

The Mental Capacity Act 2005 exists to support people who can make decisions for themselves to do so and to provide a legal framework for families or professionals to make decisions for people who are assessed as lacking mental capacity to make certain decisions for themselves.

Why is it important?

The primary purpose of the MCA is to promote and safeguard decision-making within a legal framework. It does this in two ways:

- By empowering people to make decisions for themselves wherever possible, and by protecting people who lack capacity by providing a flexible framework that places individuals at the heart of the decision-making process
- By allowing people to plan ahead for a time in the future when they might lack the capacity to make decisions for themselves.

The Mental Capacity Act (MCA) 2005 applies to everyone involved in the care, treatment and support of people aged 16 and over living in England and Wales who are unable to make all or some decisions for themselves.

- Please be mindful that if a person aged between 16-18 is considered to be “under continuous supervision and control and not free to leave” this can no longer be authorised or agreed by a person or organisation with parental responsibility; and
- If the circumstances in which a young person is supported amount to a Deprivation of Liberty under the acid test, then this deprivation must be authorised by the Court of Protection.

The Act says that people must be assumed to have capacity to make their own decisions and be given all practicable help before they are considered not to be able to make their own decisions. Where a person is found to lack capacity to make a decision then any action taken, or any decision made for, or on their behalf, must be made in their best interests.

All professionals have a duty to comply with the Mental Capacity Act 2005 Code of Practice. It also provides support and guidance for less formal carers.

As well as assessment of Mental Capacity, the Act also governs the Deputyship, Lasting Powers of Attorney, Advanced Decisions, Independent Mental Capacity Advocates and Deprivation of Liberty Safeguards (DOLS).

How do we do it?

The Mental Capacity Act 2005 is underpinned by five key principles which must underpin all acts carried out and decisions taken in relation to the Mental Capacity Act 2005:

Principle 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 that you cannot assume that someone cannot make a decision for themselves just because they have a particular medical condition or disability.

Principle 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 you should make every effort to encourage and support people to make the decision for themselves. If lack of capacity is established, it is still important that you involve the person as far as possible in making decisions.

Principle 3: Unwise decisions

People have the right to make decisions that others might regard as unwise or eccentric. You cannot treat someone as lacking capacity for this reason. Everyone has their own values, beliefs and preferences which may not be the same as those of other people.

Principle 4: Best interests

Anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.

Principle 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 act in a way that would interfere less with the person's rights and freedoms of action, or whether there is a need to decide or act at all. Any intervention should be weighed up in the particular circumstances of the case.

Assessment of capacity and best interests' decision-making (Sections 2–4, MCA)

Having mental capacity means that a person is able to make their own decisions. Always start from the assumption that the person has the capacity to make the decision in question (principle 1). The assessor should also be able to show that they have made every effort to encourage and support the person to make the decision themselves (principle 2). If a person makes a decision which is considered eccentric or unwise, this does not necessarily mean that the person lacks the capacity to make the decision (principle 3). Under the MCA, there is a requirement to make an assessment of capacity **before** carrying out any care or treatment – the more serious the decision, the more formal the assessment of capacity needs to be.

When should capacity be assessed?

A person's capacity may need to be assessed when they are unable to make a particular decision at a particular time because their mind or brain is affected by illness or disability. Lack of capacity may not be a permanent condition. Assessments of capacity must be time and decision specific. Decisions cannot be based upon age, appearance, condition or behaviour alone.

Two-stage functional test of capacity

In order to decide whether an individual has the capacity to make a particular decision, the following two questions must be answered:

Stage 1 - is there an impairment of or disturbance in the functioning of a person's mind or brain? If so,

Stage 2 - is the impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

The MCA says that a person is unable to make their own decision if they cannot do one or more of the following 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 simple muscle movements such as blinking an eye or squeezing a hand.

The Act requires that every effort is made to find ways of communicating with someone before deciding that they lack capacity to make a decision based solely on their inability to communicate. Family, friends, carers or other professionals should also be involved.

The assessment must be made on the balance of probabilities e.g. is it more likely than not that the person lacks capacity? The capacity assessment should be recorded and this should show why the conclusion has been reached that capacity is lacking for the particular decision.



One Minute Guide Mental Capacity Act 2005 (MCA)



Best interests' decision-making

If a person has been assessed as lacking capacity then any action taken, or any decision made for or on their behalf, must be made in his or her best interests (principle 4). The person determining capacity is known as the 'decision-maker' and normally this will be the carer responsible for the day-to-day care, or a professional such as a social worker, doctor or nurse where decisions about care arrangements, accommodation or treatment need to be made.

The MCA code of practice provides a checklist of factors that decision-makers must work through in deciding what is in a person's best interests. The person can put his/her wishes and feelings into a written statement if they so wish, which the person determining capacity must consider. People involved in caring for the person lacking capacity have to be consulted concerning a person's best interests.

Independent Mental Capacity Advocate

The individual may require an Independent Mental Capacity Advocate (IMCA) and arrangements will need to be made as required.

The aim of the IMCA service is to provide independent safeguards for people who lack capacity to make certain important decision and, at the time such decisions need to be made, have no-one else (other than paid staff) to support or represent them or be consulted.

An IMCA must be instructed, and then consulted, for people lacking capacity who have no-one else to support them (other than paid staff), whenever:

- An NHS body is proposing to provide serious medical treatment, or
- An NHS body or local Authority is proposing to arrange accommodation (or a change of accommodation) in hospital or a care home, and
- The person will stay in hospital longer than 28 days, or
- They will stay in the care home for more than eight weeks.

For more information:

There are a range of professionals within Children and Families Service that can provide further advice to practitioners regarding the Mental Capacity Act.

Maddie Carter is located within Children's MASH

Kayley Sayers is located within Adult MASH and AMHP

The AMHP Team can also be contacted and are located on Floor 5 of Civic Offices

Please note:

- **Changes to the Code of Practice are currently being consulted on by Government**
- **DoLS are due to be replaced by Liberty Protection Safeguards (LPS), but the timeframe for implementation has not yet been set by the Government**

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