAME
YOUR ADDRESS
DATE

Dear [NAME]

I am writing to you in respect of my [son/daughter/brother/sister/family friend, etc]. He/she [insert here a summary of their disabilities], and as a result lacks the capacity to make decisions concerning his/her welfare [be more specific if there is a particular issue of concern, eg where they live, medical treatment decisions, contact with others, etc].

As you will be aware, the Mental Capacity Act 2005 (MCA) governs the process for decision-making in someone's best interests where they lack the mental capacity to make that decision themselves. The Act says that when a person lacks capacity to make a decision themselves, a decision must be made in their best interests. If there is a dispute over mental capacity, the MCA and its code of practice also govern the process by which that dispute should be resolved.

While the term 'best interests' is not defined by the MCA, section 4 of the Act provides a list of some of the matters that should be taken into account when considering what is in an individual's best interests. The code of practice to the MCA provides detailed guidance on what should be considered, and the steps that should be taken, when considering best interests. In particular, I would like to draw your attention to the requirement that a best interests decision must take account of all the relevant circumstances and, in particular, should include the following steps:

1. Encourage [insert name] to participate as fully as possible in the decision-making process.
2. Consider [insert name]'s past and present wishes and feelings and the beliefs and values that would be likely to influence his/her decision if he/she had capacity. [Insert specifics here if relevant, eg your cultural or religious background].
3. Consider the views of anyone engaged in caring for the person or interested in his/her welfare. Clearly this would involve me as [insert name]'s [insert relationship]. Steps need to be taken to properly consult.

This does mean that both [insert name] and I should be fully involved when any decision is being made on his/her behalf.

Involving [insert name] will mean taking practical steps to assist him/her in communicating his/her wishes or preferences, for example [explain how they might do this, eg by using simple language or pictures]. [Insert name] may need help to express his/her wishes or preferences, so you may need to involve someone who knows him/her well – such as me – in this.

Template letter 1 – *continued*

In addition, you need to consult with me and anyone else interested in [insert name]'s welfare, to get our views. I do not need to be appointed a 'welfare deputy' in order to be consulted.

I have written this letter using a guide that has been published by Ambitious about Autism, Mencap and the Challenging Behaviour Foundation. The guide was based on legal advice. I would therefore be grateful if you would contact me on [insert your contact details] so we can work together to ensure that all decisions regarding [insert name]'s welfare are taken in his/her best interest.

I have copied this letter to [insert name of LA/NHS body/care manager, etc].

I look forward to hearing from you shortly.

Yours sincerely

[Print name]

Template letter 2

YOUR NAME
YOUR ADDRESS
DATE

Dear [NAME]

I am writing to you in respect of my [son/daughter/brother/sister/family friend, etc]. He/she [insert here a summary of their disabilities], and as a result lacks the capacity to make decisions concerning his/her welfare [be more specific if there is a particular issue of concern, eg where they live, medical treatment decisions, contact with others, etc].

I understand that [insert here the issue of concern, eg a best interests decision was taken in relation to my son that his medication is changed, but I was not consulted about this before the decision was reached]

As you will be aware, the Mental Capacity Act 2005 (MCA) governs the process for decision-making in someone's best interests where they lack the mental capacity to make that decision themselves. The Act says that when a person lacks capacity to make a decision themselves, a decision must be made in their best interests. If there is a dispute over mental capacity, the MCA and its code of practice also govern the process by which that dispute should be resolved.

While the term 'best interests' is not defined by the MCA, section 4 of the Act provides a list of some of the matters that should be taken into account when considering what is in an individual's best interests. The code of practice to the MCA provides detailed guidance on what should be considered, and the steps that should be taken, when considering best interests. In particular, I would like to draw your attention to the requirement that a best interests decision must take account of all the relevant circumstances and, in particular, should include the following steps:

1. Encourage [insert name] to participate as fully as possible in the decision-making process.
2. Consider [insert name]'s past and present wishes and feelings and the beliefs and values that would be likely to influence his/her decision if he/she had capacity. [Insert specifics here if relevant, eg your cultural or religious background].
3. Consider the views of anyone engaged in caring for the person or interested in his/her welfare. Steps need to be taken to properly consult.

Clearly this decision should have involved me as [insert name]'s [insert relationship], and I would like to draw to your attention the comments of Mr Justice Hedley in the case Re P [2010] EWHC 1592 (Fam):

Template letter 2 – continued

“... in a society structured as is ours, it is not the State whether through the agency of an authority or the Court, which is primarily responsible for individuals who are subject or citizens of the State. It is for those who naturally have their care and well being at heart, that is to say members of the family, where they are willing and able to do so, to take first place in the care and upbringing, not only of children, but of those whose needs, because of disability, extend far into adulthood. It seems to me at least that the Act ought to be read subject to that overriding policy aim.”

This does mean that both [insert name] and I should be fully involved when any decision is being made on his/her behalf.

Involving [insert name] will mean taking practical steps to assist him/her in communicating his/her wishes or preferences, for example [explain how they might do this, eg by using simple language or pictures]. [insert name] may need help to express his/her wishes or preferences, so you may need to involve someone who knows him/her well – such as me – in this.

In addition, you must consult with me and anyone else interested in [insert name]’s welfare to get our views. I do not need to be appointed a ‘welfare deputy’ in order to be consulted.

I have written this letter using a guide that has been published by Ambitious about Autism, Mencap and the Challenging Behaviour Foundation. The guide was based on legal advice. I hope you will confirm that the council will now act in accordance with its obligations under the MCA in relation to [insert name], but if you do not I will have to consider taking the matter further.

I would therefore be grateful if you would contact me on [insert your contact details] to arrange a best interests meeting so we can work together to ensure that this immediate issue and any future decisions regarding [insert name]’s welfare are taken in his/her best interest in accordance with the MCA.

Given the urgency of this matter, I would be grateful if you would contact me as soon as possible.

I look forward to hearing from you shortly.

I have copied this letter to [insert name of LA/NHS/care manager, etc].

Yours sincerely
[Print name]