



Mental Capacity Act Learning Briefing

What is the Mental Capacity Act (MCA)?

The [Mental Capacity Act \(2005\)](#) is:

- A legal framework for people over the age of 16 who may lack the mental capacity to make specific decisions, on a permanent or temporary basis.
- Places people in the centre of decision-making processes empowering them to make their own decisions, wherever possible. It also protects those who may lack capacity.
- Enables people to plan for a time in the future when they might lack capacity.

What may affect people's mental capacity?

Mental Capacity can be impacted in many ways such as having a brain injury, mental health condition, learning disability, or dementia. It could also be caused by substance misuse or confusion/drowsiness/unconsciousness because of an accident/illness or treatment. Decisions can range from day-to-day choices like what to wear or eat, to more complex decisions such as whether to have a medical treatment.

What is executive functioning?

Executive functioning is a set of abilities controlled by the frontal lobe of the brain. Impairment of this does not necessarily mean there is a lack of capacity to make specific decisions. However, when executive functioning is impaired, a person may have an inability to recognise that there is a difference between what they say they will do and what they do.

When executive function is impaired, it can affect appropriate decision-making (e.g., evidence of repeated risky decisions over time), reduced problem-solving abilities, planning and organisation, flexibility in thinking, multi-tasking, social behaviour, emotion control and motivation. In some complex circumstances with high risk, a capacity assessment may be helped by a psychiatrist or psychologist supporting with the executive functioning element.

Worcestershire Safeguarding Adults Board's Chair has created a short, powerful and informative [animated podcast \(2023\)](#) on this in relation to changes in his mother.

When should capacity be assessed?

Capacity should be assessed if a person appears to be unable to make a specific decision at a specific time because their mind or brain is affected by illness of disability or substance misuse.

People's situations may change so the capacity decisions may need to be reviewed. Whether someone lacks capacity or not should not be influenced by their age, appearance, condition, or behaviour alone.

What are the five principles of the MCA?

1. **Assume capacity:** People must be assumed to have capacity, unless proven otherwise. You cannot assume a lack of capacity for any reason.
2. **Provide support:** Help and support the person to make the decision for themselves. If they are found to lack capacity, it is still important that the person is as involved as possible in making decisions.
3. **Enable choice:** Each person has their own values, beliefs and preferences, and should not be stopped from making a decision just because someone else thinks it is unwise, wrong, or different to a choice you would make.
4. **Best interest:** If a person lacks capacity any decisions made must be in the person's best interests.
5. **Least restrictive:** If a person lacks capacity, decisions made must consider the person's individual circumstances and should interfere as little as possible with the person's rights and freedoms.

Assessing capacity: the two-stage test

Stage 1: Does the person have an impairment of their mind or brain and if so, what is this?

If yes, proceed to stage 2.

Stage 2: Does the impairment or disturbance of the person's mind or brain mean they are unable to make a decision when they need to?

There are four areas a person needs to evidence they have capacity to make a specific decision. All four areas have to be met to confirm capacity:

1. Can they understand the information given to them?
2. Can they retain this information long enough to make a decision?
3. Can they think about or weigh up the information to make the decision?
4. Can they communicate the decision by any means. This could be by talking, using sign language or even simple movements such as blinking or squeezing a hand?

The determination of a person's capacity is made on the balance of probabilities. You should be able to show in your assessment/records why you have come to your conclusion that capacity is lacking for the particular decision. Some people may have fluctuating capacity which may be as a result of their lifestyle or behaviour as well as a medical or mental health condition. Fluctuation can take place over hours, days, or weeks. If the decision is able to wait, carry out the assessment at a time when the adult is at their highest level of functioning.

What happens after a capacity assessment?

If a person has capacity and chooses to make an unwise decision, this does not mean that no further action is required, particularly where the risk is deemed to be serious or critical. Other actions may include comprehensive multi-agency risk assessment.

If a person lacks capacity, a decision must be made in the person's best interest.

How are Best Interests' Decisions made?

The MCA checklist must be used, including considering:

- The person's current wishes/feelings and those they expressed before losing capacity, as well as any beliefs/values that are important to them.
- All relevant circumstances including, type of impairment to their mind or brain, how long it may last, age, whether they would normally make this decision, likelihood of regaining capacity and who has cared/is caring for them.

- Whether they will have capacity to make the decision in future and whether the decision can be delayed.
- Involving the person in actions taken for them and decisions affecting them.
- The views of the person's carers/family/people who may have an interest in their welfare, or people they have appointed to act for them.

There also may be other relevant questions depending on the person's situation.

Advance Decisions

It is important to find out if a person has made a decision in advance, to refuse care/treatment should they lack capacity in the future. These are called [Advance Decisions \(NHS, 2020\)](#) and should be in a best interest process.

Who makes Best Interest Decisions?

This person is known as the 'decision maker' and will be the most appropriate person for the decision being made. For day-to-day decisions this could be a carer, for decisions about care arrangements, accommodation, or medical treatment, the decision maker would be a professional such as a social worker, doctor/nurse and/or a Deputy or Lasting Power of Attorney (LPA); please see section below.

Advocacy

[Independent Mental Capacity Advocates \(IMCAs\) \(SCIE 2010\)](#)

support and represent the person in the decision-making process when the person does not have family or friends who can represent them. A referral must be made for an IMCA if there is not an appropriate representative.

The interface between the MCA and other Acts/legislation

It is important for staff to understand the interface between the MCA and the Mental Health Act as there is still the requirement to follow the MCA even when a person is detained under the Mental Health Act. Staff also need to have an awareness of the [Deprivation of Liberty Safeguards \(SCIE 2022\)](#) and understand which legal framework should be used at the relevant time, to deprive a person of their liberty.

Roles, bodies, and powers supporting the MCA

[Lasting Powers of Attorney \(LPAs\) \(SCIE 2019\)](#): People over the age of 18 can formally appoint one or more people to look after their health, welfare &/or financial decisions, if at some time in the future they lack capacity to make decisions for themselves.

[Court of Protection & Deputies \(Gov.uk\)](#): A court and a public official to protect people who lack capacity and to supervise those making decisions on their behalf.

[The Public Guardian \(Gov.uk\)](#): The Office of the Public Guardian maintains a register of LPAs, Enduring Power of Attorneys and Court-appointed Deputies and is responsible for supervising them.



Learning resources

To extend your learning, please do refer to the following learning resources:

- [MCA Code of Practice \(Gov.uk\)](#)
- [SCIE: Introduction to the mental capacity act \(SCIE 2022\)](#)
- [NICE: MCA Guidance \(2018\)](#)
- Please also visit the [Learning & Development Gateway](#) and search 'Mental Capacity'.

To support your Continual Professional Development (CPD) we have created a [CPD Reflective Log](#) for your use. Please feel free to use this to track, and reflect on, the professional development that you complete using our resources.

References

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- Social Care Institute for Excellence 2022, [Deprivation of Liberty Safeguards \(DoLS\) at a glance](#), accessed 26 July 2023
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