

 Kingston GP Chambers <small>Kingston Training Hub Clinical Services Practice Support Services Kingston Education Centre</small>	Mental Capacity Act Guidance		Reviewed	June 2023
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Mental Capacity Act Guidance

The Mental Capacity Act 2005 in England and Wales

Adults who lack capacity to make decisions for themselves are some of the most vulnerable members of our society. The Mental Capacity Act 2005 (MCA) was designed to both empower these adults to be supported to make their own decisions and protect them where necessary. The MCA protects the human rights of people who may lack capacity to make decisions for themselves; however, adults whose capacity is impaired have the right to make unwise decisions under the MCA.

The five key principles of the MCA

1. Capacity must always be assumed - this means at the outset you should presume the person can make their own decisions
2. The person must be supported to make their own decision - this may mean involving people who may be able to help such as learning disability nurses, occupational therapists or speech and language therapists who can help with understanding and communication. Simple measures such as making sure the person has their glasses and hearing aid maybe relevant.
3. Allow for the unwise decision, just because a patient makes a decision that you view as being unreasonable does not mean that they have not got the capacity to do so.
4. Any decision made under the MCA has to be in the patient's best interests, taking into account previous wishes and feelings and opinions of those close to them.
5. Any decision made must be the least restrictive option available to the person. This may mean trying to keep someone in their own home as long as possible with support, or if they need restraint that this is the least restrictive type available.

Assessing Capacity

In order to use the MCA, the person needing to make the decision must have an impairment of the mind or brain and the lack of capacity must relate to this condition.

Any decision about capacity is decision and time specific; therefore a capacity assessment must be carried out each time a decision needs to be made. It should not be assumed that because a patient has been assessed as lacking capacity to make a decision on one issue, they are automatically unable to make any decision. Mental capacity may also fluctuate over time, and therefore

In making a capacity assessment, the assessor must be clear about:

- What the decision to be made is;
- What benefits the treatment or intervention will bring to the patient; and
- What negative effects there may be.

The capacity assessment can then be conducted, taking the following factors into consideration:

- The patient needs to be able to communicate with you in some form although this need not be the spoken word.
- They need to understand the issue, and they need to be able to show evidence that they can balance the good and bad points about what they are being offered. Do not set the bar for understanding too high, remember the patient is not a professional.
- The patient needs to retain the information, briefly is acceptable.

Recording capacity assessments is a mandatory part of good practice. The Social Care Institute of Excellence (SCIE) website hosts a variety of Mental Capacity tools and resources [here](#). These include a Mental Capacity Assessment form on which capacity assessments could be recorded. Free text notes are adequate providing you cover all aspects of the Act.

Further reading on performing capacity assessments can be found [here](#).

Best Interest Decisions

Where a capacity assessment finds that an individual is unable to make a decision for themselves, a “decision maker” can make the decision on their behalf. The decision maker is usually the person performing the act for which consent is required.

When making a decision, the following MCA principles should be applied:

- Any decision made under the MCA has to be in the patient’s best interests, taking into account previous wishes and feelings and opinions of those close to them.
- Any decision made must be the least restrictive option available to the person. This may mean trying to keep someone in their own home as long as possible with support, or if they need restraint that this is the least restrictive type available.

People who know the person who lacks capacity well, such as family and close friends, should be consulted. If someone without capacity has a legally appointed representative for health and welfare, such as an attorney or court appointed deputy, this person should have the opportunity to be involved in best interest decisions.

The patient’s prior wishes and feelings should also be taken into account, with particular value being placed on religious and cultural attitudes.

Further information on making best interest assessments is available [here](#).

Lasting Power of Attorney for Health and Welfare

Any patients with capacity over 18 years of age can nominate one or more adults to act for them once they have lost the capacity to make decisions for themselves.

These nominated people are known as attorneys. The LPA has to be registered with the Office of the Public Guardian (OPG) in order to be valid.

An attorney for health and welfare makes decisions as if they were the patient themselves. When health professionals are making a care plan for a person lacking capacity who has appointed LPA, they must consult the attorney to gain agreement with the care plan. In these cases, no best interest process is needed.

The LPA should be carefully checked to see which decisions the attorney can make (e.g. the attorney is not always granted permission to make decisions about life sustaining treatment. GPs should check that the paperwork for an LPA is registered with the OPG and if in any doubt contact the OPG themselves. An example of a properly registered LPA for Health and Welfare can be found [here](#).

The Court of Protection may also appoint a person to be the health and welfare deputy for someone without mental capacity where no LPA has been set up.

LPA Concerns

If it is considered that an attorney is not acting in the best interest of the patient, this can be reported to the OPG. The OPG will investigate the case and take it to the Court of Protection if it is felt that the attorney is not acting appropriately. Details about how to report a concern can be found [here](#).

Where there are concerns of this nature, it may also be appropriate to make a Safeguarding referral (refer to KGPC's Adult Safeguarding policy for further details, including the reporting process and contact details).

Advance Decision to Refuse Treatment (ADRT)

These documents are written when a patient aged 18 years or over has the capacity to do so and can specify what treatment in the future they do not want. This can include for instance not wanting to be ventilated or artificially fed. The patient cannot ask for treatment, only refuse treatment. This could constitute part of advance care planning for patients with long term conditions where it can be anticipated that they may lose capacity.

Clinicians must check that an ADRT is valid and applicable before they withhold treatment. An ADRT that a patient has made verbally and the doctor has recorded in the notes would not cover life sustaining treatment; these always have to be in writing, signed by the patient and witnessed by someone 18 years or over.

The SCIE website hosts a variety of resources covering ADRT [here](#). The resources include guidance for helping a patient write an Advance Decision to Refuse Treatment as described in the MCA 2005.

Independent Mental Capacity Advocate (IMCA)

IMCAs are people trained to represent adults who lack capacity to make decisions for themselves. They can be used when a person lacking capacity is 'unbefriended', (i.e. where they have no one to represent their views during the best interest process).

IMCAs are also used if a Section 42 enquiry under the Care Act 2014 is undertaken, where the person lacking capacity has experienced serious harm as a result of abuse.

Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards (DoLS) are an amendment to the Mental Capacity Act which allows restraint and restrictions to be used but only if they are in the persons best interests. These are designed to safeguard adults who lack capacity to make the decision as to where their care and treatment should take place. In a Primary Care setting, this would usually apply to people with dementia in care homes.

Any person wishing to restrain a person who lacks the mental capacity to consent to this must apply to their local authority for a DoLS order.

Further information about DoLS can be found [here](#).