

Mental Capacity Act Guidance

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Publisher: Patient Safety Committee

Date of issue: November 2014

Version: 2

Approved by: Chair of Safeguarding Adults Governance Group

Review date: November 2017

This guidance may evoke concerns addressing the following policies/guidance:

- **Safeguarding Adults**
- **Mental Capacity Act**
- **Therapeutic Restriction**

Please refer to the relevant guidance or contact the Trust Safeguarding Adults team for advice

The Mental Capacity Act (MCA) 2005 came into force in England and Wales in October 2007. The Act reflects the development of case law relating to mental capacity. It provides a legal framework for decision-making where an adult is deemed to lack capacity. It is designed to empower and protect vulnerable people who may not be able to make their own decisions.

The MCA applies to everyone who works in health and social care and are involved in the care, treatment and support of people aged 16 and over who are unable to make all or some decisions for themselves because of a lack of capacity, or who have capacity and want to make preparations for a time when they may lack capacity in the future. The Act does not apply to children under 16 years of age – in such cases the common law will continue to apply.

Decisions covered by the MCA:

- Welfare
- Medical treatment
- Financial

Decisions that are NOT covered by the MCA:

- Marriage or civil partnership and divorce
- Sexual relationships
- Adoption
- Voting
- To make a will

The MCA Code of Practice

The MCA Code of Practice explains how the MCA will work on a day-to-day basis. The MCA code of Practice has a statutory force, which means that certain people have a legal duty to have regard to it when working with or caring for adults who may lack capacity to make decisions for themselves.

This document is to be read and applied in conjunction with the MCA 2005 Code of Practice which provides more detailed information and guidance. **Section 1 to 3.19 of this guidance** refers to the relevant chapter and pages of the MCA Code of Practice. All staff must have regard and make reference to Mental Capacity Act Code of Practice. This is a legal requirement.

Person-centred approach

The underlying philosophy of the MCA is to ensure that individuals who lack the ability to make specific decisions are the focus of any decisions made, or actions taken, on their behalf. This means that an individual approach that centres on the interests of the person, not the views or convenience of those caring for that person, should prevail. Staff should make every effort to ensure that patients and service users are supported to make as many decisions as possible for themselves.

Definitions

MCA Code of Practice Chapter 4 Pages 40-63

What is mental capacity?

Mental capacity is the ability to make a decision. The key is the person's ability to carry out the processes involved in making the decision and not the outcome. Capacity is not an absolute concept. The decisions may be wide ranging and have varying consequences. Different degrees of capacity are required for different decisions, with the level of competence required increasing with the complexity of the decision.

Consent is the voluntary and continuing permission of the person to the intervention in question, based on an adequate knowledge of the purpose, nature, likely effects and risks of that intervention, including the likelihood of its success and any alternatives to it. Permission given under any unfair or undue pressure is not consent.

Defining a 'lack of capacity'

MCA Code of Practice, Chapter 4 pages 46 – 49

A lack of capacity cannot be established merely by reference to a person's age, appearance, condition or an aspect of their behaviour.

The MCA covers situations where a person is unable to make a decision in relation to a matter, if at the time they are unable to make a decision because of an impairment of, or a disturbance in the functioning of, the mind or brain.

A person's capacity to make a decision can be affected by a range of factors such as:

- 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
- Substance misuse

This means that a person lacks capacity if: They have an impairment or disturbance that affects the way their brain or mind works and the impairment or disturbance means that they are unable to make a specific decision at the time it needs to be made.

The MCA sets out four criteria in the decision making process for deciding that a person lacks capacity. A person is unable to make a decision if they are unable to do one or more of the following:

1. understand the information relevant to the decision, **OR**
2. retain that information, **OR**
3. use or weigh that information as part of the process of making the decision, **OR**
4. communicate the decision (whether by talking, using sign language or any other means)

A person's capacity may fluctuate over time and vary according to the type of decision to be made. A person may have capacity to make certain decisions, but at the same time lack the capacity to make other, more complex decisions.

The impairment or disturbance can be either permanent or temporary. A temporary lack of capacity will 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.

Some people, for example those in the early stages of dementia, are able to retain information for a limited period only. The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him or her from being able to make the decision.

Key Principles of the Mental Capacity Act 2005

MCA Code of Practice, Chapter 2 pages 19-27

The MCA 2005 is underpinned by a set of principles which aim to protect people who lack capacity and help them to take part, as much as possible, in decisions that affect them. All decisions about mental capacity should be guided by these five key principles:

1. Presumption of capacity

A person is presumed to have capacity unless it is established that they have not.

2. Maximising decision-making capacity

All practicable steps must be taken to assist and enable a person to make a decision for themselves.

3. Unwise decisions

A person is not to be treated as unable to make a decision because he makes an unwise decision.

4. Best interests

An act done or decision made, under the Mental Capacity Act for or on behalf of a person who lacks capacity must be done, or made in his/her best interests.

5. Least restrictive alternative

Before making any decision or an act is done, regard must be had to whether the purpose for which it is needed can be as effectively achieved in any less restrictive way of the person's rights and freedom of action.

When is an assessment of capacity required?

MCA Code of Practice Chapter 4 pages 52-53

The presumption is always that a person has capacity to make a decision (MCA Principle 5). It is important to carry out an assessment when a person's capacity is in doubt. Doubts about a person's capacity may occur because of:

- a person's behaviour
- their circumstances
- concerns raised by someone else

How is capacity assessed?

MCA Code of Practice chapter 4 page 44

Assessment of mental capacity is DECISION and TIME specific.

This means that the assessment of mental capacity should be made at the time the decision needs to be made. Where it involves more than one decision, each decision must be considered in turn, as a person may have capacity to make one decision but lack capacity to make another.

The MCA sets out a single clear 2-stage test for assessing whether a person lacks capacity to take a particular decision at a particular time.

Use **FORM A – 2 stage assessment of mental capacity (appendix 1)**.

Box 2: The two-stage test of capacity

There are 2 questions to be asked if you are assessing a person's capacity:

STAGE1: Is there an impairment of, or disturbance in, the functioning of the person's mind or brain?

STAGE 2: If yes, is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?

At least 1 of the 4 following criteria for decision making must NOT be met for the person to lack capacity:

1. understand the information relevant to the decision, OR
2. retain that information, OR
3. use or weigh that information as part of the process of making the decision, OR
4. communicate the decision (whether by talking, using sign language or any other means)

Helping people to make their own decisions

MCA Code of Practice Chapter 3 pages 29-39

The Act states that everyone must be assumed to have capacity unless it is established that they lack capacity (MCA Principle 1). The MCA requires that all practicable steps are taken to help someone make their own decisions, before they can be regarded as unable to make a decision.

Those making the capacity assessment should ensure that they consider the following points:

Providing relevant information

Ensure that the person has all the information or sufficient information in order to make that specific decision and that the information is explained or presented in a way that is easiest for the person to understand (taking into account the particular needs of the individual). A balance must be struck between giving insufficient information upon which to make a decision, and giving too much information or too much detail which could be confusing.

Making the person feel at ease

Consider the most appropriate location for the person. A familiar place is often the most suitable, if practicable. Most people find it easier to make decisions when they are in an environment where they feel more at ease.

Consider the timing of the decision, as some people's functioning and understanding may vary between different times of the day, or may be affected by particular medication. Also consider whether the decision be postponed to another occasion if when the timing and location would be better.

Supporting the person

The person may benefit from having the support of another person, to provide support in their decision-making

Communicating in an appropriate way

Care and thought about the most effective method of communication will help the person to understand the nature of the decision and the choices available. Simple language should be used, avoiding jargon. Explore different communication methods and aids - Use of pictures or objects could be helpful. Family, carers and others who know the person well, could advise or assist on the most effective methods of communication with the person. It should be noted that in certain cases the presence of family or carers could have the opposite effect and may not be appropriate.

Who should assess capacity?

MCA Code of Practice chapter 4, page 53

The person who is most directly involved with the individual at the time and who proposes the treatment must assess the person's capacity.

Who assesses an individual's capacity to make a decision is dependent on the decision which needs to be made. This means that different people will be involved in assessing someone's capacity to make different decisions at different times.

Complex assessments

The more significant the decision the greater the number of people likely to be involved. However, the final decision about a person's capacity must be the person intending to make the decision or carry out the action on behalf of the person who lacks capacity.

Knowledge of the person concerned is very important and therefore anyone caring for or supporting a person who may lack capacity could be involved in the test to assess capacity. In a hospital setting this can involve the multidisciplinary team who share the responsibility for a patient as well as family members and carers.

Professionals with specific training and experience in assessing capacity may be involved. It is not necessary, except in more complex cases, for a referral to be made to a psychiatrist for assistance with the assessment of mental state and/or capacity.

The following factors may indicate the need for involvement of a more experienced professional:

- The gravity of the decision or its consequences
- Where the person concerned disputes a finding of incapacity
- Where there is disagreement between family members, carers and/or professionals as to the person's capacity
- Where the person concerned is expressing different views to different people, perhaps through trying to please each or tell them what s/he thinks they want to hear
- Where the person's capacity to make a particular decision may be subject to challenge, either at the time the decision is made or in the future
- Where there may be legal consequences of a finding of capacity
- The person concerned is repeatedly making decisions that put him/her at risk or that result in preventable suffering or damage

Documentation

MCA Code of Practice Chapter 4 pages 62-63

All staff making an assessment of capacity should record this in the patient's notes.

Low risk interventions e.g. routine assistance with personal care

It will not usually be necessary to document the assessment of a person's capacity to consent to routine and low-risk interventions, such as providing personal care. For healthcare assistants or support staff helping patients who lack capacity to make day decisions in relation to day to day care, no formal assessment or completion of the mental capacity assessment tool is required.

Significant or complex decisions

When assessing capacity to make choices regarding significant actions, for example decisions about change in accommodation, it is essential that staff clearly document the process of assessment. The record should be made in

the patient's case notes. It is recommended that you demonstrate that the 2 stage capacity assessment tool has been used and complete **FORM A (appendix 1)**.

Record of capacity assessment for significant decisions

The record of the assessment should show:

The completed 2 stage assessment of capacity tool

- What the decision was
- Why the decision was made
- How the decision was made
- When the decision was made
- Who was involved
- What information was used

Regular review

Best Interests decisions and acts

MCA Code of Practice chapter 5 pages 64-91

Where a patient has been assessed as lacking capacity to make a particular decision, that decision should be made on their behalf. The MCA requires that any act done or decision made for, or on behalf of a person who lacks capacity must be done, or made, in their **best interests (Principle 4)**

The MCA does not define best interests but identifies a checklist of key factors which must **ALWAYS** be taken into account when determining what is in the best interests of a person who lacks capacity to make a particular decision.

The Best Interest's Checklist is provided in **appendix 2 FORM C** and all staff should use this when making a decision in a patient's best interests. In summary, The Best Interest's checklist requires the decision maker to:

- **Avoid discrimination**
A determination of best interests must not be made solely on the basis of a person's age, appearance, behaviour or any other aspect of a person's condition which may lead to unjustified assumptions about what might be in a person's best interests.

- **Encourage participation**
As far as possible, permit and encourage the person to participate, or to improve their ability to participate, as fully as possible in any act done for them and any decision affecting them.

Consider whether it is likely that the person will at some time regain capacity in relation to the matter in question, and if it appears likely that

they will, when that is likely to be and can the decision be delayed until that time.

- **Consider all relevant circumstances relating to the decision**
Consult with anyone engaged in caring for the person or interested in their welfare, as to what would be in the person's best interests.

Consideration must always be given as to whether there is an alternative way of achieving the desired outcome, which is less restrictive.

Consider the person's past and present wishes and feelings that would be likely to influence their decision if they had capacity,

Best interest consultation process

The best interest decision making process requires the decision maker to undertake consultation that is practical and appropriate to the particular decision being considered. The more significant and complex the decision, the more formal and wide ranging the consultation process should be.

FORM B (appendix 3) Best Interests Consultation should be used to ensure that a record of any best interests' consultation is documented in the medical case notes.

People with a right to be included in best interests' consultation include:

- Anyone named by the individual
- Anyone engaged in caring for the individual or interested in their welfare
- Any attorney appointed under lasting power of Attorney (LPA)
- Any deputy appointed by the Court of Protection
- An IMCA if the decision is about serious medical treatment or change of residence and the individual lacking capacity is unbefriended.
- In complex cases it is advised that Legal Department should be contacted.

Decision making

MCA Code of Practice Chapter 5 page 69-70

In acute hospital settings, determining or working out whether healthcare or treatment options are in the best interests of an individual who lacks capacity is likely to be a key issue.

The person who makes the decision for the person who lacks capacity is known as the '**decision maker**'. Who the "decision maker" is depends on the particular circumstances and the decision to be made. The decision maker must follow the best interest's guidance.

Medical treatment - the doctor or healthcare professional carrying out the treatment is the decision maker even if a number of professionals, for example in a multidisciplinary team, have been involved in the decision.

Nursing care - the nurse is the decision maker.

Future care and placement it is usually the social worker guided by the multidisciplinary assessments.

Day-to-day actions or decisions - the decision maker will be the person most directly involved with the patient at the time.

If a **Lasting Power of Attorney** (or Enduring Power of Attorney) has been made and registered with The Office of Public Guardian, or a deputy has been appointed under a court order, the attorney or deputy will be the decision maker, for decisions within the scope of their authority.

Protection from liability

Code of Practice, Chapter 6 pages 92-113

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

- observed the principles of the MCA
- have carried out an assessment of the person's capacity in relation to the matter in question
- reasonably believe that the person lacks capacity to consent
- Reasonably believe that the action taken is in the person's best interests.

Staff will not be protected if they act negligently.

Medical treatment requiring court approval

MCA Code of Practice Chapter 8 pages 137-156

The Court of Protection is a specialist court with powers to deal with matters affecting adults who may lack capacity to make particular decisions. It is expected that the Court of Protection will only be involved where particularly complex decisions or difficult disputes are raised. Either the Court of Protection or the Family Court may deal with health and welfare decisions concerning 16 and 17-year-olds that lack capacity to make particular decisions.

The Court is able to hear cases at a number of locations in England and Wales. It covers all areas of decision making under the Mental Capacity Act (MCA) and can determine whether a person has capacity to take a particular decision, whether a proposed act would be lawful, whether a particular act or decision is in a person's best interests, and the meaning or effect of Lasting

Power of Attorney in disputed cases. It is able to be involved in investigations of abuse, including financial issues.

If medical treatment requiring court approval is being considered for an individual it is important that senior staff within the trust are aware and the hospital legal services will co-ordinate the process.

Cases involving any of the following decisions should be brought before the Court of Protection:

- the proposed withholding or withdrawal of artificial nutrition and hydration from patients in a permanent vegetative state
- cases involving organ or bone marrow donation by a person lacking capacity to consent
- cases involving the proposed non-therapeutic sterilisation of a person lacking capacity to consent to this (e.g. for contraceptive purposes)
- All other cases where there is a doubt or dispute about whether a particular treatment will be in a person's best interests.

For further information refer to the MCA Code of Practice and www.direct.gov.uk/en/Governmentcitizensandrights/Mentalcapacityandthelaw

Court of Protection deputies

MCA Code of Practice Chapter 8 pages 146 – 149

The Court of Protection might decide that it is appropriate to appoint a deputy to make ongoing decisions on behalf of a person who lacks capacity to make those decisions. A deputy can be appointed to deal with financial matters and/or personal welfare. The appointment of a deputy could take place, for example, where no Lasting Power of Attorney exists or there is a serious dispute among carers that cannot be resolved in any other way.

A deputy can be a family member or any other person (or in property and affairs cases a trust) the Court thinks suitable. A deputy must act with regard to the Code of Practice, in accordance with the MCA's principles and in the person's best interests.

Planning for future care and treatment:

Advance decisions to refuse treatment

MCA Code of Practice Chapter 9 pages 158-176

People can make advance decisions to refuse treatment under common law; these are sometimes called '**advance directives**' or '**living wills**'. The Mental Capacity Act (MCA) formalises them and sets up clearer arrangements for them.

A person aged 18 years or over who has capacity has, under the MCA, a legal right to refuse specified medical procedures or treatment in advance, intending that refusal to take effect when they no longer have capacity to refuse procedures or treatment, unless it is being undertaken for treating a mental disorder under the Mental Health Act 1983.

No individual, whether or not they have capacity, has the right to demand specific forms of medical treatment. However, wishes or preferences made in advance by a person who subsequently lacks capacity should be taken into account in deciding what treatment would be in that person's best interests.

Staff should be aware of the possibility that a patient may have made an advance decision to refuse treatment and make reasonable efforts to find out what that decision was. This might include:

- having discussions with the patient's relatives and carers
- looking in the patient's clinical notes held in the hospital
- contacting the patient's GP

Once staff have been informed of the existence of an oral advance decision or presented with a written advance decision, they need to consider and determine:

- whether it is an advance decision within the meaning of the MCA
- whether it is **VALID**
- whether it is **APPLICABLE** to the treatment / current situation

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 to which the refusal of treatment refers are present.

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 clearly consistent with the advance decision.

The MCA states that an advance decision to refuse treatment must refer to a specified treatment(s) and may set out the circumstances when the refusal should apply. A statement that indicates a general desire not to be treated would not constitute an advance decision, but an advance decision refusing all treatment in any situation (for example, where a person explains that their decision is based on their religion or personal beliefs) may be valid and applicable.

When are advance decisions valid and applicable?

Refer to MCA Code of Practice chapter 9 pages 158-176 for criteria for valid and applicable advance decisions

Lasting Powers of Attorney (LPA)

MCA Code of Practice Chapter 7 pages 114-135

Under a Lasting Power of Attorney (LPA) an individual can, while they still have capacity, appoint one or more persons to make all or specific decisions on their behalf about financial, welfare or healthcare matters. A LPA is a formal, legal document. In order for an LPA to be valid it must be set out on the right form and be registered with the Office of the Public Guardian before it can be used. If it is not registered it cannot be used.

There are **TWO different types of LPAs** to cover a range of circumstances:

- **Personal WELFARE** - includes healthcare and medical treatment
- **PROPERTY and AFFAIRS** - financial matters

The person making the LPA (known as the donor) chooses who will be their attorney (known as the donee or attorney).

An attorney could be a:

- family member
- friend
- professional, such as a lawyer.

An Attorney is the decision maker **ONLY** for the circumstances relevant to the LPA. An Attorney must act in accordance with the MCA Code of Practice, acting in the donor's best interests and take all practical steps to help the donor to make the particular decision for themselves.

LPAs replace Enduring Powers of Attorney (EPAs), which gave power to the attorney to manage property and financial affairs (not healthcare and welfare) on behalf of the donor. At the onset of the donor's incapacity, the attorney must register the EPA with the Public Guardian in order for their authorisation under the EPA to continue.

A personal welfare LPA will only take effect when a person has lost capacity to make a particular decision. An LPA concerning financial matters will take effect immediately it is registered unless the donor specifies that it should not take effect until they lose capacity to make these decisions.

BOX 5: How to check LPAs

FIRST check the patient lacks capacity.

- ✓ Ask to see the LPA document
- ✓ Check the LPA is registered with the Office of Public Guardian and is valid
- ✓ Registered LPAs are easily identifiable as each page contains a holographic court seal
- ✓ Make sure the attorney has authorisation to make relevant decisions
- ✓ Check there is a specific statement authorising life sustaining treatment

Staff should contact the Hospital Legal services if there are any doubts about the LPA document.

Lasting Powers of Attorney (LPA) authorising healthcare decisions

MCA Code of Practice Chapter 7 pages 120-123

A LPA that authorises the attorney to make personal welfare decisions generally also includes the authority to give or refuse consent to medical treatment or make other healthcare decisions, unless such decisions are specifically excluded by the donor when creating the power.

A personal welfare (health) LPA cannot be used if the person has capacity – they must make the decision

Life sustaining treatment: An attorney has no power to consent to or refuse life-sustaining treatment, unless the LPA document expressly authorises this. If the donor wishes to authorise their chosen attorney to make decisions about the carrying out or continuation of life-sustaining treatment in circumstances where the donor lacks capacity to make such decisions, then the donor must include a clear statement to this effect in the LPA document.

When creating or updating a care plan for a patient who has appointed an attorney to make healthcare decisions, or in deciding what particular treatment would be in the patient's best interests, healthcare professionals must consult the attorney. The attorney, if it is a decision for which they have the authority, must then decide to refuse or consent.

A LPA relating to personal welfare will not authorise an attorney to give or refuse consent to treatment in the following circumstances:

- When the donor has capacity to make their own treatment decisions
- When there is an advance decision to refuse treatment which is valid and applicable in the particular circumstances.

LPA can describe treatment that the individual does not want but it cannot give attorneys the power to demand a particular treatment that healthcare professionals do not believe to be clinically necessary or appropriate.

If a personal welfare LPA is in place but does not include the authority to make the decisions that now need to be made, health and social care staff will make the necessary best interests decisions but they should still consult the attorney.

The Role of the Independent Mental Capacity Advocate (IMCA)

MCA Code of Practice, Chapter 10 pages 178-198

The Act recognises that many patients who do not have capacity may not have any family members or close friends to speak for them on their behalf. These have been referred to as the '**unbefriended**'. If there is no one other than a paid carer with whom the decision maker can consult, the decision maker **MUST** instruct an Independent Mental Capacity Advocate (IMCA).

An IMCA is an advocacy service to provide safeguards for people who lack capacity to make a specified decision at the time it needs to be made. An IMCA is there to support and represent that person and to ensure that

decision making for people who lack capacity is done appropriately and in accordance with the MCA.

An IMCA is not a decision maker for the person who lacks capacity.

IMCAs ALWAYS represent the interests if:

The NHS Body propose to make changes to a person's residence for over 28 days in respect of hospital accommodation (i.e. hospital stay of over 28 days including hospital transfers) or a change in care home placement or change in accommodation over 8 weeks in duration.

There is a decision about serious medical treatment (this does not apply to urgent medical treatment). Serious medical treatment involves providing, withdrawing or withholding treatment in circumstances.

IMCAs MIGHT represent the interests of:

In safeguarding cases (dependent on the circumstances), an IMCA can be appointed even though the person has family or friends.

The role of the IMCA will:

- Obtain and evaluate relevant information on the person's behalf
- Ascertain as far as possible the person's wishes and feelings
- Investigate if the person has an advanced decision
- Obtain a further medical opinion when necessary
- Have the right to access the relevant medical notes of the patient.

It should be noted that involvement of IMCA's is a process which may involve a number of visits (participation in MDT meetings etc) and therefore consideration of the need to involve an IMCA should be made early on in the treatment process.

Referral to The IMCA service can be made by any member of York Hospital staff by telephone to:

Cloverleaf independent advocacy
26 Bond Street
Dewsbury
WF13 1AU
Tel: 01924 454875

Therapeutic Restrictions (formerly Restraint)

[MCA Code of Practice Chapter pages 105](#)

[For further guidance on therapeutic restrictions, this section should be read in conjunction with the Trusts Therapeutic Restrictions guidance and Deprivation of Liberty Safeguards \(DOLS\) Guidance](#)

Therapeutic restriction covers a wide range of actions that includes the use of force to ensure that a person does something they would otherwise refuse to do. It also includes the restriction of a person's liberty, whether or not they resist the restriction.

The MCA requires that **TWO** conditions must be satisfied for staff to be protected from legal action when using active or passive means of restraint:

1. Reasonably believe that the therapeutic restriction is absolutely necessary to prevent the person coming to harm.
2. Ensure that the therapeutic restriction used is reasonable and in proportion to the potential harm.

If the necessary therapeutic restriction amounts to a deprivation of liberty the deprivation of liberty safeguard procedures must be employed and staff must [refer to the DOLS policy/process available on HORIZON](#)

All decisions that lead, or may lead, to the use of therapeutic restriction must be made under the assessment and decision making process that meets the MCA Code of Practice. Clear evidence and documentation is required for all decisions involving restraint.

Research

[**Code of Practice, Chapter 11 pages 202-214**](#)

There is clear guidance about involving people in health and social care research studies when they are not able to consent to taking part.

A family member or carer (**the consultee**) should be consulted about any proposed study. People who can be consultees include family members, carers, attorneys and deputies, as long as they are not paid to look after the person in question and their interest in the welfare of the person is not a professional one. If the consultee say that the person who lacks capacity would not have wanted to take part, or to continue to take part, then this means that the research must not go ahead.

Children and young people

[**MCA Code of Practice, Chapter 12 pages 216-223**](#)

Young people under the age of 16

The Mental Capacity Act (MCA) does not usually apply to children younger 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 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.

A 16 or 17-year-old who lacks capacity to consent can be treated under Section 5 of the MCA. The person providing care or treatment must follow the MCA's principles and act in a way that they reasonably believe to be in the young person's best interests. Parents, others with parental responsibility or anyone else involved in the care of the young person should be consulted unless the young person does not want this or this would otherwise breach their right to confidentiality. Any known views of the young person should also be taken into account. If legal proceedings are required to resolve disputes about the care, treatment or welfare of the young person aged 16 or 17 who lacks capacity, these may be dealt with under the Children Act 1989 or the MCA.

Accountability and Responsibility

The Chief Nurse has Board level responsibility for safeguarding adults (this includes the Mental Capacity Act).

The Trusts Safeguarding Adults Teams remit includes;
Safeguarding Adults,
Mental Capacity Act,
Deprivation of Liberty Safeguards
Therapeutic Restrictions.

Safeguarding Adult Team are available for advice in relation to this guidance.

The Trusts Safeguarding Adults Governance Group is responsible for ensuring the Mental Capacity Act Code of Practice and local guidance is adopted.

All employees of the Trust have a contractual responsibility to adhere to the policies and procedures of the Trust and should therefore;

- Be aware of, the Mental Capacity Guidance and Code of Practice and follow the principles when required in relation to decision making and planning care
- Ensure they are trained to the appropriate level as their role requires and to seek the relevant training (as identified in the training needs analysis and their individual mandatory training profiles).

Assurance

As a minimum Clinical Commissioning Group expect the following;

Availability of copies of Mental Capacity Act Codes of Practice in all relevant wards/units within the organisation

Guidance in place, for staff reference re the Mental Capacity Act

Ensure processes are in place asking about and recording if a person has an advance decision on receiving medical treatment, or record if people have a LPA (Lasting Power of Attorney, IMCA (Independent Mental Capacity Advocate) or RPR (Relevant Person's Representative)

That staff are trained and understand when and how to use the Mental Capacity Act; including induction training where this is relevant to their role

Trust Associated Documentation

All available on Staff Room

Therapeutic restriction Guidance

Deprivation of Liberty Safeguards (DOLS) Guidance

Safeguarding Adults Policy and Procedure

Safe use of Bedrails

Security Policy

York Teaching Hospital A&E Doctors Handbook

Recording of Advanced Decisions

Brief Guide to Mental Capacity Act

Appendices

Appendix 1 FORM A: 2 Stage mental capacity assessment tool

Appendix 2 FORM C: Best Interests Checklist

Appendix 3 FORM B: Best Interests Consultation Process.

Appendix 4 FORM D: IMCA Referral Checklist

Appendix 5 Glossary

FORM A 2 stage assessment of mental capacity

- The assessment must be **DECISION** and **TIME** specific
- Follow the **5 principles** of the Mental Capacity Act 2005

Patient Name <i>Affix patient label</i>	Date	Location
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Name of Assessor	Role
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Proposed treatment / intervention / decision

STAGE 1

Does the person have an impairment or disturbance in the mind or functioning of the brain or mind?	YES	NO
<input type="checkbox"/> Temporary <input type="checkbox"/> Permanent <input type="checkbox"/> Unknown	<i>Detail</i>	

STAGE 2: ALL THE QUESTIONS MUST BE ASKED SPECIFIC TO THE PROPOSED INTERVENTION

1. Is the person able to understand the information relevant to the decision?	YES	NO
<i>Detail</i>		
2. Is the person able to retain the information?	YES	NO
<i>Detail</i>		
3. Is the person able to use or weigh that information as part of the process of making the decision?	YES	NO
<i>Detail</i>		
4. Is the person able to communicate the decision? (whether by talking, using sign language or any other means)	YES	NO
<i>Detail</i>		

For a determination that a person **DOES NOT** have capacity all questions must be asked in respect of specific treatment/intervention proposed and the following must apply:

- STAGE 1:** must be answered as **YES**
- STAGE 2:** at least one of questions **1, 2, 3 or 4** must be answered as **NO**

OUTCOME	
<input type="checkbox"/> Person does <u>NOT</u> have capacity to make the decision	
<i>Detail</i>	

Can the decision be delayed because the person is likely to regain capacity in the future?	
<input type="checkbox"/> Yes	<i>Detail</i>
<input type="checkbox"/> Not likely to regain capacity	
<input type="checkbox"/> No appropriate to delay decision	

FORM C Best Interests Checklist

Avoid discrimination	
<input type="checkbox"/>	Have you avoided making assumptions about the person's best interests merely on the basis of their age, appearance, condition or behaviour, which may lead to unjustified assumptions about what might be in their best interests?
Encourage participation	
<input type="checkbox"/>	Have all steps been taken to involve the person in the in the decision-making process?
<input type="checkbox"/>	As far as practical, has a communication style that meets the individual's needs been used?
<input type="checkbox"/>	Is it the most appropriate time to make the decision?
<input type="checkbox"/>	Is it possible that the person will regain capacity in relation to the matter in question?
<input type="checkbox"/>	Can the decision be delayed until the person regains capacity?
Consider all relevant circumstances relating to the decision	
<input type="checkbox"/>	Is there an alternative way of achieving the desired outcome, which is less restrictive of the person's rights and freedom of action?
<input type="checkbox"/>	Do the circumstances maximise the person's dignity and self-respect?
<input type="checkbox"/>	Have the person's past and present wishes, feelings, beliefs and values that would be likely to influence their decision if they had capacity been taken into account?
<input type="checkbox"/>	Have any previously held instructions such as advance directives made by the person when they had capacity been taken into account?
<input type="checkbox"/>	Have the views of family and informal carers been taken into account?
<input type="checkbox"/>	Have people (such as GP, paid carers, MDT) caring for the person or

	interested in their welfare been consulted with?
<input type="checkbox"/>	Has an Independent Mental Capacity Advocate (IMCA) been consulted with - ONLY if appropriate (<i>see FORM D</i>)?
<input type="checkbox"/>	Have conflicting views or evidence been considered?
<input type="checkbox"/>	Are there clear, objective reasons as to why you are acting in the person's best interests?

Named Decision-maker	Role
Signed	Date

FORM B Best Interests Consultation Process

Patient Name <i>Affix patient label</i>	Date	Location
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Named Decision-maker	Role
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Decision to made in person’s best interests		
<input type="checkbox"/> Complete FROM A first: 2-stage mental capacity assessment completed <input type="checkbox"/> Individual <u>lacks the capacity</u> to make the above decision		
Is the person likely to regain capacity to make this decision?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Can this decision be delayed?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

ONLY if the person lacks the capacity to make the above decision and the decision needs to be made immediately can you proceed with THE BEST INTERESTS PROCESS

<input type="checkbox"/> Is an IMCA required? Only if “unbefriended”. Follow The IMCA checklist FORM D
<input type="checkbox"/> Best interests checklist followed: Complete FORM C
<input type="checkbox"/> Are there any valid and applicable advanced decisions?

Wherever practical and appropriate, the decision-maker must consult with other key people about their views as to what is in the patient’s best interests (use additional sheet if required)

Persons Consulted	Relationship	Date	Location	Views
1				
2.				

3.				
4.				

OUTCOME: Decision made in best interests

Date

FORM D IMCA Checklist and Referral

ONLY complete this section if:

THERE IS NO-ONE TO CONSULT EXCEPT a PAID CARER unless there are safeguarding circumstances or disputes that require the involvement of an IMCA

<input type="checkbox"/> YES	<input type="checkbox"/> NO	Does the decision relate to serious medical treatment as outlined in the Mental Capacity Act? <u>See Chapter 10 pages 178-198</u> SERIOUS MEDICAL TREATMENT = involves providing, withdrawing or withholding treatment in circumstances that does not apply to urgent medical treatment.
<input type="checkbox"/> YES	<input type="checkbox"/> NO	Does the decision relate to accommodation in hospital for a period of more than 28 days?
<input type="checkbox"/> YES	<input type="checkbox"/> NO	Does the decision relate to changing the patient's accommodation to another hospital for a period of more than 28 days?
<input type="checkbox"/> YES	<input type="checkbox"/> NO	Does the decision relate to a move to residential care for more than 8 weeks?

If the answer to any of the above 4 questions is **YES** then the **decision-maker** must make a referral to the IMCA service.

- YES** **IMCA referral required**
 NO IMCA referral NOT required

Named decision-maker	Role
Signed	Date

IMCA Key points:

- An IMCA is an advocacy service to provide safeguards for people who lack capacity to make a specified decision at the time it needs to be made.

- An IMCA is **not a decision maker** for the person who lacks capacity.
- An IMCA is there to support and represent that person and to ensure that decision making for people who lack capacity is done appropriately and in accordance with the MCA.

To make a referral to The IMCA Service for York Hospital, contact:

**Cloverleaf independent advocacy
26 Bond Street
Dewsbury
WF13 1AU**

Tel: 01924 454875

GLOSSARY

Appendix 5

Advance decision – allows an adult with capacity to set out a refusal of specified medical treatment in advance of the time when they might lack capacity to refuse it if it is proposed. If life-sustaining treatment is being refused, the advance decision has to be in writing, signed and witnessed, and has to include a statement saying that it applies even if life is at risk.

Attorney – the person an individual chooses to manage their assets or make decisions under a Lasting Power of Attorney or Enduring Power of Attorney.

Best interests – the duty of decision makers to have regard to a wide range of factors when reaching a decision or carrying out an act on behalf of a person who lacks capacity.

Capacity – the ability to make a decision.

Contemporaneous – at the same time. Any person with capacity can refuse treatment at the time it is offered. An advance decision means accepting that what that person wanted some time ago is what they want now.

Court of Protection – where there is a dispute or challenge to a decision under the Mental Capacity Act, this Court decides on such matters as whether a person has capacity in relation to a particular decision, whether a proposed act would be lawful, and the meaning or effect of a Lasting Power of Attorney or Enduring Power of Attorney.

Court-appointed deputy – an individual appointed by the Court of Protection to make best interests decisions on behalf of an adult who lacks capacity to make particular decisions.

Decision maker – someone working in health or social care or a family member or unpaid carer who decides whether to provide care or treatment for someone who cannot consent; or an attorney or deputy who has the legal authority to make best interests decisions on behalf of someone who lacks the capacity to do so.

Donor – the person who makes a Lasting Power of Attorney to appoint a person to manage their assets or to make personal welfare decisions.

Enduring Power of Attorney (EPA) – a power of attorney to deal with property and financial affairs established by previous legislation. No new EPAs can be made after the Mental Capacity Act 2005 is implemented, but existing EPAs continue to be valid.

Independent mental capacity advocate (IMCA) – an advocate who has to be instructed when a person who lacks capacity to make specific decisions has no one else who can speak for them. They do not make decisions for people who lack capacity, but support and represent them and ensure that

major decisions regarding people who lack capacity are made appropriately and in accordance with the Mental Capacity Act.

Lasting Power of Attorney – a power under the Mental Capacity Act that allows an individual to appoint another person to act on their behalf in relation to certain decisions regarding their financial, welfare and healthcare matters.

Public Guardian – this official body registers Lasting Powers of Attorney and court-appointed deputies and investigates complaints about how an attorney under a Lasting Power of Attorney or a deputy is exercising their powers.