

## WHAT IS THE MENTAL CAPACITY ACT 2005?

The Mental Capacity Act (MCA) 2005 was created to provide a legal framework to support and protect people aged 16 and above who may lack capacity to make specific decisions for themselves. It also supports people aged 18 and above to make formal plans for the future.

The MCA provides the following:-

- 5 Principles for us to follow in relation to mental capacity.
- A formal test for assessing mental capacity.
- A formal process for making best interest decisions for a person who lacks capacity to make a decision for themselves.
- A legal framework to make plans about who will make decisions if we lose capacity in the future (Lasting Power of Attorney or Deputyship).
- Special safeguards called Deprivation of Liberty Safeguards, for people living in circumstances which may amount to a deprivation of liberty if they lack capacity to consent.
- A special court called the Court of Protection, which can: make decisions about mental capacity and best interests, resolve disagreements, grant powers through deputyship orders, and authorise a deprivation of liberty.
- Protection for vulnerable people who lack mental capacity, through creation of a criminal offence of ill-treatment or neglect of a person, who lacks capacity.

## Who does the MCA 2005 apply to?

The MCA 2005 applies to anyone living in the UK over the age of 16, although some parts only apply from the age of 18 such as Deprivation of Liberty Safeguards and the ability to make a Lasting Power of Attorney (see additional leaflets on Deprivation of Liberty Safeguards and Lasting Power of Attorney).

## What are the 5 Principles of the MCA 2005?

1. A person is presumed to have capacity unless established otherwise.
2. A person is not to be treated as unable to make a decision unless all possible steps to help them make the decision have been taken.
3. A person should not be considered incapable of making a decision, simply because their choice appears unwise.
4. Any act done, or decision made, for a person who lacks capacity must be in their best interests.
5. Any decision made for a person who lacks capacity must be the least restrictive option possible.

## When should mental capacity be assessed?

A mental capacity assessment should only take place if there are concerns that the person may lack capacity to make the decision for themselves. Just because someone has a particular condition, such as for example dementia or a learning disability this does not mean that they will lack capacity to make decisions for themselves. Sometimes people are able to make some decisions for themselves, but not others. Someone may be able to make simple day to day decisions but may struggle with more complex decisions. For this reason, mental capacity decisions must be decision specific, we should not make assumptions that a person cannot make any decisions for themselves. Mental capacity decisions must also be time specific, undertaken at the time they are needed and reviewed if circumstances change.

## Who can assess mental capacity?

Anyone can assess someone's mental capacity to make a specific decision. There is nothing within the MCA 2005 that says the assessor has to be a particular professional or paid care giver. However, who is best placed to assess mental capacity will depend on the type of decision that needs to be made. For example, if the decision is about some form of medical treatment, a doctor might be the best person to assess someone's capacity to consent or decline the treatment. Equally a family member who provides care for a relative could assess mental capacity in relation to day to day care decisions.

## What is the test for Mental Capacity?

There are two parts to the test for mental capacity.

The first part is called the **Functional Test** and it involves establishing if the person is able to make the decision.

In order for a person to make the decision, they need to be able to do the following:-

- Understand the relevant information required to make the decision.
- Retain the relevant information long enough to make the decision.
- Be able to use and weight the relevant information, e.g. understand the pros and cons of making a particular decision.
- Communicate by any means what their decision would be. (this could be verbal or non verbal)

If the person can do all of the above, then they have the capacity to make the decision for themselves. If they fail one or more of the above then the second part of the test has to be considered.

The second part of the test is to consider if there is an impairment or disturbance in the functioning of the mind or brain, which affects their ability to pass the functional test. Such an impairment may be a formally diagnosed condition, or not. It may be a permanent condition, or it may be a temporary condition. A disturbance in the functioning of the mind or brain could be due to one of the following:-

- Brain Injury
- Dementia
- Learning disability
- Intoxication due to alcohol or drugs
- Delirium due to infection
- Concussion
- Emotional turmoil
- Excessive pain

These are just examples there may be other things affecting their ability to think clearly.

If a person cannot pass the functional test and this is caused by an impairment or disturbance in the functioning of the mind or brain, then they lack mental capacity to make the decision.

### What happens next if a person lacks capacity to make a decision?

If a person lacks capacity to make a decision, someone will have to make the decision for them. The person who makes the decision for them is called the decision maker, this could be:

- An attorney under a relevant lasting power of attorney.
- A Deputy appointed by the Court of Protection

- The person who has identified that a decision needs to be made
- A professional involved in the person's care or treatment
- A carer involved in day to day care.

Where there is an Attorney or a deputy who has relevant decision making powers, they will be the decision maker (see leaflet on Lasting Power of Attorney and Deputies).

### How are best interest decisions made?

Section 4 of The MCA 2005, provides a framework for best interest decisions. This is often referred to as the Best Interest Checklist. This checklist must be followed by all professionals, attorneys, deputies and paid carers who are involved making best interest decisions.

The Best Interest Checklist requires decision makers to do the following:-

- involve the person, who the decision is about.
- Ascertain the person's wishes, feelings and religious and cultural preferences.
- Consult with all interested parties including family, friends, professionals, advocates, attorneys or deputies.

Once this has been done the decision maker will look at all the options, make a final decision and inform the interested parties.

## Where can I find more information?

The MCA 2005 can be accessed on the following link: [MCA 2005](#)

The MCA Code of Practice can be accessed here: [MCA Code of Practice - GOV.UK](#)

Gloucestershire Health and Care NHS Foundation Trust  
leaflets:-

The MCA and Lasting Power of Attorney/ court appointed  
deputies

The MCA and Deprivation of Liberty Safeguards