

Mental capacity and mental illness

The Mental Capacity Act 2005 (MCA)



Mental capacity means you have ability to make your own decisions. If you lose mental capacity the Mental Capacity Act 2005 (MCA) protects you and your rights. You may lose mental capacity because of your mental illness. This factsheet explains mental capacity and how the MCA works.

- The Mental Capacity Act (MCA) is the law that protects you if you are not able to make decisions.
- You may lack mental capacity if you can't:
 - o understand information about a decision,
 - o remember this information,
 - \circ $\;$ use this information to make a decision, or
 - o communicate your decision.
- You may only lack mental capacity for a short period of time.
- Being unwell or having a mental illness does not mean you lack mental capacity. Most people with a mental illness do not lack mental capacity.
- Being held under the Mental Health Act does not mean that you lack mental capacity.
- Making a bad decision doesn't mean that you lack mental capacity.
- A health professional will assess if you have mental capacity.
- The MCA sets out who can make decisions for you if you lack capacity.
- You can make an advance statement or advance decision about your wishes for treatment and care in case you lose capacity in the future.
- If someone makes decisions for you because you lack capacity, they need to be in your 'best interests'.

This factsheet covers:

- 1. What is mental capacity?
- 2. What is the Mental Capacity Act (MCA)?
- 3. How is mental capacity assessed?
- 4. <u>I'm worried that I might lose my mental capacity in the future. What can I do?</u>
- 5. How are decisions made for me if I lack mental capacity?
- 6. I don't agree that I lack capacity to make a decision. What can I do?
- 7. <u>I don't agree with a decision that is being made about the person I care for. What can I do?</u>
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- 9. What else should I know about the Mental Capacity Act?
- 10.<u>I am a carer. Am I legally protected if I make best interests decision</u> for someone?
- 11. What is the difference between the Mental Capacity Act and the Mental Health Act?

1. What is mental capacity?

Mental capacity means you have the ability to make your own decisions. If you have the mental capacity to make a decision you will be able to: $^{\rm 1}$

- understand all the information you need to make that decision,
- use or think about that information,
- remember that information, and be able to communicate your decision to someone else.

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2. What is the Mental Capacity Act (MCA)?

The Mental Capacity Act (MCA) will cover you if you are:

- 16 or older,² and
- live in England and Wales.³

The MCA is there to do the following.⁴

- Help you to make decisions for yourself if you lack mental capacity. Your friends, family or carer can help you to make a decision. If you don't have any support, you will get an independent mental capacity advocate to help you.
- Give you the option to make decisions about your future. Such as your care preferences and who will manage your money. But you will have to make these decisions when you have mental capacity.
- Say who can make certain decisions for you. Any decision made for you must be in your best interest.

What is the MCA based on?

The MCA is based on 5 rules called 'key principles'. The key principles are below. $^{\rm 5}$

- 1. You must be treated as if you have capacity unless it is proven you do not.
- 2. You must be supported to make your own decisions before medical professionals decide you do not have capacity. An example might be giving you the information in a different way and trying different ways to explain it. If you have other symptoms which are causing you to lack capacity the medical team should treat those first and then assess your capacity again.
- 3. If you have mental capacity, you have a right to make decisions that other people may think are unwise.
- 4. If you don't have mental capacity anything done for you must be in your best interests.
- 5. If you don't have mental capacity anyone making decisions for you must think about what is the least restrictive option available. This means that they must always question if they can do something else that would have a smaller effect on your basic rights and freedoms.

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3. How is mental capacity assessed?

The Mental Capacity Act (MCA) has a test to see if you have the capacity to make a decision when you need to.

Anyone who thinks that you don't have capacity should be able to prove this. They need to be able to show that you don't have capacity to make a certain decision when the decision needs to be made.⁶ For example, if a professional believes that you lack mental capacity to make a decision about your treatment or care they must do this test with you.

Generally, a capacity assessment should be related to a specific decision that you are making.⁷ This is because you might have capacity to make a certain decision but lack capacity to make a different decision⁸. For example, you might be able to decide what treatment you want but you are unable to make decisions about paying bills or looking after your money.

The test has 2 stages.9

Stage1:

• there must be proof that you have an illness or injury that affects the way your brain or mind works, and

Stage 2:

• if you do, if it affects you so much that you are unable to make a specific decision at a certain time.

Stage 2 will only apply if you have been given enough support to try and make the decision for yourself.

What is an illness or injury that affects the way my brain works?

An illness or injury that affects how my brain works could be things like:¹⁰

- a mental health condition
- dementia
- brain injury
- symptoms caused by drugs and alcohol

How am I assessed as unable to make a specific decision at a specific time?

You will be assessed to see if you can:11

- understand the information you need to make the decision,
- remember and use that information again,
- understand what will happen when you make the decision, or
- tell people your decision in any way, such as talking, sign language or squeezing someone's hand.

Health professionals can only assess your mental capacity using this test. They cannot base their decision on your age, appearance or diagnosis alone.¹²

How could I lose capacity?

You may lose mental capacity because of a mental illness, brain injury, stroke, severe learning disability or if you've used alcohol or drugs.

Losing capacity may be temporary. You may be going through something such as shock or you may have an illness which sometimes gets worse and affects your ability to make decisions at certain times. ¹³ This is called 'fluctuating capacity'.

For example, if you have bipolar disorder you may lack the capacity to make financial decisions if you have an episode of mania.¹⁴ Even if you can understand and recall information and communicate your decision, you may not be able to understand what will happen when you make that decision.

John's story

John has schizophrenia. He believes that his doctors want to kill him. John has a large blood clot that needs to be removed immediately. Without an operation, he may die.

John is given information about his operation and what could happen without treatment. John is also given information about the treatment they want to give him and what to expect. He decides not to have the treatment. John can understand the information, remember the information and tell his healthcare team his decision. But John believes that his risk of dying is higher if he has the operation because he believes that the doctors are trying to kill him. This belief is not true. John is not mentally capable of weighing up risk.

John is assessed as lacking mental capacity to make this decision to refuse treatment. A decision is made in his best interest to have the operation.

Who will assess my capacity?

If your carer or healthcare professional think you lack the capacity to make a certain decision, they will assess your capacity. They have to check if you can make the decision for yourself with their support.¹⁵

The person who will assess your capacity depends on the type of decision you need to make.¹⁶ See <u>Section 5</u> of this factsheet for more information.

Anyone who assesses your mental capacity should have the skills needed to communicate with you. A professional can help the assessor if they need support. ¹⁷

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4. I'm worried that I might lose mental capacity in the future. What can I do?

If you are worried that you might lose mental capacity in the future there are things that you can do.

Can I make Lasting Power of Attorney (LPA)?

Anyone can make a Lasting Power of Attorney (LPA) but you may have to pay.

An LPA means that you give a trusted person or people the power to make decisions for you if you lose the ability to decide for yourself.¹⁸ If you make an LPA you are called the 'donor' and the person who makes your decisions is called the 'attorney'. You must be over 18 and have capacity to make someone your 'attorney'.¹⁹

There are two different types of LPA.

- Property and financial decisions
- Health and welfare decisions

Health and welfare

Health and welfare decisions can include day-to-day care, medical treatment, complaints about your care and treatment or where you should live.²⁰

Your health and welfare LPA will only be able to make a decision for you if you lose mental capacity.

Property and finance

Property and financial decisions can include buying property, managing bank accounts, investing money or claiming benefits.

Your property and financial LPA can make decisions for you straight away if you want them to.²¹ But you will still be able to make the final decision. Or you can sign to say that your property and financial affairs LPA will only be able to make decisions for you if you lose mental capacity.

You can pick more than 1 person to be you LPA.²² For example, you could have 2 different people for health and welfare and 1 person for property and finances. You could have the same person for both LPAs. The person, or people you choose, must be over 18.²³

In your LPA document you will write what things your attorney can make a decision on. An attorney can only make the decisions that the LPA document allows them to.²⁴ For example, you may only want your attorney to make decisions about your social care but not your treatment.

The attorney must always think about the 5 key principles of the Mental Capacity Act (MCA). These are explained in <u>Section 2</u> of this factsheet.

Attorney's have to follow the MCA Code of Practice and only make decisions that are in your best interests.²⁵

Attorneys must:²⁶

- make decisions carefully and correctly, follow your instructions as written on the LPA,
- only make financial decisions which benefit you,
- respect your privacy, and
- follow directions given by the Court of Protection.

Attorneys must not:

- take advantage of their position,
- let other people make any decisions, unless they have the right to, such as a doctor,
- give up the role without telling you and the court first.

Can I make an advance statement?

You can make an advance statement if you have mental capacity at the time. An advance statement is a general preference about your treatment and care.²⁷ It is free to do.

It isn't legally binding, but medical professionals should still make a practical effort to follow your wishes.

Can I make an advance decision?

An advance decision is legally binding. It gives you the legal right to refuse specific medical treatment in future when you may not have the mental capacity to make the decision for yourself at that time. An advanced decision can't be used for anything else.²⁸ It is free to do.

You can find out more about LPA's and advanced statements and decisions in:

- Money matters. Dealing with someone else's money or benefits
- Planning your care. Advance statements and advance decisions'

at <u>www.rethink.org</u>. Or contact 0121 522 7007 and ask for a copy of the information to be sent to you.

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5. How are decisions made for me if I lack mental capacity?

Anyone who makes a decision for you must follow the five key principles of the Mental Capacity Act. You can read about these in <u>Section 2</u> of this factsheet. They must also follow the Mental Capacity Act Code of Practice and only make decisions that are in your best interests.²⁹

What sort of decisions can be made for me?

Most decisions can be made for you. Common decisions made are:

- Financial decisions
- Medical treatment
- Day to day support

But there are some decisions or actions that can never be decided for you. These include: $^{\rm 30}$

- voting,
- placing a child for adoption, and
- getting married or having a civil partnership.

Who will make the decision for me?

Different people may need to make decisions for you at different times. There should be more than 1 person involved with certain decisions. Your decision maker is most likely to be the following people.³¹

- Your carer or someone who is involved with your life for day to day decisions.
- Your doctor or healthcare professional responsible for medical treatment will make decisions about your treatment.
- Your solicitor for legal decisions such as making a will.³²
- Your attorney if your Lasting Power of Attorney(LPA) has been registered.
- Your court appointed deputy.

Your decision maker has a duty to consult with other people before a decision is made. These people are:³³

- anyone who you have said that you want involved with your care,
- anyone involved with your care,
- anyone interested in your welfare such as your close relatives,
- any attorney if your LPA has been registered, and
- any court appointed deputy.

They will make a 'best interest' decision for you.

What is a court appointed deputy?

The Court of Protection (CoP) is there to protect people who lack mental capacity to make their own decisions.

The CoP will usually make a decision for you if it is a 1 off decision. The CoP can only appoint a deputy for your welfare if they think that it likely that you will lack capacity to make more decisions in future. ³⁴A deputy can be a friend, relative or professional like an accountant. The CoP will decide what the deputy can make decisions about. The deputy will usually make financial decisions.

What are my best interests?

Your best interests are individual to you. They are based on different things. To decide what your 'best interests' are the person making the decision needs to think about: ³⁵

- your views and beliefs. Such as your religious, political and moral,
- what is written on your advance statement,
- what is written on your advance decision,
- if you will ever be able to make the decision for yourself,
- if so, when are you likely to be able to make the decision, and
- any other important factors that are specific to the situation.

The decision should not be based only on your appearance, age, mental health diagnosis or your behaviour.³⁶

The decision maker must allow and encourage you to be involved with the decision that affects you.³⁷

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6. I don't agree that I lack capacity to make a decision. What can I do?

It's not up to you to prove that you have capacity. It is up to the assessor to prove that you don't. $^{\rm 38}$

You might disagree with your doctors or carers who say that you lack capacity. To try and solve this disagreement you could try the following.

Talk to your assessor

Speak to the person who has assessed that you lack mental capacity to make a decision. Ask them to explain why they think you lack capacity. They must give you evidence to show how they have made their decision in line with the Mental Capacity Act. You could ask for a meeting.

Get a second opinion

Get a second opinion from an independent professional or someone else who is an expert in assessing capacity.

Use a mediation service

A mediator helps people to come to an agreement that is acceptable to everyone involved. They are most helpful when people are not communicating well or don't understand each other's point of view. Mediation can help solve a problem at an early stage. A mediator is someone who is independent of the situation.³⁹

The Ministry of Justice provide an online directory of mediators. The service is provided on a fixed-fee basis. You can find the list at: <u>civilmediation.justice.gov.uk</u>

Apply to the court of protection

The Court of Protection can decide if you have the capacity to make the decision or not. They also have other powers such as deciding if an advance decision is valid. $^{\rm 40}$

See <u>Section 8</u> of this factsheet for more information.

Apply to the Office of the Public Guardian

You should contact the Office of the Public Guardian (OPG) to raise concerns about your attorney or deputy. See <u>Section 8</u> of this factsheet for more information.

Who can help me to challenge the decision?

You can get help from your family or friends to help you do this. If you don't have family or friends then you may be able to get help from an advocate.

What is an Independent Mental Capacity Advocate?

Independent mental capacity advocates (IMCAs) are people who support you to make or be involved in important decisions. They will: ⁴¹

- gather relevant information about you
- understand what your wishes and feelings are likely to be
- think about your beliefs and values
- think about different ways to help you in your situation
- get a second medical opinion if necessary.
- challenge a decision if they disagree with it.

An IMCA will only be given to you if:42

- you lack capacity to make a specific decision about serious medical treatment or accommodation, and
- you don't have any family or friends to help you.

What is an NHS complaints advocate?

You can use NHS complaints advocacy if you are making a complaint about an NHS service. They are free to use and independent from the NHS.

You can find out more about:

- Second opinions
- Advocacy
- Complaints about the NHS and social care.

at <u>www.rethink.org</u>. Or contact 0121 522 7007 and ask for a copy of the information to be sent to you.

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7. I don't agree with a decision that is being made about the person I care for. What can I do?

Often more than 1 person is involved with decisions that affect someone who lacks mental capacity. This means that disagreements can happen.

See <u>Section 6</u> for information about how to challenge a decision.

Isha's story

Isha has schizo-affective disorder and does not want a flu injection. Her daughter thinks she should have the injection. The doctor believes Isha has capacity to refuse treatment. The doctor does not give Isha the injection against her wishes.

Isha's daughter explains her concerns to the doctor. The doctor is satisfied that they have followed the rules of the Mental Capacity Act and refuse to give Isha the injection.

Isha's daughter contacts the patient advisory and liaison service (PALS) for advice. A member of staff gives her information about how someone has their mental capacity assessed to make a certain decision.

Isha's daughter is still unhappy. PALS advise her that she can make a formal complaint if she wants to. Isha's daughter doesn't think that she will be able to complain on her own. PALS tell her about the independent complaints advocacy service who can help her through the complaints process.

8. Who are the Court of Protection and the Office of the Public Guardian?

The Court of Protection (CoP)

The Court of Protection (CoP) can protect you if you lack capacity. It can:43

- decide if you have the mental capacity to make a certain decision that will affect you,
- decide if a lasting power of attorney (LPA) can be registered,
- pick deputies to make decisions in your best interests,
- make decisions in difficult cases,
- decide if Deprivation of Liberty safeguards (DOLs) should be used, and
- remove deputies or attorneys who have not carried out their role properly.

The Office of the Public Guardian (OPG)

The Office of the Public Guardian (OPG) have different jobs including: 44

- take action where there are concerns about an attorney or deputy,
- register LPA's,
- maintain the public register of deputies and people who have been appointed as a LPA,
- supervise deputies appointed by the Court of Protection, and make sure they follow the Mental Capacity Act, and
- look into reports of abuse against registered attorneys or deputies.

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9. What else should I know about the Mental Capacity Act?

Can I be restrained under the Mental Capacity Act?

You should only be restrained if you need to be stopped from harming yourself. The amount or type of restraint used, and time that it is used for, needs to appropriate to the level of risk.⁴⁵

Restrained means that someone is:46

- using force, or threatening to use force, to make you do something that you don't want to do, or
- stopping you from leaving somewhere whether you want to or not, such as not allowing you to leave a room or hospital.

Deprivation of Liberty Safeguards (DoLS)

Deprivation of Liberty Safeguards (DoLS) can sometimes be used if you are in a hospital or care home and lack mental capacity. ⁴⁷ Deprivation of liberty' means loss of freedom.

The care home or hospital must get permission from a 'supervisory body' before they can lawfully deprive you of your liberty. The supervisory body will usually be a primary care trust or a local authority. ⁴⁸

DoLS can only be used when:⁴⁹

- it is in your own best interests to protect you from harm
- it is needed because of the likelihood and seriousness of harm, and
- if there is no other way to keep you safe.

There are safeguards in place to make sure: ^{50,51,52}

- you get a representative to support you with all things to do with DoLS. Such as your right to challenge your DoLS through the Court of Protection,
- you and your representative are supported by an independent mental capacity advocate if you want more support, and
- that the DoLS is reviewed.

DoLS can't be used if you are detained in hospital under the Mental Health $\rm Act.^{53}$

You can learn more about DoLS by following this link: www.scie.org.uk/mca/dols/at-a-glance.

Criminal offence

The MCA has made it a criminal offence to harm or neglect someone who lacks capacity. If someone gets convicted of this offence, they could get a fine or go to prison.⁵⁴

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10. I am a carer. Am I legally protected if I make a best interests decision for someone?

The Mental Capacity Act (MCA) protects carers and healthcare professionals. If the person you care for is assessed as lacking mental capacity you may be asked to make a best interest decision for them.

You are not legally responsible for the outcome of that decision if it was made in the person's best interest.⁵⁵

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11. What is the difference between the Mental Capacity Act 2005 (MCA) and the Mental Health Act 1983 (MHA)?

The MHA and the MCA are different laws. If you are detained under the MHA it doesn't mean that you automatically lack mental capacity to make decisions.

The MHA is used to treat people who have a mental illness and need to be in hospital. Under the MHA you can be forced to have treatment whether you agree to it or not. So even if you have mental capacity you can still be given most mental health treatment against your will.

You can find more information about the '**Mental Health Act**' at <u>www.rethink.org</u>. Or call our General Enquiries team on 0121 522 7007 and ask them to send you a copy of our factsheet.

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Office of the Public Guardian (OPG)

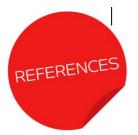
The Office of the Public Guardian (OPG) protects people in England and Wales who may not have the mental capacity to make certain decisions for themselves, such as about their health and finance.

Telephone: 0300 456 0300. Lines are open Monday, Tuesday, Thursday, and Friday 9am-5pm, and Wednesday 10am-5pm. Address: PO Box 16185, Birmingham, B2 2WH Email: <u>customerservices@publicguardian.gsi.gov.uk</u> Website: <u>www.gov.uk/government/organisations/office-of-the-public-</u> <u>guardian</u>

Court of Protection

Make decisions on financial or welfare matters for people who lack mental capacity.

Telephone: 0300 456 4600 Address: PO Box 70185, First Avenue House, 42-49 High Holborn, London, WC1A 9JA Email: <u>courtofprotectionenquiries@hmcts.gsi.gov.uk</u> Website: www.gov.uk/courts-tribunals/court-of-protection



- ¹ S3 (1), Mental Capacity Act 2005 c9.
- ² As note 1 (MCA 2005), s2(5).
- ³ Department for Constitutional Affairs. *Mental Capacity Act Code of Practice*. London: TSO; 23rd April 2007. Page 1.
- ⁴ As note 3, at para 1.1 1.5.
- ⁵ As note 1 (MCA 2005), s 1.
- ⁶ As note 3, at para 4.10.
- ⁷ As note 3, at para 4.28.
- ⁸ As note 3, at para 4.5.

⁹ Department for Constitutional Affairs. *Mental Capacity Act Code of Practice*. London: TSO; 23rd April 2007. Para 4.11 – 4.13.

- ¹⁰ As note 3, at para 4.12.
- ¹¹ As note 1 (MCA 2005), s 3(1)
- ¹² As note 1 (MCA 2005), s 2 (3).
- ¹³ As note 3, at para 4.26
- ¹⁴ As note 3, at para 4.26.
- ¹⁵ As note 1 (MCA 2005), s 1 (3).
- ¹⁶ As note 3, at para 4.38.
- ¹⁷ As note 3, at para 4.43.

¹⁸ As note 1 (MCA 2005), s 9 (1). ¹⁹ As note 1 (MCA 2005), s 9 (2)(c). ²⁰ As note 3, at para 7.21. ²¹ As note 3, at para 7.32. ²² As note 1 (MCA 2005), s 10 (4). ²³ As note 1 (MCA 2005), s10 (1). ²⁴ As note 3, at para 7.22. ²⁵ As note 1 (MCA 2005), s 9 (4). ²⁶ As note 3, at para 7.58. ²⁷ National Institute for Clinical Excellence. Information for the public: glossary www.nice.org.uk/guidance/cg136/ifp/chapter/glossary#advancestatement (accessed 10th May 2018). ²⁸ As note 1 (MCA 2005), s 6(4). ²⁹ As note 1 (MCA 2005), s1 & s4. ²³ As note 1 (MCA 2005), s 27 and 29. 31 As note 3, at para 5.8. ³² As note 3, at para 4.41. ³³ As note 1 (MCA 2005), s 4 (7). ³⁴ As note 3, at para 8.38, 8.39. ³⁵ As note 1 (MCA 2005), s 4(3) & S4(6). ³⁶ As note 1 (MCA 2005), s 4(1). ³⁷ As note 1 (MCA 2005), s 4(4). ³⁸ As note 1 (MCA 2005), s 1(2). ³⁹ As note 3, at para 15.7-15.9. ⁴⁰ As note 3, at para 9.68. ⁴¹ As note 1 (MCA 2005), s 36(2) & 356(3). ⁴² As note 3, at para 10.69. ⁴³ Gov.UK. Court of Protection – About us. https://www.gov.uk/courtstribunals/court-of-protectiont (accessed 18th June 2018). ⁴⁴ Gov.UK. Office of the Public Guardian – About us. www.gov.uk/government/organisations/office-of-the-public-guardian/about (accessed 16th May 2018). ⁴⁵ As note 3, at para 6.41. ⁴⁶ As note 1 (MCA 2005), s 6(4), ⁴⁷ As note 1 (MCA 2005), Schedule A1, para 1. ⁴⁸ The Ministry of Justice. Deprivation of liberty safeguards - Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice. http://webarchive.nationalarchives.gov.uk/20110322122009/http://www.dh. gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGui dance/DH_085476 (accessed 16th May 2018). Para 1.4. ⁴⁹ As note 48, at para 1.13. ⁵⁰ As note 48, at para 7.1 - 7.2. ⁵¹ As note 48, at para 8.2. ⁵² As note 48, at para 7.37. ⁵³ As note 48, at para 1.11. ⁵⁴ As note 1 (MCA 2005), s 44. ⁵⁵ As note 1 (MCA 2005), s 5.

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This factsheet is available in large print.

Rethink Mental Illness Advice Service

Phone 0300 5000 927 Monday to Friday, 9:30am to 4pm (excluding bank holidays)

Email advice@rethink.org

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We'd love to know if this information helped you.

Drop us a line at: feedback@rethink.org

or write to us at Rethink Mental Illness: RAIS PO Box 17106

Birmingham B9 9LL

or call us on 0300 5000 927.

We're open 9:30am to 4pm Monday to Friday (excluding bank holidays)



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