



A guide to the Mental Capacity Act

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Introduction

Brain injury can significantly impair some people's ability to make decisions. In such cases, it may be necessary to make some decisions on their behalf and the Mental Capacity Act 2005 (the MCA) provides a legal framework to allow this.

The MCA sets out important legal principles concerning how people can be helped to make their own decisions and sets out rules for those who take decisions on their behalf. The MCA applies to **financial affairs, property, health and personal welfare**.

This factsheet provides a brief overview of how the MCA works. More details on the process of making decisions for someone else is provided in the Headway booklet *Supporting people to make decisions: applying the Mental Capacity Act*, which can be purchased from the Headway online shop at shop.headway.org.uk.

The MCA only applies to England and Wales. Scotland and Northern Ireland have their own legislation and further information is suggested in the 'Further reading' section. The Isle of Man and the Channel Islands currently have no equivalent legislation, and mental capacity issues are dealt with under common law.

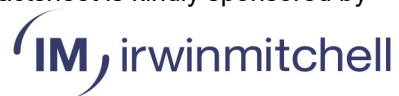
Key principles

The MCA sets out the following five fundamental principles:

- There is a presumption that a person has mental capacity unless proved otherwise
- Only after all practical steps have been taken to help a person make their own decision, should they be treated as incapable of doing so
- It should not be presumed that someone lacks mental capacity just because a person makes an 'unwise' decision
- Any acts done for a person lacking mental capacity should be done in their best interests (set out in more detail below)

Before acting for a person lacking mental capacity, consideration should be given as to the least restrictive way of achieving the desired outcome.

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These principles are set out in the MCA to ensure that people are involved as much as possible in decisions about their own personal affairs.

Defining whether a person lacks mental capacity

The MCA sets the following definition of when a person lacks mental capacity:

“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”.

The MCA also sets out that when considering whether a person lacks mental capacity the following should apply:

- It does not matter if the mental impairment is permanent or temporary
- Age, of itself, does not establish a lack of mental capacity
- An “unjustified assumption” of a person’s condition should not, of itself, establish a lack of mental capacity
- Lack of ability to communicate, of itself, does not establish a lack of mental capacity

How to assess mental capacity

The measure of whether a person has the mental capacity to make a decision is decision specific. This means that you have to look at:

- The particular decision that is to be made
- The person’s particular circumstances

You need to consider the complexity and magnitude of the particular decision and consider practically what it involves. There are then two main stages to assessing whether a person lacks capacity for a specific decision:

Stage 1 (diagnostic test): Does the person have “an impairment, or disturbance in the functioning of, the mind or brain”? A brain injury will usually mean that the person meets this requirement.

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Stage 2 (functional test): This stage has the following four criteria. Can the person:



- Understand information relevant to the decision?
- Retain that information long enough to make the decision?
- Use or weigh up that information when making the decision?
- Communicate their decision whether by talking, using sign language or any other means?

The MCA states that as long as you have **reasonable belief** that the person meets stage 1 and any of the four criteria of stage 2 then they can be said to lack capacity for the decision in question. All reasonable attempts must be made to help the person to communicate their decision.

Decisions that do not need authority

The MCA recognises that many everyday decisions have to be made for people who lack mental capacity. These can be ordinary decisions about a person's care, such as whether they ought to be bathed by a carer, or more serious decisions about consenting to hospital treatment or medical procedures.

Often, these decisions have to be made quickly or it is simply not practical to get formal authority. The MCA provides legal protection from liability for those who carry out the care and treatment of people who lack capacity to consent, provided that the person who carries out the care and treatment:

- Has reasonable belief that the person lacks capacity in relation to the matter in question
- Has reasonable belief that the action is in the best interests of the person concerned

It is likely that for important decisions, such as signing legal documents, it may be necessary to ask a medical expert to provide their professional opinion on a person's mental capacity.

In certain circumstances, such as when authority is required for financial decisions or where there is a disagreement as to what action is appropriate, it may be necessary to make an application to the Court of Protection (CoP).

The CoP may then either make a single decision about the matter or, if a series of linked decisions is required over a period of time, appoint a deputy to act on the person's behalf.



The duty to act in someone's best interests

As one of the five guiding principles of the MCA, the Court of Protection and anyone making decisions for another person is under a duty to act in that person's best interests.

The MCA sets out a checklist to be used when determining what is in a person's best interests. As far as possible the decision maker should consider:

- The person's past and present wishes and feelings (including any written statement made when he/she had capacity)
- The beliefs and values that the person would be likely to have if they had capacity
- Factors the person would consider if able to do so

The views of appropriate people should be considered, such as anyone specifically named by the person, or their close family and carers.

The Court of Protection

The Court of Protection (CoP) has an important role in making decisions on behalf of people who lack mental capacity. It has a number of important powers:

- It can decide whether or not someone lacks capacity to make a decision for themselves
- When a person cannot make their own decisions, it has the power to make decisions for them about their financial affairs, property and/or their health and personal welfare
- If a series of linked decisions will be required the CoP can appoint a deputy to make the decisions

The role of a deputy

If the CoP appoints a deputy to make decisions for a person, they are required to act within the terms of the court order that appoints them, the principles of the MCA and the Code of Practice.

The deputy should give careful consideration to the wording in the Court order. This is a document which bears the Court of Protection's seal (an impressed stamp in one corner) and gives the Deputy their authority. The deputy's power and authority is limited to that set out in the order.



Any deputy will have to consider the key principles of the MCA when making decisions. In particular, a person should be allowed, encouraged and assisted to make their own decisions whenever they are able to do so. Any decision made on their behalf must be made in their best interests.

Making arrangements in advance

The MCA allows for people to make arrangements in the event of losing decision-making capacity in the future. There are two main forms of prior arrangements: 'Lasting Powers of Attorney' and 'advance decisions to refuse medical treatment'.

Lasting Powers of Attorney

A Lasting Power of Attorney (LPA) can be made by a person to authorise decisions to be made on their behalf if they ever become unable to make their own. LPAs can be appointed for health, personal welfare, property and financial decisions.

The main aspects of LPA agreements are:

- They enable a person to appoint someone they know and trust to make decisions on their behalf
- They must be signed while the person has the mental capacity to fully understand what they are signing
- They must be registered with the Office of the Public Guardian (OPG) before they can be used
- The person can specify in writing the nature and extent of the decision-making power they are giving to their attorney
- The form contains a 'Certificate of Capacity' that needs to be completed by a professional or someone who knows the person, to confirm that the person understands what they are signing
- If a person wishes their attorney to be able to refuse consent to life-sustaining treatment this must be specified in a health and welfare LPA

An attorney is always under a duty to consider and comply with the key principles of the MCA. In particular, a person should be allowed, encouraged and assisted to make their own decisions whenever they are able to do so. Any decision made on their behalf must be made in the person's best interests.

Advance decisions to refuse medical treatment

The MCA sets out rules for making decisions about what medical treatment a person may want to refuse in the future: for example, if they were in an accident or had a serious



illness. In order to do this the MCA allows a person to make an advance decision to refuse treatment, which is sometimes referred to as a 'Living Will'.

Legal advice should be sought before making an advance decision. The MCA sets out the following rules:

- It must be made while the person has the mental capacity to fully understand what they are doing
- It must be in writing and witnessed if it is to apply to the refusal of life sustaining treatment
- When doctors consider withholding treatment because of an advance decision, they need to be satisfied that it remains valid and applicable at the relevant time
- Doctors can still provide necessary treatment if they have any doubt that the advance decision is valid and applicable
- In situations of uncertainty a decision of the Court of Protection can be sought

Summary

The MCA allows decisions to be made on behalf of those who lack the capacity to make them. It provides safeguards to protect the independence of people who lack capacity and allows them to be involved as much as possible in the decisions.

This factsheet has provided a basic overview of the legislation. The following sections signpost to more detailed information and organisations which can help.

To discuss any issues raised in this factsheet, or to find details of our local groups and branches, please contact the Headway helpline free of charge on 0808 800 2244 (Monday - Friday, 9am-5pm) or by email at helpline@headway.org.uk.

You can also find more information and contact details of groups and branches on our website at www.headway.org.uk/supporting-you.

Further reading

The Headway booklet *Mental capacity: supporting decision making after brain injury* provides more detailed information on the Mental Capacity Act and guidance on how to apply to the Court of Protection. You can download the booklet from the website at www.headway.org.uk/information-library or by calling 0115 924 0800. Limited free hard copies are available, when appropriate, from the Headway helpline, or can be purchased from shop.headway.org.uk.



Detailed information documents on the Mental Capacity Act are available on the government website at www.gov.uk/government/collections/mental-capacity-act-making-decisions.

Information and application forms regarding becoming a deputy are available on the Office of the Public Guardian website at www.gov.uk/government/organisations/office-of-the-public-guardian.

The OPG's factsheet *A Guide for Deputies appointed by the Court of Protection* is available at www.justice.gov.uk/downloads/protecting-the-vulnerable/court-funds-office/court-of-protection/role-duties-deputy/OPG510-0409-1.pdf.

Further information on mental capacity and mental health legislation in Scotland is provided in the following Headway factsheets, which can be downloaded from the website at www.headway.org.uk/information-library.

- *A guide to the Adults with Incapacity (Scotland) Act*
- *A guide to the Mental Health (Care & Treatment) (Scotland) Act*

Information on mental capacity and mental health legislation in Northern Ireland is available at www.legislation.gov.uk/nia/2016/18/contents/enacted.

Useful organisations

The key organisations regarding the Mental Capacity Act are the following:

The Court of Protection

Tel: 0300 456 4600

Email: courtofprotectionenquiries@hmcts.gsi.gov.uk

Web: www.gov.uk/court-of-protection

Office of the Public Guardian

Tel: 0300 456 0300

Email: customerservices@publicguardian.gsi.gov.uk

Web: www.gov.uk/government/organisations/office-of-the-public-guardian

Other organisations it is useful to know about include:

Association of Independent Visitors

Web: www.aivuk.org.uk

Citizens Advice

Web: www.citizensadvice.org.uk



Civil Legal Advice

Helpline: 0345 345 4 345

Web: www.gov.uk/civil-legal-advice

Court Funds Office (CFO)

Tel: 0300 0200 199

Email: enquiries@cfo.gsi.gov.uk

Web: www.gov.uk/contact-court-funds-office

The Law Society (England & Wales)

Web: www.lawsociety.org.uk

Legal Ombudsman

Tel: 0300 555 0333

Email: enquiries@legalombudsman.org.uk

Website: www.legalombudsman.org.uk

Solicitors Regulation Authority

Tel: 0370 606 2555

Web: www.sra.org.uk

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For more information and tips on living with brain injury, visit our Information Library at www.headway.org.uk/information-library.