MENTAL CAPACITY ACT 2005

GUIDANCE ON MENTAL CAPACITY ASSESSMENT AND BEST INTEREST DECISION MAKING.

L.B. HILLINGDON.

Nick Ellender LBH Revised Oct 2010. draft1.
Mental Capacity Act 2005.

Introduction.

The Mental Capacity Act (MCA) provides a framework for acting and making decisions on behalf of adults, 16 years and over, who lack the mental capacity to make decisions for themselves. It sets out the principles and mechanisms for making personal welfare decisions, health care decisions and financial decisions affecting people without the capacity to make their own decisions.

The MCA confirms in law the assumption that adults have full legal capacity to make their own decisions unless it is shown they do not. It also requires people to receive all appropriate support and help to enable them to make their own decisions or to maximise their participation in decision making. The Act also aims to provide an appropriate balance between an individual’s right to autonomy and self-determination with the right to safeguard from harm a person who lacks capacity to make decisions to protect him/herself.

The Act brings together what is current best practice and common law principles concerning people who lack mental capacity and those who have to take decisions on their behalf. It replaces existing statutory schemes for Enduring Powers of Attorney and Court of Protection Receivers with reformed and updated schemes.

The Act is underpinned by a Code of Practice, published in April 2007, to provide guidance for health and social care staff working with people who lack mental capacity. It will be a legal duty for staff to have regard to the Code.

This local guidance is to provide advice to staff so that they have a broad familiarity with main aspects of the Act and their responsibility to ensure they act in accordance with it, both in terms of good, day to day, practice and in terms of knowing what they need to do in specific circumstances. For more detailed guidance, staff need to refer to the Code of Practice and related documents set out at the end of the guidance.

Nick Ellender
Service Manager LBH
MENTAL CAPACITY.

1. Who is affected by the Mental Capacity Act (MCA)?

1.1 The provisions for decision making or taking action under the Act will affect adults age 16 years or over who lack the capacity to make decisions due to an impairment or disturbance in the functioning of the mind or brain. Assessment of capacity will therefore be fundamental to establishing this.

2. What decisions are covered by the Act?

2.1 The Act covers decision making from day to day matters to life changing events. These include matters in relation to the personal welfare of people lacking mental capacity, their health care, medical treatment and the management of their property and financial affairs.

3. What decisions are not covered by the Act?

3.1 There are some decisions not covered by the Act, either because they are covered by other legislation or are of a very personal nature. These are decisions concerning family matters including consent to marriage, civil partnership, sexual relationships, divorce, and adoption, taking parental responsibility for a child or consent to fertility treatment. Decisions to give or to consent to treatment under the Mental Health Act and decisions on voting or casting a vote for someone without mental capacity.

4. The five key principles that underpin the MCA.

4.1 A presumption of capacity - The Act states clearly that individuals have the right to make choices and decisions themselves unless it is shown that they lack the capacity to make these particular choices and decisions. Someone may need help or support to make or communicate their decision but the need for this support does not automatically mean they cannot make the particular decision or choice under consideration.

4.2 Individuals being supported in making their own decisions - A person cannot be deemed unable to make a decision until all practical steps have been taken to help him or her make that decision and these steps have not been successful. Help means adopting appropriate language and avoiding jargon to communicate what the decision is. It could mean using communication aids or enlisting family or others to support the person in explaining the decision. It means choosing the best time to engage the person or the most appropriate setting where they will feel comfortable.
4.3 Unwise decisions - A person cannot be seen as lacking mental capacity to make a particular decision if they make what might be judged as an unwise decision. However, if an individual repeatedly makes unwise decisions that places them in harms way or at risk of exploitation, or makes a decision that defies rationality or is completely out of character, then it would be reasonable to investigate further their mental capacity to make the decision.

4.4 Best interests – This requirement to act in someone’s best interests is already a well established common law principle. The principle should be overriding and must guide all actions taken or decisions made under the Act on behalf of someone who lacks mental capacity.

4.5 Least restrictive alternative - Where anything is done on behalf of a person who lacks mental capacity the option chosen should be the one that is least restrictive on their future choices and freedoms.

5.1 What is Mental Capacity?

1.1 Mental capacity is, broadly speaking, having sufficient understanding and memory to comprehend the situation you are in and the nature, purpose and consequences of any decision or act you propose to take. These decisions maybe simple expressions of preference for food or clothes but at a more complex level may have legal consequences for you or for others. Different degrees of capacity are required for different decisions.

6. How do you define a lack of mental capacity?

In order to establish whether a person has capacity to make a particular decision at a given time, a two stage approach must be applied.

6.1 Is there an impairment of, or a disturbance in the functioning of, the person’s mind or brain?

And if there is,

Is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?

6.2 Both parts have to be satisfied. The first part does not require a medical assessment, except in certain circumstances (see below) but can be based on existing reliable evidence available on their health and knowledge of the individual. However, appearance, age or preconceptions about certain conditions must not adversely influence the assessment of capacity.
6.3 If the first part is met, the second part requires it to be shown that the impairment or disturbance causes the person to be unable to make the decision in question.

The person lacks capacity to make the decision if they are unable to:

Understand the information relevant to the decision

Or

Retain the information relevant to the decision

Or

Use, or weigh the information, as part of the decision making process

Or

Communicate their decision, whether by talking or other means.

6.4 This second part does require information to be given in way that is appropriate to the person, in keeping with the five principles. Retaining the information has only to be long enough to use it to make an effective decision. Using and weighing up the information is the ability to balance consideration of the information before arriving at a choice. Communicating must be assisted, if needed and can consist of non-verbal communication.

6.5 Where someone has fluctuating mental capacity an assessment has to be made of their decision making ability at the time the decision is required to be made, but consideration needs also to be given as to whether the decision can be put off until they have recovered. This has relevance for acute confusional states in older people or some mental illnesses.

6.6 Where someone has on going lack of mental capacity this should be reviewed over a period of time as, with support and experience, people can improve their decision making capabilities.

6.7 If the assessment involves capacity to make more than one decision, each decision must be considered in turn, as the person may have the capacity to make one decision, but lack the capacity to make another. In all circumstances, the assessor must ensure the presentation of the information on the decision or decisions is made in a way that optimises the opportunity for the person to understand.

6.8 There are existing common law tests of capacity defined by Court judgements. These relate to, for example, the making of wills and litigation. Decisions of this nature require legal advice and involvement.
6.9 A person should not be treated as unable to make a decision because he or she chooses to make an unwise decision or one that appears to be irrational. The crucial test is that defined in paragraph 6.1 above.

7. Who assesses capacity?

7.1 The individual who wishes to take some action in connection with the person’s care or treatment, or is planning to take a decision on the person’s behalf is the one who needs to assess mental capacity. The Act calls this person the ‘decision maker’. In most day to day circumstances it is sufficient for the decision maker to hold a reasonable belief that the person lacks mental capacity. This does mean that they are expected to be able to point to objective evidence to back up this belief.

7.2 It is not intended that all day to day decision making requires a formal consideration of mental capacity involving professional assessment. However care needs to be taken that a reasonable belief of a lack of mental capacity is not then applied in a blanket way to all daily decision making when the individual retains some simple decision making capacity. For example a person may not have the capacity to manage their finances, but retain the capacity to make day to day decisions on straightforward domestic purchases.

8. When should professionals be involved in assessing capacity?

8.1 More complex decisions or decisions with major consequences will require the involvement of different people to assess capacity. In most circumstances the person’s GP can give an opinion. Where the person has diagnosis of a particular condition it maybe more appropriate to seek an opinion from a specialist, for example a consultant psychiatrist or psychologist. The involvement of a professional or specialist opinion is to advise on capacity and this individual does not then become the decision maker, unless they are proposing the action or decision themselves. Professionals’ opinions should be based on conducting a proper examination and assessment of the person’s capacity to make the decision in question and applying the appropriate test of capacity. If a Doctor’s or other professional’s opinion is being sought on capacity it must be clearly stated to them the specific decision in question to ensure their capacity assessment addresses this.

8.2 In some cases it is a requirement of law that a formal assessment of capacity is carried out. This includes signing a legal document or where a person maybe involved in litigation or an application to the Court of Protection concerning finances.

8.3 There are other circumstances where a judgement needs to be made as to whether a person with the appropriate skills needs to be involved in
assessing mental capacity. Examples of where it would be good practice to do this are;

The decision will have significant consequences for the person appearing to lack mental capacity.

Where the person disputes a finding that they lack mental capacity. Where there is disagreement among those involved with the person as to their mental capacity.

Where the person is expressing different views to different people and appears to be unable to form an independent opinion of their own.

Where the person’s capacity maybe challenged at the time of the decision being made or at a future date.

Where the person is repeatedly making decisions that place them at risk and could result in harm.

8.4 If the person is unable to consent to or refuse the actual assessment of capacity it will normally be possible to proceed with the assessment provided the person is compliant and it is considered in their best interests.

8.5 Out right refusal or resistance to an examination to establish capacity to make a particular decision cannot be overridden. However, where there are serious concerns about the mental health of an individual, assessment under the Mental Health Act 1983 maybe warranted, if the statutory grounds for this are fulfilled. Refusal to be assessed for capacity is not grounds in itself for lacking capacity to make the decision.

**Acting in Best Interests.**

9. What is the best interests principle?

9.1 The principle of acting in the best interests of someone lacking capacity has become well established in common law. The MCA enshrines this as the overriding principle that must guide all actions or decisions made on behalf of someone who lacks mental capacity. Given the wide range of decisions and actions that could be covered by the MCA, the term “best interests” is not defined. Rather the Act explains how to determine what is in the best interests and sets out common factors that have to taken into consideration so that there is consistency in how decisions are made on behalf of people who lack mental capacity to make these decisions themselves.
10. Who is the decision maker?

10.1 The ‘decision maker’ is shorthand for the person who is deciding to take action or to make a decision in connection with the care or treatment of an adult who lacks mental capacity (see 7.1 above). For day to day decisions, it will be the person providing the direct care. For medical treatment the doctor or for nursing care the nurse proposing to provide that care. If a Lasting Power of Attorney has been made and registered, then the Attorney will be the decision maker, providing the granted power covers the decision. If the Court of Protection has appointed a Deputy, then the decision maker will be the Deputy, provided the decision falls within the scope of their authority.


11.1 The law cannot determine what is in the best interests in all circumstances or determine all the factors that must be taken into account when deciding on best interests, as this will vary from individual to individual. What the Act does is to set out a checklist of common factors that must be taken into consideration in determining what is in the person’s best interests. Not all will be relevant to an individual but they must have been considered, even if then discarded with reasons stated why.

11.2 The checklist can be summarised in the following:

**Equal consideration and non-discrimination.**

The principle of equal consideration means that people with mental capacity problems should not be treated less favourable than anyone else. This also means not having less opportunities made available to them or making unjustified assumptions on what would be in their best interests based on appearance, age or preconceived negative assumptions about their health, behaviour or social circumstances.

**Considering all the circumstances.**

Determining what is in the best interests also requires taking into consideration all the relevant circumstances. It is recognised that a decision maker cannot make exhaustive enquiries to take into consideration every issue that may have some relevance, however small, to the decision or action being taken on behalf of someone lacking mental capacity. Therefore the Act describes the relevant circumstances as those of which the person making the decision is aware and which it would be reasonable to regard as relevant.

**Regaining mental capacity.**

Consideration has to be given to the possibility of the person lacking mental capacity regaining that capacity and, if so, when that might be. It may therefore be possible to put off a decision until they regain capacity to make the decision or to put off the decision because, with further assistance and
support, they maybe helped to make the decision themselves. It is also important to consider, if the likelihood of regaining capacity exists, taking an action or a decision on behalf of the person that is partial, perhaps dealing with an immediate problem whilst not committing a person currently lacking mental capacity to a long term course of action or a decision with long term consequences.

Permitting and encouraging participation.

Even if a person lacks mental capacity to make the decision in question he or she may have views on the matter and what they might want as an outcome. All reasonable and practical steps need to be taken to engage the person in the decision being taken and encourage their participation to the best of their ability.

Special considerations for life-sustaining treatment.

The Act clarifies that in determining whether life-sustaining treatment is in the best interests of someone who lacks mental capacity, the person must not be motivated by a desire to bring about the individual’s death. However, Doctors are not under an obligation to provide, or to continue to provide, life-sustaining treatment where that treatment is not in the best interests of the person. Doctors have to apply the best interests checklist and use their professional skills in deciding whether provision of treatment is in the person’s best interests.

The person’s wishes and feelings, belief and values.

This ensures the focus remains on the person lacking mental capacity. The decision maker has to consider, so far as can be reasonably ascertained, the person’s past and present wishes and feelings, including any relevant written information. The term ‘reasonably ascertained’ will depend on the individual circumstances as what is reasonable in an emergency situation will be different from circumstances where there is time available before a decision has to be made. A person’s beliefs and values, that is political, cultural, religious or past behaviour that indicates how a person would want to live their life, must be also considered.

The views of other people.

The MCA establishes the right for family members, partners, carers and other relevant people to be consulted on decisions affecting people who lack mental capacity. People with a right to be consulted include anyone named by the person lacking capacity as someone to be consulted and anyone engaged in caring for the person or interested in the person’s welfare. Also, anyone with legal powers related to the person lacking mental capacity.

The requirement for consultation must be balanced against the right to confidentiality of the person lacking mental capacity. So consultation must
only take place with those people who it is relevant to consult and where to do so would ensure a valid best interest decision is made.

Careful consideration of the views of those closest to the person lacking capacity should be given, where it is practical and appropriate to do so. If a decision is taken not to consult a person involved with the person lacking capacity, it must be recorded why this is not appropriate. Similarly, where a best interest decision is made which conflicts with family and others consulted, the reasons why this particular decision was made should be recorded. Remember, unless a family member has the appropriate legal powers related to the person lacking capacity, they have a right to be consulted, but cannot make the decision for the person lacking capacity themselves.

12. ‘Reasonable belief’ and best interests.

12.1 The Act provides protection to a person who acts or makes a decision in the reasonable belief that they are doing so in the best interests of a person who lacks mental capacity. This does not mean that a decision maker can impose their own view, however well meaning, rather that they must be able to point to objective reasons to demonstrate why they believe what they are doing is in the best interests of the person who lacks mental capacity.

12.2 They must show that they have considered all the relevant circumstances and applied all the elements of the checklist. If it is subsequently shown that a decision maker was mistaken in their opinion, they would still have protection under the Act if it was shown that the decision was reasonable in the circumstances prevailing at the time, and in arriving at the decision on behalf of the person who lacks capacity, they could demonstrate they followed the Code of Practice.


13.1 In complex decisions concerning someone who lacks capacity there is rarely a straightforward solution and the pros and cons and all relevant factors involved in the decision have to be balanced. Family and partners may have different or partial views of what they believe the person lacking capacity may want, based on their own relationship with that individual. The decision maker will need to try and find a way of balancing these concerns and seek a decision.

13.2 A useful tool to use in determining a decision, and one that Judges have applied, is the use of the ‘balance sheet’ principle. This involves drawing up a list of factors that are benefits or disadvantages in the decision or act proposed and then placing them under the following headings:
13.3 It maybe possible, by this method, to arrive at a consensus when involving relevant family and friends in joint discussion, and the person lacking capacity, if appropriate. In doing so the decision maker needs to be careful that they remain focused on the best interests of the person lacking capacity and do not look to accommodate other people’s own needs or wishes in the decision balance sheet.

13.4 If consensus cannot be reached, it is up to the person charged with making the decision or carrying out the action in question to reach a conclusion about the person who lacks capacity, having considered all the relevant circumstances and applied the statutory checklist.

13.5 If a challenge to that decision seems likely the decision maker should consider involving an independent advocate to act on behalf of the person lacking capacity or seek a second opinion, especially in relation to medical treatment.

14. When do I need to refer to an Independent Mental Capacity Advocate?

14.1 Anyone who lacks capacity to decide on certain major decisions, and who does not have someone to represent them, must be referred to an IMCA. These decisions are:

- Permanent or long term changes of accommodation
- Serious medical treatment.

The above two circumstances are mandatory. It is discretionary, but good practice to refer in relation to an adult protection investigation or in annual or other reviews of care arrangements or where there is an unresolved dispute on what is the best interest decision.

15. When do I need to hold a ‘best interests’ meeting?

15.1 Not all best interest decisions require a specific meeting. Day to day decisions on behalf of a person who lacks capacity can be incorporated into routine care planning and reviews of care, as long as the reasons for why a person is making the day to day decisions is clearly recorded. A best interest meeting should be held when the decision maker would like formal support from the multi-disciplinary team to make the decision, or where the decision would have significant consequences, or where there are differing views on what would be the best interests of the person lacking capacity and the meeting would be the process to resolve these differences.
15.2 Before the meeting takes place a capacity assessment must be carried out and it is established the person lacks capacity to make the relevant decision. The specific decision itself needs to be clearly stated to all those attending and it is also clarified that there is no one else qualified to make the decision on behalf of the person (e.g. a Deputy). It needs to be confirmed that the decision is not one which requires referral to the Court of Protection e.g. serious medical treatment. The relevant people, including the people responsible for implementing the decision, need to attend. By relevant people, we mean those who have a significant interest in the care of the person or who have a significant relationship with the person who lacks capacity to make the decision. Where it is not possible for some relevant people to attend e.g. a relative who lives at some distance, their views need to be sought about the decision and presented at the meeting.

15.3 The meeting itself should commence with a re-statement of what is the best interest decision to be made. It should review the requirements of the statutory checklist. Discussion can be framed around the ‘balance sheet’ (see 13.2) in order to facilitate decision making. All participants must be invited to share their views and asked, on the balance of probability, what the best interest decision should be, and why. Where there are dissenting views they should be recorded but the aim of the meeting is to try and reach agreement. Should disputes remain, the involvement of an IMCA may be able to settle disagreements. The decision maker does not require unanimous agreement, but clearly, it would be best if all professionals and others involved can agree the decision.

16. What do I need to record?

16.1 Where there is a best interests decision meeting, formal minutes are required. Other recording of decisions can be incorporated into care plans, for example, in a care home, or they are recorded as a separate and distinct record. However it is done, the following information must be explicitly stated.

How the best interest decision was reached.
If the person made a previous written statement and your decision does not follow this, the reasons for this.
What were the reasons for reaching the best interest decision.
Who was consulted in arriving at the decision.
What particular factors were taken into account.

17. When does the Court of Protection need to be involved in best interest decisions?

17.1 There are major decisions around medical treatment that require a decision by the Court of Protection and not a ‘decision maker’. These are usually significant surgery or other non-reversible procedures e.g. termination of a pregnancy. Other circumstances would be where there is a major
disagreement regarding a serious decision on where someone should live, and all efforts to resolve the matter locally have failed. Where the major decision is a social care one that requires a referral to the Court of Protection the Legal Department of LB Hillingdon must be involved. Similarly, if the decision is a medical one the PCT or Hospital Trust Legal department must be involved.

18. Additional information.


FACE Mental Capacity Assessment

Practitioner’s quick checklists (below)
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<thead>
<tr>
<th>Practitioner’s quick Checklist for carrying out a formal Mental Capacity Assessment.</th>
<th>Tick</th>
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<tbody>
<tr>
<td>The person aged 16 years or over.</td>
<td></td>
</tr>
<tr>
<td>I can clearly identify evidence that questions the presumption of capacity and therefore a formal test of capacity may need to be applied.</td>
<td></td>
</tr>
<tr>
<td>The decision to be made is it one that falls within the MCA and does not need referral elsewhere.</td>
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<tr>
<td>The decision to be made is clearly and simply stated.</td>
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</tr>
<tr>
<td>I have made all reasonable efforts to support the person to make the decision themselves and abided by the five key principles that underpin the MCA and It is not possible to delay the decision until the person acquires capacity e.g. when fluctuating capacity exists in a person.</td>
<td></td>
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<tr>
<td>An appropriate person has been identified to carry out the formal assessment of mental capacity, given the type of decision to be made and, if the assessor is not the “decision maker” they have been briefed on what the specific decision is.</td>
<td></td>
</tr>
<tr>
<td>In assessing mental capacity, the two stage approach, as defined by the MCA, has been applied correctly and each requirement addressed.</td>
<td></td>
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<tr>
<td>A proper record has been made of the process, including: what the decision is and why it is needed, efforts to assist the person to make the decision themselves, who has been consulted, the assessment of capacity and the outcome, who has been informed of the outcome, any need to review capacity.</td>
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**Practitioner’s quick checklist for making best interest decisions.**

<table>
<thead>
<tr>
<th>It has been established that the person lacks capacity to make the decision or decisions by application of the mental capacity assessment test (MCA).</th>
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<tbody>
<tr>
<td>There is a designated decision maker appropriate to the decision being made, and the decision is clearly stated.</td>
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<tr>
<td>There is no person with legal power to make the decision for the person, or requirement to refer the best interest decision to the Court of Protection because of the nature of the decision.</td>
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| In arriving at a best interest decision, the decision maker has applied:  
  the principle of equal consideration, 
  considered all the relevant circumstances, 
  considered if capacity might be regained, 
  involved the person as much as possible, 
  considered, as far as possible, the person’s known wishes, beliefs and values, 
  considered the views of others e.g. family members, |
| Any relevant written statement by the person, when they had capacity, has been considered. |
| Where the person has no representative, and the decision is a major one, a referral to the IMCA service has been made for their involvement. |
| A need for a best interest decision meeting has been considered. |
| The record evidences: how the best interest decision was reached, consideration of any written or other statements of the person, the reasons for arriving at the decision, who was consulted, what particular factors were taken into account. |