

Guide to the Mental Capacity Act 2005

Information for patients and families



This booklet has been written to provide an introduction to the Mental Capacity Act 2005 (MCA). If you have any questions or concerns in relation to your treatment or care, please speak to a member of your healthcare team.

What is the Mental Capacity Act 2005?

The Mental Capacity Act 2005 (MCA) is a law that protects and supports people who may lack the ability to make a particular decision for themselves, at a particular time. The Act applies to people aged 16 and over in England and Wales. It makes it clear who can make decisions, in which situations, and how they should go about this. It also allows you to plan ahead for a time when you may lack capacity. It provides guidance to support people who need to make decisions on behalf of someone else.

The MCA is designed to cover situations where someone may be unable to make a decision for themselves as a result of illness or disability, such as a stroke (or other brain injury), dementia, mental illness or learning disability.

However, it could also cover situations when you are unconscious or under the influence of drugs or alcohol.

Many types of decisions are covered by the MCA. They may include simple things, like what to have to eat, as well as more complicated things, like where to live; what medical treatment to have; and decisions about your property and affairs.

However, some decisions such as marriage, civil partnership, sexual relationships, adoption and voting are not covered by the MCA.

What does 'mental capacity' mean?

Having mental capacity means that you are able to make an informed decision for yourself.

The law says that you must be assumed to have capacity unless it is proved to be otherwise. This means that a diagnosis of a particular condition, type of behaviour, your age or appearance cannot automatically mean you lack capacity.

Lack of capacity may not be a permanent condition. Assessments of capacity should therefore always be time and decision-specific.

How is mental capacity assessed?

If a health or social care professional has any doubts regarding your capacity to make a decision about your care or treatment, they will carry out a capacity assessment. This is a two stage test which asks:

- 1) Does the person have an impairment of their mind or brain, whether as a result of an illness, or external factors such as alcohol or drug use?**
- 2) Does the impairment mean the person is unable to make a specific decision when they need to?** People can lack capacity to make some decisions, but have capacity to make 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.

Where appropriate, people should be allowed the time to make a decision themselves.

The MCA says that you are unable to make a particular decision if you cannot do one or more of the following four things:

- understand information given to you about the decision
- retain that information long enough to be able to make the decision
- weigh up the information available to make the decision
- communicate your decision (for example, by talking, or using sign language).

Key principles

There are five key principles in the Act. Health and social care staff must:

- always assume that you have capacity to make your own decision unless it is proved otherwise (this is called 'presumption of capacity')
- do everything possible to support you to make your own decision
- allow you to make a decision which might be regarded by others as unwise
- act in your best interests if you are unable to make your own decision
- choose the least restrictive option when making decisions on your behalf.

What happens if I cannot make my own decisions?

The MCA says you should be given help to understand the information about the decision you need to make.

If you are unable to make a particular decision and are assessed as 'lacking capacity', someone else will have to make a decision in your best interests. This could be someone you have appointed to act on your behalf through a Lasting Power of Attorney. Or, if you haven't made plans about this in advance, then someone else such as a carer or professional will have to decide what should happen in your best interests.

Where consent is needed for medication, treatment or examination, the doctor or healthcare professional will decide whether or not you have capacity to make this decision.

Sometimes the courts will make decisions as to what is in your best interests and can appoint someone called a deputy to make decisions for you.

How does someone work out what is in my best interests?

Health and social care staff have to follow the MCA Code of Practice (see below) to decide what option is best for you. This involves consideration of whether or not the decision can wait until you regain capacity to make the decision yourself, involving you in the decision as much as possible, taking into account your wishes and feelings and talking to your friends and family to find out what you would have wanted, had you been able to make the decision yourself.

Once the decision maker has considered the relevant information, they should consider all the facts and make a decision they believe to be in your best interests and the least restrictive of your rights and freedoms.

The MCA Code of Practice

The MCA is supported by a Code of Practice that tells people who work in health and social care what to do. All professionals such as doctors, healthcare professionals, social workers, people doing research and paid carers must follow the Code of Practice when they are working with someone who lacks capacity. This applies in all health and social care settings.

Anyone appointed as an attorney under a Lasting Power of Attorney (LPA) or deputy appointed by the Court must also abide by the Code. Family and friends may also find it useful if they have to make decisions on your behalf.

Providing care or treatment if you lack capacity

The MCA allows people to carry out everyday tasks to do with care or treatment if they believe that you lack capacity and that the care is in your best interests, but should always do what is the least restrictive.

Lasting Powers of Attorney

A Lasting Power of Attorney (LPA) allows someone to make decisions for you in the future if you lose the capacity to do this yourself. This could be decisions about:

- property and financial affairs
- health and welfare matters

LPAs must be registered at the Office of the Public Guardian (OPG) before they can be used.

If you wish to appoint an LPA you must be 18 or over and be deemed able to understand and make the decision for yourself.

For further guidance and the forms you need to complete, go to the OPGs website www.publicguardian.gov.uk

You can also telephone, or get someone to call on your behalf.
Tel: **0300 456 0300** (weekdays, 9.30am to 5pm)
Or email: customerservices@publicguardian.gov.uk

The Public Guardian is also responsible for supervising deputies appointed by the Court of Protection and investigating concerns if an attorney is not acting in the person's best interests.

Court of Protection

The Court of Protection is able to make decisions or appoint someone called a deputy to make decisions for you if you lack capacity to appoint someone yourself regarding:

- property and financial affairs
- health and welfare matters

A deputy is usually a friend or relative of the person who lacks capacity, but could also be a professional. Deputies must make decisions in the best interests of the person lacking capacity.

The Court can also make decisions about:

- a person's capacity to make a specific decision
- disagreements about best interests
- challenges to a deprivation of liberty
- removal of a Lasting Power of Attorney (LPA)

A court appointed deputy is not however able to refuse or consent to life-sustaining treatment.

Protecting you from ill-treatment or wilful neglect

To protect you, carers and professionals, attorneys and deputies can be charged with certain offences under the MCA if they make decisions which are not in your best interests which cause you harm.

Advance decisions to refuse treatment (ADRT)

An advance decision to refuse treatment (ADRT) allows you to specify any medical treatment that you do not want should you lack the capacity to decide this in the future.

ADRTs are legally binding and must be followed by doctors and other healthcare staff, provided the treatment and circumstances set out by the ADRT apply to the situation.

The ADRT should say which treatment is being refused and the circumstances the refusal refers to.

You must be 18 or over to make an ADRT.

Making advance decisions about life-sustaining treatment

'Life-sustaining treatment' is treatment that is needed to keep you alive and without which, you might die. There are some specific rules if you want to make an advance decision to refuse life-sustaining treatment.

This type of advance decision must:

- be in writing
- state that it applies even if your life is at risk
- be signed by you in front of a witness (or in front of you by someone else that you appoint)
- be signed by the witness in front of you.

However, an ADRT can be withdrawn at any time.

Recording your wishes and feelings about treatment and care

When you have capacity to do so, you can also write down or tell people your wishes and preferences about future treatment or care. These must be considered when deciding what is in your best interests but are not legally binding.

Independent Mental Capacity Advocates (IMCA)

Under the MCA there is a duty for health and social care professionals to appoint an IMCA. An IMCA is a person who may be brought in to help support an individual who lacks capacity to make specific important decisions.

IMCAs are mainly instructed to represent people who do not have family or friends who can represent them.

An IMCA must be involved if the decision is about:

- serious medical treatment or a withdrawal of serious medical treatment
- changes of accommodation (more than 28 days in hospital or 8 weeks in a care home)

When

- you do not have capacity to decide this yourself

And

- you do not have anyone who can be spoken to about the decision.

An IMCA may also be involved in certain:

- accommodation reviews
- safeguarding adults cases

The IMCA will help in the best interests decision making process to make sure the MCA is followed.

What does the MCA say about research?

The MCA has rules in place to protect people who take part in research projects but lack capacity to make decisions about their involvement.

These rules ensure that a person's current or previous wishes about taking part in research are taken into account.

Challenging decisions and raising concerns

There may be disagreements about decisions made under the MCA, such as the assessment of capacity to make a decision.

There are a number of ways that disagreements can be sorted out. It is recommended that you try the following:

- informal meetings with the decision maker (may include advocacy services)
- using the NHS (National Health Service) complaints procedure
- using the complaints procedure of the Local Authority
- speaking to the Office of the Public Guardian if there are concerns about the way a Lasting Power of Attorney is being used.

The Court of Protection has the final say about disagreements.

Where to get more information

This booklet is only a short summary of the Mental Capacity Act. More detailed information and guidance can be found in the Act which you can download from:

www.legislation.gov.uk/ukpga/2005/9/contents

The MCA Code of Practice can also be downloaded from: www.gov.uk/government/publications/mental-capacity-act-code-of-practice

For access to the Department of Health booklets go to: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921428/Mental-capacity-act-code-of-practice.pdf

The NHS website also has information about the MCA: www.nhs.uk/conditions/social-care-and-support/mental-capacity/

You can also contact the Court of Protection for further advice:
Telephone: **0300 456 4600**
Text phone: **020 7664 7755**
Website: www.gov.uk/court-of-protection

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For help preparing for your visit, arranging an interpreter or accessing the hospital, please visit **www.uhs.nhs.uk/additionalsupport**

www.uhs.nhs.uk

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