



Mental Capacity Act 2005
Social Care Institute for Excellence
11th January 2016
3pm-4pm



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People have the right to live as they choose



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What we will cover

- Human rights and the importance of the MCA
- The five key principles
- Assessing capacity: who does it and how
- Best interests decisions
- Section 5 protections
- Restraint
- IMCAs
- Planning ahead
- Court of Protection



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Human rights: why they were needed

- Universal Declaration of Human Rights (1948):
'All people are free and equal in rights and dignity'
- European Convention on Human Rights (1950)



Human rights

“Where, after all, do human rights begin? In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person...”

(Eleanor Roosevelt, 1958)



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Who?

Age: from 16 +

Any impairment or disturbance of mind or brain

Conditions include: Dementia, learning disability, brain injury, mental illness, autism, confusion, concussion, substance misuse, unconscious

When & Where?

Across England and Wales

Anywhere a health or social care act is delivered:

home, hospital, GP, care home, day centre, dental practice, supported housing

Which decisions?

All health & social care & financial decisions such as :-

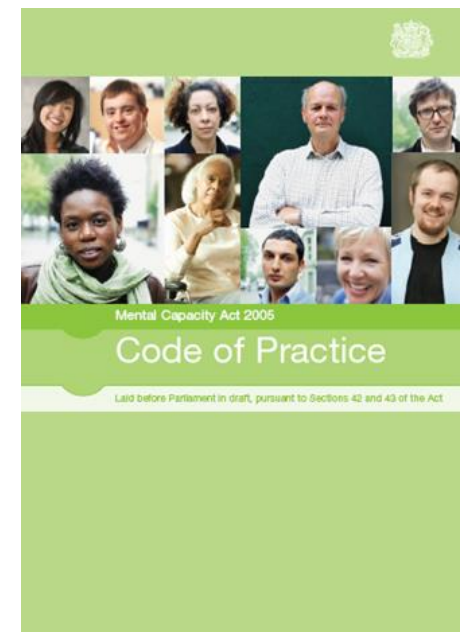
washing, dressing, going out, toileting, nursing care, domiciliary care, housing support, providing accommodation, contact

all medical treatment, diagnostic tests, allied health therapies, emergency care, dental care

Why is the MCA important?

Protects a person's **rights** to:

- make their own decisions while they are able
- have their best interests at the heart of decision-making if they lack capacity
- Capacity is relevant wherever consent is required
- **Everyone** who works with people who lack mental capacity must follow the law and the Code of Practice



MCA - Five Statutory Principles

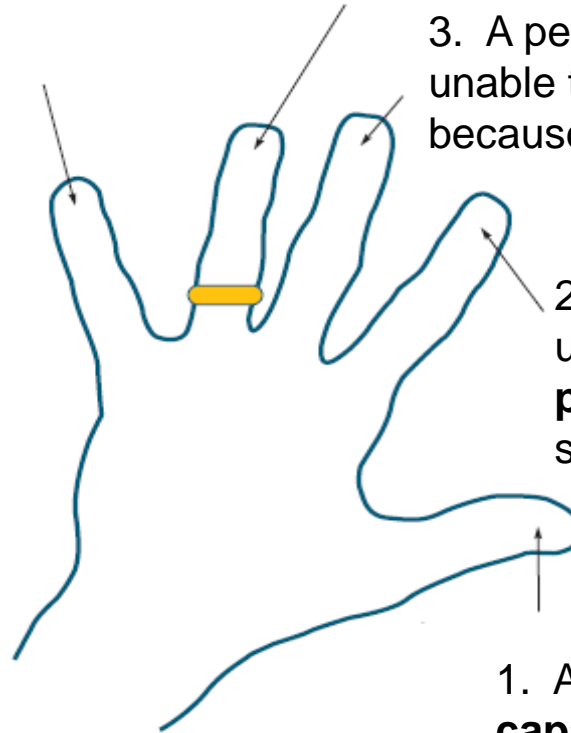
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is **less restrictive** of the persons rights and freedom of action.

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**.

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

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.

1. A person must be **assumed to have capacity** unless it is established that they lack capacity.



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Applying the 5 principles

- Try to think of a time when you have applied any one of the principles effectively, and a time when you've not/mis-applied one.
- What helped when you did it well?
- What factors contributed to you not doing it so well?



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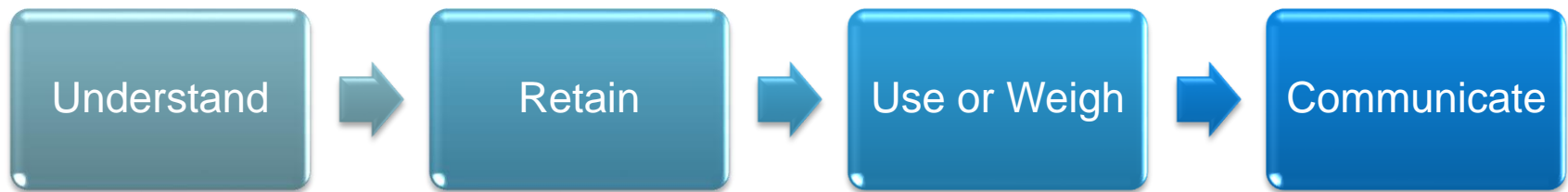
Who should assess mental capacity?

- The decision-maker: usually be the person who is directly concerned with the individual at the time the decision needs to be made – (Code para 4.38)
- In complex decisions and where a professional gives advice on an individual's mental capacity, the final decision about a person's capacity must be made by the person intending to make the decision or carry out the action on behalf of the person who lacks capacity – not the professional, who is there to advise – (Code para 4.42)



How to assess capacity: balance of probability

- Is the person unable to make THIS decision at the time it needs to be made? (Functional)
- Must be able to do these four steps:



- Is there any impairment or disturbance in the mind or brain? (Diagnostic)
- *And* is that what causes the inability to make a decision?

Cardinal rules

- You need ‘reasonable belief’ to even assess. A diagnosis in itself isn’t enough.
- Decision-specific: “He lacks capacity” is essentially meaningless.
- Think “What is the actual decision” and then ask the person that, in whatever way works best for them
- Take all reasonable steps (Principle 2)



Supported decision-making

- Don't rush to assess capacity
- Useful to reframe: “How can I support this person to make the decision themselves?”
- Things to consider:
 - Communication: tools, techniques, right information
 - Location: relaxed? quiet? private?
 - Timing: best time of day?
 - Support from others: professionals? family & friends?
 - Delaying: can it wait?



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Unwise decisions



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Unwise decisions

“There is a space between an unwise decision and one which an individual does not have the mental capacity to take and ... it is important to respect that space, and to ensure that it is preserved, for it is within that space that an individual's autonomy operates.”

Lord Justice McFarlane, PC & NC v City of York Council, 2013



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Unwise decisions

- Are you allowed to respect people's space to make unwise decisions where you work?
- If not, what could you do to challenge that?



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What does the MCA mean by 'best interests'?

- *Section 1(5) establishes the principle that 'any act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made in his best interests'*
- We don't start with the best interests process: it is determined by the person lacking capacity
- It is not defined - checklist of factors
- As well as best interests, the decision should aim to satisfy the least restrictive option (principle 5)



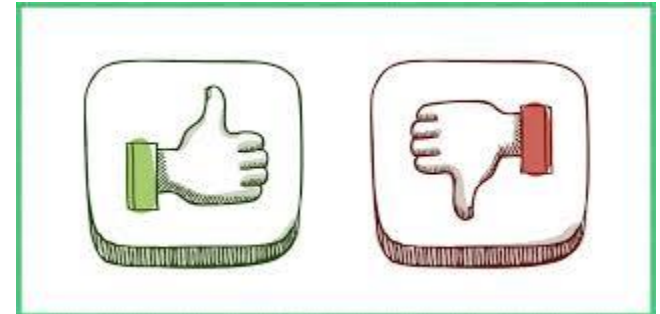
‘Best interests’ decision checklist

1. All **relevant circumstances**
2. The person’s *reasonably ascertainable* past and present **wishes/statements + their beliefs and values** + any other factors they would take into account
3. **Consult** others as *practicable and appropriate* to do so. Examples: carers, relatives, attorneys, deputies
4. **Consider less restrictive options** - can the same result be achieved in a less restrictive way?

- ▶ Will the person have **capacity sometime in the future** in relation to the matter? If so, when?
- ▶ Must **encourage** and permit the person to participate
- ▶ Don’t base the ‘best interests’ decision solely on **age, appearance, behaviour or condition**

Balance sheet approach

- Medical, emotional, and social interests considered and entered onto a 'balance sheet'
- Detail all options considered
- List the pros and cons, and the likelihood of each
- If the proposed option entails risks - consider what can be done to reduce them
- Set out your conclusion, even if it seems obvious
- Clear and transparent 'workings out'



If you lost capacity...

- Think about what things would you most want professionals to take into account about you?



Excluded – Best interests decisions s27-29

Mental health treatment for patients subject to the MHA 1983

Decisions about sexual relations, marriage, divorce, adoption and voting cannot be made under Best Interests – need to apply to the Court of Protection



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What gives us the authority to do things to or for people? (MCA s.5)

- If you have to act 'in connection with' another person's care or treatment, then as long as you can:
 - explain why you think the person lacks capacity
 - explain why you think you are acting in her/his 'best interests'then you are acting lawfully
- So keep a record of your work
- Negligent acts are not protected, nor are acts that would be illegal if carried out with consent
- Sec.44: Wilful ill-treatment and neglect



You are protected if you use restraint

If you 'reasonably believe':

- that it is necessary to use restraint in order to **prevent harm to the person**; *and*
- that the restraining act is a **proportionate response** to the *likelihood* of the person suffering harm and the *seriousness* of this harm; *and*
- that there is no less restrictive option to meet the need

If the effects of restriction amount to deprivation of liberty this must be specifically authorised.

Independent Mental Capacity Advocate (IMCA)

- Person is facing a big decision, about serious medical treatment or where to live; *and*
- Lacks capacity to make that decision; *and*
- Has no family or friends able and willing to be part of that process; *then*
 - IMCA must be brought in
 - May also be involved in safeguarding
 - IMCA has right to see relevant notes
 - IMCA's report must be taken into account



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Advance decisions to refuse treatment

- With capacity, a person (18+) can say they don't want certain treatments in the future
- Refusing life-sustaining treatments: must be in writing, signed, witnessed, and have a statement that the person understands this might put their life at risk
- Can't refuse basic nursing care (warm, clean, fed, hydrated)
- Cannot be over ruled if valid and applicable
- Advance statements of wishes
 - Not 'trump cards' like ADRTs - but must have good grounds to ignore
 - Good for best interests decisions and planning how you'd want to be cared for



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Lasting Powers of Attorney

- Two types - both must be on set forms. Must be set up by capacitated individual
 - Financial and Affairs
 - Health and Welfare
- LPA attorney must make decisions in a person's best interests
- If the person is incapacitated – CoP deputy



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Page 1 of 11 – Keep all pages of this form together

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Office of the Public Guardian

Lasting power of attorney – property and financial affairs

Checklist
See the information sheet for guidance on all the people involved
Part A: about you, the attorneys you are appointing, and people to be told
How many attorneys are you appointing? Write in words
How many replacement attorneys are you appointing? Write in words or write 'None if this does not apply'
How many people to be told are you choosing? Write in words from 'None to five'. If 'None' you must have two certificate providers in part B.
Part B: about your certificate providers
How many certificate providers do you have? (Not an exit)
One OR Two
If you have used any continuation sheets each one must be signed and dated.
Attached to the back of this lasting power of attorney are:
the number of each continuation sheet A1
continuation sheet A2
continuation sheet A3-PFA
continuation sheet B
continuation sheet C
Total number of continuation sheets

Who can fill it in?
Anyone aged 18 or over, who has the mental capacity to do so.

Before you fill in the lasting power of attorney:
1. Please read the guidance available at publicguardian.gov.uk or by calling 0300 456 0300. See, for example, the **Lasting power of attorney creation pack** or other relevant guidance booklets which are all available online or by post.
2. Make sure you understand the purpose of this lasting power of attorney and the extent of the authority you are giving your attorneys.
3. Read the separate **information sheet** to understand all the people involved, and how the three parts of the form should be filled in.
4. Make sure you, your certificate provider(s), and your attorney(s) have read the section on page 2 called **information you must read before filling in their relevant part**.

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⚠ This lasting power of attorney could be rejected at registration if it contains any errors.

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Lasting power of attorney for health and welfare

Checklist
See the information sheet for guidance on all the people involved
Part A: about you, the attorneys you are appointing, and people to be told
How many attorneys are you appointing? Write in words
How many replacement attorneys are you appointing? Write in words or write 'None if this does not apply'
How many people to be told are you choosing? Write in words from 'None to five'. If 'None' you must have two certificate providers in part B.
Part B: about your certificate providers
How many certificate providers do you have? (Not an exit)
One OR Two
If you have used any continuation sheets each one must be signed and dated.
Attached to the back of this lasting power of attorney are:
the number of each continuation sheet A1
continuation sheet A2
continuation sheet A3-HW 2 pages
continuation sheet B
Total number of continuation sheets

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Court of Protection

- 'Last resort' dispute resolution in welfare, health care and financial decisions:
 - whether a person has capacity
 - where someone should live
 - serious issues about health treatments
 - property and financial affairs
 - in relation to LPAs
 - debatable ADRTs
- Deprivation of Liberty NOT in a care home or hospital
- Certain medical treatments HAVE to go to the Court



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SCIE resources - www.scie.org.uk

- Open access training – 18th March 2016
- Bespoke training
- Online guidance
- Social care TV
- E-learning
- MCA Directory



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