Healthier Business UK Ltd
OCCUPATIONAL HEALTH

Mental Capacity Act 2005 Training

Mental capacity within the context of the MCA means the ability to make a decision. A person's capacity to make a decision can be affected by a range of factors such as a stroke, dementia, a learning disability or a mental illness. People with a mental illness do not necessarily lack capacity. However, people with a severe mental illness may experience a temporary loss of capacity to make decisions about their care and treatment.

A person's capacity may vary over time or according to the type of decision to be made. Physical conditions, such as an intimidating or unfamiliar environment, can also affect capacity, as can trauma, loss and health problems. A temporary lack of capacity will also include those who are unconscious or barely conscious whether due to an accident, being under anaesthetic or as a result of other conditions or circumstances such as being under the influence of alcohol or drugs.

The five core principles

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable (doable) steps to help them to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because they make an unwise decision.
4. An act done, decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action

Which staff will be affected by the Mental Capacity Act?

The MCA applies to all people making decisions for or acting in connection with those who may lack capacity to make particular decisions. The staff who are legally required to have regard to the Code of Practice when acting in relation to a person who lacks, or who may lack, capacity are as follows:

- People working in a professional capacity, e.g. doctors, nurses, social workers, dentists, psychologists and psychotherapists
- People who are being paid to provide care or support, e.g. care assistants, home care workers, support workers, staff working in supported housing,
- Prison officers and paramedics
- Anyone who is a deputy appointed by the Court of Protection
- Anyone acting as an IMCA
- Anyone carrying out research involving people who cannot make a decision about taking part.

Why do we need the Mental Capacity Act?

The MCA has been developed to bring together existing legal requirements and provide consistency in decision making about the care and treatment of people who lack capacity to make a decision. Much of the Act builds on existing common law (that is, law that is established in judgments made by the courts), but it also brings in important changes, including new criminal offences, IMCAs, a new Court of Protection and the Office of the Public Guardian.

The MCA is designed to protect the rights of individuals and to empower vulnerable adults. In the past, some people with dementia, learning disabilities and severe mental illness have often not been listened to, and their rights to make decisions may not have been recognised.

The MCA covers decisions that range from day-to-day decisions such as what to eat and wear, through to serious decisions about where to live, having an operation or what to do about a person's finances and property.

What is lack of capacity?

A person lacks capacity if they are unable to make a particular decision because of an impairment or disturbance of the mind or brain, whether temporary or permanent, at the time the decision needs to be made. Under the MCA, the following factors have to be considered when assessing if someone has capacity to make a decision:

- Whether they are able to understand the information
- Whether they are able to retain the information related to the decision to be made
- Whether they are able to use or weigh that information as part of the process of making the decision
- Whether they are able to communicate that decision – by any means,
- Including blinking an eye or squeezing a hand.

Capacity is both time and decision specific. As a rule, most people will be able to make most decisions most of the time. A lack of capacity can change over time; a person may have the capacity to make some decisions but not others.

What triggers an assessment?

As stated in the principles of the Mental Capacity Act (MCA), you should always start from an assumption of capacity. Doubts as to a person's capacity to make a particular decision can occur because of:

- The way a person behaves
- Their circumstances
- Concerns raised by someone else.

Other important triggers could be the death or move of a person who has been providing care, or a referral to an adult protection co-ordinator. Any doubts must be considered in relation to the specific decision to be made. Also, remember that an unwise decision does not necessarily indicate lack of capacity.

What do you need to ask when assessing capacity?

There are two questions to be asked if you are assessing a person's capacity.

- Is there an impairment of, or disturbance in, the functioning of the person's mind or brain?

If so:

- Is the impairment or disturbance sufficient to cause the person to be unable to make that particular decision at the relevant time?

This two-stage test must be used, and you must be able to show it has been used. Remember that an unwise decision made by the person does not itself indicate a lack of capacity. Most people will be able to make most decisions, even when they have a label or diagnosis that may seem to imply that they cannot. This is a general principle that cannot be over-emphasised.

The assessment process has to be clear and accountable. It will require input from staff in the range of organisations involved in providing support, and should include family and carers. Where there is no family or carer or other person authorised to make decisions for that person, an independent mental capacity advocate (IMCA) may be assigned if there is an important decision about certain medical treatment or a change of accommodation to be made. Other advocates may also be able to offer support, representation or advice, and staff need to be familiar with the local services and know how to contact them. All professional staff involved in an assessment should keep adequate records that explain the grounds on which a person is found to have, or lack, capacity.

Assessing capacity in practice

Anyone who is being assessed for capacity to make a decision should be assessed at their best level of functioning for the decision to be taken. This will be best achieved by approaches similar to those listed below. What sort of help might a person need to make a decision?

The following factors demonstrate the range of areas that will need to be considered. As always, the range of areas to be considered will be specific to the individual and their circumstances, and the two-stage test of capacity must be applied. Do you remember what this is? Please see Part 3.2 of these materials.

Factors to be considered in an assessment:

- General intellectual ability
- Memory
- Attention and concentration
- Reasoning
- Information processing – how a person interprets what they are told
- Verbal comprehension and all forms of communication
- Cultural influences
- Social context
- Ability to communicate

Not all of these factors need to be considered in every assessment of capacity although, for some formal assessments, a number of these factors will be relevant. A reasonable belief in a person's lack of capacity to make a particular decision should be supported by judgements about some of these factors.

Each assessment of capacity will vary according to the type of decision and the individual circumstances.

Who will assess capacity?

Anyone caring for or supporting a person who may lack capacity could be involved in an assessment. Remember, each decision needs to be considered alongside the person's capacity to make it. For example, care home staff. The more significant the decision to be made, the more likely that a number of different professional staff will be involved.

What sort of help might a person need to make a decision?

You must always bear in mind the five core principles and ensure that no one is treated as unable to make a decision unless all practical steps to help them have been exhausted and shown not to work.

Steps to be taken (Code of Practice, 3.10–3.16)

- Provide all relevant information but do not burden the person with more detail than required. Include information on the consequences of making, or not making, the decision. Provide similar information on any alternative options.

- Consult with family and other people who know the person well on the best way to communicate, e.g. by using pictures or signing. Check if there is someone who is good at communicating with the person involved.

- Be aware of any cultural, ethnic or religious factors which may have a bearing on the individual. Consider whether an advocate or someone else could assist, e.g. a member of a religious or community group to which the person belongs.

- Try to choose the best time for the person. Try to ensure that the effects of any medication or treatment are considered. For example, if any medication makes a person drowsy, see them before they take the medication, or after, the effect has worn off.

- Take it easy. Make one decision at a time, don't rush and be prepared to try more than once.

Legal tests under common law and other legislation

Although the MCA brings together much of existing common law and establishes the way in which capacity must be assessed, some decisions will continue to be dealt with under common law (that is, law established through decisions made by courts in individual cases). Where a legal decision needs to be made, staff must be fully aware of those decisions that are covered by the MCA and those which are covered by common law or other legislation.

There are several tests of capacity that have been produced following judgments in court cases.

These are known as common law tests. They cover capacity to:

- Make a will
- Make a gift (although attorneys can also make gifts – see Part 6.4 of these materials)
- Enter into litigation (take part in legal cases)
- Enter into a contract
- Enter into marriage.

Other professionals will need to be involved in administering these tests of capacity under common law. For example, it is advisable to seek legal advice from a legal practitioner when people who may lack capacity are making a will, and registrars will continue to decide if somebody has the necessary capacity to understand the marriage vows.

Other acts, for example the Juries Act 1974, have been amended to include the MCA's definition of lacking capacity. A lack of capacity to serve on a jury disqualifies somebody from jury service.

For more information on common law tests and their use, see the British Medical Association and Law Society book, Assessment of Mental Capacity – Guidance for Doctors and Lawyers, Second Edition. Please check that you use the latest edition – as the law develops and decisions are made about individual cases, some of the guidance will change.

Excluded decisions

Other decisions excluded from the MCA include:

- Consent to sexual relations
- Consent to divorce or dissolution of a civil partnership
- Consent to a child being placed for adoption or to making an adoption order
- Voting.

Other people can never make these decisions on behalf of another person, regardless of the person's capacity to make these decisions themselves.

Sexual relationships

Sexual relationships involving a person who may lack capacity to consent can pose complex dilemmas for staff and families. The MCA does not give anyone the power to consent to sexual relationships on behalf of a person who lacks capacity.

What kind of records will staff need to keep?

Day-to-day records

Where a person is judged to lack capacity to consent to day-to-day care, elaborate record keeping is not required. However, if a practitioner's decision is challenged, they must be able to describe why they had a reasonable belief of lack of capacity. The decision about the lack of capacity should always be recorded in the person's case notes or file. Although this does not need to be done on a daily basis, the record should note the decision and note that it will be reviewed regularly.

Recording decisions in this way will help staff to demonstrate why they had a reasonable belief in the person's lack of capacity. Some employers will have policies about what they require in respect of such documentation.

Professional records

Where professionals such as occupational therapists, nurses, social workers, psychologists or doctors are involved, it is good practice for a proper assessment of capacity to be made and the findings recorded in the relevant records. These records will be useful for other people involved in the person's care, or if your practice is challenged. Daily notes on an individual's care should be part of this process. Local agency protocols and procedures should cover this.

Reports for the Court of Protection/Office of the Public Guardian

Formal reports or access to records may be required in certain circumstances by the Court of Protection or Office of the Public Guardian. It is therefore important that records are maintained and kept up to date.

At this point, you have:

- Been introduced to the two-stage test of capacity
- Identified what needs to be considered when assessing capacity
- Discovered when a legal practitioner should be consulted about a person's capacity to make certain legal decisions
- Noted the importance of recording decisions about assessing capacity

Best interests decisions and acts

The Mental Capacity Act (MCA) requires any decision or act made on behalf of a person who lacks capacity to be made in that person's best interests. Decisions may be made under the MCA by people appointed to do so, such as attorneys, deputies and the Court of Protection (see Parts 6 and 8 of these materials). However, decisions will often be made by staff involved in the care and treatment of the person concerned. Staff can also undertake most acts in connection with care or treatment which are made on behalf of a person who lacks capacity to consent if those acts are in a person's best interests.

The MCA does not define best interests but identifies a range of factors that must be considered when determining the best interests of individuals who have been assessed as lacking capacity to make a particular decision or consent to acts of care or treatment. There are a number of steps involved in deciding what a person's best interests are. The MCA makes it clear that when determining what is in someone's best interests, you must not base the decision on the person's age or appearance or make unjustified assumptions based on their condition.

Considering all relevant circumstances – these are circumstances of which the decision maker is aware and those which it is reasonable to regard as relevant.

Regaining capacity – can the decision be put off until the person regains capacity?

- Permitting and encouraging participation – this may involve finding the appropriate means of communication or using other people to help the person participate in the decision-making process.
- Special considerations for life-sustaining treatment – the person making the best interests decision must not be motivated by the desire to bring about a person's death.
- Considering the person's wishes, feelings, beliefs and values – especially any written statements made by the person when they had capacity.
- Taking into account the views of other people – take account of the views of family and informal carers and anyone with an interest in the person's welfare or appointed to act on the person's behalf.

Acts in connection with care and treatment

When carrying out acts of care and treatment in the best interests of a person who lacks capacity, staff will be legally protected. This means that staff will be protected under Section 5 of the MCA against legal challenges (but not if they act negligently), provided those they:

- Have taken reasonable steps to assess the person's capacity to consent to the act in question
- Reasonably believe that the person lacks the capacity to consent
- Reasonably believe that the act they are carrying out is in the person's best interests.

However, staff will not be protected if they act negligently.

Acts in connection with personal care may include:

- Assistance with physical care, e.g. washing, dressing, toileting, changing a catheter and colostomy care
- Help with eating and drinking
- Help with travelling
- Shopping
- Paying bills
- Household maintenance
- Those relating to community care services.
- Acts connected to healthcare and treatment may include:
- Administering medication
- Diabetes injections
- Diagnostic examinations and tests
- Medical and dental treatment
- nursing care
- Emergency procedures.

You must also consider whether you could provide the care or treatment in a less restrictive way – for example, could a person be given a shower that they can manage themselves rather than a bath for which they will need to be supervised? The three conditions described above must also be met.

What are these conditions?

The decision maker must:

- Have taken reasonable steps to assess the person's capacity to consent to the act in question
- Reasonably believe that the person lacks the capacity to consent
- Reasonably believe that the act they are carrying out is in the person's best interests

Who is the decision maker in health and social care services?

The 'decision maker' is a shorthand term for someone who has to decide whether to provide care or treatment for someone who cannot consent because they lack the capacity to do so. The decision maker will vary depending on the individual's circumstances and the type of decision involved. Social care staff will be decision makers for many day-to-day situations. They may also act as decision makers for longer-term decisions regarding the care of an individual who lacks capacity. Those making such decisions have some protection under the MCA (see Section 5 of the Act).

Health professionals will be decision makers for medical and related treatment, such as dental care and physiotherapy. 'Treatment' includes investigations such as X-rays, as well as procedures like operations and injections. However, doctors are unlikely to be decision makers for social activities or day-to-day care. Nurses will be the decision makers in relation to nursing care. Remember, the person delivering the treatment or nursing care makes the decision about whether to deliver the care, even though the treatment may have been prescribed by someone else.

Although decisions may result from discussions with other professionals or with the medical or nursing team, the person who delivers the treatment or care for somebody who lacks capacity is responsible for making the final decision to deliver that treatment or care in the person's best interests. Family members and unpaid carers who live with or care for people who lack capacity to make decisions will often be the decision makers for many day-to-day acts such as what people eat or wear.

Limitations on restraint

In circumstances where restraint needs to be used, staff restraining a person who lacks capacity will be protected from liability (for example, criminal charges) if certain conditions are met. There are specific rules on the use of restraint, whether verbal or physical, and the restriction or deprivation of liberty.

If restraint is used, staff must reasonably believe that the person lacks capacity to consent to the act in question, that it needs to be done in their best interests and that restraint is necessary to protect the person from harm. It must also be a proportionate or reasonable response to the likelihood of the person suffering harm and the seriousness of that harm.

Restraint can include physical restraint, restricting the person's freedom of movement and verbal warnings, but cannot extend to depriving someone of their liberty.

Restraint may also be used under common law in circumstances where there is a risk that the person lacking capacity may harm someone else.

The Code of Practice is clear that any dispute about the best interests of a person who lacks capacity should be resolved, wherever possible, in a quick and cost-effective manner. Alternative solutions to disputes should be considered, where appropriate, before any application to the Court of Protection.

The Court will consider if appropriate alternatives have been pursued when an application is made. Certain groups, including people who lack or are said to lack capacity to make a decision, have an automatic right of application to the Court. Otherwise, the Court will decide which applications it will accept.

Alternative methods for resolving disputes include the following:

- Disputes or arguments between family members may be dealt with informally or through mediation.
- Disputes about health, social or other welfare services may be dealt with by informal or formal complaints processes such as Patient Advice and Liaison Services (PALS) in the NHS in England or through other existing complaints systems.
- Advocacy services may be able to help resolve a dispute.

Advance decisions

The Mental Capacity Act (MCA) requires that advance decisions are made in a particular way. It is essential that professionals involved in the care of a person who lacks capacity understand the difference between an advance decision to refuse treatment and other expressions of an individual's wishes and preferences.

An advance decision to refuse treatment enables an adult to make treatment decisions in the event of their losing their capacity at some time in the future. Such a decision properly made is as valid as a contemporaneous decision (made at the time) and so it must be followed, even if it would result in the person's death. If an advance decision involves refusing life-sustaining treatment, it has to be put in writing, signed and witnessed but, otherwise, advance decisions can be verbal and do not need to be signed or witnessed if they are written down.

Even in the absence of an advance decision, people's views and wishes, whether written down or not, should be used to assist in planning appropriate care for the individual and making decisions in their best interests. Such statements of wishes and feelings are important, particularly if they are written down, but are not legally binding in the same way as advance decisions.

When are advance decisions valid and applicable?

An advance decision is valid when:

- It is made when the person has capacity
- The person making it has not withdrawn it
- The advance decision is not overridden by a later Lasting Power of Attorney that relates to the treatment specified in the advance decision
- The person has acted in a way that is consistent with the advance decision.

An advance decision is applicable when:

- The person who made it does not have the capacity to consent to or refuse the treatment in question
- It refers specifically to the treatment in question
- The circumstances the refusal of treatment refers to are present.

An advance decision to refuse life-sustaining treatment is applicable when:

- It is in writing, including being written on the person's behalf or recorded in their medical notes
- It is signed by the person making it (or on their behalf at their direction if they are unable to sign) in the presence of a witness who has also signed it.
- It is clearly stated, either in the advance decision or in a separate statement (which must be signed and witnessed), that the advance decision is to apply to the specified treatment, even if life is at risk.

An advance decision is not applicable if there are reasonable grounds for believing that circumstances now exist that the person did not anticipate at the time they made the advance

decision and which would have affected their decision had they been able to anticipate them (e.g. new treatment), or if they have behaved in a way that raises doubts about or contradicts their advance decision.

Staff must be able to recognise when an advance decision to refuse treatment is both valid and applicable. A best interest's decision to provide treatment cannot override a valid and applicable advance decision that refuses that treatment. Protection from liability will not apply if a valid and applicable advance decision is ignored.

The decision of an attorney acting under a registered Lasting Power of Attorney will override an advance decision if the Lasting Power of Attorney has been made after the decision and gives the attorney the right to consent to or refuse the treatment specified. There are special rules for people who are detained under the Mental Health Act 1983; in some circumstances, their refusal of treatment for a mental disorder may be overridden.

Advance decisions may not be valid if the individual made the decision while they had capacity and if they then did something that is clearly inconsistent with the advance decision.

As part of empowering service users, staff need to develop means of promoting, implementing and recording this form of advance planning. NHS trusts and user groups are developing guidance on the use of advance decisions and expressions of wishes.

Independent mental capacity advocates

The Mental Capacity Act (MCA) introduces a duty on the NHS and local authorities to involve an independent mental capacity advocate (IMCA) in certain decisions. This ensures that, when a person who lacks capacity to make a decision has no one who can speak for them and serious medical treatment or a move into accommodation arranged by the local authority or NHS body (following an assessment under the NHS and Community Care Act 1990) is being considered, an IMCA is instructed.

The IMCA has a specific role to play in supporting and representing a person who lacks capacity to make the decision in question. They are only able to act for people whose care or treatment is arranged by a local authority or the NHS. They have the right to information about an individual, so they can see relevant health and social care records.

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, both through interviewing the person and
- Through examining relevant records and documents
- Obtain the views of professionals and paid workers providing care or treatment for the Person who lacks capacity
- Identify alternative courses of action
- Obtain a further medical opinion, if required
- Prepare a report (that the decision maker must consider).

In England, regulations have extended the role of IMCAs so they may also be asked to represent the person lacking capacity where there is an allegation of or evidence of abuse or neglect to or by a person who lacks capacity. In adult protection cases, an IMCA can be appointed even though the person has family or friends.

Similarly, the regulations also allow IMCAs to contribute to reviews for people who have been in accommodation arranged by the local authority or NHS body or who have been in hospital for more than 12 weeks and who have nobody else to represent them.

The MCA creates new criminal offences of ill-treatment or wilful neglect, which may apply to the following:

- People who have the care of a person who lacks capacity
- An attorney acting under a Lasting Power of Attorney or Enduring Power of Attorney
- A deputy appointed by the Court.

Allegations of offences may be made to the police or the Office of the Public Guardian. They can also be dealt with under adult protection procedures (via adult services in social services departments). The penalty for these criminal offences may be a fine and/or a sentence of imprisonment for up to five years.

Young people under the age of 16

The Mental Capacity Act (MCA) does not usually apply to children younge than 16 who do not have capacity. Generally, people with parental responsibility for such children can make decisions on their behalf under common law. However, the Court of Protection has powers to make decisions about the property and affairs of a person who is under 16 and lacks capacity within the meaning of the MCA (see Part 2.4 of these materials) if it is likely that the person will still lack capacity to make these types of decision when they are 18.

Young people aged 16 and 17

The MCA overlaps with provisions made under the Children Act 1989 in some areas. There are no absolute criteria for deciding which route to follow. An example of where the MCA would be used would be when it is in the interests of the young person that a parent, or in some cases someone independent of the family, is appointed as a deputy to make financial or welfare decisions.
This could apply when a young person has been awarded compensation and a solicitor is appointed as a property and affairs (financial) deputy to work with a care manager and/or family members to ensure that the award is suitably invested to provide for the young person's needs throughout their lifetime.

Sharing information

People making decisions on behalf of people who lack capacity will often need to share personal information about the person lacking capacity. This information is required to ensure that decision makers are acting in the best interests of the person lacking capacity.

When releasing information, the following questions must be considered:

- Is the person asking for the information acting on behalf of the person who lacks capacity?
- Is disclosure in the best interests of the person who lacks capacity?
- What kind of information is being requested?

Disclosure of, and access to, information is regulated by:

- The Data Protection Act 1998
- The common law duty of confidentiality
- Professional codes of conduct
- The Human Rights Act 1998.

Attorneys with a Lasting Power of Attorney are entitled to as much information as if they were the person lacking capacity. Court of Protection visitors have a right of access to records, and independent mental capacity advocates (IMCAs) have a right of access to that part of a person's records relevant to the decision in question. Court of Protection deputies may have access to a person's records if the Court gives them that power.