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Mental Capacity Act 2005 at a glance

SCIE At a glance 5

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This at a glance summary presents an overview of the Mental Capacity Act (MCA) 2005, which is important to health and social care practice.

The MCA has been in force since 2007 and applies to England and Wales. The primary purpose of the MCA is to promote and safeguard decision-making within a legal framework. It does this in two ways:

- By empowering people to make decisions for themselves wherever possible, and by protecting people who lack capacity by providing a flexible framework that places individuals at the heart of the decision-making process.
- By allowing people to plan ahead for a time in the future when they might lack the capacity.

Key messages

- The Mental Capacity Act (MCA) 2005 applies to everyone involved in the care, treatment and support of people aged 16 and over living in England and Wales who are unable to make all or some decisions for themselves.
- The MCA is designed to protect and restore power to those vulnerable people who lack capacity.
- The MCA also supports those who have capacity and choose to plan for their future – this is everyone in the general population who is over the age of 18.
- All professionals have a duty to comply with the Code of Practice. It also provides support and guidance for less formal carers.
- The Act's five statutory principles are the benchmark and must underpin all acts carried out and decisions taken in relation to the Act.

- Anyone caring for or supporting a person who may lack capacity could be involved in assessing capacity – follow the two-stage test.
- The MCA is designed to empower those in health and social care to assess capacity themselves, rather than rely on expert testing – good professional training is key.
- Understanding and using the MCA supports practice – for example, application of the Deprivation of Liberty Safeguards.

Reach

About two million people in England and Wales are thought to lack capacity to make decisions for themselves. They are cared for by around six million people, including a broad range of health and social care staff, plus unpaid carers. Those working in health and social care include: doctors, nurses, dentists, psychologists, occupational therapy, speech and language therapists, social workers, residential and care home managers, care staff (including domiciliary care workers), and support workers (including people who work in supported housing).

Someone's Mental Capacity, or ability to make a certain decision, may be impacted by:

- a stroke or brain injury
- a mental health problem
- dementia
- a learning disability
- confusion, drowsiness or unconsciousness because of an illness of the treatment for it
- substance misuse.

Five key principles

The Act is underpinned by five key principles (Section 1, MCA). It is useful to consider the principles chronologically: principles 1 to 3 will support the process before or at the point of determining whether someone lacks capacity. Once you've decided that capacity is lacking, use principles 4 and 5 to support the decision-making process.

Principle 1: A presumption of capacity

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.

Principle 2: Individuals being supported to make their own decisions

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.

Principle 3: Unwise decisions

People have the right not be treated as lacking capacity merely because they make a decision that others deem 'unwise' . Everyone has their own values, beliefs and preferences which may not be the same as those of other people.

Principle 4: Best interests

Anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.

Principle 5: Less restrictive option

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.

Assessment of capacity and best interests decision-making (Sections 2–4, MCA)

What is mental capacity and when might you need to assess capacity?

Having mental capacity means that a person is able to make their own decisions. You should always start from the assumption that the person has the capacity to make the decision in question (principle 1). You should also be able to show that you have made every effort to encourage and support the person to make the decision themselves (principle 2). You must also remember that if a person makes a decision which you consider eccentric or unwise, this does not necessarily mean that the person lacks the capacity to make the decision (principle 3). Under the MCA, you are required to make an assessment of capacity before carrying out any care or treatment – the more serious the decision, the more formal the assessment of capacity needs to be.

When should capacity be assessed?

You might need to assess capacity where a person is unable to make a particular decision at a particular time because their mind or brain is affected by illness of disability. People's situations may change and the capacity determination may need to be reviewed. You cannot decide that someone lacks capacity based upon age, appearance, condition or behaviour alone.

The test to assess capacity

Two-stage functional test of capacity

The Supreme Court in the case of *A Local Authority v JB* [2021] UKSC 52 supported the following approach to undertaking and an assessment and making a determination of someone's capacity to make a specific decision (this was also included in the Draft Codes of Practice):

1. Is the person able to make the decision (with support if required)?
2. If they cannot, is there an impairment or disturbance in the functioning of their mind or brain?
3. Is the person's inability to make the decision because of the impairment or disturbance?

The person is determined as unable to make the relevant decision if they are unable to:

1. understand information given to them
2. retain that information long enough to be able to make the decision
3. weigh up the information available to make the decision
4. communicate their decision – this could be by talking, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand.

The determination of a person's capacity is made on the balance of probabilities – is it more likely than not that the person lacks capacity? You should be able to show in your records why you have come to your conclusion that capacity is lacking for the particular decision.

Best interests decision-making

If a person has been assessed as lacking capacity then any action taken, or any decision made for or on behalf of that person, must be made in their best interests (principle 4). The person who has to make the decision is known as the 'decision-maker' and normally will be the carer responsible for the day-to-day care, or a professional such as a doctor, nurse or social worker where decisions about treatment, care arrangements or accommodation need to be made.

What is 'best interests'?

The Act provides a non-exhaustive checklist of factors that decision-makers must work through in deciding what is in a person's best interests. A person can put their wishes and feelings into a written statement if they so wish, which the person determining capacity must consider. In addition, people involved in caring for the person lacking capacity have to be consulted concerning a person's best interests.

If a person has been assessed as lacking capacity then any action taken, or any decision made for or on behalf of that person, must be made in their best interests.

For more detailed information you should refer to the Code of Practice.

Case example: Assessing capacity

Anna Southcott (the patient's name has been changed), 76, has dementia and lives in a care home. She has asthma. Her capacity fluctuates. The district nurse attends to administer flu vaccinations. Ms Southcott is able to communicate.

Principle

The decision relates to administering a flu vaccination. The district nurse should start from the position of assuming that Ms Southcott has the capacity to decide whether to receive a flu vaccination, unless there is evidence to show that she lacks the capacity to do so (principle 1). Even if the nurse has to help Ms Southcott to make the decision, this does not mean she lacks the capacity to make it.

The nurse should not treat Ms Southcott as being unable to make the decision herself until all practicable steps to help and support her to make it have been taken, without success (principle 2). Only if this is the case should the nurse assess Ms Southcott's capacity to make the decision using the two-stage test.

As Ms Southcott's capacity fluctuates, the nurse should consider whether the decision can be postponed until she may have capacity to make the decision. The nurse will speak to Ms Southcott's carers about this, as well as asking about her condition and whether there are any contraindications for a flu vaccination – the following assumes this not to be the case.

Practice

The nurse must disregard Ms Southcott's ability to make decisions in general. The impairment or disturbance must affect her ability to make a specific decision at a specific time. The nurse will give her some simple information about why she needs a flu vaccine (her age and asthma), then will ask her to repeat that information. It may be that Ms Southcott has previously expressed preferences about having a flu vaccination, and this might provide a useful steer for the nurse.

In relation to the decision that needs to be made, the district nurse should decide on the balance of probabilities (more likely than not) whether Ms Southcott is able to:

- understand relevant information about the decision
- retain that information in her mind long enough to make the decision herself
- use or weigh up (evaluate) that information as part of the decision-making process.

If Ms Southcott cannot do any of these three things, she is treated as being unable to make the decision.
The District nurse must then decide: does Ms Southcott have an impairment of, or a disturbance in, mind or brain function? There must be an impairment of her mind or some disturbance that affects the way her brain works. She has dementia, so this part of the test is fulfilled to the balance of probabilities (more likely than not).

Does the impairment or disturbance mean that she is unable to make a specific decision, at the specific time she needs to?

The decision about Ms Southcott's capacity must not be based merely on her age, appearance, assumptions about her condition or any aspect of her behaviour.

The nurse decides that Ms Southcott lacks capacity to make a decision about receiving a flu vaccination and clearly records her assessment with reasons. Using best interests decision-making (principle 4) the decision is taken that in view of her age and asthma, it would be in her best interests to receive the vaccination.

Thanks to Andrew Alonzi of Nottingham Law School for his contribution to this case study. (updated by Claire Webster to reflect the Supreme Court ruling in *A Local Authority v JB* [2021] UKSC 52).

The new roles, bodies and powers supporting the MCA

Attorneys appointed under Lasting Powers of Attorney (LPAs) – the Act introduces a new form of Power of Attorney which allows people over the age of 18 to formally appoint one or more people to look after their health, welfare and/or financial decisions, if at some time in the future they lack capacity to make those decisions for themselves.

Court of Protection and Deputies – the MCA created a new court and a new public official to protect people who lack capacity and to supervise those making decisions on their behalf. The Court is able to appoint a Deputy, for example, because a person has an ongoing lack of capacity. The Court will tailor the powers of the deputy according to the circumstances of the individual.

The Public Guardian – the role of the Public Guardian is to protect people who lack capacity from abuse. The Public Guardian is supported by the Office of the Public Guardian (OPG). The OPG maintains a register of LPAs and EPAs. It also maintains a register of the Court-appointed Deputies and is responsible for supervising them.

Independent Mental Capacity Advocate (IMCA) – IMCAs are a statutory safeguard for people who lack capacity to make some important decisions. This

includes decisions about where the person lives and serious medical treatment when the person does not have family of friends who can represent them. IMCAs can also represent individuals who are the focus of adult protection proceedings. The Deprivation of Liberty Safeguards introduced further roles for IMCAs.

Advance decisions to refuse treatment – the Act creates statutory rules with clear safeguards so that people may make a decision in advance to refuse treatment if they should lack capacity in the future.

A criminal offence – the Act introduces a new criminal offence of ill treatment or willful neglect of a person who lacks capacity.

Code of Practice

The Code explains how the MCA works on a day-to-day basis and provides guidance to those working with people who may lack capacity. The Code explains the key features of the MCA in more detail, as well as some of the practical steps that people using and interpreting the law need to take into consideration. If you work with people who lack capacity and you are a professional and/or you are paid for the work you do then you have a legal duty to have regard to the Code. It is also relevant to unpaid carers who will be helped and guided by it. The current code of practice requires updating, as case law continues to provide updated guidance for practice. The new Mental Capacity Amendment Act, and Liberty Protection Safeguards will also be followed by an updated Code of Practice to include updated case studies and findings from case law.

Interface with the MHA

It will be important for health and social care staff who support some client groups (for example, those with mental health problems, particularly those with severe and enduring mental ill health, or older people) to have an understanding of the interface issues between the MCA and the Mental Health Act 1983 (as amended by the 2007 Act). This will also include the need to have an awareness of the Deprivation of Liberty Safeguards. Health and social care staff who support people should have an understanding that there are still requirements to follow the MCA even when a person is detained under the Mental Health Act, and an understanding which legal framework should be used at the relevant time, to deprive a person of their liberty.

Liberty Protection Safeguards

In July 2018, the government published a Mental Capacity (Amendment) Bill which will see DoLS replaced by the Liberty Protection Safeguards (LPS). This passed into law in May 2019. Under LPS, there will be a streamlined process to authorise deprivations of liberty. Read more here: **Liberty Protection Safeguards**[1].

Keep up to date

We hope this at a glance about MCA has been helpful. Some aspects of the MCA are complex, and it is important that they are fully understood. SCIE offers e-learning, bespoke training, and consultancy support, to make sure that you and your organisation are aware of good practice and legal duties in this area. Or if you would like to talk to our team about how we can help, please complete our enquiry form.

[1] https://www.scie.org.uk/mca/lps/latest.