

# The Mental Capacity Act 2005



# Introduction

The MCA provides a legal framework for people over the age of 16 who lack capacity to make particular decisions for themselves or who have capacity and want to make preparations for a time when they may lack capacity in the future.

The MCA's starting point is to confirm in legislation that it should be assumed that an adult (aged 16 or over) has the full legal capacity to make decisions about themselves unless it can be shown that they lack capacity to make a decision for themselves at the time the decision needs to be made.

The MCA established good practice in decision making. It aims to provide consistency in decision making that affects the finances, personal welfare and healthcare of people who lack capacity to make particular decisions.

# Introduction

Much of the MCA was built on existing common law (that is, law which is established in judgments made by the Courts) but it also brought in important changes including new criminal offences, Independent Mental Capacity Advocates, a new Court of Protection and a new Office of the Public Guardian.

The MCA is designed to protect the rights of individuals and to empower vulnerable adults. In the past, people with dementia, learning disabilities or severe mental illness have often not been listened to and their rights to make decisions may not have been recognised.

The MCA puts the interests and wishes of the person who lacks capacity at the centre of any decision making process.

# Introduction

In this booklet you will learn about:

- What is capacity
- The two stage assessment of capacity
- Underpinning principles of the Mental Capacity Act
- Best interest checklist
- Lasting Powers of Attorney
- Court of Protection
- Advance Decisions

# What is 'mental capacity'?

Mental capacity is the ability to make a decision.

Whenever the term 'a person who lacks capacity' is used, it means a person who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision needs to be made.

It is critical to remember that a person may lack capacity to make some decisions but not others. For example, they may have capacity to make decisions about everyday issues such as what to wear or what to eat, but lack capacity to make more complex decisions about financial matters.

A person's ability to make a decision can be affected by a range of factors such as a stroke, dementia, a learning disability or a mental illness. Physical conditions, such as an intimidating or unfamiliar environment, can also affect capacity as can trauma, bereavement or health problems.

As you will read later, the law requires that a person is given support to make decisions and that steps are taken to help them have capacity.

# Who is affected by the MCA?

The MCA affects everyone!

This includes anyone planning for the future when they may no longer have capacity to make specific decisions.

It also affects the whole health and social care workforce who are responsible for making decisions in line with the Act.

But the MCA particularly affects people with impairments and conditions which affect capacity to make decisions. The MCA is often used with people who have the following conditions are often (although not everyone with these conditions will lack capacity):

- Dementia
- Learning disability
- Brain injury
- Severe mental illness

# Who is affected by the MCA?

It is difficult to estimate the exact numbers of people who lack capacity to make decisions. However, government estimates for England and Wales range from one to two million adults where there may be issues about capacity, including:

- 840,000 people with dementia
- 145,000 people with a severe learning disability
- 1.2 million people with mild to moderate learning disability
- 120,000 people with a severe brain injury

It is important to remember that people with a mental illness do not lack capacity to make specific decisions. However, people with a severe mental illness may experience a temporary loss of capacity to make decisions about their care and treatment. People who are under the influence of drugs and alcohol may also experience temporary loss of capacity and in some urgent situations the MCA may be used.

# The 5 Principles

The MCA is a rights-based Act and has five principles which underpin it. This means that every action in connection with care and treatment taken under the MCA must follow these principles.

**Principle 1:** A person must be assumed to have capacity unless it is established that he lacks capacity

**Principle 2:** 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.

**Principle 3:** A person is not to be treated as unable to make a decision merely because he makes an unwise decision

**Principle 4:** An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests

**Principle 5:** Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action



# Principle 1 - Assume a person has capacity unless proved otherwise

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.

It places a legal duty onto people making decisions on behalf of those who lack capacity to prove (or assess) that the person lacks the capacity to make their own decision.

If you are supporting or representing a person through a specific decision (like where to live, or choices about treatment), always make sure the person's capacity has been assessed for that specific decision. Beware of capacity tests that are out of date (some have been over 2 years old), tests that relate to other decisions ('well they lacked capacity for that decision so we'll just use that one') or generalisations ('they have dementia so they must lack capacity').

# Principle 2 Practicable support

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.

Advocates need to check that decision makers have looked at this and push them to take all practicable steps *before* they assess the person's capacity.

If you believe that the person wasn't supported to have capacity then you can ask for the capacity test to be redone - but this time with the right support.

This includes thinking about:

- how should the information be presented? What format is best understood by the person? Are pictures helpful? Does the information need to be short/simple/repeated?
- who is the best person to support the person? Who knows their communication well?
- what is the best time of day to do this?

# 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

This principle says that it is not lawful to judge or assess someone as lacking capacity to make the decision just because it is an unwise choice.

Unwise or eccentric decisions or choices are not evidence a person lacks capacity.

# Principle 4 - Best Interests

Once the assessment has been done that the person lacks capacity to make this particular decision, the MCA says that the decision will now be taken on the persons 'best interests'. This means that anything done on behalf of a person who lacks capacity to make that decision, must be done to promote that individuals best interests.

Whilst a person's 'best interests' is inevitably a subjective judgement, the MCA does give clear direction on what types of things should be taken into account when working out someones best interests - and this includes including the persons wishes or likely wishes.

We will look at this in detail a bit later.

# Principle 5 Least restrictive of rights

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.

Whenever there is a choice of decisions, the MCA requires that the least restrictive option is considered - which means the choice which has the least impact on the person's rights and freedoms.

It does not mean the decision has to be the option that is least restrictive of the person's rights and freedoms - just that the decision maker has considered this and looked at alternatives. As an advocate you have an important role to check this has been done and highlight options that are less restrictive of their rights and freedoms.

# Assessing Capacity

Assessments of capacity need to be carried out within health and social care in many different situations by doctors, nurses, social workers, care workers and others.

Assessments of capacity are not carried out by advocates. It is however important to understand broadly how they are done.

There are two questions to be asked when assessing a person's capacity (which is why it is often referred to as the 'two stage capacity of assessment test').

These are:

1. Is there an impairment of, or disturbance in the functioning of, the person's mind or brain?
2. If so, is the impairment or disturbance sufficient to cause the person to be unable to make that particular decision at the relevant time?

# Assessing Capacity

This two-stage test must be used and people must show it has been used whenever a person's capacity is assessed. It does not matter whether the impairment or disturbance is temporary or permanent. Most people will be able to make some decisions, even when they have a label or diagnosis that may seem to imply that they cannot.

This is a general principle that cannot be over-emphasised. In particular, it is important not to base assumptions about a person's capacity on their age, appearance, condition or an aspect of their behaviour.

# Assessing Capacity

If the person has a temporary loss of capacity then the question should be asked if the decision being made can be delayed until the person is likely to regain capacity. This ensures that people are supported to make their own decisions that affect their own life as much as is possible.

For instance, if a person has an UTI which is affecting their decision making, can the decision wait until after a course of antibiotics has been completed to get rid of the UTI? This is also relevant in mental health settings when a person who is experiencing an acute illness may very well regain capacity after taking medication and receiving care.

Not all decisions will be able to wait (especially urgent medical ones) but the question is worth asking: Might the person regain capacity and can the decision wait?



# Assessing Capacity

In an assessment of capacity, the decision maker must establish whether the person is able to:

- understand the information relevant to the decision
- retain that information
- use or weigh that information as part of the process of making the decision
- communicate their decision (whether by talking, using sign language or any other means).

If a person is unable to do one or more of the above, they lack the capacity to make that decision.

# Assessing Capacity

Information relevant to the decision will include what's involved in the decision in question, why it's needed and the likely effects of making the decision. It must also include the likely consequences of deciding one way or another or of making no decision at all.

Every effort must be made to provide this information in a way that the individual can understand, using the means of communication that is most appropriate for the person concerned. The ability to retain information for only a short period does not necessarily mean the person is unable to make the decision – it will depend on what is necessary for the decision in question.

# Who should assess capacity?

It depends on the decision or act required but is generally the person proposing to make a decision or carry out an act concerning the person's care or treatment. Carers and professionals must take 'reasonable steps' to establish whether a person has capacity (Section 5(1)(a)) – there are higher expectations on professionals than on 'lay' carers.

Social workers, care managers, doctors or nurses can all be expected to carry out assessments of capacity.

The Court of Protection can also make decisions on a person's capacity, based on medical and other evidence. Advocates may suggest the Court of Protection is involved with there is a dispute about a person's capacity.

Advocates should not assess a person's capacity to make the decision in question - but should always check the capacity assessment is up to date and decision specific.

# Best Interests Checklist

The MCA requires any decision or act on behalf of a person who lacks capacity to be made or carried out in that person's best interests.

Attorneys, deputies and the Court of Protection all have the authority to make decisions under the MCA. Advocates are not decision makers so do not make decisions.

The best interests principle also applies to any acts carried out in connection with care or treatment of a person who lacks capacity to consent to the care or treatment proposed.

The MCA allows such acts to be performed without a person's consent when that person lacks the capacity to give permission for the care or treatment to be provided (as long as the processes within the Act are followed).

# Best Interests Checklist

The MCA does not define 'best interests' but identifies a number of factors that must to be considered when determining the best interests of individuals who have been assessed as lacking capacity to make a particular decision to consent to acts of care or treatment. These include:

- Not making assumptions about someone's best interests merely on the person's age, appearance, condition or behaviour.
- Taking account all the circumstances that are relevant to the decision in question.
- Giving consideration to a person's own wishes, feelings, beliefs and values and any factors they would have considered if able to do so. This includes any written statements made by the person when they had capacity.
- Taking account of the views of family and informal carers, anyone with an interest in the person's welfare and anyone appointed to act on the person's behalf (such as an attorney or deputy). If there is no-one available to be consulted, an IMCA must be appointed and their views taken into account.

# Best Interests Checklist (cont.)

- Whether it is likely that the person will regain capacity. If so, can the decision be put off until then?
- Involving the person in the decision making process.
- If the decision concerns the provision or withdrawal of life-sustaining treatment, not being motivated by a desire to bring about the person's death.

All of the above factors must be considered, if only to be disregarded as irrelevant to the particular decision. It is also important for the decision maker to:

- consider whether there is a less restrictive alternative or intervention and whether this might be in the person's best interests
- demonstrate they have carefully assessed any conflicting views or evidence
- provide clear, objective reasons as to why they believe they are acting in the person's best interests.

# Lasting Power of Attorney (LPA)

A power of attorney is a legal document by which one person (the donor) gives another person (the donee or attorney) the authority to act on the donor's behalf.

There are two different types of LPA to cover different types of decisions:



Personal welfare (including healthcare)



Property and affairs (finance)

A person may choose to appoint more than one attorney or different attorneys to make different decisions. One attorney may act under a number of LPAs for different people; for example, a daughter may have been appointed as an attorney for both her parents. A person can choose one or more people to act as attorneys under his or her LPA, such as a partner as well as adult children.

# Lasting Power of Attorney (LPA)

An individual can, while they still have capacity to do so, appoint another person to act on their behalf in relation to certain decisions regarding their financial, welfare or healthcare matters even after they lose capacity to make such decisions for themselves.

The person making the LPA chooses who will be their attorney. They can allow the attorney to make all decisions, or they can choose which decisions they can make.

When acting under an LPA, an attorney has the authority to make specified decisions on behalf of the person who made it (the donor), if the donor can no longer make these decisions for themselves.

Attorneys are not there simply to be consulted. They are the decision maker. Attorneys must act in accordance with the MCA and its code of practice and ALWAYS in the person's best interests.



# Lasting Power of Attorney (LPA)

The person making the LPA is the donor who donates or hands over responsibility to make decisions under specified circumstances. The person appointed to make the decisions under the LPA is the donee, also known as the attorney in the CoP. There are some restrictions depending on the type of LPA, such as restrictions on gifts. If a personal welfare LPA is in place but does not include the particular decision which now needs to be made, health and social care staff will need to make that decision in the person's best interests, having consulted and taken into account the attorney's views.

LPAs must be registered with the Office of the Public Guardian before they gain their decision making powers.

# Lasting Power of Attorney (LPA)

## Who can be an attorney?

It is up to the donor to choose who they wish to appoint as their attorney. An attorney could be a family member, friend, or professional, such as a lawyer.

The CoP advises that health and social care staff should not act as attorneys for people they are supporting unless they are also close relatives of the person who lacks capacity. Attorneys are always subject to the provisions of the MCA, particularly the core principles and the best interests requirements.

An attorney must be over 18 years old and (for property and affairs LPAs only) not be bankrupt. Most attorneys will be named individuals. However, for property and affairs LPAs the attorney could be a trust or part of a bank.

# Lasting Power of Attorney (LPA)

## **Powers and limitations of LPAs**

An LPA can be used to set out a person's wishes and preferences. For example, a person may want their attorney to take their religious beliefs into account when making decisions for them in the future. However, it is important to remember that an attorney can consent to, or refuse, treatment as specified by the donor in the LPA, but an attorney has no power to demand a specific treatment that healthcare professionals do not believe is clinically necessary or appropriate.

If the donor has not specified any limits to the attorney's authority, the attorney will be able to make most decisions on their behalf. However, they would not be able to refuse life-sustaining treatment unless this has been specifically authorised by the donor in the LPA document.

# Lasting Power of Attorney (LPA)

An attorney acting under a property and affairs LPA can make certain gifts from the property and estate of the owner, for example to friends and relatives (including the attorney) on customary occasions such as birthdays, Christmas, Diwali, or any religious festival the person lacking capacity would be likely to celebrate. Any customary gift or charitable donation must be reasonable in the circumstances.

Limitations may also be specified in the LPA. The Court of Protection can give an attorney permission to make additional gifts if the attorney seeks the Court's approval.

# Court of Protection

The Court of Protection is a specialist Court with powers to deal with any matters affecting adults who may lack capacity to make particular decisions. The Court is able to hear cases at a number of locations in England and Wales.

It covers all areas of decision making under the MCA and can determine whether a person has capacity in relation to a particular decision, whether a proposed action would be unlawful, whether a particular act or decision is in a person's best interests and the meaning or effect of an LPA in disputed cases.

# Court of Protection

The Court can make decisions about:

- capacity - the Court can decide whether they think a person has capacity to make a particular decision
- whether a decision or course of action is in a person's best interests.
- disagreements or disputes that cannot be settled in any other way
- situations where a series of decisions rather than a single decision need to be made
- challenges to an authorisation for the deprivation of liberty safeguards (or LPS)
- removing an attorney or a deputy.
- a person's healthcare or personal care, where there is no attorney or deputy to make it.
- settling a dispute about the use of the safeguards

The Court always acts in a persons best interests.

# Court of Protection

## **Court appointed deputies**

Court appointed deputies are individuals (generally lay people such as family members, but there are also some professional deputies) appointed by the Court of Protection to make ongoing decisions on behalf of a person who lacks capacity to make those decisions.

A deputy must act within the powers given by the Court and only when they believe the person lacks capacity.

A deputy must act in accordance with the MCA's principles, the MCA CoP and, in particular, in the person's best interests. The appointment of a deputy could take place, for example, where no LPA exists or there is a serious dispute between carers.

The appointment of a deputy is limited in scope (what they can make decisions about) and duration (time). This is to reflect the principle of least restrictive intervention.

A deputy can be a family member, or any other person the Court thinks suitable.

# Court of Protection

## **Court of Protection visitors**

These are individuals appointed by the Lord Chancellor who provide independent advice to the Court and the Public Guardian. They have a role in the investigation of allegations of abuse of a person who lacks capacity. Their visits will include checks on the general well-being of the person. They also help and support attorneys and deputies.

Further information and guidance on their role and how to contact them is provided by the Office of the Public Guardian.



# Advance Decision to Refuse Treatment

The MCA gives legal status to advance decisions to refuse medical treatment, but the MCA requires that advance decisions are made in a particular way.

There is a difference in law, between an advance decision to refuse treatment and other expressions of an individual's wishes and preferences.

An advance decision to refuse treatment enables an adult, while they have capacity to do so, to refuse specified forms of treatment, intending that decision to take effect in the event of their losing the capacity to consent to that treatment at some time in the future. Such a decision, properly made, is as valid as a contemporaneous decision (made at the time).

An advance decision that involves refusing life sustaining treatment must be in writing and witnessed; otherwise, advance decisions can be verbal.

# Advance Decisions

## When are advance decisions valid and applicable?

An advance decision is valid when:

- the person making it has not withdrawn it
- it has not been superseded by an LPA that relates to the treatment specified in the advance decision, and
- the person has not acted in a way that is inconsistent with the advance decision.

An advance decision is applicable when:

- it refers to the treatment in question, and
- the circumstances the refusal of treatment refers to are present.

However, an advance decision is not applicable if circumstances now exist that the person did not anticipate at the time of making the advance decision and would have affected his decision had he anticipated them (e.g. new treatments).

# Advance Decisions

An advance decision to refuse life-sustaining treatment is applicable when:

- it is in writing, including being written on the person's behalf or recorded in their medical notes
- it is signed by the person making it (or on their behalf and at their direction if they are unable to sign) in the presence of a witness who has also signed it, and
- it is clearly stated, either in the advance decision or in a separate statement (which must be signed and witnessed), that the advance decision is to apply to the specified treatment, even if life is at risk.

Staff must be able to recognise when an advance decision to refuse treatment is both valid and applicable. A best interests decision cannot overrule a valid and applicable advance decision.

Protection from liability will not apply if a valid and applicable advance decision was ignored. The decision of an attorney acting under a registered LPA will override an advance decision if the LPA has been made after the decision and gives the attorney the right to consent to or refuse the treatment specified.

# Advance Decisions

There are special rules for people who are detained under the Mental Health Act 1983 – in some circumstances their refusal of treatment for a mental disorder may be overridden.

Advocates can play a really important role in supporting people to make plans for their future. You can spend time with people thinking about what is important to them and recording:

- their preferences for treatment options
- if any treatment would not be okay
- choices around where they might like to live
- preferences around care decisions
- statements that capture what other people need to know about them should they lose capacity to make certain decisions

# Sources & Further reading

## **Government series of very useful resources and information packs**

<https://www.gov.uk/government/collections/mental-capacity-act-making-decisions>

## **Easy Read version of MCA**

<https://www.local.gov.uk/sites/default/files/documents/easy-read-guide-pdf-16-pa-2cc.pdf>

## **Mind**

<https://www.mind.org.uk/information-support/legal-rights/mental-capacity-act-2005/court-of-protection/>

## **SCIE - guidance on accessing the court of protection**

<https://www.scie.org.uk/publications/guides/guide42/files/guide42.pdf>

# Sign up!!!

Peter Edwards Law Newsletters

-<http://www.peteredwardslaw.com/latest-newsletters/>

Sophy Miles

-<https://courtofprotectionhandbook.com/posts/>

Jonathan – MH Law Online

-<http://www.mentalhealthlaw.co.uk>

Mental Capacity Law and Policy

<http://www.mentalcapacitylawandpolicy.org.uk/>

39 Essex Street – Monthly Newsletter

<https://www.39essex.com/tag/mental-capacity-newsletter/>

Mental Health Cop

-<https://mentalhealthcop.wordpress.com/>

The Masked AMHP

<http://themaskeamhp.blogspot.co.uk/>

Lucy Series

<http://thesmallplaces.blogspot.co.uk>

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e-learning for the next  
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