



## Making decisions

A guide for people who work in health  
and social care

# Making decisions

## A guide for people who work in health and social care

Helping people who are unable to make  
some decisions for themselves

This booklet provides introductory information on the Mental Capacity Act 2005 and how it will affect the way you work. It is not a statutory Code of Practice issued under the Mental Capacity Act 2005 and is not a guide to how the law will apply to specific situations.

This document has been produced by:

Ministry of  
**JUSTICE**



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

---

In association with the National Care Association:



## Acknowledgements

The Mental Capacity Implementation Programme (MCIP) published this booklet. MCIP is a joint government programme between the Ministry of Justice, the Department of Health, the Office of the Public Guardian and the Welsh Assembly Government that was established to implement the organisation, processes and procedures to launch the Mental Capacity Act.

We are very grateful to Sheila Scott, Chief Executive of the National Care Association, who wrote this booklet assisted by Zoe Sampson, Ruth Scott and Viv Shepherd. They were supported by Nadra Ahmed and Dick Barton and three focus groups.

We are also very grateful to our Advisory Group which was made up of organisations who work with or represent people who work in health and social care. They played an important role in sharing their views and perspectives on the booklet and helped us to reflect on our work.

## Contents

<b>1</b>	<b>Introduction</b>	<b>6</b>
<b>2</b>	<b>What is mental capacity?</b>	<b>7</b>
<b>3</b>	<b>What is the Mental Capacity Act and what changes does it introduce?</b>	<b>9</b>
	What is the Mental Capacity Act?	9
	The Code of Practice	10
	What changes does the Mental Capacity Act introduce?	11
<b>4</b>	<b>The five principles of the MCA</b>	<b>13</b>
<b>5</b>	<b>Helping people to make decisions for themselves</b>	<b>14</b>
<b>6</b>	<b>Assessing capacity</b>	<b>17</b>
	When should capacity be assessed?	18
	The test to assess capacity	18
	Challenging the result of an assessment of capacity	20
<b>7</b>	<b>Best interests</b>	<b>21</b>
	What is ‘best interests’?	21
	What should I do if there is a dispute about ‘best interests’?	23
<b>8</b>	<b>The Independent Mental Capacity Advocate (IMCA) service</b>	<b>24</b>
<b>9</b>	<b>Providing care or treatment to people who lack capacity</b>	<b>27</b>
	How does the Mental Capacity Act protect people who work in health and social care?	27
	Information for people who work in social care	27
	Information for people who work in health care	28
	The use of restraint	29
	Deprivation of Liberty Safeguards	30
	What are the Mental Capacity Act 2005 Deprivation of Liberty Safeguards?	30
	Protecting people who lack capacity from ill-treatment or wilful neglect	31

<b>10</b>	<b>Providing care or treatment for people who have planned ahead</b>	<b>33</b>
	Lasting Powers of Attorney	33
	Advance decisions to refuse treatment	36
	What are the requirements for advance decisions?	36
	Advance decisions to refuse life-sustaining treatment	37
	Conscientious objection	39
	Liability of people who work in health and social care	39
	Disputes and disagreements about advance decisions	39
	Dealing with advance decisions that were made before October 2007	39
	Statements of wishes, feelings, beliefs and values	40
<b>11</b>	<b>Confidentiality and record-keeping</b>	<b>41</b>
	Confidentiality	41
	Record-keeping	42
<b>12</b>	<b>Public bodies and services created by the Mental Capacity Act</b>	<b>43</b>
	Court of Protection and Deputies	43
	The Public Guardian	44
<b>13</b>	<b>Research involving people who may lack capacity</b>	<b>45</b>
<b>14</b>	<b>Interface with other legislation, policy and procedures</b>	<b>47</b>
	The MCA and the Mental Health Act 1983	47
	The MCA and assessment processes across health and social care	48
	The MCA and Social Security appointees	50
	The MCA and Human Tissue Act 2004	50
	The MCA and children and young people	50
<b>15</b>	<b>What if I want to know more about the MCA?</b>	<b>52</b>
<b>16</b>	<b>Some useful contacts</b>	<b>54</b>

# 1. Introduction

## About this booklet

This booklet tells you about the Mental Capacity Act (MCA), which applies to England and Wales and affects the way you work.

The MCA applies to **everyone who works in health and social care** and is involved in the care, treatment or support of people aged 16 and over who live in England and Wales and who are unable to make all or some decisions for themselves. The inability to make a decision could be caused by a psychiatric illness (for example, dementia), a learning disability, mental health problems, a brain injury or a stroke.

People who work in health and social care such as doctors, nurses, dentists, psychologists, occupational, speech and language therapists, social workers, residential and care home managers, care staff (including domiciliary care workers), support workers (including people who work in supported housing) and any other health and social care workers are affected by the MCA and need to know about it.

Although this booklet should give you a broad overview of the MCA and its main implications for you in your work, you should refer to the Code of Practice for the Mental Capacity Act (**see part 3**), which has more detailed information and guidance. There is also a list of more detailed sources of information and a list useful contacts at the back of this booklet.

This booklet is **not** about detention or compulsory treatment under the Mental Health Act 1983. The 1983 Act is primarily about people who are diagnosed as having a mental health problem which requires that they be detained or treated in the interests of their own health or safety or with a view to protecting other people.

## 2. What is mental capacity?

Having mental capacity means that a person is able to make their own decisions. The Mental Capacity Act says that a person is unable to make a particular decision if they cannot do one or more of the following four things.

- Understand information given to them.
- Retain that information long enough to be able to make the decision.
- Weigh up the information available to make the decision.
- Communicate their decision - this could be by talking, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand.

We all have problems making decisions from time to time, but the Mental Capacity Act is about more than that. It is specifically designed to cover situations where someone is unable to make a decision because the way their mind or brain works is affected, for instance, by illness or disability, or the effects of drugs or alcohol.

A lack of mental capacity could be due to:

- a stroke or brain injury;
- a mental health problem;
- dementia;
- a learning disability;
- confusion, drowsiness or unconsciousness because of an illness or the treatment for it; or
- substance misuse.



The type of decisions that are covered by the MCA range from day-to-day decisions such as what to wear or eat, through to more serious decisions about where to live, having an operation or what to do with a person's finances and property.

### **Decisions that are not covered by the new law:**

Some types of decisions (such as marriage or civil partnership, divorce, sexual relationships, adoption and voting) can never be made by another person on behalf of a person who lacks capacity. This is because these decisions or actions are either so personal to the individual concerned or because other laws govern them and the Mental Capacity Act does not change this.

The MCA applies to situations where a person may be unable to make a **particular decision at a particular time** because their mind or brain is affected, for instance, by illness or disability, or the effects of drugs or alcohol. For example someone may be unable to make a decision when they are depressed but may be able to make the decision when they are feeling better. It may be the case that the person lacks capacity to make a particular decision at a particular time but this does **not** mean that a person lacks all capacity to make any decisions at all. For example a person with a learning disability may lack the capacity to make some major decisions, for instance where they should live, but this does not necessarily mean that they cannot decide what to eat, wear and do each day.

It is very important that you remember at all times that lack of capacity may not be a permanent condition. Assessments of capacity should be time and decision specific (**see part 6 of this booklet which gives details of assessing capacity**).

### 3. What is the Mental Capacity Act and what changes does it introduce?

#### What is the Mental Capacity Act?

- The MCA applies in England and Wales to everyone who works in health and social care and is involved in the care, treatment or support of people over 16 years of age who may lack capacity to make decisions for themselves.
- It is based on best practice and creates a single, coherent framework for dealing with mental capacity issues and an improved system for settling disputes, dealing with personal welfare issues and the property and affairs of people who lack capacity.
- It puts the individual who lacks capacity at the heart of decision making and places a strong emphasis on supporting and enabling the individual to make his/her own decisions. If they are unable to do this it emphasises that they should be involved in the decision making process as far as possible.
- It introduces important new safeguards for people who lack capacity and the people who work with, support or care for them.
- It is underpinned by five key principles which must inform everything you do when providing care or treatment for a person who lacks capacity (see [part 4](#) of this booklet).
- There is a Code of Practice which explains how the MCA works on a day-to-day basis.

## The Code of Practice

The Code explains how the MCA works on a day-to-day basis and provides guidance to all those working with people who may lack capacity. The Code explains in more detail what the key features of the legislation are and some of the practical steps that people using and interpreting the new law need to take into consideration. If you work with people who lack capacity and you are a professional and/or you are paid for the work you do then you have a **legal duty to have regard to the Code**.

Having regard involves paying attention to the Code and being able to show that you are familiar with the guidance in it and if you don't follow the Code you should be able to give convincing reasons why not.

The Code of Practice is available online at:

[www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)

and you can order hard copies from the TSO by calling 0870 600 5522 or emailing [customerservices@tso.co.uk](mailto:customerservices@tso.co.uk)

## What changes does the Mental Capacity Act introduce?

- There must always be the presumption that people you provide care or treatment for have capacity to make decisions for themselves.
- A single clear test for assessing whether a person lacks capacity to make a decision (see part 6).
- A check list of key factors which provides a starting point to help you determine what is in the 'best interests' of a person lacking capacity (part 7).
- Several ways that people can influence what happens to them if they are unable to make particular decisions in the future, including advance decisions to refuse medical treatment, statements of wishes and feelings, and creating a Lasting Power of Attorney (LPA) (part 10).
- Clarification about the actions you can take if someone does lack capacity, and the legal safeguards that govern this (part 9).
- An obligation for you to consult, where practical and appropriate, people who are involved in caring for the person who lacks capacity and anyone interested in their welfare (for example family members, friends, partners and carers) about decisions affecting that person (part 7). If there is an Attorney under an LPA (part 10), a Deputy appointed by the Court (part 12) or named person, you also have an obligation to consult them.
- An advocacy service called the Independent Mental Capacity Advocate (IMCA) service becomes involved in specific circumstances where there is no one appropriate who can be consulted (part 8).

- A new criminal offence of ill-treatment or wilful neglect of people who lack capacity (part 9).
- New safeguards for undertaking research involving people who lack capacity (part 13).
- A new Court of Protection and a new public official (the Public Guardian) who is supported by the Office of the Public Guardian (OPG) (part 12).

## 4. The five principles of the MCA

The MCA has five key principles which emphasise the fundamental concepts and core values of the MCA. You must always bear these in mind when you are working with, or providing care or treatment for people who lack capacity.

The five principles are:

- 1 Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. This means that you cannot assume that someone cannot make a decision for themselves just because they have a particular medical condition or disability.
- 2 People must be supported as much as possible to make a decision before anyone concludes that they cannot make their own decision. This means that you should make every effort to encourage and support the person to make the decision for themselves. See [part 5](#) of this booklet for more information on how to do this. If a lack of capacity is established, it is still important that you involve the person as far as possible in making decisions.
- 3 People have the right to make what others might regard an unwise or eccentric decision. Everyone has their own values, beliefs and preferences which may not be the same as those of other people. You cannot treat them as lacking capacity for that reason.
- 4 Anything done for or on behalf of a person who lacks mental capacity must be done in their **best interests**. See [part 7](#) of this booklet for more information on how to go about deciding what is in the best interests of the person you are providing care or treatment for.
- 5 Anything done for, or on behalf of, people without capacity should be the least restrictive of their basic rights and freedoms. This means that when you do anything to or for a person who lacks capacity you must choose the option that is in their best interests and you must consider whether you could do this in a way that interferes less with their rights and freedom of action.

## 5. Helping people to make decisions for themselves

When a person in your care needs to make a decision you must start from the assumption that the person has capacity to make the decision in question (**principle 1**). You should make every effort to encourage and support the person to make the decision themselves (**principle 2**) and you will have to consider a number of factors to assist in the decision making.

These could include:

- Does the person have all the relevant information needed to make the decision? If there is a choice, has information been given on the alternatives?
- Could the information be explained or presented in a way that is easier for the person to understand? Help should be given to communicate information wherever necessary. For example, a person with a learning disability might find it easier to communicate using pictures, photographs, videos, tapes or sign language.
- Are there particular times of the day when a person's understanding is better or is there a particular place where they feel more at ease and able to make a decision? For example, if a person becomes drowsy soon after they have taken their medication this would not be a good time for them to make a decision.
- Can anyone else help or support the person to understand information or make a choice? For example, a relative, friend or advocate.

**Example:**

Michael had a stroke 3 years ago. He has been unwell and is now in hospital. The doctor wishes to undertake further tests involving a general anaesthetic.

The doctor discusses the procedure with Michael who becomes anxious and repeatedly asks why he needs an anaesthetic.

This is not an emergency but the doctor feels that Michael may lack capacity to consent as he does not seem to be able to understand and remember what the doctor is saying. So the doctor consults Michael's wife who explains that ever since the stroke Michael gets anxious when he is away from home and the people and things he is familiar with. She tells the doctor that it would help if she was there when the doctor explained the tests to Michael as she can reassure him and explain things to him.

The doctor discusses the tests again with Michael when his wife is present. Michael is at first reluctant to agree to the anaesthetic but his wife explains she will be there when he wakes up and that he will not have to stay in the hospital overnight. With the help of his wife, Michael understands what the doctor is saying and is able to make a decision and give his consent to the tests.

You must remember that if a person makes a decision which you think is eccentric or unwise, this does not necessarily mean that the person lacks capacity to make the decision (**Principle 3**).



### Example:

As a result of a car accident a few years ago Margie is paralysed and also has brain damage.

Margie has received significant compensation for her injuries.

She wants to use part of the money on cosmetic surgery.

Her family agree that she understands the financial implications of spending a portion of the compensation on cosmetic surgery. However, they are concerned that she does not understand the risks that the procedure will involve.

The cosmetic surgeon has had several consultations with Margie. She has made it clear that she understands the implications both physically and financially and is determined to have the surgery. She thinks it will increase her self esteem and confidence and that these benefits outweigh the potential risks.

The surgeon also asks a colleague to discuss the implications of the surgery with Margie. His colleague concludes that Margie has the capacity to make the decision and makes a note in the health records.

When there is reason to believe that a person lacks capacity to make a decision you are expected to consider the following:

- Has everything been done to help and support the person to make a decision?
- Does this decision need to be made without delay?
- If not, is it possible to wait until the person does have the capacity to make the decision for himself or herself? For example, a person may be drowsy or disorientated because of the medication they are taking.

If the person's ability to make a decision still seems questionable then you need to move onto the next phase of assessing capacity as set out in [part 6](#) of this booklet.

## 6. Assessing capacity

You should always start from the assumption that the person has capacity to make the decision in question (**principle 1**). Under the MCA, you are required to make an assessment of capacity before carrying out any care or treatment. Of course the more serious the decision, the more formal the assessment of capacity will need to be. Whether and how such assessments are recorded may vary according to the seriousness of the decision made.

You should always bear in mind that just because someone lacks capacity to make a decision on one occasion that does not mean that they will never have capacity to make a decision in the future, or about a different matter.

### **Example:**

Ridwaan has dementia and lives in a residential care home.

Like many people with dementia his mental capacity fluctuates.

On most days he can make all the basic decisions about daily living such as washing, eating and drinking etc.

However, sometimes he lacks capacity to make the most basic of decisions, such as what to eat.

On these occasions, a possible entry in the care records could be: “At lunch time today, Ridwaan lacked capacity to decide what to eat, so a decision about this was made in his best interests. At each mealtime we will assess his capacity to decide what he wants to eat. If Ridwaan has capacity to make this decision at any point he will decide what to eat”.

## When should capacity be assessed?

The MCA makes clear that any assessment of a person's capacity must be 'decision-specific', this means that:

- the assessment of capacity must be about the particular decision that has to be made at a particular time and is not about a range of decisions;
- if someone cannot make complex decisions this does not mean that they cannot make simple decisions. For example, it is possible that someone with learning disabilities could make decisions about what to wear or eat but not about whether or not they need to live in a care home; and
- you cannot decide that someone lacks capacity based upon their age, appearance, condition or behaviour alone.

## The test to assess capacity

You will not normally make an assessment of capacity without involving family, friends and/or carers or an Independent Mental Capacity Advocate (IMCA) if one has been appointed (see part 8). This will depend on the situation and the decision that needs to be made.

You should never express an opinion, without first conducting a proper assessment of the person's capacity to make a decision.

## The functional test of capacity

In order to decide whether an individual has the mental capacity to make a particular decision, you must first decide whether there is an impairment of, or disturbance in, the functioning of the person's mind or brain (it does not matter if this is permanent or temporary).

If so, the second question you must answer is does the impairment or disturbance make the person unable to make the particular decision?

The person will be unable to make the particular decision if after all appropriate help and support to make the decision has been given to them (**principle 2**) they cannot do the following things.

- 1 Understand the information relevant to that decision, including understanding the likely consequences of making, or not making the decision.
- 2 Retain that information.
- 3 Use or weigh that information as part of the process of making the decision.
- 4 Communicate their decision (whether by talking, using sign language or any other means).

Every effort should be made to find ways of communicating with someone before deciding that they lack the capacity to make a decision based solely on their inability to communicate. Very few people will lack capacity on this ground alone. Those who do might include people who are unconscious or in a coma or who suffer from a very rare neurological condition known as 'locked-in syndrome'. In many other cases such simple actions as blinking or squeezing a hand may be enough to communicate a decision. The input of professionals with specialised skills in verbal and non-verbal communication is likely to be required when making decisions in this area.

An assessment must be made on the balance of probabilities - is it more likely than not that the person lacks capacity? You should be able to show in your records why you have come to the conclusion that the person lacks capacity to make the particular decision.

## Challenging the result of an assessment of capacity

Sometimes the assessment that you or a colleague has made will be challenged.

This may be by the person who has been assessed or by someone acting for them, for instance a relative or an advocate.

When an assessment is challenged, the person could seek resolution in the following ways.

- The first step will always be to raise the matter with the person who did the assessment. The assessor's records will be an important part of this process.
- A second opinion may be useful in some cases.
- Involve an advocate (not an IMCA) who is independent of all parties involved.
- Local complaints procedures.
- Mediation.
- Case Conference.
- If a resolution is not possible they can apply to the Court of Protection (see part 12) to seek a ruling.

For more detailed guidance on channels for resolving disagreements you should refer to the Code of Practice.

## 7. Best interests

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 the carer responsible for the day to day care, or a professional such as a doctor, nurse or social worker where decisions about treatment, care arrangements or accommodation have to be made.

### What is ‘best interests’?

The law gives a checklist of key factors which you must consider when working out what is in the best interests of a person who lacks capacity. This list is not exhaustive and you should refer to the Code of Practice for more details.

- It is important not to make assumptions about someone’s best interests merely on the basis of the person’s age or appearance, condition or any aspect of their behaviour.
- The decision-maker must consider all the relevant circumstances relating to the decision in question.
- The decision-maker must consider whether the person is likely to regain capacity (for example, after receiving medical treatment). If so, can the decision or act wait until then?
- The decision-maker must involve the person as fully as possible in the decision that is being made on their behalf.
- If the decision concerns the provision or withdrawal of life-sustaining treatment the decision-maker must not be motivated by a desire to bring about the person’s death.

- The decision maker must in particular consider:
  - the person's past and present wishes and feelings (in particular if they have been written down); and
  - any beliefs and values (for example, religious, cultural or moral) that would be likely to influence the decision in question and any other relevant factors.
- As far as possible the decision-maker must consult other people if it is appropriate to do so and take into account their views as to what would be in the best interests of the person lacking capacity, especially:
  - anyone previously named by the person lacking capacity as someone to be consulted;
  - carers, close relatives or close friends or anyone else interested in the person's welfare;
  - any Attorney appointed under a Lasting Power of Attorney; and
  - any Deputy appointed by the Court of Protection to make decisions for the person.

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.

For decisions about serious medical treatment or certain changes of accommodation and where there is no one who fits into any of the above categories, you should consider whether you need to involve an Independent Mental Capacity Advocate (IMCA) (see part 8).

## What should I do if there is a dispute about best interests?

Family and friends will not always agree about what is in the best interests of an individual.

If you are the decision-maker you will need to clearly demonstrate in your record keeping that you have made a decision based on all available evidence and taken into account all the conflicting views.

If there is a dispute, the following things might assist you in determining what is in the person's best interests.

- Involve an advocate who is independent of all the parties involved.
- Get a second opinion.
- Hold a formal or informal case conference.
- Go to mediation.
- An application could be made to the Court of Protection for a ruling.



## 8. The Independent Mental Capacity Advocate (IMCA) service

In most situations, people who lack capacity will have a network of support from family members or friends who take an interest in their welfare, or from a Deputy (see part 12) or an Attorney appointed under an Lasting Power of Attorney (see part 10). However, some people who lack capacity may have no one to support them (other than paid staff) with major, potentially life-changing decisions so the MCA created an Independent Mental Capacity Advocate (IMCA) who will represent and support them.

An IMCA is a specific type of advocate that has to be involved if there is no-one appropriate who can be consulted. An IMCA is not the decision-maker, but the decision-maker has a duty to take into account the information given by the IMCA.

The IMCA service is provided in each local authority area in England and in each local health board area in Wales.

An IMCA will only be involved if:

- the decision is about serious medical treatment provided by the NHS;
- it is proposed that the person be moved into long-term care of more than 28 days in a hospital or 8 weeks in a care home; or
- a long-term move (8 weeks or more) to different accommodation is being considered, for example, to a different hospital or care home;

in England, local authorities and the NHS, and in Wales local authorities and local health boards, have been given powers to extend the IMCA service to specific situations if they are satisfied that an IMCA would provide particular benefit. These are:

- care reviews about accommodation or changes to accommodation; and
- adult protection cases (even if the person who lacks capacity has family and/or friends).

However, an IMCA does **not** have to be involved if the treatment is to be given under the Mental Health Act 1983, or the person concerned is required under the Mental Health Act to go into the hospital or home in question.

### **The duties of an IMCA are to:**

- support the person who lacks capacity and represent their views and interests to the decision-maker;
- obtain and evaluate information - an IMCA can talk to the patient in private and examine, and where appropriate, take copies of health and social care records such as clinical records, care plans or social care assessment documents;
- as far as possible, ascertain the person's wishes and feelings, beliefs and values;
- ascertain alternative courses of action;
- obtain a further medical opinion, if necessary; and
- prepare a report for the person who instructed them.

If an IMCA disagrees with the decision made, they can also challenge the decision-maker.

If you are the decision-maker in the NHS or local authority (in England) or local health board (in Wales) it is your duty to instruct the IMCA before making the decision (apart from in emergency situations). Local IMCA providers and commissioners will ensure that the necessary contacts are widely circulated so that decision-makers are able to contact IMCA provider(s) speedily when necessary.

### Example:

Jamil is an adult with severe learning disabilities and both his parents have recently died.

Jamil needs heart bypass surgery. This is the first time since his parents died that a decision needs to be made in relation to Jamil and he has no other family and friends or anyone else to represent or support him.

Although he is able to make decisions about his day to day life he lacks capacity to consent to the operation.

An IMCA will therefore be instructed to find out as far as possible Jamil's views and represent them to the doctor who will then decide whether or not it is in Jamil's best interests to go ahead with the operation.

If you need to instruct an IMCA you can get more detailed guidance and information on the IMCA service from:

- The Code of Practice
- The Department of Health IMCA web pages, including information on the IMCA pilots, IMCA Commissioning Guidance, information on IMCA training materials and also guidance on interpreting the regulations extending the IMCA service to accommodation reviews and adult protection cases: [www.dh.gov.uk/imca](http://www.dh.gov.uk/imca)
- IMCA regulations for England which detail the role and functions of the IMCA: [www.opsi.gov.uk/si/si2006/20061832.htm](http://www.opsi.gov.uk/si/si2006/20061832.htm)  
[www.opsi.gov.uk/si/si2006/20062883.htm](http://www.opsi.gov.uk/si/si2006/20062883.htm)
- Draft IMCA regulations for Wales which detail the role and functions of the IMCA: email [sarah.austin@wales.gsi.gov.uk](mailto:sarah.austin@wales.gsi.gov.uk)

## 9. Providing care or treatment to people who lack capacity

### How does the MCA protect you if you work in health and social care?

The MCA provides legal protection from liability for carrying out certain actions in connection with the care and treatment of people who lack capacity to consent, provided that:

- you have observed the principles of the MCA;
- you have carried out an assessment of capacity and reasonably believe that the person lacks capacity in relation to the matter in question (part 6); and
- you reasonably believe the action you have taken is in the best interests of the person (part 7).

Some decisions that you make could result in major life changes or have significant consequences for the person concerned and these need particularly careful consideration. For example, a change of residence, perhaps into a care home or nursing home; or major decisions about healthcare and medical treatment.

### Information for people who work in social care

Providing you have complied with the MCA in assessing a person's capacity and have acted in the person's best interests, you can carry out many aspects of a person's personal care without their consent and have protection from liability in doing so.

Actions concerning a person's care that may have protection from liability may include:

- helping with washing, dressing or attending to personal hygiene;
- help with eating and drinking;
- helping people to walk and assistance with transport;

- help with arranging household services such as power supplies, housework, repairs or maintenance;
- acts performed in relation to domiciliary care or other services;
- acts performed in relation to other community care services (such as day care, residential accommodation or nursing care);
- acts associated with a change of residence;
- acts associated with the person's safety; and
- acts associated with adult protection procedures.

As such acts may be disputed it is in your interests to keep a record of the steps taken and the factors considered in doing so. How detailed that will be may vary according to the seriousness of the action.

In emergencies, it will often be in the person's best interests for you to provide urgent care without delay.

### Information for people who work in health care

Providing you have complied with the MCA in assessing a person's capacity and have acted in the person's best interests you will be able to diagnose and treat patients who do not have the capacity to give their consent. For example:

- diagnostic examinations and tests;
- assessments;
- medical and dental treatment;
- surgical procedures;
- admission to hospital for assessment or treatment (except for people who are liable to be detained under the Mental Health Act 1983. See [part 14](#) for information on the interface between the MCA and the Mental Health Act 1983);
- nursing care; and
- emergency procedures (such as cardiopulmonary resuscitation).

It is important to keep a full record of what has happened. The protection from liability will only be available if you can demonstrate that you have assessed capacity (see part 6), reasonably believe it to be lacking and then acted in what you reasonably believe to be in the person's best interests (see part 7).

In emergencies, it will often be in a person's best interests for you to provide urgent treatment without delay.

There are some decisions about medical treatment that are so serious that each case should go to the Court of Protection. For more detailed information you should refer to the Code of Practice.

The Department of Health's consent guidance and model consent forms are available at: [www.dh.gov.uk/consent](http://www.dh.gov.uk/consent)

## The use of restraint

Issues relating to restraint may be of particular concern to you.

Restraint covers a wide range of actions, including the use, or threat, of force to do something that the person concerned resists, for example by using cot sides or confining people's movements or a restriction of his or her liberty of movement (falling short of a restriction that would deprive them of their liberty).

The MCA identifies two additional conditions that must be satisfied in order for protection from liability for restraint to be available.

- You must reasonably believe that it is necessary to restrain the person who lacks capacity in order to prevent them coming to harm.
- Any restraint must be reasonable and in proportion to the potential harm.

Using excessive restraint could leave you liable to a range of civil and criminal penalties. For instance, it may be necessary to accompany someone when going out because they cannot cross roads safely, but it may be unreasonable for you to stop them from going outdoors all together.

## Deprivation of Liberty Safeguards

These safeguards are designed to protect people lacking capacity who need to be deprived of their liberty for their own safety and who are not capable of making decisions themselves about arrangements that should be made for their care and treatment. They were introduced into the Mental Capacity Act 2005 by the Mental Health Act 2007 (which received Royal Assent on 19 July 2007) and apply to people in care homes or hospitals.

## What are the Mental Capacity Act 2005 Deprivation of Liberty Safeguards?

The Mental Capacity Act 2005 Deprivation of Liberty Safeguards (MCA DOLS), which come into force in England on 1 April 2009, provide a legal framework to prevent unlawful deprivation of liberty occurring. They protect vulnerable people in hospitals or care homes who lack the capacity to consent to the arrangements made for their care and/or treatment but who need to be deprived of their liberty in their own best interests to protect them from harm. Primary care trusts (PCTs), local authorities, hospitals and care homes have a statutory responsibility for administering and delivering the MCA DOLS at a local level.

If you want to find out more about what MCA DOLS means for you or your organisation, the MCA DOLS Code of Practice, which explains in detail how MCA DOLS' processes and procedures work, can be downloaded at: [www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_085476](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476)

Or you can visit the website at: [www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm](http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm)

The Welsh Assembly Government has published three guidance booklets to assist managing authorities and supervisory bodies identify the key processes in the safe and effective use of the safeguards:

- 1 Guidance for Managing Authorities working within the Mental Capacity Act Deprivation of Liberty Safeguards.
- 2 Guidance for Supervisory Bodies working within the Mental Capacity Act Deprivation of Liberty Safeguards.
- 3 Standard Forms and Letters for the Mental Capacity Act Deprivation of Liberty Safeguards.

The Welsh Assembly Government has also published a range of information leaflets which managing authorities and supervisory bodies may use to assist in providing information to the relevant person. These can be found at [www.mentalcapacityact.wales.nhs.uk](http://www.mentalcapacityact.wales.nhs.uk)

### Protecting people who lack capacity from ill-treatment or wilful neglect

The MCA introduces a new criminal offence of ill treatment or wilful neglect of a person who lacks capacity. This is intended to deter people from abusing, ill-treating or neglecting people who lack capacity. If convicted, people can be imprisoned or fined.

The offence covers restraining someone unreasonably against their will, failure to provide adequate care, and also the more commonly understood types of abuse such as financial, sexual, physical and psychological abuse.

This offence applies to a person who:

- has the care of a person who lacks capacity;
- is an Attorney appointed under a LPA or EPA; or
- is a Deputy appointed for the person by the Court of Protection.



You need to have full knowledge of this as you carry out your duties. In keeping with good practice in health and social care, you should keep records showing that you have followed the Code of Practice.

While the majority of people who are involved in the care of vulnerable people are entirely trustworthy, everyone should be alert to signs of abuse and take swift action to prevent or stop it. If you think someone is being abused or ill-treated you should contact the police or your Social Services Department's adult services who will deal with it under local adult protection procedures.

## 10. Providing care or treatment for people who have planned ahead

The MCA has far reaching effects for people who work in health and social care because it extends the ways in which people using services can plan ahead for the time when they may lack capacity. These are Lasting Powers of Attorney (LPAs), advance decisions to refuse treatment, and written statements of wishes and feelings.

If you are providing care or treatment for someone who lacks capacity these may be very helpful in deciding what to do. If you are working with people who have capacity, or who have fluctuating capacity (such as people with mental health problems) it may be helpful for you to explain to them these ways of planning ahead for a time when they may lack capacity.

Providing care or treatment for people who have planned ahead is a very complex area and it is advisable to refer to the Code of Practice for more detailed guidance.

### Lasting Powers of Attorney

The MCA introduces a new form of Power of Attorney which allows people over the age of 18 to formally appoint one or more people to look after their health, welfare and/or financial decisions, if at some time in the future they lack the capacity to make these decisions for themselves. The person making an LPA is called the **Donor**. The power that is given to someone else is called a **Lasting Power of Attorney (LPA)** and the person(s) appointed are known as an **attorney(s)**. The LPA gives the Attorney authority to make decisions on behalf of the Donor and the Attorney has a duty to act or make decisions in the best interests (**principle 4**) of the person who has made the LPA.

## There are two different types of LPA:

- 1 A **Personal Welfare LPA** is for decisions about both health and personal welfare; and
- 2 A **Property and Affairs LPA** is for decision about financial matters.

## Important facts about LPAs

- The introduction of LPAs for property and affairs means that no more Enduring Powers of Attorney (EPA) can be made, but the MCA makes transitional provisions for existing EPAs to continue whether they are registered or not. This means that pre-existing EPAs can continue to be used (whether registered or not) and can continue to be registered.
- When a person makes an LPA they must have the capacity to understand the importance of the document and the power they are giving to another person.
- Before an LPA can be used it must be registered with the Office of the Public Guardian ([part 12](#)). This is vital, without registration an LPA cannot be used at all.
- An LPA for property and affairs can be used when the Donor still has capacity unless the Donor specifies otherwise.
- A Personal Welfare Attorney has no power to consent to, or refuse treatment, at any time or about any matter when the person has the capacity to make the decision for himself or herself.
- If the person in your care lacks capacity and has created a Personal Welfare LPA, the Attorney is the decision-maker on all matters relating to the person's care and treatment. Unless the LPA specifies limits to the Attorney's authority the Attorney has the authority to make personal welfare decisions and consent to or refuse treatment (except life-sustaining treatment) on the Donor's behalf. The Attorney must make these decisions in

the best interests of the person lacking capacity (principle 4) and if there is a dispute that cannot be resolved, for example, between the attorney and a doctor, it may have to be referred to the Court of Protection.

- If the decision is about life-sustaining treatment, the Attorney only has the authority to make the decision if the LPA specifies this.
- If you are directly involved in the care or treatment of a person who lacks capacity, you should not agree to act as their Attorney other than in exceptional circumstances, for instance, if you are the only close relative of the person.
- It is important to read the LPA if it is available to understand the extent of the Attorney's power.

### **Example:**

Martin has recently been diagnosed as being in the very early stages of Alzheimer's disease.

He wants to make sure that if he lacks capacity in the future his personal values and preferences are taken into account when a decision is made on his behalf. He decides to appoint his daughter as a Personal Welfare Attorney to make any personal welfare decisions that he loses capacity to make herself.

He talks through things that are important to him such as wanting to stay near his friends, and to be able to go into a care home that allows pets. His daughter then registers the LPA.

If in the future Martin lacks capacity to decide where he should live, his daughter will have the authority to make this decision as his Personal Welfare Attorney. She will be able to take account of the things that her father has stated when considering what would be in his best interests.

## Advance decisions to refuse treatment

Sometimes people have clear views about what types of treatment they don't want to have and would not consent to. An advance decision allows them to express these views clearly, before they lose capacity. Advance decisions, also called advance directives or 'living wills' can currently be made under common law and the Mental Capacity Act puts them on a statutory footing. It also explains what is required in law for an advance decision to be **valid** and **applicable** and introduces new safeguards.

An advance decision is where a person aged 18 or over may set out what particular types of treatment they would **not** want to have and in what circumstances, should they lack the capacity to refuse consent to this treatment for themselves in the future. It can be about any treatment even if it may result in the person's death and if it is **valid** and **applicable** it must be followed as it is legally binding and has the same force as when a person with capacity refuses treatment (see below for the requirements for advance decisions). An advance decision does not need to be in writing, except for decisions relating to life-sustaining treatment (see below) but it is helpful if it is.

### What are the requirements for advance decisions?

The MCA introduces a number of rules people must follow when making an advance decision. If you are making a decision about treatment for someone who is unable to consent to it, you must be satisfied that the advance decision exists and is **valid** and **applicable** to the particular treatment in question.

The following list gives a very brief summary of some of the main requirements for advance decisions (if you are involved in such a decision you should consult the Code of Practice).

- It must be **valid**. The person must not have withdrawn it, or overridden it by making an LPA that relates to the treatment in the advance decision (**see part 10**), or acted in a way that is clearly inconsistent with the advance decision.
- It must be **applicable** to the treatment in question. It should clearly refer to the treatment in question (detailed medical terms do not have to be used) and it should explain which circumstances the refusal refers to. If there have been changes in circumstances which there are reasonable grounds for believing would have affected a person's advance decision when they made it, then it may not be applicable.

You should also note the following.

- Where people are detained under the Mental Health Act 1983 and can therefore be treated for mental disorder without their consent, they can also be given such treatment despite having an advance decision to refuse the treatment.
- People cannot make an advance decision to ask for medical treatment - they can only say what types of treatment they would refuse.
- People cannot make an advance decision to ask for their life to be ended.

If you are satisfied that the decision is both **valid** and **applicable** then you will have to abide by that decision.

### **Advance decisions to refuse life-sustaining treatment**

The MCA sets out additional formalities for advance decisions that refuse life-sustaining treatment.

An advance decision to refuse life-sustaining treatment must fulfil the following additional requirements:

- It must be in writing, which includes being written on the person's behalf or recorded in their medical notes.
- It must be signed by the maker in the presence of a witness who must also sign the document. It can also be signed on the maker's behalf at their direction if they are unable to sign it for themselves.
- It must be verified by a specific statement made by the maker, either included in the document or a separate statement, that says that the advance decision is to apply to the specified treatment even if life is at risk. If there is a separate statement this must also be signed and witnessed.

**Example:**

Ike has witnessed a friend die of cancer. He decides that he would not wish to receive chemotherapy or radiotherapy if he became seriously ill and was close to dying. Ike is concerned that if he is unable to make a decision, the doctors may make it for him.

So he makes an advance decision stating that in the future if he becomes ill he does not want to receive chemotherapy or radiotherapy. His advance decision includes a written statement confirming that he does not want chemotherapy or radiotherapy even if his life is at risk. Ike signs the advance decision and his close friend witnesses the signature.

The advance decision must be followed if and when it becomes relevant and the doctor is satisfied that it is valid and applicable.

Providing care or treatment for people who have made advance decisions is a complex area and it is advisable to refer to the Code of Practice for more detailed guidance.

## Conscientious objection

You will not have to act on an advance decision if you object to it on religious or moral grounds.

You must make this known as soon as possible and arrangements must be made for the management of the patient's care to be transferred to another health professional.

## Liability of people who work in health and social care

You will not incur liability for providing treatment in a patient's best interests if, having taken reasonable steps, you do not know or are not satisfied that a **valid** and **applicable** advance decision exists. If you are satisfied that an advance decision exists which is valid and applicable, then not to abide by it could lead to a legal claim for damages or a criminal prosecution for assault.

If you reasonably believe that there is a valid and applicable advance decision then you will not be held liable for the consequences of abiding by it and not providing treatment. You should clearly record how you came to your conclusions.

## Disputes and disagreements about advance decisions

You will have to form a view about whether or not an advance decision is **valid** and **applicable** and you should refer to the Code of Practice for more detailed guidance particularly if there is a disagreement.

If there is a dispute or difficulty, then you should consider mediation or the matter could be referred to the Court of Protection by you or a relative, carer or a close friend of the patient.

## Dealing with advance decisions that were made before October 2007

If any of the people you provide care or treatment for had an advance decision (sometimes known as a 'living will') before the MCA came into force then it may still be valid. However, you should



check that it meets the new rules, particularly if it deals with life-sustaining treatment. More detailed guidance on this is available at [www.dh.gov.uk/consent](http://www.dh.gov.uk/consent)

## Statements of wishes, feelings, beliefs and values

Sometimes people will want be able to write down or tell people about their wishes and preferences about future treatment and care and explain their feelings or values that govern how they make decisions.

These statements can be about anything, including personal preferences such as having a shower rather than a bath, or wanting to sleep with the light on. Such statements can request certain types of treatment, which you must consider carefully, in particular if they have been written down.

### Example:

Khalid is vegetarian and has a degenerative condition. He wants to make sure that if he lacks mental capacity and needs people to help him with daily tasks they take into account his personal beliefs. He therefore writes down a statement explaining that he only wishes to receive vegetarian food.

Khalid asks for the statement to be filed with his health records so that in the future, if he can no longer make and communicate his own decisions, he receives food in line with his wishes.

When you are assessing what treatment or care is in a person's best interests you will have to take these statements into account. However, your final decision must always be based on your assessment of what is in the person's best interests and your professional judgement of what is clinically necessary or appropriate. If this is different to what they have said in their statement of wishes and feelings you should keep a record of this and be prepare to justify your decision if challenged.

## 11. Confidentiality and record-keeping

### Confidentiality

You are required to maintain confidentiality with regard to information about the people in your care. Personal information should not be disclosed unless:

- the person agrees;
- there is a legal obligation to do so; or
- there is an overriding public interest.

Where a person lacks capacity the Mental Capacity Act test of 'best interests' may also justify disclosure (see part 7).

An assessment of capacity may require the sharing of information among health and social care workers. If a person lacks capacity to consent to disclosure then you must work out whether it would be in their best interests (see part 7) to disclose the information. Only as much information as necessary should be divulged.

Where an Attorney under a Personal Welfare LPA has been appointed they will determine whether information can be disclosed and you must normally consult with them before sharing any information. Where it is not possible to consult, for example, because urgent treatment is necessary, you must act in the patient's best interests and advise the Attorney of any action taken as soon as practicable.

Disclosure of, and access to, information can be complex. The Information Commissioner has issued guidance on the Data Protection Act 1998, and the Mental Capacity Act does not change or substitute this. Also, professionals and organisations have their own codes of conduct, policies and procedures about confidentiality. These are supported by experts such as Information/Data Protection Officers in Social Services and Caldicott Guardians in NHS organisations.

For more detailed guidance and sources of information on confidentiality, you should go to:

- Guidance on the Data Protection Act 1998  
[www.ico.gov.uk](http://www.ico.gov.uk)
- NHS Code of Practice on confidentiality and information on Caldicott Guardians  
[www.dh.gov.uk](http://www.dh.gov.uk) (search under 'patient confidentiality')
- You should also refer to any codes of conduct or procedures on confidentiality that your workplace has.

## Record-keeping

As a person who works in health or social care you will need to record accurately the decisions you make about the assessment of mental capacity, and the determination of best interests.

The decisions may be recorded in the:

- care plan;
- nursing records;
- medical records;
- social work records;
- other health and social care records; and/or
- other notes and records such as those kept by social workers, therapists or care assistants.

You should remember that the records you keep might in the future be referred to if there is a dispute or as part of legal proceedings.

## 12. New public bodies and services created by the Mental Capacity Act

The MCA created a new court and a new public official to protect people who lack capacity and to supervise and support those making decisions on their behalf.

### Court of Protection and Deputies

The previous Court of Protection was replaced by a new Court of Protection which is a specialist court that deals with all issues related to the MCA. It deals with decisions concerning both the property and affairs and the health and welfare of people who lack capacity. It is particularly important in resolving complex or disputed cases, for example, about whether someone lacks capacity or what is in their best interests.

In specific situations the Court of Protection is able to consider cases relating to children who are under 16, for example, when longer-term decisions need to be made about their financial affairs.

The Court of Protection has the power to:

- make declarations about whether or not a person has capacity to make a particular decision;
- make decisions on serious issues about healthcare and treatment;
- make decisions about the property and financial affairs of a person who lacks capacity;
- appoint Deputies to have ongoing authority to make decisions; and
- make decisions in relation to Lasting Powers of Attorney (LPAs) and Enduring Powers of Attorney (EPAs).

The Court is able to appoint a Deputy if necessary, for example, because a person has an ongoing lack of capacity. The Court tailors the powers given to a Deputy based on the circumstances of the case.

Deputies replace the previous system of Court-appointed Receivers to deal with property and affairs of someone who lacks capacity, Under the Mental Capacity Act, however, Deputies can also be appointed to deal with personal welfare decisions.

Deputies have to pay attention to the Code of Practice (see part 3) and have to act in the best interests of the person who lacks capacity (see part 7).

People who work in health and social care and are directly involved in the care or treatment of a person who lacks capacity, will not usually be appointed as Deputies because of the possible conflict of interests.

## The Public Guardian

The role of the Public Guardian is to protect people who lack capacity from abuse. The Public Guardian is supported by the Office of the Public Guardian (OPG).

Some of the tasks of the Public Guardian include:

- maintaining a register of LPAs and EPAs;
- maintaining a register of orders appointing Deputies;
- supervising Deputies appointed by the Court;
- directing Court of Protection Visitors to visit people lacking capacity;
- receiving reports from Attorneys acting under LPAs and from Deputies;
- providing reports to the Court as requested;
- dealing with representations (including complaints) about the way in which Attorneys or Deputies exercise their powers; and
- providing general information about the MCA.

## 13. Research involving people who may lack capacity

The MCA sets out a clear legal framework for many types of research involving people who lack capacity to consent to taking part in such research. As someone who provides care or treatment for a person who lacks capacity you may be asked to be involved if the person is taking part in such research.

It is important that research is able to involve people who lack capacity, to provide knowledge about the causes of incapacity and about the diagnosis, treatment, care and needs of people who lack capacity. The MCA covers a wide range of research including clinical, health and social care research but not clinical trials, which are covered by separate legislation.

Research covered by the MCA includes:

- developing new and more effective ways of treating a condition;
- improving the quality of health and social care services;
- discovering the cause of a debilitating illness or learning disability;
- preventing harm, exclusion or disadvantage on the part of people who lack capacity; and
- checking to see what type of intervention works best in a particular situation.

The MCA introduces a number of safeguards to protect people taking part in such research, which include the following.

- A family member or unpaid carers must be consulted about any proposal and agree that the person can be part of the research. If such a person cannot be identified, then the researcher must identify a person who is independent of the research project to provide advice on the participation of the person who lacks capacity in the research.

- If the person without capacity shows any sign that they are not happy to be involved in the research then the research is not allowed to continue.
- All plans for research are to be checked by a recognised independent research ethics committee.
- The committee needs to agree that the research is necessary, safe and appropriate and cannot be done as effectively using people who have mental capacity.
- The committee also has to approve plans to deal with people who consented to join a long-term research project but lost capacity before the end of the project.

The person's past or present wishes and feelings and values are most important in deciding whether they should take part in research or not. Someone involved in a research project may ask you if you know what the person's feelings are. Part of a research project may be carried out when you are providing care or treatment for a person and you may be asked to let the researchers know if the person seems upset about any aspect of it.

Anyone setting up or carrying out such research will need to make sure the research complies with the provisions set out in the MCA and will need to follow the guidance given in the Code of Practice.

### Further sources of information and guidance

- For more detailed guidance on research involving people who lack capacity you should read the Code of Practice.
- For more information on issues relating to the consent to the use of tissue or organs for research you should refer to the Human Tissue Authority:  
[www.hta.gov.uk/guidance/codes\\_of\\_practice.cfm](http://www.hta.gov.uk/guidance/codes_of_practice.cfm)

## 14. Interface with other legislation, policy and procedures

The Mental Capacity Act applies in conjunction with other laws relevant to or affecting the property and affairs, care or treatment of people who may lack capacity in relation to specific matters. People who work in health and social care should also be aware of their obligations under other laws, including (but not limited to) the following.

- Care Standards Act 2000
- Data Protection Act 1998
- Disability Discrimination Act 1995
- Human Rights Act 1998
- Mental Health Act 1983
- National Health Service and Community Care Act 1990
- Human Tissues Act 2004.

### The MCA and the Mental Health Act 1983

- The MCA **may be used** to treat people for mental disorder when they cannot consent to the treatment because they lack capacity and where the treatment is in their best interests ([see part 7](#)).
- But the MCA **cannot be used** to detain anyone. If you think a person might need to be detained for treatment for mental disorder, you will need to consider taking steps to have them assessed with a view to detention under the Mental Health Act 1983 (MHA).

If a person is detained under the MHA, the MCA does not apply to treatment for the person's mental disorder which can be given without consent under the MHA itself. This is because even people who have capacity to consent cannot refuse such treatment. It also means that Attorneys (and Deputies) cannot



consent or refuse such treatment on the patient's behalf. For the same reason, an advance decision to refuse treatment for mental disorder can be over-ridden where necessary.

- For most other purposes, the MCA applies to a patient detained under the MHA. This means, for example, that an advance decision to refuse treatment for any illness or condition other than mental disorder is not affected, nor is any power an Attorney has to consent to such treatment. It also means that where a detained patient lacks capacity to consent to treatment other than treatment for mental disorder, the decision-maker will need to act in accordance with the MCA.

For more detail on the interface between the MCA and the Mental Health Act 1983 you should read the Code of Practice.

## The MCA and assessment processes across health and social care

There are currently a range of national assessment processes in place across health and social care, including the following.

- **The Single Assessment Process (SAP)** in England, called the **Unified Assessment Process (UAP)** in Wales, which is the way care and treatment is planned and provided for older people.
- **The Care Programme Approach (CPA)** which is the way care and treatment is planned and provided to adults who receive statutory mental health services.
- **Person-Centred Planning** which is the way care and treatment is planned and provided to adults with a learning disability.

These assessment processes may also involve people who work in voluntary and independent sector care services.

If you work as part of any of these processes, such as a CPA care co-ordinator for someone, you should consider how the MCA will apply, and how it will help you and the person you are caring for.

The MCA helps emphasise the importance of ensuring the individual is at the centre of these processes including decision-making and processes about the care and treatment the person receives. The MCA also emphasises that the person should be supported as much as possible to make their own decisions, even where you may consider these decisions to be unwise (see part 5).

If you are involved in the assessment of someone's needs, providing care and treatment as part of a person's care plan, or reviewing their care plan you have to take into account the provisions of the MCA. For example:

- you may have to assess the person's capacity to make certain decisions about their care or treatment (see part 6);
- when you make a decision for a person who lacks capacity you have to consider what is in their best interests (see part 7);
- if the person has planned ahead and has made an advance decision to refuse treatment that is valid and applies to the treatment you are proposing, you have to abide by it (see part 10);
- if the person has made a written statement of wishes and feelings you need to take this into account (see part 10);
- if the person has made an LPA (particularly one for health and welfare) and now lacks capacity, you need to involve the Attorney in the planning and provision of care or treatment (see part 10). If the LPA gives the Attorney the power to consent to or refuse treatment or care on behalf of the person you need to ensure that the decision made by the Attorney is treated in the same way as a decision made by the person (see part 10); and
- the person may request your help in making a written statement or advance decision to refuse treatment (see part 10).

## The MCA and Social Security appointees

Some people who receive benefits or pensions will lack capacity to act for themselves. In those circumstances an appointee is appointed by the Department of Work and Pensions to claim, spend and manage the benefit or pension on the person's behalf.

If you are an appointee for someone who lacks capacity to make financial decisions, or you work with someone who has an appointee, the appointeeship should be carried out in accordance with the MCA. For example, decisions on how the person's money should be spent should be done according to the best interest principle (see part 7) and the principle about doing things that are least restrictive of a person's rights and freedoms (see part 4).

If there is evidence that the appointee is not following these principles the appointment can be revoked.

## The MCA and the Human Tissue Act 2004

The Human Tissue Act 2004 deals with, amongst other things, issues relating to the consent to the use of tissue or organs for purposes such as transplantation, research or gaining information that may be relevant to another person.

Before considering the storage or use of tissues or organs for any of these purposes from people who lack the capacity to consent, healthcare professionals must take into account the Human Tissue Act 2004. Further guidance is available from the Human Tissue Authority: [www.hta.gov.uk/guidance/codes\\_of\\_practice.cfm](http://www.hta.gov.uk/guidance/codes_of_practice.cfm)

## The MCA and children and young people

### 1 Where the MCA applies to young people aged 16 to 17

- There is an overlap between the MCA and the Children Act for 16 and 17 year olds. Most of the provisions of the MCA apply to young people, and the Code of Practice for the MCA gives guidance on how to proceed.
- Any decisions relating to the treatment of young people of 16 or 17 years old must be made in their best interests and

in accordance with the principles of the MCA. As with all such decisions, the decision-maker must, where practicable and appropriate, consult the person's family and friends, especially those with parental responsibilities, as part of the best interests decision-making process (see part 7).

## **2 Where the MCA does not apply to young people aged 16-17**

There are certain parts of the MCA that do not apply to young people aged 16-17 years old, as the MCA requires a person to be 18 or over. These are:

- making a Lasting Power of Attorney (see part 10);
- making an advance decision to refuse treatment (see part 10); and
- making a will. The law generally does not allow people under 18 to make a will and the MCA confirms that the Court of Protection has no power to make a will on behalf of anyone under 18.

## **3 Where the MCA applies to children under the age of 16**

In most situations the care and welfare of children under 16 will continue to be dealt with under the Children Act 1989.

There are two parts of the MCA that apply to children under 16.

- The Court of Protection's powers to make decisions concerning the property and affairs of a child under the age of 16. The Court can make these decisions where the Court considers it likely that the child will lack capacity to make decisions about their property and affairs even when they are 16 (see part 12).
- The criminal offence of ill treatment or wilful neglect also applies to children under 16 who lack capacity as no lower age limit is specified for the victim (see part 9).

The Code of Practice explains in more detail about legal proceedings for young people and the relationship with other relevant laws such as the Children Act 1989.

## 15. What if I want to know more about the MCA?

If you would like to know more about the Mental Capacity Act you can call 0845 330 2900 or email [customerservices@publicguardian.gsi.gov.uk](mailto:customerservices@publicguardian.gsi.gov.uk)

Other sources of useful information and guidance includes:

Title	Available from
Other information booklets like this one	You can view these electronically by going to: <a href="http://www.publicguardian.gov.uk">www.publicguardian.gov.uk</a>
The Mental Capacity Act 2005	You can view this for free by going to: <a href="http://www.publicguardian.gov.uk">www.publicguardian.gov.uk</a> Or you can order a hard copy from TSO by calling 0870 600 5522 or emailing <a href="mailto:customerservices@tso.co.uk">customerservices@tso.co.uk</a>
The Code of Practice for the Mental Capacity Act	You can download the Code for free by going to: <a href="http://www.publicguardian.gov.uk">www.publicguardian.gov.uk</a> You can order a hard copy from TSO by calling 0870 600 5522 or emailing <a href="mailto:customerservices@tso.co.uk">customerservices@tso.co.uk</a> .
Best practice tool to assist with testing your organisation's readiness for the implementation of the MCA	<a href="http://www.dh.gov.uk/PublicationsAndStatistics/Bulletins/ChiefExecutiveBulletin">www.dh.gov.uk/PublicationsAndStatistics/Bulletins/ChiefExecutiveBulletin</a> (and then go to Chief Execs Bulletin Issue 329, 28 - July 3 August 2006)

Title	Available from
Training Materials on the MCA for people who work in health and social care	These will only be available from late April 2007. For more information go to <a href="http://www.dh.gov.uk">www.dh.gov.uk</a>
Information on the IMCA service, IMCA Pilots and training materials for IMCAs	<a href="http://www.dh.gov.uk/imca">www.dh.gov.uk/imca</a>

## 16. Some useful contacts

The following government departments work together to implement the Mental Capacity Act

Department	What it is/does	Contact
<b>Office of the Public Guardian (OPG)</b>	The Office of the Public Guardian supports and promotes decision-making for those who lack capacity or would like to plan for their future, within the framework of the Mental Capacity Act 2005	<a href="http://www.publicguardian.gov.uk">www.publicguardian.gov.uk</a> T 0845 330 2900 E <a href="mailto:customerservices@publicguardian.gsi.gov.uk">customerservices@publicguardian.gsi.gov.uk</a>
<b>Department of Health (DH)</b>	Responsibilities include setting health and social care policy in England. The Department's work sets standards and drives modernisation across all areas of the NHS, social care and public health	Wellington House, 133-155 Waterloo Road, London, SE1 3UG <a href="http://www.dh.gov.uk">www.dh.gov.uk</a> T 020 7210 4850
<b>Welsh Assembly Government</b>	Develops policy and approves legislation that reflects the needs of the people of Wales	Cathays Park, Cardiff, CF10 3NQ <a href="http://www.wales.gov.uk">www.wales.gov.uk</a> T 029 2082 5111

The following organisations were involved in writing and advising on this booklet

Organisation	What it is/does	Contact
<b>Making Decisions Alliance</b>	It includes: Action on Elder Abuse, Age Concern England, Alzheimer's Concern Ealing, Alzheimer's Society, Beth Johnson Foundation, Carers UK, Centre for Policy on Ageing, Cloverleaf Advocacy, Consumer Forum, Different Strokes, Down's Syndrome Association, Foundation for People with Learning Disabilities, Headway, Help the Aged, Horsham Gateway Club, Independent Advocacy Service, Kent Autistic Trust, Leonard Cheshire, Mencap, Mental Health Foundation, Mind, Motor Neurone Disease Association, National Autistic Society, North Staffordshire Users Group, The Oaklea Trust, Patient Concern, Powerhouse, Relatives and Residents Association, Respond, Rethink, Rett Syndrome Association, St Clements Patient Council, Scope, Sense, Skills for People, Stroke Association, Turning Point, United Response, WITNESS  <a href="http://www.makingdecisions.org.uk">www.makingdecisions.org.uk</a>	
<b>Action for Advocacy</b>	A resource and support agency for the advocacy sector, information, training and advice	PO Box 31856, Lorrimore Square, London, SE17 3XR <a href="http://www.actionforadvocacy.org">www.actionforadvocacy.org</a>
<b>Age Concern England</b>	The UK's largest organisation working to promote the Wellbeing of all older people. It provides vital services, information and support to thousands of older people - of all ages and backgrounds	Astral House, 1268 London Road, London, SW16 4ER <a href="http://www.ageconcern.org.uk">www.ageconcern.org.uk</a> <a href="http://www.accymru.org.uk">www.accymru.org.uk</a> Information line 0800 00 99 66
<b>Alzheimer's Society</b>	The UK's leading care and research charity for people with dementia, their families and carers	Gordon House, 10 Greencoat Place, London, SW1P 1PH <a href="http://www.alzheimers.org.uk">www.alzheimers.org.uk</a> Helpline 0845 300 0336
<b>Association of Black Social Workers and Allied Professions</b>	The Association aims to improve the quality of health and social care for Black users and staff	65 Woodrow, Woolwich, London, SW18 5DH T 020 8 854 7402



Organisation	What it is/does	Contact
<b>Association of Directors of Social Services (ADSS)</b>	Represents all the Directors of Adults Social Services (DASS) and Directors of Children's Services (DCS) in England, Wales and Northern Ireland	ADDSS Administrator, ADDSS Business Unit, Local Government House, Smith Square, London, SW1P 3HZ <a href="http://www.adss.org.uk">www.adss.org.uk</a> T 020 7072 7433 F 020 7863 9133
<b>British Association of Social Workers (BASW)</b>	The largest association representing social work and social workers in the UK.	16 Kent Street, Birmingham, B5 6RD <a href="http://www.basw.co.uk">www.basw.co.uk</a> T (0121) 622 3911 F (0121) 622 4860
<b>British Medical Association (BMA)</b>	BMA represents doctors from all branches of medicine all over the UK	MA House, Tavistock Square, London, WC1H 9JP <a href="http://www.bma.org.uk">www.bma.org.uk</a> T 020 7387 4499 F 020 7383 6400
<b>Carers UK</b>	Looks after family, partners or friends in need of help because they are ill, frail or have a disability	20/25 Glasshouse Yard, London, EC1A 4JT <a href="http://www.carersuk.org">www.carersuk.org</a> T 020 7566 7637 F 0207490 8824
<b>Down's Syndrome Association</b>	Provides information and support for people with Down's syndrome, their families and carers, as well as being a resource for interested professionals	Langdon Down Centre, 2a Langdon Park, Teddington, Middlesex, TW11 9PS <a href="http://www.downs-syndrome.org.uk">www.downs-syndrome.org.uk</a> T 0845 230 0372 F 0845 230 0373
<b>English Community Care Association</b>	The largest representative body for community care in England	4th Floor, 145 Cannon Street, London <a href="http://www.ecca.org.uk">www.ecca.org.uk</a> T 020 7220 9595 F 020 7220 9596

Organisation	What it is/does	Contact
<b>Foundation for People with Learning Disabilities</b>	Works with people with learning disabilities, their families and those who support them to improve the quality of their lives and promotes the rights, quality of life and opportunities of people with learning disabilities and their families	Sea Containers House, 20 Upper Ground, London, SE1 9QB <a href="http://www.learningdisabilities.org.uk">www.learningdisabilities.org.uk</a> T 020 7803 1100
<b>General Medical Council (GMC)</b>	GMC registers doctors to practise medicine in the UK	Regents Place, 350 Euston Road London, NW1 3JN T 0845 357 3456 F 0845 357 8001
<b>Headway – the brain injury association</b>	Promotes understanding of all aspects of brain injury; and to provide information, support and services to people with a brain injury, their family and carers	4 King Edward Court Service , King Edward Street, Nottingham, NG1 1EW <a href="http://www.headway.org.uk">www.headway.org.uk</a> T 0115 9240800 Helpline 0808 800 2244
<b>Local Government Association (LGA)</b>	Promotes the interests of English and Welsh local authorities – a total of just under 500 authorities	Local Government House, Smith Square, London, SW1P 3HZ <a href="http://www.lga.gov.uk">www.lga.gov.uk</a> T 020 7664 3131 F 020 7664 3030
<b>Mental Health Foundation</b>	A leading UK charity that provides information, Carries out research, campaigns and works to improve services for anyone affected by Mental health problems, whatever their age and wherever they live	Sea Containers House, 20 Upper Ground, London, SE1 9QB <a href="http://www.mentalhealth.org.uk">www.mentalhealth.org.uk</a> T 020 7803 1100

Organisation	What it is/does	Contact
<b>MIND</b>	A leading mental health charity, working to create a better life for everyone with experience of mental distress. Provides information and support mental health charity in England and Wales	15-19 Broadway, Stratford, London, E15 4BQ <a href="http://www.mind.org.uk">www.mind.org.uk</a> T 0208 519 2122
<b>National Autistic Society (NAS)</b>	Champions the rights and interests of all people with autism and to ensure that they and their families receive quality services appropriate to their needs	393 City Road, London, EC1V 1NG <a href="http://www.autism.org.uk">www.autism.org.uk</a> Autism helpline 0845 070 4004
<b>National Care Association (NCA)</b>	Represents the interests and provides services to support small and medium sized providers of social care in England and Wales	45-49 Leather Lane, London, EC1N 7JT <a href="http://www.nca.gb.com">www.nca.gb.com</a> T 020 7831 7090
<b>National Care Forum</b>	Established to represent the interests of not-for-profit health and social care providers in the United Kingdom	National Care Form, 3 The Quadrant, Coventry, CV1 2DY. <a href="http://www.nationalcareforum.org.uk">www.nationalcareforum.org.uk</a> T 024 7624 3619
<b>The National Family Carer Network</b>	Provides a focal point for issues affecting families that include an adult with a learning disability	Merchants House, Wapping Road, Bristol, BS1 4RW <a href="http://www.familycarers.org.uk">www.familycarers.org.uk</a> T 0117 930 2600
<b>The National Family Carer Support Service</b>	Provides support and information for family carers	Merchants House, Wapping Road, Bristol, BS1 4RW <a href="http://www.hft.org.uk/page15a.html">www.hft.org.uk/page15a.html</a> T 0117 930 2608
<b>Patient Concern</b>	An organisation committed to promoting choice and empowerment for all health service users	PO Box 23732, London, SW5 9FY <a href="http://www.patientconcern.org.uk">www.patientconcern.org.uk</a> E <a href="mailto:patientconcern@hotmail.com">patientconcern@hotmail.com</a>

Organisation	What it is/does	Contact
<b>The Relatives and Residents Association</b>	An organisation for older people needing, or living in, residential care and the families and friends left behind	24 The Ivories, 6-18 Northampton Street, London, N1 2HY <a href="http://www.relres.org">www.relres.org</a> T 020 7359 8148
<b>RESCARE</b>	The national society for children and adults with learning disabilities and their families	Steven Jackson House, 31 Buxton Road, Heaviley, Stockport, SK2 6LS <a href="http://www.rescare.org.uk">www.rescare.org.uk</a> T 0161 474 7323
<b>RESPOND</b>	Provides a range of services for both victims and perpetrators of sexual abuse who have learning disabilities and those who have been affected by other trauma. Their services extend to support and training for families, carers and professionals.	3rd Floor, 24-32 Stephenson Way, London, NW1 2HD T 020 7383 0700 F 020 7387 1222 <a href="http://www.respond.org.uk">www.respond.org.uk</a> Helpline 0808 808 0700
<b>Royal College of Nursing (RCN)</b>	Represents nurses and nursing	20 Cavendish Square, London, W1G 0RN <a href="http://www.rcn.org.uk">www.rcn.org.uk</a> T 020 7409 3333
<b>Royal College of Psychiatrists</b>	The professional and educational body for psychiatrists in the United Kingdom and the Republic of Ireland	17 Belgrave Square, London, SW1X 8PG <a href="http://www.rcpsych.ac.uk">www.rcpsych.ac.uk</a> T 020 7235 2351
<b>Social Care Association</b>	A vibrant, inclusive and informed Association which visibly promotes positive practice within all social care services throughout the UK	Thornton House, Hook Road, Surbiton, Surrey, KT6 5AN <a href="http://www.socialcareassociation.co.uk">www.socialcareassociation.co.uk</a> T 020 8 397 1411
<b>Scope</b>	Disability organisation in England and Wales, whose focus is people with cerebral palsy	6 Market Road, London, N7 9PW <a href="http://www.scope.org.uk">www.scope.org.uk</a> T 020 7619 7100

Organisation	What it is/does	Contact
<b>Sense</b>	Charity providing specialist information, advice and services to deaf blind people, their families, carers and the professionals who work with them. Funded to develop training materials which address the advocacy issues for deaf blind people	11-13 Clifton Terrace, Finsbury Park, London, N4 3SR <a href="http://www.sense.org.uk">www.sense.org.uk</a> <b>T</b> 0845 127 0060 <b>F</b> 0845 127 0061 <b>Text</b> 0845 127 0062
<b>Turning Point</b>	The UK's leading social care organisation, providing services for people with complex needs, including those affected by drug and alcohol misuse, mental health problems and those with a learning disability	Standon House, 21 Mansell Street, London, E1 8AA <a href="http://www.turning-point.co.uk">www.turning-point.co.uk</a> <b>T</b> 020 7481 7600

Other booklets in this series include:

- OPG601** Making decisions...about your health, welfare or finances.  
Who decides when you can't?
- OPG602** Making decisions:  
A guide for family, friends and other unpaid carers
- OPG604** Making decisions: A guide for advice workers
- OPG605** Making decisions: An Easyread guide
- OPG606** Making decisions:  
The Independent Mental Capacity Advocate (IMCA) service

Making decisions booklets are available to download at:  
[www.publicguardian.gov.uk](http://www.publicguardian.gov.uk) and are available in English, Welsh and Braille formats. There is also an Easyread booklet and Easyread Audio version. Contact the Office of the Public Guardian for more information.

- OPG607** Deprivation of Liberty Safeguards:  
A guide for primary care trusts and local authorities
- OPG608** Deprivation of Liberty Safeguards:  
A guide for hospitals and care homes
- OPG609** Deprivation of Liberty Safeguards:  
A guide for relevant person's representatives

Deprivation of Liberty Safeguards booklets are available at:  
[www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm](http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm)

The Mental Capacity Implementation Programme published this booklet.  
It was written by the National Care Association.

- OPG603** Making decisions: A guide for people who work in health  
and social care (04.09)