

Implementation of the Mental Capacity Act 2005

Local Guidance

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Introduction

This local guidance must be read in conjunction with the MCA , Regulations and the statutory guidance in the MCA [Code of Practice](#).

The MCA Code of Practice and this guidance will be subject to revisions in the future.

All staff who work with people who lack or may lack mental capacity must have regard to the guidance in the statutory Code of Practice.

These guidelines are a starting point to assist staff in determining where to turn to in the Code of Practice when considering

- the steps to take to enable a person to make their own decision,
- whether a vulnerable adult lacks capacity to make a particular decision
- how to establish this
- what action to take
- how to make decisions when a person lacks capacity and when to involve an Independent Mental Capacity Advocate (IMCA).

If it appears the service user may lack capacity

Where there are doubts about a person's ability to make that particular decision, the MCA sets out the process to follow to assess capacity.

The 5 key principles place a strong emphasis on empowering people to make their own decisions. They must be followed in any assessment of or decision about a person's capacity.

5 key principles

1. Every adult has the right to make their own decision if they have the capacity to do so. Family carers and healthcare or social care staff must assume that a person has the capacity to make decisions, unless it can be established that the person does not have capacity.
2. People should receive support to help them make their own decisions. Before concluding that individuals lack capacity to make a particular decision, it is important to take all possible steps to try to help them reach a decision themselves.
3. People have the right to make decisions that others might think are unwise.
4. A person who makes a decision that others think is unwise should not automatically be labelled as lacking the capacity to make a decision.
5. Any act done for, or any decision made on behalf of, someone who lacks capacity must be in their best interests.

Before any act is done for, or any decision made on behalf of, someone who lacks capacity regard must be had to whether the purpose for which it is needed can be effectively achieved in a way that is less restrictive of their basic rights and freedoms – as long as it is still in their best interests.

About mental capacity

Mental capacity within the context of the MCA means the ability to make informed decisions.

A lack of mental capacity

For the purpose of the MCA, a person lacks capacity if someone is unable to make a particular decision at a particular time because of impairment of, or disturbance in the functioning of, the mind or brain, which may be temporary or permanent.

A person is unable to make a decision for themselves if they cannot do any one of the following four things

1. Understand information given to them relevant to the decision.
2. Retain that information long enough to be able to make the decision.
3. Use or weigh up the information available to make the decision.
4. Communicate their decision.

To be able to establish a reasonable belief that a person lacks capacity to make a particular decision at a particular time you will need to be able to show that you have taken reasonable steps to assess capacity.

Reasonableness will depend on the individual circumstances, the seriousness and the urgency of the decision to be taken. It is also important to be able to demonstrate why any decision taken on behalf of, or action taken in respect of, a person is, or will be, in the person's best interests.

Providing MCA information to the person and their carer

([Code of Practice](#) chapters 2 and 5)

A person must not be treated as unable to make a decision unless all practical efforts to help them have been made without success. The type of information that should be provided to enable a person to make their own decision is contained in the Code of Practice. (See chapter 2 page 22 2.6–2.9).

Where it is reasonably believed after assessment that a person does not have capacity to make a particular decision, any action taken or decision made for, and on behalf of, an individual who lacks capacity must be made in their best interests. The best interests checklist can be found at Chapter 5 page 75 5.13 . The legislation provides a non-exhaustive checklist of factors that decision makers must work through, including the provision of relevant information such as

- Involving the person as fully as possible in the decision that is being made (See chapter 5 page 75 5.21–5.24).
- Consulting other people close to the person if it is appropriate to do so (See chapter 5 page 84 5.49–5.55).

The Department of Health has published practical guidance in specific areas including guidance for family and friends and other unpaid carers in the Making Decisions series on the Department of Constitutional Affairs website.

The person can be helped to make the decision themselves

([Code of Practice](#) chapter 3)

The 5 key principles place a strong emphasis on supporting and enabling a person to make their own decision.

The Second Principle (See chapter 2 page 22 2.6–2.9) requires that a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

The MCA and Code of Practice require every effort to be made to help someone to make their own decision. Anyone who assesses an individual's capacity will have to show what steps were taken to endeavour to support the individual to make their own decision.

All relevant information must be provided; different methods of communication of information must be explored; involvement of people who are close to the individual; selecting the most appropriate time and place to put the person at ease.

For detailed guidance on how people can be helped to make their own decisions see Chapter 3 pages 29–39.

Assessing mental capacity

([Code of Practice](#) Chapter 4)

For detailed consideration of what is meant by capacity and lack of capacity and the process for assessment, see chapter 4 page 44.

Who should assess?

This will depend upon the decision to be made. Different people will be involved in assessing capacity for different decisions that have to be made. Family and carers including paid care staff will deal with assessments for making day to day decisions.

For more complex decisions it may be necessary to take professional advice depending on the nature of the decision to be made. But the final decision about a person's capacity must be made by the person intending to carry out the action on behalf of the person who lacks capacity – not the advisors.

The Assessment

The first principle (See chapter 2 page 19) is the assumption that a person has capacity unless it can be established that they lack capacity. Steps must be taken to support a person to make their own decision.

Where their ability to make the decision is in doubt the test for assessment set out in the MCA will be followed by anyone who needs to establish capacity. The more complex decisions may involve specialists, depending on the decision to be made.

2 stage test

Assumptions must not be made based on the basis of age, appearance, condition or any aspect of behaviour. Staff must follow the two stage test set out in the MCA and Code of Practice for establishing whether a person lacks capacity.

1. The Diagnostic test (See chapter 4 page 44)

Is there an impairment of or disturbance in the functioning of the mind or brain? If so, does it make the person unable to make that particular decision at that particular time?

The presence of an impairment or disturbance of the mind (See chapter 4 page 44 4.11-4.12) must not in itself imply that a person lacks capacity to make a particular decision and each decision will need to be considered in accordance with the functional test.

2. The functional test (See chapter 4 page 45 4.14–4.30)

After providing all reasonable support to enable a person to make their own decision can the person

1. understand information given to them relevant to the decision?
2. retain that information long enough to be able to make the decision?
3. use or weigh up the information available to make the decision?
4. Communicate their decision?

If the answer to any one of these functions is no, and all reasonable steps have been taken to empower the individual to fulfil the function, the reasons why the person lacks capacity should be noted. This will be proof of the assessor's reasonable belief of incapacity (See chapter 4 page 55 4.44-4.45).

If the assessment establishes a lack of capacity, any act done for, or any decision made on behalf of, someone who lacks capacity must be in their best interests (see the section on best interests below).

Records of Assessments

Assessments for most day to day decisions will not usually need to be recorded, but the assessor must be able to describe the steps taken that give reasons for believing the person lacks capacity to take the decision in question.

The more complex the decision to be taken the more formal the assessment is likely to be. These will need to be recorded (Also see records below & the assessment record).

The list below gives examples of types of cases which will need to be more formal and may require professional involvement

1. Where an assessment is for a decision that needs to be taken which will have serious consequences.
2. Where an assessment is or is likely to be disputed.
3. If a person is expressing different views to different people.
4. There are legal consequences to a finding of capacity.
5. A person is repeatedly making decisions that put them or others at risk of harm.
6. There is a question of capacity and a safeguarding of adults issue.

This list is non-exhaustive. See chapter 4 page 59 4.51–4.54 for more information about when to involve other professionals.

Refusal to be assessed

If someone refuses assessment, the MCA does not provide a mechanism for requiring a person to be assessed.

If a person lacks the capacity to consent or refuse, the assessment will normally go ahead providing the person does not object, and it is in their best interests.

If there are serious concerns about a person, there are legal alternatives that may be considered, for example by warrant for treatment. However, the requirements for such action are not under the MCA. Further advice should be sought in such cases.

The role of the Court of Protection

The new Court of Protection will have similar powers to the High Court.

It will usually be necessary to show that the disputes resolutions processes required by Chapter 15 have been followed before applying to Court.

Applications will usually concern serious unresolved matters relating to

1. Whether a person has capacity to make a decision themselves.
2. Financial or welfare matters affecting people who lack capacity to make those decisions, unless the only income is state benefits or there is a valid Power of Attorney.
3. The validity of an Enduring Power of Attorney or Lasting Power of Attorney.
4. Certain serious matters of medical treatment will be reserved to the Court
5. (See chapter 8 page 143 8.18–8.24).
6. It will appoint Deputies to make decisions for people lacking capacity and will remove Deputies or Attorneys who fail in their duties (See chapter 8, 8.31 – 8.68).

Permission from the court to make an application will usually be required (See chapter 8 page 140 8.11-8.12).

For further information on the Court of Protection see chapter 8 pages 137–157).

Decisions that others are prohibited from taking

Decisions that cannot be made on behalf of someone who lacks capacity are

1. consenting to marriage or civil partnership
2. consenting to have sexual relations
3. consenting to a decree of divorce on the basis of two years' separation
4. consent to a dissolution of a civil partnership
5. consent to a child being placed for adoption or the making of an adoption order
6. discharging parental responsibility for a child in matters not relating to the child's property
7. giving consent under the Human Fertilisation and Embryology Act 1990.

Nothing in the act permits a decision on voting on behalf of a person who lacks capacity to vote, neither at an election for any public office, or at a referendum.

For the avoidance of doubt, nothing in the act is to be taken to affect the law relating to murder, manslaughter or assisting suicide.

Interface with the Mental Health Act 1983

Where a person who lacks capacity to consent is currently detained and being treated under Part 4 of the Mental Health Act 1983 (MHA), nothing in the MCA authorises anyone to give the person treatment for mental disorder, or consent to the person being given treatment for mental disorder.

Staff may need to consider using the MHA to detain if it is not possible to give the person the care or treatment they need without depriving them of their liberty. Restraint that leads to deprivation of liberty is unlawful under the MCA (See chapter 6 page 105 6.39-6.53).

A person who has made a valid advance decision may not be given treatment under the Mental Capacity Act contrary to their refusal of such treatment. However a person may be treated under the MHA even if they have made a valid and applicable advance decision to refuse all or part of the treatment, provided that they meet the criteria for treatment under the MHA.

For more detailed guidance see chapter 13.

Please note that additional guidance on the deprivation of liberty which will link to the MCA Code of Practice will be issued in 2008.

Research involving people who lack capacity

The provisions relating to restriction of research are detailed and are not covered by this guidance.

In brief, the MCA imposes strict rules in relation to research involving persons who lack capacity. The rules cover when the research can be carried out, the ethical approval process, respecting the wishes and feelings of the people who lack capacity, and other safeguards to protect people who lack capacity.

All research must be approved through the Research Governance Procedures. For more detailed information see chapter 11.

Advance decisions

An advance decision relates to a decision to refuse medical treatment rather than to social care.

The act enables a person aged 18 years or over, while still capable, to record their wishes to refuse specified medical treatment for a time in the future when they may lack the capacity to consent to or refuse that treatment.

The existence of an advance decision should be checked upon initial assessment of a service user's needs and lodged accessibly (if it is in writing) with the service user's notes.

There are specific legal requirements that are applicable to an advance decision to refuse life sustaining treatment these are set out in section 25 MCA. They relate to the content of the decision and to the procedure by which such a decision is recorded.

The validity (See chapter 9 page 169 9.38-9.40) and applicability (See chapter 9 page 171 9.41-9.45) of an advance decision should be determined by healthcare professionals.

For more detail on advance decisions, see Chapter 9.

Lasting Power of Attorney, deputy or other who can and should make the decision

Lasting Powers of Attorney (LPA) **must** be registered with the Office of the Public Guardian before they can be used (See chapter 7 page 114–135).

An LPA gives another person the authority to make a decision on behalf of the person who lacks capacity. A Lasting Power of Attorney is a legal document that replaces Enduring Powers of Attorney and increases the range of different types of decisions that people can authorise others to make on their behalf.

As well as property and financial affairs, LPA's also cover health and personal welfare decisions. A Property and Affairs Attorney can use a registered LPA to make decisions on behalf of the donor while the donor has capacity as well as when he lacks capacity [subject to any restrictions in the LPA].

A Health and Welfare Attorney can only use a registered LPA to make such decisions when a person lacks capacity to make a decision for him or herself. If a person being provided with care lacks capacity and has created a personal welfare LPA, the attorney is the decision-maker on all matters relating to the person's care and treatment.

Unless the LPA specifies limits to the attorney's authority, the attorney has the authority to make personal welfare decisions and refuse treatment on the donor's behalf. The attorney must make these decisions in the best interests of the person lacking capacity (principle 4).

A paid care worker should not agree to act as an attorney, apart from in exceptional circumstances. In these cases it should be referred to Head of Service for a decision.

Enduring Powers of Attorney may not be made after 1/10/07. Existing Enduring Powers of Attorney (EPA) will still be valid after implementation of the MCA.

These can operate before being registered with the Office of Public Guardian unless the EPA states otherwise, but it has to be registered with the Office of Public Guardian when the attorney believes that the donor is no longer mentally capable of managing their own property and finances.

The Code of Practice stipulates restrictions on an attorney's powers and the duties of an attorney. For further information see chapter 7.

It is important that where such documents have to be consulted they are considered carefully to ascertain whether they are relevant and whether there are any restrictions. Where disputes arise that cannot be resolved these may have to be referred to the Court of Protection further advice should be obtained in such cases.

Appointment of a Deputy

The court will appoint a deputy to manage a person's property and affairs (including financial matters), in similar circumstances to those in which they would have appointed a receiver in the past.

If a person who lacks capacity to make decisions about property and affairs has not made an EPA or LPA, applications to the court are necessary

1. For dealing with cash assets over a specified amount that remain after any debts have been paid.
2. For selling a person's property.
3. Where the person has a level of income or capital that the court thinks a deputy needs to manage.

If the only income of a person who lacks capacity is social security benefits and they have no property or savings, there will usually be no need for a deputy to be appointed.

Decisions that policy permits staff to take

Information is due to be disseminated to staff about decisions which staff cannot take on behalf of service users because they are prohibited by policy.

All local policies, procedures and guidance must make clear what decisions staff are not permitted to take even though such decisions are in theory allowable under the MCA. For example, the Medications Policy prohibits staff from administering medication to a service user who is refusing it.

Goods and service decisions

The general rule that a contract entered into by a person who lacks capacity to make the contract cannot be enforced, if the other person knows, or must be taken to have known, of their lack of capacity, has been modified.

The MCA provides that where the contract is for 'necessary' goods **or** services are supplied to a person who lacks capacity, the incapacitated person must pay a reasonable price for them.

'Necessary' means something that is suitable to the person's condition in life, not only to their mental or physical condition but to their actual requirements when the goods or services are provided. This means that what is necessary for people will differ according to their individual circumstances.

A carer may make payment for goods and services and can pay himself back from money he holds on behalf of the person who lacks capacity where the goods or services are for the incapacitated person's care or treatment and are in his/her best interests.

The Act does not give a carer or a care worker access to a person's income or assets. Nor does it allow them to sell the person's property. That requires legal authority either through an LPA, EPA, Order of the Court of Protection or appointment of a Deputy to make financial decisions

An 'appointee' (under Social Security Regulations) who has authority to claim benefits for a person who lacks capacity to make their own claim would be expected to use the money on the person's behalf, in accordance with the principles of the Act. However, this is a limited authority extending only to weekly benefits and not to the use of savings or other assets.

For further information see chapter 6 page 111 6.56–6.66).

Determining a person's best interests and taking the decision (is IMCA or advocate required?)

Where a person is assessed as lacking capacity and another person must take a decision on their behalf in connection with their care or treatment, as long as s/he acts in that person's best interests the decision maker will benefit from statutory protection from liability (See chapter 6 page 94 6.4–6.6 & page 102 6.26–6.39).

Best Interests Checklist (See chapter 5)

When taking any decision on behalf of another, staff must avoid discrimination on matters such as age, appearance, condition or behaviour. The MCA and Code provide a non-exhaustive list of factors to consider:

1. Encourage participation by the person who lacks capacity so far as practicable (See chapter 5 page 73 5.16–5.17).
2. Identify all relevant circumstances which will vary from case to case (See chapter 5 page 74 5.18-5.20).
3. Find out the persons views, for example their beliefs and values, written statements from when they had capacity, their past and present wishes, the things that they would take into account such as family obligations and emotional bonds.
4. Special considerations apply to life sustaining treatment (See chapter 5 page 79 5.29-5.36 & 5.45).
5. Assess whether the person might regain capacity. Can the decision wait? (Link to Chapter 5 page 77 5.25-5.28).
6. Is there an alternative that would be less restrictive of their rights?
7. Consult key people as to what would be in the person's best interests their wishes, feelings values beliefs (See chapter 5 page 84 5.49-5.55). Key people are anyone named, such as carers, spouse or partner, family, others with an interest in their welfare such as friends, volunteers, professionals, a Lasting Power of Attorney or a deputy appointed by the Court of Protection.

In terms of treatment, it is critical that health staff are aware of any advance decision. If one exists, the health professionals will determine the validity and applicability and no further assessment of best interests in respect of the treatment referred to in the advance decision will be necessary.

An advance decision is a decision made by a person over 18 years while still capable to refuse medical treatment (See chapter 9 page 158-177).

See Chapter 5 pages 64–91 for a detailed look at best interests.

Role of the IMCA

The purpose of the IMCA service is to provide independent safeguards for persons who lack capacity.

They will work with and support people who lack capacity, and represent their views to those who are working out their best interests, where the person lacking capacity has no family or friends that it would be appropriate to consult about these decisions, namely a nominated person, LPA, EPA, Deputy, or any other persons who it would be appropriate to consult in determining best interest.

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

1. an NHS body is proposing to provide serious medical treatment, or
2. an NHS body is proposing to arrange accommodation, or a change of accommodation, in hospital or a care home, and
3. the person will stay in hospital longer than 28 days, or
4. they will stay in the care home for more than eight weeks or
5. a local authority proposes to make arrangements for residential accommodation* or change residential accommodation for a person who lacks capacity and that person is not befriended.

*This may be accommodation in a care home, nursing home, ordinary and sheltered housing, housing association or other registered social housing or in private sector housing provided by a local authority or in hostel accommodation.

IMCAs may be involved in other decisions, concerning a care review, or an adult protection case set up in accordance with the no secrets guidance where the authority propose to take, or have taken protective measures.

In adult protection cases, an IMCA may be appointed even where family members or others are available to be consulted.

In the situations involving a care review or adult protection case, the responsible body must consider in each individual case whether to instruct an IMCA.

In some situations, a case may start out as an adult protection case where a local authority may consider whether or not to involve an IMCA under the criteria they have set – but may then become a case where the allegations or evidence give rise to the question of whether the person should be moved in their best interests. In these situations the case has become one where an IMCA must be involved if there is no-one else appropriate to support and represent the person in this decision.

IMCA's will work with and support people who lack capacity, and represent their views to those who are working out their best interests.

If an IMCA disagrees with the decision made they can also challenge the decision maker.

For further detail see Chapter 10 pages 178–198.

Resolution of disputes

There may be a dispute over

1. an assessment of a person's capacity to make a decision
2. what is in their best interests

3. a decision someone is making on their behalf or an action someone is taking on their behalf.

This is a non-exhaustive list. If the challenge comes from the individual who is said to lack capacity, they might need support from family, friends or an advocate.

It is important that everything is carefully documented, showing

1. it is reasonably believed after an assessment that capacity is lacking and that it is reasonably believed that actions that have been taken or are proposed are in the person's best interests and;
2. application of the MCA principles
3. objective evidence to support that belief.

It is important to consider

1. a second opinion
2. use of an advocate
3. complaints procedure
4. mediation
5. Local Government Ombudsman.

If a disagreement cannot be resolved, the person who is challenging the assessment may be able to apply to the Court of Protection. The more irreversible the nature of the decision about which there is disagreement, the higher the level of consultation and agreement with the decision will be required. See chapter 15 for more detail.

Records

The MCA provides protection to persons who provide care or treatment on behalf of others if they have taken reasonable steps to assess the person's capacity and hold a reasonable belief that the person being cared for lacks capacity to make relevant decisions about their care or treatment or lacked capacity to consent to an act at the time that the consent was required .

It is important that records establish that there were objective reasons for believing that the person lacked capacity to make the decision in question, and establish that the act or decision was in the person's best interests. See Chapter 4 page 59 4.51 – 4.54 for information on when to involve other professionals.

In many cases file notes will be adequate to record decisions taken but it will be particularly important in the more complex decisions that the records cover the decision to be taken, the assessment of capacity, and where capacity is lacking the action to be taken in the person's best interests.

The records may also need to refer to the risks identified, if the decision is made or is not made. The record may need to be supplemented with supporting evidence such

as care plans, medical or professional reports, LPA's, advance decisions, Court Orders, Deputy Appointments, and resolution of dispute settlements.

Disclosure of information

Records relating to the service user will be confidential and may only be disclosed with the individual's consent. Without consent they may only be disclosed to a person if there is a legal obligation to do so.

The MCA does not change disclosure of and access to information in accordance with the Data Protection Act 1998. Where a person lacks capacity the best interests test may justify disclosure of the incapacitated person's records.

In compliance with the DPA 1998, disclosure should be limited to the minimum information required to address the purpose of the request for disclosure.

A Health and Welfare Attorney should be consulted about the sharing of information e.g. between health and social care workers where ever possible, if the decision whether to share information must be taken urgently it must be taken in the person's best interests and the Attorney should be informed as soon as practical.

See chapter 16 for further information on disclosure.

Criminal offence

The Act introduces a new criminal offence for anyone caring for an individual who lacks capacity who ill treats or wilfully neglects them. A person guilty of such an offence is liable for a term of imprisonment and/or a fine.

Contact us

The Mental Capacity Act Support Team are the supervisory body for the Deprivation of Liberty Safeguards (DOLS) in Sheffield. We offer both information and support via our helpline and email:

Email: safeguardingadults@sheffield.gcsx.gov.uk

Telephone: 0114 2736870

Fax a form or letter: 0114 2736332

Post a form or letter:

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