Guidance

for Adult Community Services Staff on the Mental Capacity Act 2005

Preface

My intention in writing the ***Guidance for Adult Community Services Staff on the Mental Capacity Act 2005*** is to provide healthcare practitioners in the community with a greater understanding of the new law covering mental capacity. The *Guidance* distils the new law and presents it in such a way that busy community practitioners can familiarise themselves with it.

All of the subjects covered in the *Guidance* are those which community practitioners are most likely to encounter as part of their working lives. With this in mind, I hope that these practitioners will find the *Guidance* a very helpful first point of reference.

Clearly, it is not the intention of the *Guidance* to answer every question that may arise or to replace the Code of Practice that accompanies the Act. The Code should always be available to practitioners as the principal source of reference. I encourage practitioners to consult the Code and to engage in frank and open discussion with colleagues about mental capacity issues they have encountered through clinical practice.

I hope that the major themes of empowerment and protection of the patient are as apparent in the *Guidance* as they are in the Mental Capacity Act 2005 and the accompanying Code of Practice. Improving our understanding of the Act and the Code has tangible benefits to patients who may lack or have reduced capacity.

The *Guidance* incorporates checklists and case studies which can be used to enhance understanding of the Act and Code. The electronic version of the *Guidance* also has several audio-files which summarise the checklists. Community practitioners may find this is a particularly useful way to improve understanding.

I am grateful to the Social Care Institute for Excellence (SCIE) for funding the research study out of which the *Guidance* was created, and to the community service staff of Nottingham City PCT and Nottinghamshire County Teaching PCT, without whose views and ideas the *Guidance* would not have been possible.

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This *Guidance for Adult Community Services Staff on the Mental Capacity Act 2005 ("Guidance")* is designed to provide you with clear, introductory information on the requirements of the Mental Capacity Act 2005 and how these may affect your area of practice. This *Guidance* is not intended to replace the Code of Practice accompanying the Mental Capacity Act 2005 and does not seek to advise on how the law applies to specific situations.

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Contents

Introduction.....Page 2

Section 1: Essentials.....Page 3

Section 2: Five principles.....Page 4

Section 3: Help with decision-making.....Page 5

Section 4: Assessing capacity .....Page 8

Section 5: Best interests .....Page 12

Section 6: Protection for acts of healthcare or treatment .....Page 16

Section 7: Independent Mental Capacity Advocate .....Page 17

Section 8: Advance decisions to refuse medical treatment .....Page 19

Section 9: Good record keeping under the MCA 2005.....Page 23

Section 10: Confidentiality and sharing information .....Page 25

Section 11: Challenging your decision .....Page 28

Glossary.....Page 29

Resources .....Page 30

Introduction

How to use this *Guidance*

You must follow the requirements of the Mental Capacity Act 2005 ("MCA 2005) and the Code of Practice ("Code") when treating or caring for people who may lack or have reduced capacity to make a specific decision. You must also be able to show, objectively, that you have had regard to the Code when doing so.

This *Guidance* has been designed for community practitioners treating or caring for patients in the context of the MCA 2005 in England and Wales. It introduces you to some of the key aspects of the MCA 2005 and the Code which you may encounter when delivering community services.

This *Guidance* is not intended to replace the Code. The Code should always be your principal source of reference when treating or caring for a patient who you believe may lack or have reduced capacity to make a specific decision. You may prefer to use this *Guidance* as a quick source of reference and as part of your reflective learning.

We use case studies as a training tool, to illustrate how community practitioners may approach certain situations in a way that is compliant with the MCA 2005. We have also designed some checklists which are designed to encourage you to approach issues around capacity in a way envisaged by the MCA 2005 and the Code. There has to be flexibility. The case studies and checklists are not intended to cover all issues around capacity that may arise because these issues vary from case to case. By adopting the approaches used in this *Guidance*, and clearly recording the steps you have taken, you will be practising in a way that is compliant with the MCA 2005.

Some of the checklists have been converted to audio files for you to listen to, as part of your reflective learning. There is a glossary of relevant terms used in this *Guidance*, at the end.

The MCA 2005 and the Code in community services

The MCA 2005 applies to people who make decisions for those who may lack or have reduced capacity to make a specific decision. The Code tells you how the MCA 2005 applies in a range of practical situations, and explains the law in more detail.

As a community practitioner working with people from time to time who may lack or have reduced capacity to make a specific decision, you are under a legal duty **to have regard to** the Code when making any decision or taking any action for a person who lacks the capacity to make a decision or to consent to an act themselves. This means that you have to be familiar with the guidance in the Code, follow it and, if you do not follow it, be able to give good reasons why you did not.

Before assessing the capacity of a person who you believe may lack or have reduced capacity to make a specific decision, you need to try to involve the person in the decision-making process. We have highlighted the importance of this in the *Guidance* (section 3) and have designed a checklist to help you achieve this.

We have explained clearly the two-stage statutory test for assessing a person's capacity (section 4). Again, this is accompanied by a checklist to prepare you to assess a person's capacity confidently.

For ease of expression, this book uses "he" to mean "he or she" (unless otherwise apparent or appropriate).

Section 1: Essentials

When should I carry out a formal, recorded assessment of a person's capacity?

There is no threshold indicating which decisions require a formal, recorded assessment of a person's capacity, and which do not. The MCA 2005 encourages all practitioners to carry out situation specific assessments of mental capacity. Local procedures also vary for different kinds of staff.

The kinds of decision which, potentially, are covered by the MCA 2005 range from the minor to the serious. As a general approach, the more serious a decision, the more formal your assessment of the person's capacity to make it should be. More serious decisions have greater consequences for the person who, it is thought, may lack capacity and justify a more formal assessment of capacity.

You should assess and clearly record a person's capacity to make any decision about their healthcare or treatment. Providing healthcare or treatment includes providing nursing care, carrying out diagnostic examinations and tests, providing professional medical treatment, giving medication, providing emergency care, carrying out other necessary medical procedures and therapies and arranging to refer someone to hospital for an assessment or for treatment.

Although it is not necessary to record assessments of a person's capacity for minor, everyday decisions, a care plan should reveal that the person's capacity to make these kinds of decision has been assessed and there is intention to review that person's capacity periodically. This also means that you are much less likely to assume that a person's lack of capacity is permanent. Any new assessment of capacity must be clearly recorded.

What does lack of capacity under the MCA 2005 mean?

Lack of capacity means the inability of a person to make a specific decision (including consenting to a particular act of healthcare or treatment) at the time the decision has to be made.

Must lack of capacity be permanent?

No. Lack of capacity may be temporary or permanent. A person's ability or otherwise to make a specific decision (including consenting to a particular act of healthcare or treatment) is time-specific.

All assessments of capacity should be decision and time-specific. If you believe that a person lacks capacity temporarily (this may be due to the effects of medication or alcohol), and the decision can be postponed, you should wait until the person regains capacity to make the particular decision or consent to a particular act. This also means that the vulnerable person in this situation does not lose power permanently (it restores their ability to make their own decision, when they have the capacity to do so).

Who may lack capacity to make a specific decision at a specific time?

A person may lack capacity to make a specific decision at a specific time due to a range of causes encountered by community services staff. These include dementia, significant learning disabilities, brain injury, concussion following a head injury, the effects of a stroke, brain tumours, physical and medical conditions that cause confusion, drowsiness or loss of consciousness, neurological disorder, conditions associated with some forms of mental illness, delirium and the effects of drug or alcohol use.

Section 2: Five principles

The five principles should always be your starting point. You need to remember the five principles whenever you propose to make any decision or take any act for a person who you consider may lack capacity. These principles should inform everything that you do.

Remember that the MCA 2005 is designed to empower and protect people who lack capacity. Keep this in mind when you consider the five principles outlined below.

1. You should assume that every person over the age of 16 years has the capacity to make their own decisions, unless it can be shown that the person lacks capacity.

   This means that every adult has a right to make their own decisions, providing they have the capacity to do so. Even if a person needs help to make a decision, this may not mean they lack the capacity to make it.

2. You should not treat someone as being unable to make a decision until all practicable steps to help and support them to make a decision have been taken, without success.

   This means that every adult should be offered appropriate help and support to make their own decision. It is vital that you do this before assessing a person's capacity to make a specific decision at a specific time. We deal with this principle in more detail in section 3.

3. You should not treat a person as lacking the capacity to make a decision, simply because his decision is unwise.

   Simply put, a person has a right to make a decision which may be thought unwise. This should not lead you to conclude that a person lacks the capacity to make the decision. However, there may be cause for concern if a person repeatedly makes unwise decisions that put them at significant risk of harm or exploitation, or makes an unwise decision that is obviously irrational or out of character.

4. Any act done or decision made on behalf of a person who lacks capacity must be done or made in their best interests.

   This principle is straight forward. The best interests principle is now placed on a clear statutory footing. It is particularly important to remember that the act or decision must be in the best interests of the **person who lacks capacity**. This is important to remember, particularly if other people (such as the person's family or friends) hold different views about what is in the person's best interests. We deal with this principle in more detail in section 5.

5. Any act done or decision made on behalf of a person who lacks capacity must be the least restrictive of that person's basic rights and freedoms.

   This principle is about finding the least restrictive alternative for the person who lacks capacity to make the specific decision at that specific time. You should also think about whether you need to act or make a decision at all (this will depend upon the circumstances).

Section 3: Help with decision-making

In section 2, you were introduced to the second principle:

You should not treat someone as being unable to make a decision until all practicable steps to help and support them to make a decision have been taken, without success.

You must first offer all practicable help and support to a person who you think may lack or have reduced capacity, before you decide that person lacks the capacity to make the decision. In many cases, you will help to restore the power of a vulnerable person to make their own decision, by taking this important step. Just because a person needs help to make a specific decision does not necessarily mean that they lack the capacity to make that decision.

Practicable steps to help and support.

Taking all practicable steps means offering whatever help and support is possible and appropriate, bearing in mind:

- the individual circumstances of the person making the decision;
- the nature of the decision that needs to be made; and
- the time available to make it (for example, in an emergency situation, there may be fewer steps that you are able to take because of a lack of time available to take them).

What should I do?

As a community practitioner, you need to present **relevant information** to the person who may lack capacity in a way that they will best understand.

1. Identify what information is **relevant** to the decision that you want to help the person to make.
2. Identify the person's needs and abilities and **match** the information you convey to these.
3. Communicate the information in a way that the person will find **easiest** to understand.
4. Explain the **advantages and disadvantages** of making the decision in question (and, importantly, of making no decision at all).

It is important to check the person's understanding of the information you have given them, after a short period of time.

What can I do to help the person understand the relevant information I give them?

You need to think about what communication strategies will be most effective. Here are some ideas:

1. Choose an environment where the person is most at ease and a time of day when the person is most alert. You may need to speak to people who know the person well, to ascertain this.
2. Use clear, simple language and break down relevant information.
3. Use pictures, objects and illustrations to convey relevant information.

4. Address specific communication or cognitive problems appropriately (using sign language, visual aids, computers, Makaton).

5. Speak to people who know the person well or whom the person trusts, to find out what methods of communication work best for them. You may be able to speak with people interested in the person's welfare, such as near relatives and friends, a carer or an attorney (if one has been appointed). If you consult other people, remember that you can only share as much information about the person as is in their best interests.

6. In some situations, there may be specific cultural, ethnic and religious factors for you to consider. These can shape a person's way of thinking, their behaviour, their way of communicating and factors that *they* consider to be relevant to the specific decision. For example, some people may be used to making certain decisions after extensive family collaboration.

7. You may repeat relevant information more than once if you feel this will help the person to understand it. After a short period of time, check the person's understanding of the information you have given them and the decision you want them to make.

Help with decision-making

1. Do you feel clear about the decision that has to be made?

2. Can the decision be postponed until a time when the person is better able to participate in the decision-making process?

3. Have you given the person all relevant information to help them make an informed decision?

   - Have you covered all important information with them?
   - Have you explained the risks and benefits of the decision in a balanced way?
   - Have you explained the consequences of making no decision at all?
   - Have you considered whether the person may need support to make the decision, from a trusted friend or family member?
   - Is any information needed from elsewhere, for example, from a specialist medical practitioner?

4. Does the person feel at ease? Are you happy that the time of day and environment is right for them?

5. Have you thought about how to present the information in a way that the person will best understand?

6. When identifying the best means of communication:

   - Ask people who know the person about what form of communication works best for them.
   - Use simple language and (if it is appropriate) use images.
   - Break down important information into smaller, easier to understand points.
   - Think about whether the use of an advocate might make it easier to communicate with the person.
   - Be aware of cultural, ethnic or religious factors that may shape the way the person behaves, thinks or communicates. Be sensitive to these.

CASE STUDY 1

Amrit, 83 years of age, has early dementia. She also has a leg ulcer. The District Nurse visits Amrit at home to change bandages and to check on how well her leg ulcer is healing. On a visit, the District Nurse notices that the bandages are wet. She believes Amrit may be incontinent of urine and wishes to carry out a continence assessment. Amrit seems reluctant to talk to the District Nurse about this.

Context

This example is concerned with the second principle, help with decision making.

Principle

In order to fulfil the second principle, the District Nurse should make sure that she does not treat Amrit as being unable to decide whether to have a continence assessment until all practicable steps to help and support her to make her own decision have been taken, without success.

This means the District Nurse:

- has to clearly understand the decision that she will support Amrit to make (whether to agree to a continence assessment); and
- will offer Amrit all possible help and support that is appropriate, bearing in mind Amrit's individual circumstances (her early dementia and her apparent reluctance to talk about this) and the nature of the decision which needs to be made.

Practice

The District Nurse needs to present relevant information to Amrit in a way that she will best understand. Fortunately, the District Nurse has visited Amrit many times before and understands how best to overcome Amrit's sensitivity and to enable her to become involved in the decision-making process.

The District Nurse:

- identifies what information is relevant to Amrit's decision;
- identifies Amrit's needs and abilities and thinks about how to match relevant information to these;
- communicates relevant information in a way that Amrit will find easiest to understand; and
- explains to Amrit the advantages and disadvantages of making the decision and of making no decision at all, in a balanced way.

The District Nurse may repeat information to check that Amrit understands why she wants to carry out a continence assessment. She should check Amrit's understanding of the decision she wants her to make, after a brief period, by asking Amrit to tell her what she understands will happen. Once the District Nurse is happy that Amrit understands and agrees to have a continence assessment, she should clearly record Amrit's decision and the steps taken to reach it.

Section 4: Assessing capacity

If you have taken all practicable steps to help and support a person who you think may lack capacity to make a decision, without success, you can then take steps to assess that person's capacity to make a specific decision at a specific time.

Assessing capacity

As we have seen in section 1, when we talk about a person's capacity in the context of the MCA 2005, we mean the person's ability to make a specific decision (including consenting to specific treatment).

If you are responsible for **carrying out** the particular medical or related treatment to which the decision relates, you will be responsible for assessing the person's capacity to make that specific decision at that specific time (even if the decision to offer that specific medical or related treatment was taken by others).

Which decision?

You need to be satisfied that you clearly understand the decision that the person is being asked to make. This is because you need to assess the person's ability to make a specific decision at a specific time.

Balance of probabilities

When you assess capacity, your view should be based upon the balance of probabilities test (meaning more likely than not).

Assessing capacity

We will outline the test below and then explain the key phrases used. The test for assessing capacity is in 2 stages:

1. *Does the person have an impairment of, or a disturbance in the functioning of, the mind or brain?*

   *If **no**, the person has capacity. The person must consent to any treatment offered.*

   *If **yes**, the person **may** lack capacity. You must move onto stage 2.*

2. *Does the impairment or disturbance mean that the person is unable to make a specific decision, at the time they need to?*

   *If **no**, the person has capacity. The person must consent to any treatment offered.*

   *If **yes**, the person lacks capacity to make a specific decision at a specific time.*

Your clinical records **must** show that the 2 stage test was used.

Impairment of, or a disturbance in the functioning of, the mind or brain (stage 1)

Put simply, this means there is an impairment of the person's mind or brain, or a disturbance that affects the way the person's mind or brain works. An impairment or disturbance **may include** dementia, significant learning disabilities, brain injury, concussion following a head injury, the effects of a stroke,

brain tumours, physical and medical conditions that cause confusion, drowsiness or loss of consciousness, neurological disorder, conditions associated with some forms of mental illness, delirium and the effects of drug or alcohol use. This is a non-exhaustive list. Evidence of impairment or disturbance is not conclusive evidence of lack of capacity – you must move onto the second stage.

Inability to make a specific decision (stage 2)

The impairment or disturbance must affect the person's ability to make a **specific decision** at a **specific time**. This part of the test **only** applies if you have given the person all practicable help and support to make that decision themselves, without success (see section 3 in this *Guidance*).

The person is **unable** to make a specific decision at the time they need to make that decision if the person cannot:

- **understand** relevant information about the decision to be made;
- **retain** that information in their mind long enough to make the decision themselves;
- **use or weigh up** that information as part of the decision-making process; **or**
- **communicate** their decision by **any** means.

Remember that if the person lacks the ability in **any one of these areas**, the person is treated as being unable to make a particular decision.

Temporary or fluctuating capacity

There are two considerations here.

1. The person's lack of capacity may be temporary (for example, caused by the effects of drug or alcohol use). What is relevant is the person's ability to make a specific decision at a specific time.
2. In cases of temporary or fluctuating capacity, you **must** consider whether it is possible to postpone the specific decision until a later time, when you think the person may have capacity to make it.

Reasonable belief and protection from challenges

Following your assessment, it is important only to have a reasonable belief that the person lacks capacity to make a specific decision. To achieve this, you must have:

- started with the first principle – the assumption of capacity in adults; and
- followed the two-stage test for assessing capacity properly.

Should your decision about capacity be challenged, you need to be able to:

- give **reasons** why you decided that the person lacked capacity to make a specific decision at a specific time; and
- provide **objective evidence** to support that belief. This means keeping a clear and accurate record in the person's clinical notes that you assessed their capacity to make a specific decision at a specific time using the two-stage test.

Assessing capacity

1. Check that you have taken all practicable steps to help and support the person to make the decision, without success.

2. Consider whether the decision can be postponed until a time when the person is better able to take part.

3. Start with the first principle. You must start with the assumption than an adult over the age of 16 years has capacity to make the decision, unless there is evidence to the contrary.

4. Move onto the first stage. Does the person have an impairment of, or a disturbance in the functioning of, the mind or brain?

5. Does the impairment or disturbance mean that the person is unable to make a specific decision, at the specific time they need to (disregard the person's ability to make decisions in general)? Specifically, consider the following on the balance of probabilities (meaning more likely than not):

    - Is the person able to understand, retain (for as long as is required) or use and weigh up the information you have given them, to reach a decision?

    - Is the person able to communicate their decision by any means?

6. Where the assessment of capacity relates to a decision with particularly serious consequences for the person, have you considered whether there is a need for a more thorough assessment of capacity (to be carried out by someone with particular expertise, such as a specialist medical practitioner)?

7. Have you made sure that your decision about the person's capacity is not based simply upon the person's age, appearance (physical appearance, characteristics, dress (including religious dress)), assumptions about their condition or any aspect of their behaviour?

8. Before you act, do you consider that you now have a reasonable belief that the person lacks capacity to make the decision or agree to the act of care or treatment being proposed?

9. Have you recorded your assessment and reasons (the more complex the assessment or the more serious the consequences of your assessment for the person, the more comprehensive should be your record)? Do you think your record would help you to withstand a challenge to your decision?

CASE STUDY 2

Anna Southcott, 76, has dementia and lives in a residential care home. Anna is also asthmatic. Like many people with dementia, Anna's capacity fluctuates. The District Nurse attends one day to administer 'flu vaccinations. Anna is able to communicate.

Context

This example is concerned with assessing capacity.

Principles

The decision relates to administering a 'flu vaccination. The District Nurse should start from the position of assuming that Anna has the capacity to decide whether to receive a 'flu vaccination, unless there is evidence to show that she lacks the capacity to do so (first principle). Even if the nurse has to help Anna to make the decision, this does not necessarily mean that she lacks the capacity to make it.

The nurse should not treat Anna as being unable to make the decision herself until all practicable steps to help and support her to make it have been taken, without success (second principle). Only if this is the case should the nurse assess Anna's capacity to make the decision using the two-stage test.

As Anna's capacity fluctuates, the District Nurse should carefully consider whether the decision can be postponed until a time when Anna may have capacity to make the decision. The District Nurse will speak to Anna's carers for information about this, as well as asking questions about her condition and whether there are any contra-indications for a 'flu vaccination. The following assumes this not to be the case.

Practice

Does Anna have an impairment of or a disturbance in the functioning of the mind or brain?

There must be an impairment of Anna's mind or brain, or some disturbance that affects the way her mind or brain works. Anna has dementia, so this part of the test is fulfilled to the balance of probabilities (more likely than not).

Does the impairment or disturbance mean that Anna is unable to make a specific decision, at the specific time they need to?

The District Nurse must disregard Anna's ability to make decisions in general. The impairment or disturbance must affect Anna's ability to make a specific decision at a specific time. The District Nurse will present Anna with some simple information about why she needs a 'flu jab (her age and asthma) and will then ask Anna to repeat that information.

In relation to the decision that needs to be made, the District Nurse should decide on the balance of probabilities (more likely than not) whether Anna is able to:

- understand relevant information about the decision;
- retain that information in her mind long enough to make the decision herself; or
- use or weigh up (evaluate) that information as part of the decision-making process.

If Anna cannot do any of these three things, she is treated as being unable to make the decision.

The decision about Anna's capacity must not be based merely upon her age, appearance, assumptions about her condition or any aspect of her behaviour. The District Nurse decides that Anna lacks capacity to make a decision about receiving a 'flu vaccination and clearly records her assessment with reasons.

Section 5: Best interests

In section 2, we introduced you to the fourth principle:

Any act done or decision made on behalf of a person who lacks capacity must be done or made in their best interests.

With the implementation of the MCA 2005, the way in which you will work out the best interests of a person who lacks capacity became much clearer. This is because the MCA 2005 ushered in a very clear set of criteria which you have to consider when deciding whether a particular decision (which you reasonably believe the person lacks the capacity to make) is in that person's best interests.

Remember to be flexible. A person's best interests will vary from case to case and some of the criteria may not apply in particular situations. Three things are important:

1. Be aware of and apply the criteria. We describe these for you in more detail below.

2. You must focus upon the best interests of the person who lacks capacity (whilst still taking the views of other people into account to help you to better understand the person's best interests).

3. Always clearly record your best interests decision, giving full reasons.

Who makes the best interests decision?

You will be the best interests decision-maker for medical and related treatment (such as investigations and procedures, nursing care) if you are responsible for **carrying out** the particular treatment or procedure in question (even if the decision to deliver it was reached after consultation with other members of staff).

What must I take into account?

Put simply, you need to take into account **all relevant circumstances** when deciding whether the act of healthcare or treatment you propose to carry out is in the person's best interests.

What are relevant circumstances?

Those things which you, as the best interests decision-maker, are aware of **and** which it would be reasonable to regard as relevant.

What does this mean in practice?

1. Consider whether it is more likely than not that the person will regain capacity to make the decision in question, at a later time (for example, the person may lack capacity because of the effects of medication). If so, consider postponing the decision until then.

2. As far as reasonably practicable, you should still permit and encourage, or improve the ability of, the person to participate in the decision-making process (even though he lacks the capacity to make the specific decision himself).

3. Consider and take into account all relevant circumstances as far as you are able to ascertain these. This means identifying things like:

   - evidence of the person's past and present wishes and feelings (including any relevant statement of wishes and feelings made by him when he had capacity);

- the beliefs and values that are likely to have influenced his decision, if he had capacity; and
- any other factors that the person would take into account, if he were able to do so (you may elicit this by speaking with people close to the person, such as near relatives – see below).

4. As far as it is practicable and appropriate to do so, you are also under a duty to consult and take into account the views of:

   - anyone named by the person who lacks capacity as someone to consult in relation to the decision in question or in relation to similar issues of healthcare or treatment;
   - anyone involved in caring for the person;
   - anyone interested in the person's welfare (such as near relatives and friends);
   - an attorney (if the person has made a personal welfare or a financial power of attorney); and
   - any court-appointed deputy.

5. Remember that if a decision is being made about starting, stopping or withholding serious medical treatment and the person has no-one within the categories above with whom you can consult, an Independent Medical Capacity Advocate (IMCA) must be consulted. We will look at the role of an IMCA in more detail in section 7.

Must the act done or decision made be the least restrictive option?

Yes. Remember the five principles (section 2). The act done or decision made must be the least restrictive in terms of the person's rights and freedom of action (the fifth principle). Then, weigh up all of these factors carefully to work out what is in the person's best interests.

Am I always able to make a best interests' decision myself?

Not always. Some decisions may involve the Court of Protection, court appointed deputies, attorneys appointed under a personal welfare LPA and advance decisions to refuse medical treatment.

The **Court of Protection** will only be involved where very complex decisions or difficult disputes are involved. The court will decide whether the particular treatment proposed is lawful and in the best interests of the person, before it can be taken. If the person who lacks capacity needs on-going treatment, in the absence of a personal welfare LPA, the court may appoint a deputy to make future healthcare decisions on behalf of the person who lacks capacity. It is vital to check this.

An attorney appointed under a **registered personal welfare lasting power of attorney (LPA)** will be the decision-maker on matters relating to the care and treatment of the donor who now lacks capacity. Unless the LPA imposes conditions or restrictions of the attorney's authority (it is **very** important to check for these), the attorney will have the authority to consent to or refuse medical examinations and treatment on behalf of the donor. An attorney does not have the power to consent to or refuse life-sustaining treatment unless the LPA document expressly authorises this. An attorney must follow the five principles (see section 2) and make decisions in the best interests of the donor who lacks capacity.

A valid and applicable **advance decision to refuse medical treatment** must be respected when the person lacks capacity, even if you consider that their decision to refuse treatment is not in their best interests. An attorney appointed under a registered personal welfare LPA cannot consent to specific treatment if the donor has made a valid, applicable advance decision to refuse that same treatment. However, if the donor (when he had capacity) made a personal welfare LPA after the advance decision and gave the attorney the right to consent to or refuse the same treatment, the attorney can choose not to follow the advance decision.

Best interests

1. Have you taken all practicable steps to help and support the person to make the decision, without success?

2. Consider whether the decision be postponed until a time when the person is better able to take part.

3. Is there any evidence of the person's past and present wishes and feelings (they may have expressed these verbally to others, or even put them in a written statement when they had capacity to do so)?

4. Is there any evidence of the person's beliefs and values which are likely to have influenced the decision that the person would have made if they had the capacity to make it? These may include religious, cultural or moral views for example.

5. Are there any other factors you are aware of which it would be reasonable to regard as relevant when deciding what is in the person's best interests?

6. If it is practicable and appropriate, consult and take into account the views of:

   - anyone the person has named as someone to consult in relation to the decision in question or in relation to similar issues;
   - anyone involved in caring for the person;
   - anyone interested in the person's welfare (such as near relatives and friends);
   - an attorney;
   - any court-appointed deputy; or
   - an Independent Medical Capacity Advocate if one has been appointed.

7. Remember that your decision about the person's best interests should not be based simply upon the person's age, appearance, assumptions about their condition or any aspect of their behaviour.

8. You need to check that the decision or act proposed must be the least restrictive of the person's rights and freedom of action. You need to weigh up all of these factors in order to work out what is in the person's best interests and then record your reasonable belief very clearly.

CASE STUDY 3

Jenny Blake is dying of breast cancer and has recently been in hospital. She is discharged home where she lives with her husband and main carer, Robert. The District Nurse must develop a care plan but is unable to engage Jenny (who is semi-conscious) in this process. Following an assessment, the District Nurse reasonably believes that Jenny lacks the capacity to make a decision about receiving painkillers subcutaneously using a syringe driver.

Context

This example looks at the factors that help you to determine the best interests of a person who lacks the capacity to make a specific decision at a specific time.

Principles

The District Nurse must make sure that any act done or decision made on behalf of Jenny:

- is done or made in her best interests (principle 4); and
- is the least restrictive of her basic rights and freedoms (principle 5).

When developing the care plan, the District Nurse should:

- think about whether she needs to act or make a decision at all. If she must, the decision must still be in Jenny's best interests; and
- have taken all practicable steps to help and support Jenny to make the decision to receive painkillers subcutaneously, without success (principle 2).

Practice

Any decision to offer painkillers subcutaneously should be clearly indicated. Assuming that it is not possible to communicate with Jenny in her present state nor that it would be appropriate to postpone the decision to offer painkillers, the District Nurse should ask Robert:

- whether Jenny has ever expressed a view on receiving painkillers (whether or not such expression is in the form of a written statement);
- whether Jenny holds any beliefs or values that need to be considered (religious, cultural, moral) and which are likely to have influenced her decision if she had the capacity to make it; and
- as his Jenny's main carer, what he considers should happen to his wife and why. While the views of Robert are important in helping the District Nurse to work out what course of action would be in Jenny's best interests, the decision must not be based upon what action Robert prefers. It must be based upon the best interests of Jenny as the patient.

The District Nurse should consider any other factors which she is aware of and which, objectively, it would be reasonable to regard as relevant. The decision must not be based merely upon Jenny's age, appearance, assumptions about her condition or any aspect of his behaviour. The District Nurse should also consider whether there are other options that may be less restrictive of Jenny's rights and freedoms.

The District Nurse decides that offering Jenny painkillers subcutaneously is in her best interests and is the least restrictive option for relieving her pain, clearly recording her assessment of Jenny's capacity to make this decision and the factors she has taken into account to determine Jenny's best interests.

Section 6: Protection for acts of healthcare or treatment

You may recall from the introductory section (section 1) that you are under a legal duty to have regard to the Code when making any decision or performing any act for or on behalf of a person who lacks capacity. The MCA 2005 offers you protection if you perform an act of healthcare or treatment in the best interests of a person who lacks capacity to consent to that act, providing you have followed the MCA 2005 and the Code.

By offering this protection, the MCA 2005 permits acts of healthcare or treatment to be performed without risk of legal liability. This means that the person who lacks capacity to consent to an act can still receive healthcare or treatment in their best interests and you will perform this safe in the knowledge you are protected. But there are limits to the protection you have.

1. You must reasonably believe that the act is in the best interests of the person.

2. The protection does not apply to an act which is negligently performed, or which may give rise to criminal liability.

What acts are protected?

Healthcare and treatment includes things like providing nursing care, carrying out diagnostic examinations and tests, providing professional medical treatment and prescribing or giving medication, providing emergency care, carrying out other necessary medical procedures and therapies and arranging to refer someone to hospital for an assessment or for treatment.

How do I receive protection?

There are broadly two steps that you need to satisfy.

1. **Before** performing the act of healthcare or treatment in question, you must have taken **reasonable steps** to establish that the person lacks capacity in relation to the act proposed.

   Reasonable steps means:

   - taking all practicable and appropriate steps to help the person make a decision about an action themselves (**see section 3: Help with decision-making**); and
   - applying the two-stage test of capacity (**see section 4: Assessing capacity**).

2. When **performing** an act of healthcare or treatment, you must **reasonably believe** that:

   - the person lacks capacity in relation to the matter; and
   - it is in the best interests of the person for the act to be performed.

If you satisfy these two steps, you can treat the person as if he had capacity to consent to treatment and had so consented (as long as there are no restrictions on your ability to make a best interests decision – see **section 5**). If your decision is challenged, you have to be able to provide objective reasons for your reasonable belief. It is vital that you clearly record your reasonable belief with reasons.

Emergency treatment

In emergency situations, you have less time to come to a conclusion about the steps above so it will almost always be in the person's best interests to give urgent treatment without delay (this is subject to separate requirements about advance decisions).

Section 7: Independent Mental Capacity Advocate (IMCA)

What is the role of an IMCA?

An IMCA supports and represents a person who lacks the capacity to make certain decisions. The nature of these decisions is described below.

When should an IMCA be appointed?

An IMCA is essentially a safeguard for people who lack capacity but who have little or no network of support and therefore no one with whom it would be appropriate to consult.

If a person who is 16 years of age or more and lacks the capacity to make a specific decision about:

- serious medical treatment; or
- a long-term move to accommodation in hospital or a care home arranged by the NHS or the local authority; and
- has no relative, friend or carer (someone not paid to care), attorney appointed under an LPA or an EPA, court-appointed deputy or an individual named by the person who lacks capacity to consult on this decision or decisions of this nature, who is willing, able and considered by you to be appropriate to consult on this specific decision

a referral **must** be made to the local IMCA service. The referral must be made by the decision-maker (the person responsible for carrying out the act of healthcare or treatment concerned). The IMCA appointed **must** then be consulted.

Relatives and carers whom you consider are **not** appropriate to consult might include relatives permanently living abroad. In some cases, adult protection issues may have been raised. Remember that if the person's family and friends disagree with your decision about what is in the person's best interests, that does not mean it is inappropriate to consult them.

What is meant by serious medical treatment?

An IMCA must be instructed and consulted where a decision has to be made about providing, withholding or stopping serious medical treatment for a person who lacks capacity to make that decision. This is treatment which involves giving new treatment, stopping treatment that has already started or withholding treatment that could be offered in circumstances where:

- if a single treatment is proposed, there is a fine balance between the likely benefits and the burdens to the person and the risks involved;
- a decision between a choice of treatments is finely balanced; or
- what is proposed is likely to have serious consequences for the person (for example, treatments which cause serious and prolonged pain, distress or side effects, have a serious impact on the person or on their future life choices).

Examples of serious medical treatment include chemotherapy, surgery for cancer, major heart surgery, major amputations, termination of pregnancy, treatments which will result in permanent loss of sight or hearing, withholding or withdrawing artificial nutrition and hydration (this list is non-exhaustive).

What if I am not sure whether I should instruct an IMCA?

If you are not sure whether to instruct an IMCA, it is a good idea to consult your colleagues or team leader.

Urgent decisions and emergency treatment

If there is a need for an urgent decision or emergency treatment (for example, to save a person's life) you should not delay essential treatment and need not instruct an IMCA immediately. Keep a clear record of your decision and the reason for non-referral. You must instruct an IMCA as soon as possible for any serious medical treatment that follows this. If an IMCA has already been instructed and you are waiting for their report, you should continue to act in the person's best interests (for example, treating the person to prevent a deterioration of the person's condition).

What will an IMCA do?

An IMCA is independent. An IMCA will:

- support and represent the person in the decision-making process;
- ascertain the person's wishes, feelings, beliefs and values;
- provide information to help you work out what is in the person's best interests;
- consider whether the proposed option is the least restrictive of the person's rights and freedoms; and
- ask questions or challenge a decision which they believe is not in the best interests of the person.

Remember that if you are the person responsible for carrying out the proposed act of healthcare or treatment, you are the decision-maker for the purpose of determining the person's best interests. An IMCA is not an attorney and does not have the power to substitute their own decision for your decision. However, an IMCA is there to help you to make your decision. Asking questions or challenging your decision can be an important part of that process.

What rights does an IMCA have?

An IMCA has a right to meet the vulnerable person in private and is allowed access to those parts of the person's healthcare records that are relevant to the specific decision. An IMCA has a right for the information they provide on behalf of the vulnerable person to be taken into account properly, may ask questions and may challenge your decision.

An IMCA may consider seeking a second medical opinion from a doctor with appropriate expertise, putting the person who lacks capacity in the same position as a person who has capacity and asks for a second opinion.

Disagreements

Sometimes, an IMCA may disagree with your decision about the person's lack of capacity or proposed best interests decision. An IMCA can challenge your decision. An IMCA should try to resolve a disagreement informally, by speaking with you. You should both try to listen to each other's views to understand the reason for your different views. An IMCA can use more formal methods to try to resolve a disagreement. An IMCA may pursue a complaint or seek permission to refer a very serious or urgent case to the Court of Protection, where this is appropriate.

Section 8: Advance decisions to refuse medical treatment

A person who is 18 years of age and over and has capacity can refuse specific medical treatment for a time in the future when they may lack the capacity to consent to or refuse that treatment. A valid, applicable advance decision has the same effect as a contemporaneous refusal of medical treatment by a person who has capacity.

Do advance decisions only relate to refusals of treatment?

Yes. It is not possible for a person to compel a healthcare professional to treat them in a particular way, whether contemporaneously with the medical treatment demanded or in advance.

How does an advance decision differ from a statement of wishes and feelings?

A valid, applicable advance decision is about refusing medical treatment and is **binding** on medical staff. An advance decision may be communicated verbally, but there are certain formalities required for an advance decision to refuse life sustaining medical treatment.

A statement of wishes and feelings may deal with things like the kind of medical treatment the person would want in case of future illness, or where they would prefer to live, and is **non-binding** on medical staff. Evidence of a person's wishes and feelings should be taken into account when working out the best interests of a person who lacks capacity, particularly if the person previously prepared a written statement of wishes and feelings.

What are the requirements of an advance decision?

The person making an advance decision must be 18 years of age and over and must have the capacity to make an advance decision.

To be effective, an advance decision must:

- exist (although in many cases an advance decision may have been expressed verbally);
- be valid; and
- be applicable to the circumstances under which it is considered.

An advance decision will not be valid if the person who made it:

- has since withdrawn his decision and, at the time he withdrew his decision, had capacity to do so;
- has made a personal welfare Lasting Power of Attorney (LPA) after the date of his advance decision which confers authority upon the attorney to give or refuse consent to the same treatment to which the advance decision relates; or
- has done anything else which is *clearly inconsistent* with the advance decision

Must an advance decision be contained in a formal document?

No. Unless the advance decision includes a refusal of life-sustaining medical treatment (in which case it must be in writing and meet certain requirements), it can be communicated verbally or reduced to writing. It need only be in the words of the person making the advance decision to refuse medical treatment, as long as it is clear about what treatment is being refused.

Life-sustaining treatment

An advance decision to refuse life-sustaining treatment must:

- be in writing;
- be signed by the person making it and witnessed; and
- contain the words "**even if life is at risk**". If these words are contained in a separate document, that document must also be signed and witnessed.

As someone providing healthcare or treatment, can I witness the document, if asked?

Yes, you can. You are only witnessing the signature and the fact that it concerns the person's wishes expressed in their advance decision.

What should people include in an advance decision?

It is important that any healthcare professional who is presented with an advance decision at a time when the person who made it lacks capacity, can quickly identify whether the advance decision is applicable to the current circumstances. With this in mind, an advance decision:

- **must** state precisely what treatment is to be refused (an expression of a general desire not to be treated is not enough);
- **may** set out the circumstances when the refusal should apply (although not obligatory, the Code suggests that it is helpful to include as much detail as possible in the advance decision); and
- will only apply at a time when the person lacks capacity to consent to or refuse the treatment specified (if the person has capacity at the relevant time, they should of course consent to the treatment offered).

Can a person validly refuse all treatment in any situation, in advance?

An advance decision refusing all treatment in any situation may be valid and applicable (for example, this may be based on a person's personal or religious beliefs).

What steps may I take to ensure an advance decision is clear?

1. An advance decision that is regularly reviewed and (where necessary) updated is more likely to be applicable to current circumstances, when it is being considered.
2. Encourage the person to tell their General Practitioner about their advance decision (if they have made one) or to discuss making one with their General Practitioner (if they wish to make one).
3. Clearly record a verbal advance decision in a person's healthcare records. Your record must state clearly:
    a. the treatment to be refused and the circumstances in which it will apply;
    b. that the decision should apply if the person lacks the capacity to make treatment decisions in the future;

c. details of any people present with you when you recorded the verbal advance decision in the healthcare records; and

d. whether you heard the decision, took part in it or are simply aware that it exists.

Advance decisions and personal welfare Lasting Powers of Attorney (LPA).

An advance decision is a method by which a person with capacity can make a binding decision to refuse medical treatment in advance. In other words, it has the same force as a contemporaneous refusal of medical treatment. An advance decision does not have to be registered, but every effort should be made to encourage the person to tell his General Practitioner about his advance decision (or his decision to change or withdraw his decision). This is designed to ensure that the right information can be communicated to healthcare staff when it needs to be.

A registered personal welfare LPA acts in a different way because it may entitle another person - an attorney - to refuse healthcare and medical treatment on behalf of the person (the donor) who has lost capacity to refuse treatment. Whether it does depends on any conditions or restrictions attached to the LPA identifying areas where the donor does not wish the attorney to have the power to act.

A personal welfare LPA only becomes valid when the donor lacks the capacity to make decisions about personal welfare (which can include healthcare and medical treatment decisions) and has been registered with the Office of the Public Guardian.

It is important to know which takes precedence. There are broadly 3 situations:

- a personal welfare attorney cannot consent to treatment if the donor made a valid and applicable advance decision to refuse the same medical treatment after the date the LPA was signed;
- a registered personal welfare LPA which gives the attorney the right to consent to or refuse specific medical treatment, made after the advance decision refusing the same treatment, allows the attorney to choose not to follow the advance decision; and
- an attorney has no power to consent to or refuse life-sustaining treatment unless the LPA document expressly authorises this.

Protection

As a healthcare professional, you will be protected from legal liability if you:

- stop or withhold treatment from a person who lacks capacity because you reasonably believe that a valid, applicable advance decision exists; or
- treat a person who lacks capacity because, despite having taken all practical and appropriate steps, do not know or are not satisfied that a valid and applicable advance decision exists.

Record keeping

It is essential and always good practice for all healthcare practitioners to record their decision to stop, withhold or treat in accordance with an advance decision or best interests, and the reasons for doing this. It is important to remember that in the absence of a valid and applicable advance decision, the person must be treated in accordance with their best interests. Even if an advance decision exists but is not valid or applicable, it still represents an expression of the person's wishes and feelings and must be taken into account when determining the person's best interests (please see **section 5**).

Advance decisions to refuse medical treatment

1. Has the person expressed an advance decision to refuse medical treatment, or expressed a wish to make one?

2. If so, is the person 18 years of age or more and do they have capacity to make an advance decision to refuse medical treatment? Remember that there is an assumption of capacity in adults, which we introduced you to in section 2 (principle 1).

3. Has the person sought or been offered advice about making an advance decision? It is good practice to record any discussion about this in the person's healthcare records.

4. If the person has made an advance decision, does it state precisely what treatment is to be refused (a statement giving a general desire not to be treated is not enough)?

5. Does the advance decision set out the circumstances under which the refusal should apply? It is helpful to include as much detail as possible.

6. Have you asked the person whether they have told their General Practitioner about their advance decision? If they have not, they should be encouraged to communicate their advance decision to their General Practitioner as soon as possible.

7. If an advance decision has been expressed verbally, has the person been offered the opportunity for their advance decision to be recorded in their healthcare records? Where possible, a verbal advance decision should be so recorded to prevent confusion in the future. Include in your record details of:

   - the treatment to be refused and the circumstances in which it will apply;
   - that the decision should apply if the person lacks the capacity to make treatment decisions in the future;
   - details of any people present with you when you recorded the verbal advance decision in the healthcare records; and
   - whether you heard the decision, took part in it or are simply aware that it exists.

8. If the person makes an advance decision to refuse life-sustaining treatment, is the advance decision in writing, signed by the person making the advance decision, signed by a witness and contains the words "*even if life is at risk*"? If these words are written in a separate document, this must also be signed and witnessed.

9. Have you advised the person to regularly review their advance decision, to make sure it is kept up to date?

10. Has the person made a personal welfare Lasting Power of Attorney (LPA) (either before or after making the advance decision)? Check with the person whether the LPA confers upon the attorney the power to make decisions about the same type of medical treatment that the advance decision refuses.

Section 9: Good record keeping under the MCA 2005

The MCA 2005 and the accompanying Code is evidence based. As well as following the requirements of the MCA 2005 and the guidance in the Code, it is vital that you have made a clear record of the steps you have taken in an MCA 2005 compliant way. Your decision may be reviewed or challenged.

Help with decision-making and record keeping

In section 3, we introduced you to the importance of offering a person who you think may lack capacity all practicable help and support to make a specific decision. If you have done this, without success, you must clearly record the steps you have taken to help and support the person to make their own decision. Please refer to the checklist in section 3 for the steps you should take. It may not be necessary to record each and every step you have taken, but your record should **at the very least** show that you have taken steps to help and support the person to make their own decision, without success.

Assessing capacity and record keeping

When assessing a person's capacity to make a specific decision at a specific time using the two-stage test, you **must** keep a clear record of your assessment. The more significant the specific decision or the likely consequences of that specific decision for the person who may lack capacity, the more formal and clearly recorded your assessment should be.

What should I record?

You must **clearly** record your assessment of the person's capacity to make the specific decision using the two-stage test, namely:

- the specific decision that needs to be made by the person;
- whether stage 1 of the test is satisfied with reasons (the nature of the person's impairment or disturbance in the functioning of their mind or brain);
- whether stage 2 of the test is satisfied with reasons (for example, the person is unable to understand information relevant to the decision);
- the people with whom you consulted and what information you took into account to reach your reasonable belief that the person lacks capacity in relation to the specific decision. This will also help you if your decision is ever challenged or reviewed by the Court of Protection, because your record is evidence of your reasonable belief;
- the date, time and location of your assessment; and
- your name and title.

You should **always** assess and record a person's capacity to make decisions about their healthcare or treatment, including a person's lack of capacity to consent to proposed treatment.

If a care plan exists for a person who lacks capacity, this should also show that the person's capacity to make minor, everyday decisions has been assessed and there is intention to review capacity periodically. There is no need to carry out a formal assessment of capacity for minor, everyday decisions. Where a care plan is developed for a person's health and social care needs, their capacity to agree to receive support needs to be assessed, and thereafter periodically.

Best interests and record keeping

Assuming that your assessment reveals on the balance of probabilities (more likely than not) that the person lacks capacity to make the specific decision at the specific time, and as the person who will carry out the act of healthcare or treatment, you must determine what is in the person's best interests.

You must record every act of healthcare or treatment for a person who lacks capacity (such as performing diagnostic examinations and tests, giving medical treatment and nursing care, arranging an admission to hospital for an assessment or treatment, giving medication, taking blood samples, therapies or emergency care).

Your record (or any checklist you use) must reveal:

- the act of healthcare or treatment proposed and performed and why you consider this to be in the person's best interests;
- whether you have considered postponing the decision until a time when the person is likely to regain capacity to make his own decision at a future time;
- whether (following reasonable investigation) there is:
    - a valid, applicable advance decision;
    - a validly appointed attorney under a personal welfare LPA;
    - a court appointed deputy; or
    - a written statement of wishes and feelings or any other evidence of the person's beliefs and values
- what steps you have taken to involve the person in the decision-making process as far as possible;
- any relevant circumstances you have taken into account. For example:
    - evidence of the person's past and present wishes and feelings (including any relevant statement of wishes and feelings made by him when he had capacity);
    - the beliefs and values that are likely to have influenced his decision, if he had capacity; and
    - any other factors that the person would take into account, if he were able to do so
- any person whose views you have taken into account after consulting them. This may include anyone involved in caring for the person or interested in the person's welfare (such as near relatives and friends) or an IMCA (if a decision is being made about starting, stopping or withholding serious medical treatment for example);
- whether the same purpose could be achieved in a less restrictive way;
- what steps you have taken to resolve conflict with any person who disagrees with your decision; and
- the date and time and your name and title.

You need to be able to point to evidence in the clinical notes that you reasonably believe that the decision or act proposed is in the best interests of the person who lacks capacity.

Section 10: Confidentiality and sharing information

To make decisions in an MCA 2005 compliant way, you are encouraged to consult certain groups of people appropriately to help you to decide whether a person lacks capacity or whether a particular act of healthcare or treatment may be in their best interests.

You may sometimes need to disclose personal information about the person who may lack or have reduced capacity, so that your consultation is meaningful. This is a difficult area because the MCA Code does not replace the rights and obligations that exist at common law (judge-made case law), under statutory provisions (such as the Data Protection Act 1998) and your own professional guidance about disclosing and giving access to confidential information. The guidance below should be read alongside those other requirements. We shall start with the NHS Confidentiality Code of Practice.

The NHS Confidentiality Code of Practice

Under the NHS Code on Confidentiality, where the person lacks capacity and is unable to consent to acts of healthcare or treatment, confidential information should only be disclosed in the patient's best interests and then only as much information as is needed to support their care (*Annex B – Confidentiality decisions*).

Independent Mental Capacity Advocates (IMCAs)

As we saw in section 7, an IMCA who is appointed to represent a person who lacks capacity is entitled to see (and to receive copies of) those parts of a person's medical records that are relevant to the decision in question. It is good practice to ask the IMCA to keep the confidential information safe and for no longer than is necessary for the purpose requested.

Assessment of capacity

If you need to share confidential information with others about the person who may lack or have reduced capacity, to help you to carry out the two-stage test:

- start by trying to obtain the person's agreement to share relevant information with others. The person may still have the capacity to give permission to do this. You will need to give the person a full explanation of why you believe this is necessary and in their best interests. You will need to be prepared to explain the risks and consequences of revealing or not revealing this information to others; and

- if the person lacks the capacity to give permission, you may still be able to share relevant information necessary to help you accurately assess their capacity if it is in their best interests to do this.

Record the fact that you have discussed the person's capacity with others (perhaps other healthcare professionals, with relatives or close friends of the person). This helps to describe the extent of your inquiry to determine the person's capacity and helps you to show how you formed a reasonable belief that the person lacks capacity, should your decision ever be challenged.

Best interests decision

As with the assessment of capacity, you need to balance very carefully the right to privacy of the person who lacks capacity against your own duty to have regard to the MCA Code and to consult with and take into account the views of others.

If you must reveal confidential information about the person who lacks capacity to others in order to fulfil that duty, make sure:

- that you only seek the views of those whom it is appropriate to consult (see the checklist in section 5);
- that it is in the best interests of the person to reveal this information, or there is some other lawful reason to do so; and
- only reveal as much information as is relevant to the decision to be made.

You need to be able to justify your decision to discuss confidential information with others. Always record how you worked out the person's best interests for each relevant healthcare or treatment decision, including details of the people with whom you consulted and what particular factors you took into account. If you did not consult a person whom it would be regarded as reasonable to consult, you should record that you did not consult this person, giving reasons why you did not.

Attorney appointed under a Lasting Power of Attorney (LPA)

An attorney appointed under a registered LPA is legally entitled to request confidential information about the donor who now lacks capacity, in the same way that the donor could have requested this information himself. However, this is subject to:

- the attorney acting within the scope of his authority under the LPA; and
- the confidential information being relevant to decisions that the attorney has the right to make.

Ask to see proof of identity and appointment of the attorney, taking care to note the scope of the attorney's authority. If confidential information about the person is lawfully disclosed, the attorney should be asked to treat this information confidentially.

Where a third party requires confidential information, an attorney appointed under a registered personal welfare LPA will decide if the confidential information can be disclosed. You must consult the attorney before sharing confidential information with a third party. You should record this clearly.

If for some reason it is not possible for you to speak to the attorney about disclosing confidential information to a third party (it may be the case that urgent treatment is necessary) you must still act in the best interests of the donor and advise the attorney of the disclosure as soon as possible. You should record your decision clearly, giving reasons.

Confidentiality and sharing information

Sometimes, third parties may request information from you.

1. Always consider first whether the person who lacks capacity in relation to a specific decision may nevertheless have the capacity to agree to that information being disclosed. If so, seek the person's consent to disclose the information.

2. Always consider whether the person making the request for confidential information has lawful authority to ask for it (for example, is the person a validly appointed attorney with authority to make the request?)

3. Are you satisfied that the person making the request for information is acting in the best interests of the person who lacks capacity and needs the information to act properly?

4. Are you satisfied that the person making the request will respect confidentiality and will keep the information for no longer than is necessary?

5. If you decide, based upon the best interests and needs of the person who lacks capacity, that information should not be revealed to the person's carer, the MCA 2005 Code encourages you to try to resolve the matter initially through discussion with the carer.

6. If you reveal confidential information lawfully, consider asking the recipient to confirm that they will keep that information safe, confidential and for no longer than is reasonably necessary for the purpose requested.

Section 11: Challenging your decision

Any decision you make under the MCA 2005 may be challenged. The clearer your records, the easier it will be to show that your decision (whether about capacity or best interests) was reached in an MCA 2005 compliant way.

Who may challenge my decision?

Your decision may be challenged by a family member, carer or any other person interested in the welfare of the person who may lack capacity, by an IMCA or even by the vulnerable person.

Challenge to your assessment of the person's capacity

If someone intends to challenge your assessment of a person's capacity, they should raise it with you first. If the challenge comes from the person whose capacity you assessed, they may need support from family, friends or an advocate. The person challenging your assessment of capacity can ask you why you believe the person lacks capacity to make a specific decision and for evidence to support that belief. Clearly recording your assessment of capacity is therefore vital.

Challenge to your best interests decision

You are the decision-maker for the best interests decision if you are the person who carries out the act of healthcare or treatment which is the subject of the best interests decision. We have seen that you are under a duty to consult other people and take their views into account. Remember, it is your responsibility to decide what is in the best interests of the person who lacks capacity. Where some of the people you have consulted disagree with your decision, or with each other, this may be difficult to deal with. There are strategies you should consider using if you are faced with conflicting views.

1. Review your best interests checklist with everyone involved (including the person who lacks capacity). Explain how you have come to your view. You may be able to show those who disagree with your view, why you have reached your decision.

2. Consider a meeting so that everyone involved can talk about their concerns.

3. Consider alternative forms of conflict resolution, such as mediation (this is suggested as an appropriate way to resolve conflicts, in the Code accompanying the MCA 2005).

Sometimes, it may not be possible to resolve conflicting views. Ultimately, the responsibility for working out a person's best interests is yours.

Conflict resolution

There are many ways to resolve disagreements. It is better to try to resolve disagreements informally. Often, by simply explaining the reasons for your decision, it is possible to avoid a more serious disagreement. When any form of conflict resolution is employed, it is very important not to lose sight of what is in the person's best interests.

Glossary of terms

Advance decision to refuse medical treatment: this is a decision made by an adult with capacity to refuse specific medical treatment in advance. The decision will apply at a future date when the person lacks the capacity to consent to or refuse the treatment specified in the advance decision. It has the same effect as a contemporaneous refusal of specified medical treatment.

Attorney: this is a person who has been appointed under either a Lasting Power of Attorney or (prior to October 2007) an Enduring Power of Attorney. An attorney has the legal right to make decisions on behalf of the donor, providing these decisions are within the scope of their authority. There are now personal welfare and financial Lasting Powers of Attorney.

Best interests: Any act done or decision made on behalf of a person who lacks capacity must be done or made in their best interests. Section 4 of the MCA 2005 sets out a non-exhaustive checklist.

Capacity: this describes a person's ability to make a specific decision at a specific time.

Decision maker: this is a person who is responsible for deciding what is in the best interests of a person who lacks capacity.

Deputy: this is a person appointed by the Court of Protection with ongoing legal authority to make particular decisions on behalf of the person who lacks capacity. Deputies for personal welfare (including healthcare) decisions will only be required in the most difficult cases where important and necessary actions cannot be carried out without the court's authority or there is no other way of settling the matter in the best interests of the person who lacks capacity to make particular welfare decisions.

Donor: this is a person who makes a Lasting Power of Attorney to appoint a person to manage their assets or to make personal welfare decisions or (prior to October 2007) an Enduring Power of Attorney.

Enduring Power of Attorney (EPA): this is a power of attorney created under the Enduring Powers of Attorney Act 1985 to deal with property and financial affairs. Existing EPAs continue to be valid.

Independent Mental Capacity Advocate (IMCA): this is a person who supports and represents a person who lacks capacity to make a specific decision, where that person has no one else who can support them. They make sure that major decisions for a person who lacks capacity are made in accordance with the Mental Capacity Act 2005.

Lasting Power of Attorney (LPA): this is a power of attorney created under the Mental Capacity Act 2005. It enables a person initially with capacity to appoint another person to act on their behalf in relation to decisions about the donor's financial and / or personal welfare (including healthcare) at a time when they no longer have capacity. An LPA must be registered with the Office of the Public Guardian before it can be used.

Mediation: a voluntary, facilitative process that assists parties to reach a mutually acceptable outcome. Mediation is a non-adversarial and voluntary process. A mediator is independent and acts as a facilitator. A mediator works with the parties to identify their concerns and helps them to resolve areas of disagreement. Parties who take part in mediation have a real stake in the process and a mediator empowers them to resolve the dispute themselves. This is why mediation is often very successful.

Statement of wishes and feelings: a person with capacity may express their wishes and feelings about their future medical treatment, where they would choose to live, how they would wish to be cared for, in the event they lose capacity in the future. These are non-binding but should be used by relevant professionals to decide what is in the best interests of a person who lacks capacity.

Electronic resources

Mental Capacity Act 2005: www.opsi.gov.uk/ACTS/acts2005/ukpga_20050009_en_1

You can download a copy of the Mental Capacity Act 2005 free of charge.

Code of Practice: www.justice.gov.uk/guidance/mca-code-of-practice.htm

You can download a copy of the Code of Practice free of charge.

Department of Health Training Materials:

www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_074491

There are some very helpful training sets published by the Department of Health which are available to download free of charge, including a core training set and a community care and primary care training set.

Nursing and Midwifery Council:

The Nursing and Midwifery Council Code (2008) can be found at www.nmc-uk.org

Department of Constitutional Affairs:

www.dca.gov.uk/legal-policy/mental-capacity/mibooklets/booklet03.pdf

There is a very helpful publication entitled *Making decisions: a guide for people who work in health and social care* which is published on the DCA website.

Office of the Public Guardian (including information about the Court of Protection):

www.publicguardian.gov.uk