

## Mental Capacity Act and Medical Decision Making

### **Background to this document**

The Mental Capacity Act safeguards the rights of people who have an impairment or disturbance in the way that their mind or brain functions. This document sets out to define the process that professionals should follow when making judgments about a person's capacity to consent to medical treatment.

### **Introduction**

To ensure that from now on all actions are compliant with the MCA and therefore sound and legal the following process must be followed.

At the heart of the MCA is the individual's right to make their own decisions about their lives including care, treatment, finances and accommodation. Decision making around specific issues on the person's behalf must only be carried out when it has been clearly established that they lack mental capacity to make that decision for themselves.

"The Act's starting point is to confirm in legislation that it should be assumed that an adult (aged 16 or over) has full legal capacity to make decisions for themselves (the right to autonomy) unless it can be shown that they lack capacity to make a decision for themselves at the time the decision needs to be made. This is known as the presumption of capacity. The Act also states that people must be given all appropriate help and support to enable them to make their own decisions or to maximise their participation in any decision-making process." MCA Code of Practice 1.2

### **The decisions that people need to make**

Because different forms of treatment require different levels of understanding, capacity to consent must be clearly determined each time a new procedure or medication is being proposed.

The starting point of the process should be that all people are assumed to have capacity, as principle number 1 of the act states:

"Every adult has the right to make their own decisions if they have the capacity to do so. Family carers and healthcare or social care staff must assume that a person has the capacity to make decisions, unless it can be established that the person does not have capacity." MCA Code of Practice chapter 2 quick summary

It is important that this principle is borne in mind throughout the process.

Further, the act would require that capacity assessments are not carried out until all realistic efforts have been made to inform and support the person to be able to make their own decisions about treatment, as principle number 2 of the act states:

"People should receive support to help them make their own decisions. Before concluding that individuals lack capacity to make a particular decision, it is important to take all possible steps to try to help them reach a decision themselves." MCA Code of Practice chapter 2 quick summary

**The first step is to inform the person about the proposed treatment**

**Information should aim to address the following questions:**

What treatment is being proposed?

Why is the treatment necessary?

What are the benefits?

What are the risks?

Where can the treatment be carried out?

How long will it take to recover (if medical procedure)?

**All possible steps to promote capacity to make own decisions must be made**

The following are a number of steps that could be taken

1. Present above information in a range of different formats to allow the person to process using different sensory pathways.
2. Individual meetings with patient with support available from people **they** would find most helpful to discuss the treatment.
3. Sufficient time left to allow people to reflect on information and further discussions encouraged to help decision making.
4. Information presented in manageable 'chunks'
5. Information on different issues presented separately.
6. Following this process the MCA would expect that the above points were documented as evidence for the promotion of capacity.

Having presented the person with all the information a decision should be made about their capacity to manage their treatment.

The assessor of capacity is the person who needs to act if the person lacks capacity. In the case of medical treatment this would be usually be the GP, nurse or other medical practitioner as they are the ones who are proposing the treatment.

**Assessing capacity**

Assessment of capacity is the critical part of the act and it is only be possible to make specific decisions for others if it has clearly been determined that they lack capacity to decide for themselves.

The act requires the assumption that all adults have capacity to make their own decisions.

There are a number of reasons why people may question a person's capacity to make a specific decision:

- the person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision
- somebody else says they are concerned about the person's capacity, or
- the person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works and it has already been shown they lack capacity to make other decisions in their life.

A person's capacity must not be judged simply on the basis of their age, appearance, condition or an aspect of their behaviour.

Mental Capacity Act Code of Practice chapter 4 quick guide

Anyone assessing someone's capacity to make a decision for themselves should use the two-stage test of capacity:

- Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (It doesn't matter whether the impairment or disturbance is temporary or permanent.)
- If so, does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

### **Assessment of Capacity**

The following are a number of steps that should be taken (Appendix 1 and 2)

1. Identify and document why it is felt that someone may lack capacity to make a particular decision.
2. If an assessment is to be carried out the assessor should be clearly identified.
3. All those involved in communicating information to the person (including medical practitioner, relatives, friends, carers, healthcare staff) should be judging the person's capacity to make the particular decision using the following 4 steps as a reference:
  - Does the person have a general understanding of medical treatment?
  - Does the person have a general understanding of the likely consequences of managing their treatment?
  - Is the person able to understand, retain, use and weigh up the information relevant to this decision?
  - Can the person communicate their understanding (by talking, using sign language or any other means)? Would the services of a professional (such as a speech and language therapist) be helpful?

Mental Capacity Act Code of Practice chapter 4 quick guide.

4. The capacity assessor consults with those who know the person and who have been communicating with them to ask for their judgment on capacity. The assessor then concludes whether the person has capacity based on consideration of all the evidence. Capacity assessments relating to complex decisions require that the assessor consults widely and documents their consultation and final decision about capacity. An expert in this area should be used for advice and additional evidence.

5. Records should show in which particular instances the person lacks capacity and should therefore be decision specific. i.e. what can they do?

6. A lack of capacity is not static and assessments should inform care plans with the possibility that the service user is supported in developing their understanding in this area.

7. Decisions should not be made for the service user unless they are unlikely to regain or develop capacity in the time available to make the decision.

*If the result of the assessment is that the person has or could be supported to have capacity they should make their own decision*

*If the result is that the person lacks capacity to consent to the treatment at this time then a best interest meeting should be held.*

### **Making a decision in the person's best interests**

If the capacity assessor has judged that the person lacks capacity in a specific area then a decision can be made on the person's behalf but it must be clearly shown that it is in the person's best interests.

“One of the key principles of the Act is that any act done for, or any decision made on behalf of a person who lacks capacity must be done, or made, in that person's *best interests*. That is the same whether the person making the decision or acting is a family carer, a paid care worker, an attorney, a court-appointed deputy, or a healthcare professional, and whether the decision is a minor issue – like what to wear – or a major issue, like whether to provide particular healthcare.”

Mental Capacity Act Code of Practice chapter 5 introduction

The person who decides what is in a person's best interest is referred to in the act as the decision maker. The decision maker is the person who is proposing the particular service or element of care.

At the outset the decision maker should ensure that they have established whether the person must be referred to the Independent Mental Capacity Advocacy Service (IMCA).

IMCA is a key aspect of the Mental Capacity Act. The Act places a responsibility on Local Authorities to ensure that people who are considered to lack capacity have access to an independent advocate when best interest decisions are being made about them that relate to **serious medical treatment** (SMT).

A referral must be made by the decision maker if the person who is considered to lack capacity has **no family or friends** to represent their likely views (with the exception of adult protection cases).

The role of the IMCA is to:

- Support the person who lacks capacity and represent their likely views to those responsible for making decisions
- Obtain and evaluate information
- Ascertain the person's wishes and feelings, as far as possible

- Ascertain alternative courses of action – e.g. different care arrangements
- Seek a further medical opinion, if necessary.

There may not be time to refer to and secure the support of an IMCA when serious medical intervention is required immediately, for example, in life-threatening circumstances.

Before considering a best interest decision it is important to establish if the person has or should have:

An IMCA (see appendix 6)

An advance decision to refuse a particular aspect of treatment.

An attorney (Personal Welfare LPA) who has decision making rights in the instance being considered.

A Court Appointed Deputy who has decision making rights in the instance being considered.

The act requires that, in principle, **the more complex the decision** the more people are consulted. The availability of someone to advocate on the person's behalf is essential and this could be a family member, advocate or in some circumstances an IMCA. The advocate is there to represent the person so must therefore know or get to know them in order to express their views. Their view is vital but they are not the final decision maker and therefore should be considered alongside the views of all others involved.

A decision maker should be identified who is likely to be a medical practitioner involved in the treatment process who wants to know if the person has capacity.

The decision maker should ensure that all involved with the person are given sufficient information about the range of decisions that the person needs to make.

In light of the complexity of the decisions an advocate should be identified. In some cases this would be a family member, where this is not applicable and advocate from an independent organisation should be found.

Anyone involved in contributing to the decision should:

- Consider all the relevant circumstances relating to the decision
- Consider whether the person is likely to regain capacity. If so can the decision or act wait until then?
- Consider the person's past and present wishes and feelings (in particular if they have been written down)
- Consider any beliefs and values (e.g. religious, cultural or moral) that would be likely to influence the decision in question and any other relevant factors.

Everything that is possible should be done to permit and encourage the person to take part, or to improve their ability to take part, in making the decision.

**Making a decision in the person's best interests (see appendix 3)**

Having decided on and documented that the person lacks capacity to make the specific decision:

1. Consideration should be given to whether there is an advance decision, Attorney or Court Appointed Deputy. If any of these are present guidance should be sought from them.

2. An individual best interest meeting should be organised (see appendix 4) to consider the specific decision or a number of decisions if relevant and all those involved should attend or report their opinions.

A Best Interest Meeting should involve:

Service User

Care staff

Relatives and friends

Health Care staff

Expert in this area

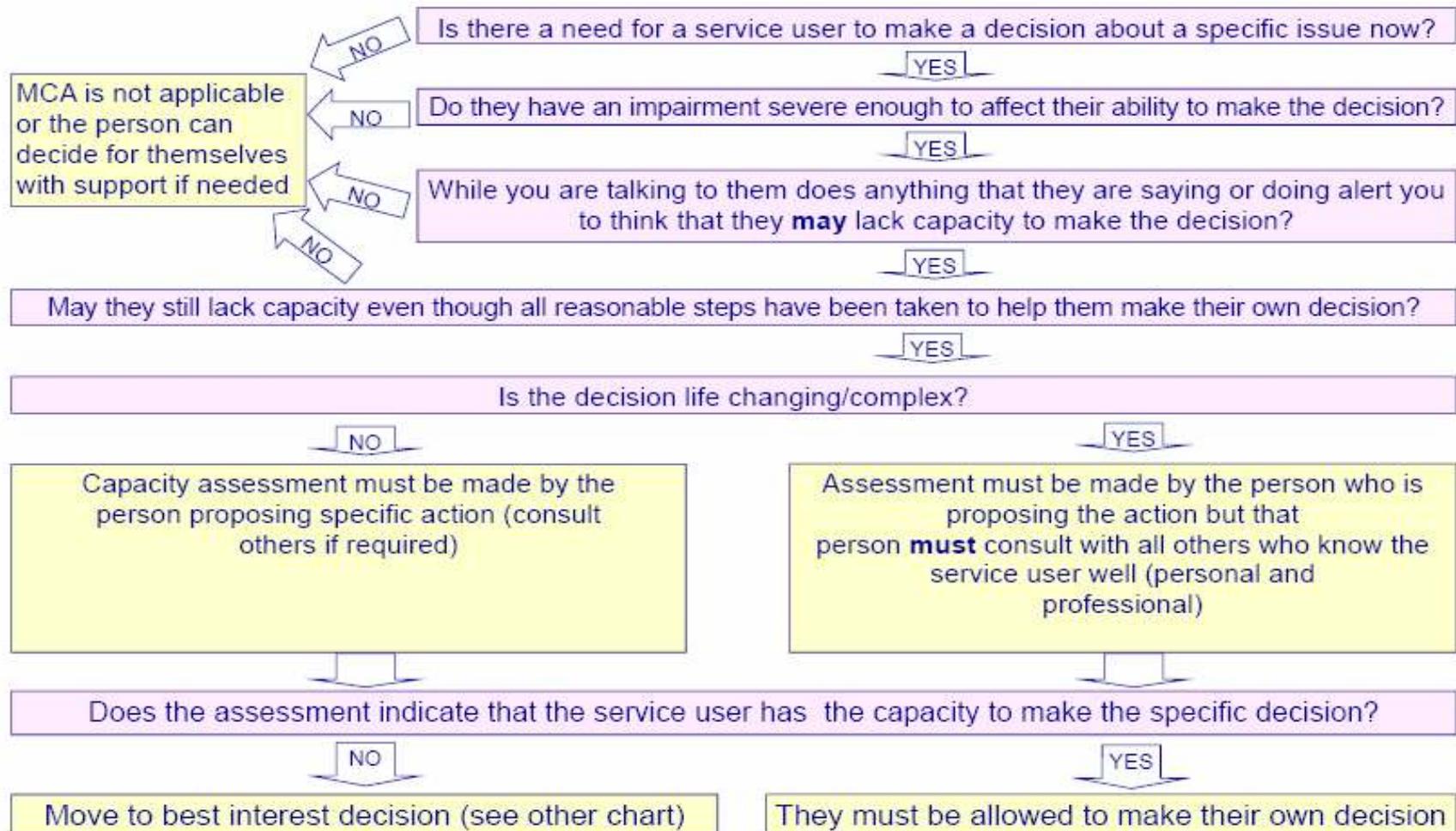
Appointee or proposed Deputy if this is likely to be considered.

3. The decision maker makes the final decision and documentation should clearly show how the decision was reached. (Use appendix 5 to promote discussion around costs and benefits of planned action). Use FACE form to document final decision (see appendix 2 for example)

4. Any dispute about the decision should be taken through an identified procedure.

## Appendix 1

# The Mental Capacity Act - Assessing Capacity



## Appendix 2 Assessing Capacity

This guidance should be used alongside the flow chart “The Mental Capacity Act - Assessing Capacity”

All reasonable steps must be taken to help the service user to make their own decision?

The starting assumption must always be that a person has the capacity to make a decision and we all need information to make our own decisions.

This information must be given:

***In the way that they best understand and communicate (if you don't know about the way they best communicate, ask people who know them – you may need to get a suitably qualified person's help with this like a Speech and Language Therapist)***

***At a time when they are most able to concentrate, take information in and think about it.***

***In a place where they feel comfortable and are not too anxious.***

***With the support, if necessary, of someone who they trust and can communicate with.***

Is there a need for a service user to make a decision about a specific issue now?

If the decision is not urgent support, help, advice and ‘training’ should be given to assist the person to make their own decision.

A person's capacity **must** be assessed specifically in terms of their capacity to make a particular decision at the time it needs to be made.

A person's capacity must not be judged simply on the basis of their age, appearance, condition or an aspect of their behaviour.

Do they have an impairment severe enough to affect their ability to make the decision?

If they do this guidance **may** apply.

If they don't then the guidance does **not** apply

While you are talking to them does anything that they are saying or doing alert you to think that they **may** lack capacity to make the decision?

As stated previously, we should assume that everyone has capacity to make their own decisions and this should only be questioned when their behaviour gives you clear reason to doubt capacity. (Remember this must be after you have given them all the information).

If it does you should move on to make an assessment.

#### Assessing capacity to make a particular decision

Having given the person the information that they need in the way they need it capacity is judged by deciding

- 1. If the person has a general understanding of what decision they need to make and why they need to make it?***
- 2. If the person has a general understanding of the likely consequences of making, or not making, this decision?***
- 3. Is the person able to understand, retain, use and weigh up the information relevant to this decision?***
- 4. Can the person communicate their decision (by talking, using sign language or any other means)? Would the services of a professional (such as a speech and language therapist) be helpful?***

If they can do all of the above they **have** capacity.

If they are unable to carry out one or more of the steps then they **lack** capacity.

Is the decision life changing/complex?

NO

Capacity assessment must be made by the person proposing specific action  
(consult others if required)

Day to day decisions can be made by the person who is proposing or delivering the particular piece of care and if they know the person they should not generally need to consult with others especially if the issue is recorded in the care plan already.

YES

If the decision is likely to alter their life significantly and/or is complex then you must ask other people their view of the person's capacity. They must give their opinion by applying their knowledge of the four steps above.

People who should be asked are:

Paid and unpaid carers

Family and or friends

Social Worker and or other Adult Social Care staff

Advocate (if one has been appointed)

CPN and/or Psychiatrist (if they have one) and/or GP

Other involved professionals

In complex decisions you may need to ask all of the above people but a proposed minimum would be 4 people.

There may well be a need for a more thorough assessment (perhaps by involving a doctor or other professional expert) for an opinion.

Who makes the final judgment on capacity? Who is the assessor?

Assessment must be made by the person who is proposing the action but remember; that person **must** consult with all others who know the service user well (personal and professional).



## **Appendix 4**

### **Best Interests meetings: some points to consider**

Has an assessment of capacity been carried out? If it hasn't a best interest meeting should not happen first.

Has the assessment shown that the person lacks capacity to make the decision or decisions for themselves? If it hasn't the person decides not a meeting

Is the decision to be made one that is allowed to be made under the Mental Capacity Act (i.e. not an excluded decision or one that requires a Court ruling)?

Has someone been appointed to Chair the Best Interests meeting?

Has someone been appointed to record the Best Interests meeting and the outcome?

Has the Chair ensured that all of those mentioned in the statutory checklist (if appropriate) have either been consulted or invited to the meeting?

Has the Chair sent out an agenda including:

- Introductions
- Purpose of the meeting (specifying the decision or decisions)
- Review of requirements of the statutory checklist
- Giving information
- Discussion
- Summary of information and factors to be considered
- Deciding on best interests

Has the outcome of the meeting been recorded and distributed?

**Appendix 5**  
**Best Interests 'Balance Sheet'**

Having decided that the person lack capacity, this sheet can be used during the meeting to help you to weigh up advantages and disadvantages of propose Best Interest decision/plan

What decision/plan is being considered?

Identified advantages

Identified disadvantages

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## Appendix 6

### WHAT IS IMCA?

IMCA is a key aspect of the Mental Capacity Act, 2005, which will be partially implemented in April 2007. The Act places a responsibility on Local Authorities to ensure that people who are considered to lack capacity have access to an independent advocate when decisions are being made about them that relate to:

- Serious medical treatment (SMT)
- Changes of NHS accommodation (more than 8 weeks).

Recent changes to the legislation have also included some:

- Accommodation Reviews and Adult Protection cases

### Complaints Comments Compliments

SEAP is committed to providing high quality advocacy support to clients, and to working effectively with service providers. However we recognise that sometimes things go wrong. If you have a complaint about our service, please ask for a copy of our complaints procedure. If you would like to make a comment, or compliment us, please write to the address below.

**IMCA**  
**28 Beatrice Road**  
**Walker Lines Industrial Estate**  
**Bodmin**  
**Cornwall**  
**PL31 1RD**

**Phone: 0845 2799019**  
**Fax: 0845 2799018**  
**E-mail: [admin.bodmin@seap.org.uk](mailto:admin.bodmin@seap.org.uk)**



**South of England  
Advocacy Projects**

**IMCA  
SERVICE**

**Independent Mental  
Capacity Advocacy**

**Cornwall & Isles of Scilly**

**Registered Charity No. 1080679**  
**Company No. 3963421**



## IMCA (INDEPENDENT MENTAL CAPACITY ADVOCACY) SERVICE

### WHO CAN RECEIVE IMCA?

- Those who are considered to lack capacity by decision-makers
- Those who have no family or friends to represent their likely views (with the exception of adult protection cases).

### WHAT DOES AN IMCA DO?

- Support the person who lacks capacity and represent their likely views to those responsible for making decisions
- Obtain and evaluate information
- Ascertain the person's wishes and feelings, as far as possible
- Ascertain alternative courses of action – e.g. different care arrangements
- Seek a further medical opinion, if necessary.

### AN IMCA IS

- Independent of the person making the decision
- Able to meet the person concerned in private
- Able to see all relevant health, social services and care home records
- Able to request an additional medical opinion.

### WHEN IS IT NOT APPROPRIATE TO REFER TO IMCA?

- When serious medical intervention is required immediately, for example, in life-threatening circumstances
- When the treatment is regulated by Part 4 of the Mental Health Act
- Where it is necessary to provide accommodation urgently
- Where restrictions are placed on an individual's accommodation under the Mental Health Act.

### HOW DO IMCAs WORK?

- We recognise the need to provide a rapid response to referrals in order to avoid unnecessary delays to the decisions which need to be made, and will respond to all requests as quickly as possible.
- Advocates will work with the person lacking capacity, to try and establish their views and to involve them in the decision-making process as much as possible. They will also speak with people who may have information about the person's views, beliefs, and preferences, and will consult any written information such as case-notes and reports, or directions which the person may have given before they lacked capacity.
- IMCA staff do not have decision-making responsibility, but they will write a report which outlines their findings on the likely views of the person, detailing how they arrived at their recommendations; and decision-makers have a responsibility to give full consideration to the contents of the report. IMCA staff can appeal if they believe a decision has been made without due weight being given to the advocate's report.

### HOW TO REFER

Referrals will usually be made by health and social care staff.  
You can download a referral form from our website: [www.seap.org.uk/imca](http://www.seap.org.uk/imca)  
or telephone us on 0845 2799019  
Fax 0845 2799018  
Email: [admin.bodmin@seap.org.uk](mailto:admin.bodmin@seap.org.uk)



SEAP is committed to the Mindful Employer Charter

Leaflets in other formats/languages available on request