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# **Mental Capacity Act 2005**

## **Frequently Asked Questions**

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### **What is the Mental Capacity Act?**

The Mental Capacity Act 2005 (MCA) came into force from April 2007. It provides a legal framework by which people can plan ahead for a time when they may lose capacity to make their own decisions. It provides guidance on how decisions may be made on a person's behalf when it is in their best interests. Such decisions are only made when the person does not have the mental capacity to make decisions.

This guidance is primarily used by local authorities, primary care trusts (PCTs), hospital trusts and independent care providers to protect the rights of adults (aged over 16) who lack mental capacity to make decisions about their care or treatment. It allows local authorities and NHS organisations to ensure that adults lacking mental capacity receive the appropriate care or treatment that they require when it is in their best interests to do so.

The law is designed to help and support people who are unable to make decisions for themselves for reasons due to mental capacity. It covers major decisions about someone's property and affairs, health care treatment and where the person lives. It also covers everyday decisions about personal care (such as what the person eats), where the person lacks capacity to make those decisions themselves.

### **When might a person lack capacity?**

For the purpose of the MCA, a person lacks capacity if at any material point in time they are unable to make a decision for themselves in relation to a particular matter, because of an impairment of, or disturbance in, the functioning of the mind or brain (for example, a disability, condition or trauma). It does not matter whether the impairment disturbance is permanent or temporary.

### **Who does the Act apply to?**

MCA applies to all of us but particularly to some groups whose ability to make decisions is temporarily or permanently impaired.

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## Are there principles that underpin this new law?

Yes, when anyone is involved in assisting a person lacking capacity to make a decision about their care or treatment, they must apply the following five key principles.

Principle one	You must always start with the assumption that a person has the capacity to make the decision in question.
Principle two	All practical steps must be taken to assist a person to make a decision before a decision is taken on their behalf.
Principle three	A person who makes an unwise decision must not be presumed to lack capacity because of this.
Principle four	Any act done on behalf of a person who lacks capacity must be undertaken in the person's best interests.
Principle five	Before any action or decision is taken consideration must be given to whether the outcome can be effectively achieved in a less restrictive way.

The first three principles are focussed on empowering or enabling the person to make their own decisions. The last two principles are concerned with taking decisions when they need to be taken on an individual's behalf.

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## What protective measures have been introduced as a result of the Act?

The MCA introduces a number of standard procedures and protective measures to ensure that any decisions made are in the best interests of the individual. These include the following.

A standard universal test for mental capacity is established.

Decisions must be made in the person's best interests which goes further than medical best interests alone.

Wherever possible or appropriate family, carers and involved others should be involved in the decision making process.

Adults 18 years and over can plan ahead for a time when they may lose capacity by making an Advanced Decision to refuse a particular medical treatment (also known as a living will) or by Lasting Power of Attorney.

A new Court of Protection oversees the implementation of the MCA and can make complex best interest decisions. It can also appoint deputies to oversee welfare or financial decision making for some people.

New criminal offences have been introduced concerning wilful neglect and ill-treatment.

The introduction of Independent Mental Capacity Advocates (IMCAs).

The Code of Practice provides guidance for key professionals which has legal force and they have a legal duty to conform to.

## What is meant by best interests?

If any care or treatment needs to be undertaken when a person does not have to the capacity to consent to it, then it can only be done if it is considered to be in the person's best interests. Determining what is in someone's best interests often involves asking the person, their family and carers about the person's beliefs, preferences or values before they lost their mental capacity. In this way the person making the decision is helped to ensure that the decision is based on more than one factor.

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## **What is an Advanced Decision?**

An Advanced Decision gives someone over the age of 18 the option to make an 'advance decision to refuse treatment' if there is a particular medical treatment they would not wish to receive at a time in the future when they may lack capacity to refuse it.

## **What is a Lasting Power of Attorney?**

The Lasting Power of Attorney replaces Enduring Power of Attorney for Property and Affairs and now can additionally apply to welfare and health decisions. This gives people the opportunity to appoint someone to make decisions about their finances and property or healthcare and welfare should they ever lack the capacity to make these decisions themselves.

## **What is the role of Independent Mental Capacity Advocates?**

Independent Mental Capacity Advocates (IMCAs) act on behalf of people who have no family or unpaid carer to support them. They are required to be involved when serious medical treatment decisions and changes of accommodation are being considered for people. There are discretionary powers that allow IMCAs to be involved in care reviews and adult protection enquiries.

## **What is the Code of Practice for?**

The Mental Capacity Act is supported by a Code of Practice. The Code contains guidance, primarily for health and social care professionals, on how to put the legislation into practice. All professionals have a duty to comply with the guidance unless there are very strong reasons why not to. In such circumstances when a health or social care professional makes such a decision it should be documented and where required substantiated in a court of law.

The Code makes it clear what sort of actions, generally day to day nursing and welfare actions, can be taken on behalf of a person who lacks capacity. This provides reassurance for professionals that they are acting in a way that does not incur liability in providing protection from harm.

In situations where it is necessary to protect a person from harm that requires measures which may deprive the person of their liberty they will need to be assessed under the Deprivation of Liberty Safeguards (DoLS).

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## **Who can be cared for or treated under DoLS?**

DoLS only affects people who lack mental capacity who are resident in care homes or hospitals. The wider provisions under the Mental Capacity Act are normally sufficient to enable professional carers to provide care or treatment in care homes or hospitals. In exceptional circumstances some people require carers to restrict their freedom of movement in care homes or hospitals to provide care or treatment which if they were not detained, would place them at risk of significant harm. There is a Frequently Asked Question sheet for DoLS which provides further information.

## **What does the Mental Capacity Act mean for service users and carers?**

The Mental Capacity Act ensures that the views of carers are taken into account when making a decision on behalf of someone who lacks capacity.

Individuals who have made advanced decisions to refuse health treatment when they had the capacity to do so should have their decisions respected. Where a Lasting Power of Attorney is applied then any decisions need to be authorised by those who have been appointed to make decisions on behalf of the individual.

An Independent Mental Capacity Advocate must support any individual who does not have an unpaid carer to support them. The advocates should be present when decisions are being considered regarding serious medical treatment or a move to a care home or from one hospital unit to another. Decision makers also have a legal duty to consider reports made by an IMCA before any decision is made.

Individuals who lack capacity or authorised attorneys or professional decision makers may apply to the Court of Protection to intervene if they believe that their rights are not being appropriately recognised under the MCA.

## **What does this mean for health and social care professionals?**

All health and social care employees have a duty to act in a way which is consistent with the guidance contained in the Code of Practice.

An individual who is reasonably suspected to be lacking mental capacity has the right to expect that any decision made by a professional is in their best interest as set out in the Code of Practice. Any decision made by a professional must be suitably documented. Following the act and its principles provides those involved with protection under law.

Professionals need to assure themselves that when advanced decisions and Lasting Powers of Attorney are reportedly in existence, they are verified as valid and applicable and are respected.

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## **What does this mean for health and social care organisations?**

Health and social care organisations must ensure that their services comply with the Mental Capacity Act. They need to ensure that appropriate staff have sufficient knowledge and understanding of the MCA and apply the legislation where required.

Organisations should ensure that their services meet the Care Quality Commission registration requirements. They are required to meet National Minimum Standards and performance requirements set out by commissioners of the service.

## **What can happen if health and social care staff do not comply with the MCA?**

Decisions taken without regard to the Code of Practice can be challenged with the individual employee or service provider and if necessary the Court of Protection can be asked to intervene. The MCA introduced two new criminal offences of ill-treatment and willful neglect which professionals and non-professionals may be liable for.

## **Where can I find out more?**

Key information is available at [www.leadssafeguardingadults.org.uk](http://www.leadssafeguardingadults.org.uk), <http://www.justice.gov.uk/about/mental-capacity.htm> and additional booklets can be downloaded at the Office of the Public Guardian website [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)

For more information ask your line manager.