



# **Mental Capacity Assessment Tool Guidance**

August 2015

# Background

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This guidance has been produced to help support the use of the mental capacity assessment tool now available to Barnet, Enfield and Haringey GPs on EMIS and VISION IT systems.

For detailed information on the Mental Capacity Act 2005 (MCA) and Code of Practice (2007) please visit.

<http://www.legislation.gov.uk/ukpga/2005/9/contents>

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

The legislation applies in England and Wales to all those who work in health and social care, and is involved in the care of a person over the age of 16 who may lack the capacity to make a decision about their treatment and care.

The Mental Capacity Act 2005 provides a statutory framework for people who lack capacity to make decisions, or who have capacity and want to make preparations for a time when they may lack capacity in the future. It sets out who can take decisions, in which situations, and how they should go about it.

The Act sets out how capacity should be assessed and procedures for making decisions on behalf of people who lack mental capacity. “The underlying philosophy of the MCA is that any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision or act for themselves must be made in their best interests.”<sup>1</sup>

The Act covers day to day decisions such as what to eat and wear, and also more complex or life changing decisions such as whether to undertake major surgery.<sup>2</sup>

The Mental Capacity Act 2005 defines lack of capacity in the following way:

“A person lacks capacity in relation to a matter if, at the material time, he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain”.<sup>3</sup>

## The Five Statutory Principles

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

**Principle 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. Individuals should be given support to make their own decisions and all practicable steps should be taken to make that possible. Support might include:

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<sup>1</sup> Page 15 paragraph 1.3 Mental Capacity Act Code of Practice 2007 TSO

<sup>2</sup> Some decisions are NOT covered by the Act these can be found on pages 16 and 17 of the Code of Practice and relate to family relationships, the Mental Health Act (section 28), voting rights and unlawful killing or suicide (section 62).

<sup>3</sup> c9 Part 1 Persons who lack capacity Mental Capacity Act 2005

- Different forms of communication e.g. non-verbal such as sign language
- Information in different formats, e.g. photographs or flash cards
- Treating a medical condition that may be affecting an individual's capacity
- A structured programme to improve capacity to make particular decisions, especially relevant for individuals with learning disabilities

**Principle 3** a person is not to be treated as unable to make a decision merely because he makes an unwise decision. People have a right to make a decision that others do not agree with. If there is concern a person is acting in a way that isn't consistent with previous behaviour, or they are making decisions that may put them at risk of harm, then a mental capacity test should be undertaken.

**Principle 4** an act done or decision made, under the Act for or on behalf of a person who lack capacity must be done, or made in, the person **best interests**.

**Principle 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 person's rights and freedom** of action.

## How to use the mental capacity assessment form

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### **What triggered the mental capacity assessment?**

A mental capacity assessment should be undertaken when the capacity of a patient to consent to treatment is in doubt.

Lack of capacity cannot be demonstrated by referring to a person's age or appearance, condition or any aspect of their behaviour.

Capacity is about the ability to take a particular decision at the time it needs to be taken. It is decision-specific and time-specific.

Where the person's capacity to make a decision has come into doubt because of the persons behaviours, their circumstances or concerns raised, you should consider the following:

- Has sufficient effort been made to help and support the person to make the decision in question?
- Is the decision required imminently, or can it be delayed until the person has sufficient capacity to make the decision themselves? A person may temporarily lack capacity, e.g. if they are taking medication which makes them drowsy.

**The test for assessing mental capacity is in two stages.**

#### **Diagnostic test:**

Does the person have an impairment of, or disturbance in the functioning of, the mind or brain (whether permanent or temporary)?

Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?

### **Functional test:**

A person is unable to make a specific decision if they cannot:

#### **1. Understand** information relevant to the decision

- The person must be able to understand the nature of the decision and the consequences. The understanding doesn't need to be in depth, broad understanding is acceptable under the MCA 2005.
- The information should include possible options, and what happens if the decision is not made.
- All possible help must be given to the person to understand the information, including using simple language and visual aids if needed.
- The assessor should undertake the assessment in the best environment for the person and at the best time of day for them.

#### **2. Retain** that information

- The information only needs to be retained for long enough to make the decision in question. There is no set time limit for how long this is.
- The person only needs to have capacity at the time the decision needs to be made. It might be necessary to repeat the discussion again at another time before the action is taken to demonstrate that the person's decision is the same.
- It is important to help the person retain the information, use of notes, or recording the decision are steps that could be taken.

#### **3. Use or weigh** that information as part of the process of making the decision

- The person should be able to demonstrate that they understand the consequences of the decision.
- This might mean giving them time to think about it, and to weigh the advantages and disadvantages.
- It might be necessary to involve another person to help in the weighing up process, such as an advocate, carer, friend or family member.

#### **4. Communicate** their decision (whether by talking, using sign language or any other means)

- The assessor should ensure that the person's capacity is not misjudged because they have difficulty understanding them.

The assessor must record that the lack of capacity to make the decision is caused by the impairment or disturbance in the functioning of the person's mind or brain, and not due to other factors (such as outside influence or coercion, a history of being an indecisive person or the decision being significant and the person needs more time to consider it).

## **Best Interest Process**

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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 his or her best interests (principle 4).

The person who has to make the decision is known as the 'decision-maker' and normally will be a professional such as a doctor, nurse or social worker where decisions about treatment, care arrangements or accommodation have to be made: carers may be the decision maker for days to day care arrangements.

The MCA 2005 provides a checklist of factors to be followed to ensure decisions taken are in the person's best interest which are captured in the assessment form.

### **Encourage participation**

- do whatever is possible to permit and encourage the person to take part, or to improve their ability to take part, in making the decision
- Identify all relevant circumstances
- try to identify all the things that the person who lacks capacity would take into account if they were making the decision or acting for themselves

**Find out the person's views**, try to find out the views of the person who lacks capacity, including:

- The person's past and present wishes and feelings – these may have been expressed verbally, in writing or through behaviour or habits.
- any beliefs and values (e.g. religious, cultural, moral or political) that would be likely to influence the decision in question.
- any other factors the person themselves would be likely to consider if they were making the decision or acting for themselves.

### **Avoid discrimination**

- Do not make assumptions about someone's best interests simply on the basis of the person's age, appearance, condition or behaviour.
- Assess whether the person might regain capacity
- Consider whether the person is likely to regain capacity (e.g. after receiving medical treatment). If so, can the decision wait until then?

### **If the decision concerns life-sustaining treatment**

- Do not be motivated in any way by a desire to bring about the person's death.
- You should not make assumptions about the person's quality of life.

### **Consulting others**

- If it is practical and appropriate to do so, consult other people for their views about the person's best interests and to see if they have any information about the person's wishes and feelings, beliefs and values.

In particular, try to consult:

- anyone previously named by the person as someone to be consulted on either the decision in question or on similar issues
- anyone engaged in caring for the person, close relatives, friends or others who take an interest in the person's welfare
- any attorney appointed under a Lasting Power of Attorney or Enduring Power of Attorney made by the person

- Any deputy appointed by the Court of Protection to make decisions for the person.

For decisions about major medical treatment or where the person should live and where there is no-one who fits into any of the above categories, an Independent Mental Capacity Advocate (IMCA) must be consulted.

### **Independent Mental Capacity Advocate (IMCA) service**

The IMCA service was created under the MCA 2005 to support people who lack capacity to make certain important decisions and, at the time such decisions need to be made, who have no-one else (other than paid staff) to support and represent them or be consulted.

An IMCA must be instructed if the decision to be made relates to:

- An NHS body proposing to provide serious medical treatment
- An NHS body or local authority proposing to arrange accommodation (or change of accommodation) in hospital or care home, and
- The person will stay in hospital longer than 28 days, or
- They will stay in the care home for more than eight weeks

An IMCA may also be instructed to support someone concerning

- Care reviews
- Safeguarding processes. An IMCA can be instructed for those who need support during a safeguarding investigation, even if they have family or friends.

The information provided by the IMCA must be taken into account by the decision maker.

### **Avoid restricting the person's rights**

See if there are other options that may be less restrictive of the person's rights.

If you are making the decision under the Mental Capacity Act you must take the above steps, amongst others and weigh up the above factors in order to determine what is in the person's best interests. For more information you should refer to the Code of Practice.

## **Section 6 MCA (Restraint)**

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Section 6 permits restraint of a person who lacks capacity. Restraint is defined as:

- the use - or threat to use - force to make someone do something they are resisting;  
or
- Restricting a person's freedom of movement, whether they are resisting or not.

Restraint is only permitted if the person using it reasonably believes it is necessary to prevent harm to the person and it is proportionate response to the likelihood and seriousness of harm.

Less restrictive options must always be considered before restraint is used. The use of restraint must only be considered in the best interests of the person and must be the minimum needed to achieve the desired outcome.

Liberty restricting measures are not the same as liberty depriving measures. The difference between the two is one of degree or intensity, not nature or substance.

The MCA 2005 does not permit you to deprive a person who lacks capacity of their liberty - instead, this must be authorised by the Supervisory Body under the DoLS scheme or the Court (assuming of course that it is not a deprivation of liberty required for the purpose of providing him with emergency medical treatment for either a physical or mental disorder while a decision on a relevant issue is sought from the Court)

# Advance Decisions

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## **Lasting Power of Attorney LPA**

People can be given statutory authority to make treatment decisions on another person's behalf, once they have lost mental capacity, by making a **health and welfare lasting power of attorney**.

There are two types of lasting power of attorney, health and welfare and property and finance. A health and welfare LPA can be created while a person still has capacity to give authority to an attorney to make decisions when they are no longer able to consent to treatment or care. The attorney may be given power to make decisions about day to day care, consenting or refusing medical treatments, moving accommodation, refusing life sustaining treatment and more.

A lasting power of attorney must be registered with the Office of the Public Guardian before it is valid. Records must reflect whether an LPA has been registered, and what decisions are given to the attorney.

## **Advance Decision to Refuse Treatment**

An **advance decision** allows a person over the age of 18 to refuse a specific treatment in the future when they lack the capacity to consent to, or refuse, that treatment. The law acknowledges that people have the right to consent to or refuse treatment. And that this may be done in advance, even if this results in death, **as long as they have capacity to make the decision at the time it is being made**.

Under the Mental Capacity Act 2005 a valid and applicable advance decision has the same effect as a decision that is made at the time by a person who has capacity. For an advance decision to refuse treatment to be valid, health professionals must try to establish if:

- The patient has done anything since making the advance decision that would clearly suggest that they no longer agree with the advance decision.
- The patient has withdrawn the advance decision.
- Power has been given to an attorney to make the same treatment decision as covered in the advance decision.
- The patient would have changed their mind if they had known more about the current circumstances.

Advance decisions to refuse treatment for mental disorder may not be valid if the patient is, or may be, detained under the Mental Health Act 1983.

For an advance decision to refuse **life sustaining treatment to** apply, the patient must no longer have capacity to make the decision for themselves. The advance decision must also:

- State exactly what treatment is to be refused.
- Set out the circumstances when the refusal should apply.
- State that the refusal is to apply even if there is a risk to life.
- Be in writing.
- Be signed by the patient refusing the treatment or by another person in the patient's presence and by their direction.
- The signature must be witnessed and signed in the presence of the patient.

An advance decision which is not in relation to life sustaining treatment does not need to be in writing to be legally binding. However, this is still good practice.

The Court of Protection may be asked to decide whether the advance decision exists, is valid, or applicable to the current situation if the advance decision is called into question. While a decision is being made by the court, life sustaining treatment or treatment necessary to prevent a patient's deterioration may still be provided.

Advance decisions can only be made to refuse treatment; not to demand a treatment choice.

**Advance Statement or preferred priorities for care form.**

This is a non-legally binding document that those involved in treatment and care should take into consideration when making a best interests decision. It is a statement of the views and wishes of the individual (verbal or written), and might reflect treatment preferences.