



Making decisions

A guide for advice workers

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Helping people who are unable to make
some decisions for themselves

This booklet provides information on the Mental Capacity Act 2005 and how it will affect you.
It is not a statutory Code of Practice issued under the Mental Capacity Act 2005
and is not a guide to how the law will apply to specific situations.

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1. Introduction

Who is this booklet for?

This booklet is for advice workers and others who give advice as part of their job. It tells you about the Mental Capacity Act and how it affects your work.

The Mental Capacity Act helps and supports people who are unable to make some decisions for themselves, because, for instance, of a stroke or brain injury, dementia, a learning disability or mental health problems.

It will help people to plan ahead in case they are unable to make decisions in the future.

If you are unsure of any of the terms in this guide, please refer to the 'Jargon buster' on page 34.

Although this booklet should give you a broad overview of the MCA and its main implications for you in your work, you may find you need more information. See page 37 for a list of useful contacts and sources of further help at the back of this booklet.

How does the Mental Capacity Act affect my work?

You will need to know about the Mental Capacity Act if you give advice to:

- people who may lack the mental capacity to make some decisions for themselves;
- people who care for, help or work with people who lack capacity; and/or
- anyone who wants to know more about the law and how it could affect them, for example if they want to prepare for a time when they might lack capacity.

Lacking mental capacity

If a person lacks mental capacity they can't make a particular decision at the time it needs to be made, because the way their mind or brain works is affected. The inability could be because of, for instance, a stroke, brain injury, mental health problem, dementia or a learning disability. In this guide 'lacking capacity' means the same as 'lacking mental capacity'.

An adviser's story

After Marie had gone I thought about what she'd asked me. She'd seemed genuinely concerned about Ruby and it was nice to see a young woman looking out for her neighbour, but I'd felt a bit uneasy about giving advice to her without meeting the person we were talking about.

Marie told me that Ruby's doctor said she needed to move to a care home. He thinks she's not managing on her own now her dementia is so advanced. Marie came in to see if we could suggest anywhere. It all seemed a bit odd, as Marie thinks Ruby is managing ok. Apparently Ruby is very unhappy about the idea of a care home but because a doctor says she should move they feel they have to go along with it.

I'd advised Marie that rather than heading straight into sorting out a move, we could go back a step and check what is really in Ruby's best interests. I wanted to meet Ruby so that I could try to explain things clearly enough for her to make her own choice. I'd had to shuffle things around to get an appointment sorted: Marie reckoned Ruby would be more 'with it' after eating lunch. Apparently Ruby sometimes gets agitated with new people, so we had to find a time when Marie could be there too, so that she could help me to explain. But hopefully after the visit I'd be sure that Ruby was ok about whatever we ended up helping her to do.

Find out what happened when the adviser visited Ruby later in this booklet.

The Mental Capacity Act has the potential to affect everyone. As well as having clients who themselves lack capacity you may have their friends, relatives or carers, like Marie in the story above, walking through your door. When you help them you will need to ask ‘does my client have the mental capacity to make this decision?’ or ‘is what my client asking me to advise them on really in the best interests of the person they care for?’ If there is, or could be, any question about the capacity of your client, or someone your client helps, you should ensure that your actions and your case records reflect the requirements set out in the Mental Capacity Act.

The Code of Practice for the Mental Capacity Act

There is a Code of Practice (the ‘Code’) alongside the MCA, which provides guidance on how the MCA works on a day to day basis. It gives case studies and explains in more detail what the key features of the law are.

Professionals and anyone who is paid for the work they do with someone who lacks capacity has a duty to ‘have regard’ to the Code. Having regard involves paying attention to the Code and being able to show that you are familiar with the guidance in it and have followed it. If you don’t follow the Code you should be able to give convincing reasons as to why not.

This includes advice and advocacy workers (paid or unpaid), as well as other professionals who may be involved in your cases, such as doctors, housing or health advisers, youth workers and the police. Remember that the involvement does not have to be a formal or paid role, as it includes those who work as volunteer support workers as well as Attorneys (page 22) or Deputies (page 31).

Family, friends and other unpaid carers won’t have a duty to ‘have regard’ to the Code but will still find the guidance useful. It is a good idea for you to draw their attention to relevant parts of the Code.

The Code can be downloaded for free at: www.publicguardian.gov.uk

What does the Mental Capacity Act cover?

The MCA pulls together many best practice principles and case law decisions which help people who don't always have the capacity to make decisions for themselves. Although much of what is in the MCA is not new, it means that you can now find the law as it affects people who may lack capacity in one place without having to piece it together from other sources. The MCA also introduces some changes and new safeguards that you need to know about.

The MCA aims to make sure that people who lack capacity to make decisions and are therefore vulnerable are given all the help and support possible to enable them to make their own decisions, or are as involved as much as possible in decision-making.

The MCA sets out five key principles that underpin everything else in the MCA and the way it is used. In particular the principle of acting in a person's 'best interests' is crucial. The five principles are described on page 14.

Best interests

If anything is done or any decision is made for people who lack capacity to make a decision for themselves it must be in their best interests. This means thinking about what is best for the person, not about what anyone else wants. See page 19 for more details.

The MCA explains how to work out when someone may lack mental capacity and when this may be important.

- It defines a lack of mental capacity, setting out a basic capacity test and makes clear that someone's capacity may vary depending on the time and type of decision that has to be made (see page 14).
- This includes people whose capacity fluctuates, for example because they have mental health problems, which means that they might be able to make a particular decision on one day but not the next.
- It also includes those who lack the capacity to make some decisions but not all. For example, someone who has dementia may be able to make decisions about what to wear but may lack the capacity to decide whether they are able to live safely in their own home.

The Mental Capacity Act makes it easier for someone to plan ahead for a time when they may lack capacity to make some decisions affecting their lives.

- Enduring Powers of Attorney (EPAs) are now replaced by Lasting Powers of Attorney (LPAs). LPAs enable people to appoint a representative (an 'Attorney') to make personal welfare or health decisions, or decisions about their property and affairs, should they lack capacity to make these decisions for themselves at some time in the future (see page 22).
- It also formalises rules on making advance decisions to refuse medical treatment, and sets out additional requirements for advance decisions that refuse life sustaining treatment (see page 24).

In order to protect vulnerable people, the MCA:

- clarifies how people should act when helping someone who lacks capacity to make a decision. In particular this includes ensuring that any help given to them is in their 'best interests' (see page 19);
- created a Court of Protection with High Court status which deals with cases relating to mental capacity issues (see page 30);
- created an Independent Mental Capacity Advocate (IMCA) service (see page 32);
- created the role of Public Guardian, who keeps a register of LPAs and EPAs, supervises Deputies (see page 30) and provides general information and advice on the MCA. The Public Guardian is supported by the Office of the Public Guardian.
- introduced a new offence of ill-treatment or wilful neglect of someone who may lack capacity to take decisions to protect themselves (see page 26); and
- sets out the rules for when people without capacity to consent can still take part in research (see page 27).

Decisions that are not covered by the new law

Some types of decisions (such as consenting to sex, marriage, divorce, adoption and voting) can never be made by another person on behalf of someone who lacks capacity, even if they are an 'Attorney' or a 'Deputy' and the Mental Capacity Act does not change this.

Most of the Mental Capacity Act does **not** apply to under-16-year olds. There are two exceptions to this.

- The Court of Protection may make certain decisions about property for under-16-year olds.
- The new offence of ill-treatment or wilful neglect (see page 26) also applies to situations involving under-16-year olds who lack capacity.

Most of the provisions of Mental Capacity Act **do** apply to young people aged 16-17 although under 18s will not be able to make a Lasting Power of Attorney or an advance decision to refuse treatment under the MCA.

For more detail on how young people are affected by the MCA and how it interacts with other relevant legislation such as the Children Act, refer to the Code of Practice. Get expert help if you need further advice on this.

The Mental Health Act

The 1983 Mental Health Act (MHA) is primarily about people who are diagnosed as having a mental health problem which means that, in the interests of their own health or safety or to protect other people, they have to be compulsorily detained or treated.

The MHA is not changed by the Mental Capacity Act, but the two Acts may affect the same people. The Mental Capacity Act will apply to everyone who lacks capacity, including patients who have been detained in hospital ('sectioned') under the Mental Health Act. However, these people won't be covered by the Mental Capacity Act in regard to compulsory mental health treatment which can be given without consent under the Mental Health Act itself. The new Mental Capacity Act will, however, apply to most other situations where someone who has been detained lacks capacity to make a decision, such as consenting to treatment for anything else, for example a physical condition, or making financial decisions.

The Government is working on updating the Mental Health Act. For more information visit the Department of Health website at: www.dh.gov.uk.

2. How do I know if someone lacks capacity?

As part of your work you may be asked for advice by a client who is worried about their relative's ability to make decisions because, for example, they keep giving money they can't afford to a neighbour. To deal with cases like this you will need to be sure that the person concerned has the mental capacity to make those kinds of decisions. This means that you will have to know how to carry out a capacity assessment, either to apply the test yourself or to explain it to relatives and carers.

To help with this, the MCA begins by setting out five key principles which must underlie everything you do in relation to someone who may lack capacity to make some decisions. It also defines what 'mental capacity' is and explains how you assess whether someone has mental capacity to act in any given situation.

The five principles:

Principle 1

It should be assumed that everyone can make their own decisions unless it is proved otherwise.

Principle 2

A person should have all the help and support possible to make and communicate their own decision before anyone concludes that they lack capacity to make their own decision.

Principle 3

A person should not be treated as lacking capacity just because they make an unwise decision.

Principle 4

Actions or decisions carried out on behalf of someone who lacks capacity must be in their best interests.

Principle 5

Actions or decisions carried out on behalf of someone who lacks capacity should limit their rights and freedom of action as little as possible.

For more detail it is important that you refer to the Mental Capacity Act and the Code of Practice.

The first three principles should be used to work out what decisions a person can make for themselves. We look at this in more detail in the section 'Assessing capacity', below.

The last two principles set out how decisions should be made and actions taken on behalf of a person who lacks capacity. This is explained in more detail on pages 19-21.

Assessing capacity: principles 1, 2 and 3

The law sets out how you can assess someone's capacity to make a particular decision. Anyone carrying out an assessment must apply principles 1, 2 and 3:

Principle 1 says that every adult has the right to make their own decisions. You must assume that someone is capable of making a decision unless it's shown that they aren't. You should not assume that someone can't make a decision just because they have a particular disability or condition.

Principle 2 says that before applying the capacity test you must be sure that someone you think may lack capacity has had all the help and support they need to encourage and enable them to make and communicate their own decision. The person should be given all the information they need to make the decision, which should be presented to them in a way which makes it as easy to understand as possible.

This may mean, for example, having the information explained to them by someone they understand and trust, and using pictures, Braille or audio tape. The person's decision does not have to be conveyed in any particular way (for example, it doesn't have to be spoken or written or grammatical) so long as it is clear what they have decided. In some instances this could, for example, mean that blinking or squeezing a hand may be enough to communicate a decision. If, after all the help and support has been given, their capacity is still in doubt then it should be assessed.

Principle 3 says that you should not treat a client as lacking capacity just because they choose to make a decision which you or someone else thinks is unwise. The capacity test concerns the ability to make a decision, not how sensible it is. Deciding to spend up to the limit on two or three credit cards is not a wise thing to do, but it isn't suggested that anyone who gets into debt in this way should have their capacity to make that decision assessed.

The test to assess capacity

The Mental Capacity Act says that a person should not be assumed to lack capacity just because of their age, behaviour, any condition they have, or because they couldn't make a particular decision in the past.

The MCA makes clear that assessing whether someone can make a decision should be about whether they can make a particular decision at a particular time and not about their capacity to make decisions in general.

A lack of capacity may be temporary, for example when someone is depressed, or it may just concern some types of issues, for example, a person with a learning disability may have capacity to decide what they should wear each day, but they may lack capacity to choose how to invest their money.

There are four key questions you must consider to help you determine whether someone is able to make a decision.

- Can the person understand information relevant to the decision, including understanding the likely consequences of making, or not making the decision?
- Can they retain this information for long enough to make the decision?
- Can they use and weigh the information to arrive at a choice?
- Can they communicate their decision in any way?

If you believe that the answer to any of these questions is ‘no’, then you can find that they lack capacity to make that decision at that time.

It can be difficult to assess capacity as the test relies on the discretion of the person applying it. However, as long as you have a ‘reasonable belief’ that your assessment is correct, you should be protected by the law.

Reasonable belief

The Mental Capacity Act says that you must have a reasonable belief that your assessment of someone’s capacity is correct before you can act on their behalf. This means that any other reasonable person would come to a similar conclusion as you in the same circumstances.

The MCA and Code stress the importance of applying the test for capacity every time action or a decision is needed. However, in practice it might not be necessary to assess someone’s capacity on every occasion if help is needed frequently or continuously. For example, if you are an Attorney managing the finances of a person with early stage dementia you may not need to interview them every time that you pay a routine bill for them so long as you reasonably believe they continue to lack capacity to act for themselves on this issue and that they’ve authorised you to act in this way.

This ‘reasonableness’ test partly depends on the role of the person who is helping: a solicitor, for example, would be expected to have a different type of knowledge to bring to a decision than a relative or Attorney who is not a professional.

Who can assess capacity?

Anyone can assess capacity, including medical professionals, advisers, lawyers, friends, relatives and carers, but the person who assesses should be someone appropriate to the decision or action in question (for example an adviser may be appropriate to

assess capacity relating to decisions about benefits claims but not necessarily personal care).

The more serious the decision being made the more formal the assessment should be. There are no forms to fill in to ‘prove’ that somebody has been found to lack capacity to make a decision but your records should show how you carried out the assessment.

What does this mean for me?

If you need help on the practicalities of how you or others should apply the test you should look at the Code of Practice, which gives detailed guidance. For example, it clarifies that even if someone can only understand the relevant information for a short time and convey their decision very simply, this can be enough. It also explores how you can help a person to understand information, for example, someone with depression may feel more able to deal with decisions at particular times of the day.

Capacity should be assessed for each particular decision. Assessing capacity is not a ‘one-off’ event or a checklist to tick off. In each new situation, for example at the start of an interview, or as new decisions come up, you will have to apply the test.

The assessment should check whether the person’s lack of capacity to make the decision is temporary (for example, because of a recent stroke), when it might change and what can be done to help and support the person to make the decision in question. Some decisions may be safely postponed until the person regains their capacity to make it.

Appointees

The Department for Work and Pensions will need to apply the capacity test and adhere to the five principles of the Mental Capacity Act when they decide whether someone has the mental capacity to manage their benefits, as will anyone who acts as an ‘appointee’.

3. Helping people who lack capacity to make decisions

If your client or the person they care for lacks capacity to make a particular decision, then principles 4 and 5 of the Mental Capacity Act will apply. Everyone making decisions or acting for someone who lacks capacity will be bound by these principles, whether they are a carer, relative, friend, lawyer, adviser, Attorney, representative of the Court or any other professional.

As an advice worker you will not only need to act in line with these principles but will need to be able to look at whether the principles have been followed by others involved in your case, for example, your client's GP or the Department for Work and Pensions.

Principle 4 - 'Best interests'

The principle of always acting in a person's best interests is a crucial part of the Mental Capacity Act, and should be central to any action taken on behalf of someone who lacks capacity.

The MCA gives a checklist of key factors that you must consider when working out what is in someone's best interests. It is not a full list and you should refer to the Code of Practice for more details. Checking 'best interests' includes the following.

- Never make assumptions about the person lacking capacity based on their looks, age, appearance, behaviour, or their condition alone. How a person appeared last time you met them, or what your receptionist tells you about their behaviour, may be relevant to help you assess whether their condition may fluctuate but should not prejudice your assessment of their capacity in relation to the decisions you are considering.

- Consider all the relevant circumstances, including looking at other options. For example, if a carer wants a relative with advanced dementia to move into a care home because they think they lack capacity to make decisions about everyday living, you should advise them that there may be other care and housing options available.
- Consider postponing the decision if the person may regain the capacity to make it. For example, if a major decision needs to be made for someone who has had a recent stroke; it may be in their best interests to wait until they regain the capacity to make it for themselves.
- Make sure that the person retains as much control and involvement in the decision-making as possible.
- If the decision is about treatment needed to keep someone alive (called life-sustaining treatment), the person making the decision must not be motivated by a desire to bring about death.
- Think about what the person lacking capacity would have decided for themselves by taking into account what is known of their past and present wishes, feelings, beliefs and values, (particularly if they have been written down). For example, a best interests assessment of a person who has always held outspoken views against accepting charity should take this into account when looking at maximising their income even though it may not in the end rule out an application for money from a charity if this is determined as being in their overall best interests.
- As far as possible consult with others, such as family, friends and any Deputy or Attorney, and take into account what they think would be in the person's best interests.

Any other relevant factors must also be taken into account when assessing what is in someone's best interests. How issues are weighed up will depend on the individual case, and on things like the urgency and importance of the decision. There is further guidance on how to determine best interests in the Code of Practice.

Principle 5 – The less restrictive option

Principle 5 says that you or anyone else helping a person who lacks capacity should consider all possible options which will limit the person's rights and freedom as little as possible. This means that when you or anyone else does anything to or for a person who lacks capacity you must choose the option that is in their best interests (**principle 4**) and you must consider whether you could do this in a way that interferes less with their rights and freedoms of action.

When deciding on the best course of action to take for someone who lacks capacity to make a decision, conflict may arise.

Principles 4 and 5 say that although the views of relatives or carers may be invaluable, decisions made should be based on what is best for the person and not about what anyone else wants. See page 27 for more information on resolving disputes.

An adviser's story, continued

I was really glad I'd gone to see Ruby: I felt a lot clearer about what was going on. I'm not medically trained but I could see that Ruby's dementia was causing a lot of difficulties. She told me that she often forgets to take her medication, and would not know when it was time for meals if Marie didn't pop in and remind her. Although she was confused at times she definitely understood what we were talking about, with a few prompts from Marie.

We talked through all the options for Ruby's future, including the GP's recommendation that she move into a home. Ruby was definite she wanted to stay in her flat so we talked through ways to make it safer. Ruby was happy with the suggestion that we see what help social services can give and pleased that Marie was happy to carry on popping in to help. She also agreed to make claims for Attendance Allowance and Carer's Allowance for her and Marie.

Read on to find out what happened next.

4. Advising people on planning for the future

Many people ask advisers to explain how they can prepare for their future, for example, how they can make a will or set out what they would want to happen to them if they lose the ability to make their own decisions. The MCA formalises and changes some of the measures previously available.

Lasting Powers of Attorney

The MCA introduces new 'Lasting Powers of Attorney' (LPAs) which replace the previous system of Enduring Powers of Attorney (EPAs) (see page 23).

An LPA enables a person who has mental capacity and is over 18 (the 'Donor') to appoint another person or people (their 'Attorney(s)') to make certain decisions for them if they lose the capacity to make them themselves.

There are two types of LPA:

- A Property and Affairs LPA for decisions about financial matters, similar to an EPA. This type of LPA can be used while the Donor still has capacity, unless the Donor specifies that it can't.
- A Personal Welfare LPA can only be used when the Donor no longer has capacity to make decisions affecting their health or personal welfare.

Unless the Donor says otherwise on their LPA form, the Attorney has authority to act on the Donor's behalf for all the issues covered in the LPA. However, if a Donor wants their Attorney to make decisions about 'life-sustaining treatment' (see page 24) they need to specify this in the Personal Welfare LPA form.

Any Attorney has to abide by the five principles of the MCA including acting in the Donor's best interests, and has a legal duty to have regard to the Code.

As part of your job you may be asked how someone can make an LPA. There are two forms for Donors to fill in, one for each type of LPA. LPA forms have to be certified and then registered (for a fee) with the Office of the Public Guardian (OPG) (see page 30), before they can legally be used, as unregistered LPAs don't give any powers to the Attorney.

Anyone wanting to check if an LPA is registered can contact the OPG which keeps a register of LPAs.

Forms to make and register an LPA are available from the OPG (where you can also get guidance on filling in the forms) and from legal stationers. They are all downloadable from:

www.publicguardian.gov.uk

Enduring Powers of Attorney

A Power of Attorney is where someone delegates the power to manage their financial affairs to someone they trust, who becomes their 'Attorney'. Prior to 1 October 2007 when the Mental Capacity Act came into effect the system for people to appoint Attorneys for financial matters was an Enduring Power of Attorney (EPA).

If someone has an existing EPA it is still valid and can still be registered although new ones can't now be drawn up. If you are already an Attorney and the EPA has been registered because the Donor can no longer make their own financial decisions then you should carry on as before.

If the EPA has not been registered and the Donor at some point is no longer able to make financial decisions then the EPA will have to be registered before the Attorney can continue to use it.

If the Donor still has capacity, the Donor can keep the EPA for finance decisions or revoke it and replace it with a Property and Affairs LPA, or keep it and also make a Personal Welfare LPA.

Other Powers of Attorney are not affected by the Mental Capacity Act.

The Court of Protection has the power to revoke LPAs and EPAs if they're misused. Guidance and more details on the duties and responsibilities of Attorneys is available from the OPG and you should also refer to the Code of Practice.

Advance decisions to refuse treatment

The MCA introduces specific requirements for when someone aged 18 or over decides to refuse future medical treatment which might be offered to them when they're unable to refuse or consent to the treatment. These are termed advance decisions to refuse treatment (referred to in this guide simply as 'advance decisions') and can specifically include a decision to refuse life-sustaining treatment.

Life sustaining treatment

Treatment the health care provider believes is necessary to keep someone alive. It can include artificial nutrition and hydration.

People can't make an advance decision to request medical treatment - they can only say what kinds of treatment they would refuse. Neither can people make an advance decision to ask for their life to be ended.

The Mental Capacity Act introduces new rules and safeguards for making advance decisions. Advance decisions are legally binding and have to be followed by health professionals, as long as they meet these rules, even if it results in the person's death.

The person making the advance decision must have capacity to do so. Advance decisions should make clear which treatments the person is refusing (although they do not need to use detailed medical terms) and explain which circumstances the refusal refers to.

An advance decision doesn't have to be in writing (unless it related to life-sustaining treatment), but writing it down and discussing it with other relevant people (such as healthcare staff and family) can help avoid later confusion or challenges about its validity or scope.

Advance decisions to refuse life sustaining treatment have additional requirements. For example, they must be in writing, signed, witnessed and have a specific statement saying that the advance decision is to apply even if their life is at risk.

Existing advance decisions or ‘living wills’

You may have clients who have already made an advance decision or ‘living will’ as it is sometimes known. You should advise them to check that it meets the new rules, particularly if it deals with life-sustaining treatment. More detailed guidance is available at: www.dh.gov.uk/consent

Remember that people who are detained under the Mental Health Act 1983 can be treated for mental disorder without their consent, so they can also be given such treatment despite having an advance decision to refuse the treatment.

If you need to advise a client on advance decisions you should read the Code of Practice and look at the list of other sources of information and contacts (at the back of this booklet) for other organisations that can help.

Wishes and feelings about treatment and care

Under the Mental Capacity Act people can write down or tell others about their wishes and preferences about future treatment and care, and explain the feelings and values that led to these decisions. These statements can be about anything and can include requests for certain types of treatment or personal preferences such as having a shower rather than a bath, or wanting to sleep with the light on.

Such statements must be taken into account when deciding what is in their best interests (particularly if they have been written down) but they are not legally binding in the same way that advance decisions are and they do not have to be followed if overall it would not be in the best interests of the person.

5. How else might the Mental Capacity Act affect my work?

Ill-treatment or wilful neglect of a person who lacks capacity

The Mental Capacity Act introduces a new criminal offence of ill-treating or wilfully neglecting someone (of any age) who lacks capacity. This is intended to deter people from abusing, ill-treating or wilfully neglecting people who lack capacity. The offence applies to anyone who 'has care of' the person and can lead to imprisonment or a fine.

If you think someone is abusing, ill-treating or wilfully neglecting someone you should contact the police or social services.

What are the Mental Capacity Act 2005 Deprivation of Liberty Safeguards?

The Mental Capacity Act 2005 Deprivation of Liberty Safeguards (MCA DOLS), which come into force in England on 1 April 2009, provide a legal framework to prevent unlawful deprivation of liberty occurring. They protect vulnerable people in hospitals or care homes who lack the capacity to consent to the arrangements made for their care and/or treatment but who need to be deprived of their liberty in their own best interests to protect them from harm. Primary care trusts (PCTs), local authorities, hospitals and care homes have a statutory responsibility for administering and delivering the MCA DOLS at a local level.

If you want to find out more about what MCA DOLS means for you or your organisation, the MCA DOLS Code of Practice, which explains in detail how MCA DOLS' processes and procedures work, can be downloaded at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

Or you can visit the website at: www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm

The Welsh Assembly Government has published three guidance booklets to assist managing authorities and supervisory bodies identify the key processes in the safe and effective use of the safeguards:

- 1 Guidance for Managing Authorities working within the Mental Capacity Act Deprivation of Liberty Safeguards.
- 2 Guidance for Supervisory Bodies working within the Mental Capacity Act Deprivation of Liberty Safeguards.
- 3 Standard Forms and Letters for the Mental Capacity Act Deprivation of Liberty Safeguards.

The Welsh Assembly Government has also published a range of information leaflets which managing authorities and supervisory bodies may use to assist in providing information to the relevant person. These can be found at www.mentalcapacityact.wales.nhs.uk

Protection from liability for carers and professionals

When helping someone who lacks capacity, a carer or professional may have to do something for them which could legally be, for example, assault or theft. For example, if a person lacks the capacity to bath themselves and their carer does it for them, the carer is potentially committing assault in touching them without their consent, even though they weren't harmed in any way.

These rules apply to anyone who acts or makes decisions on behalf of someone who lacks capacity. As an adviser, relatives may ask you whether they are protected from liability for their actions, or you may want to be sure that your own actions and decisions on behalf of a client who lacks capacity are likely to be lawful.

The MCA offers carers and professionals protection from liability so long as they have a 'reasonable belief' (see page 17) that the person lacks capacity and their actions are in the person's best interests. This means that even if you can't show that you did a full capacity or best interest assessment in every instance, a belief that is based on good reasons (not just an assumption), within the spirit of the principles of the MCA, could protect you.

Carers and professionals are not protected from liability if they use restraint or restrict liberty, unless they do so because they reasonably believe that it is necessary to prevent harm to the person who lacks capacity. The degree of restraint must be in proportion to the likelihood and degree of harm.

As such actions or decisions may be disputed, it is a good idea to record any actions you take in relation to capacity matters clearly. How detailed that will be may vary according to the seriousness of the action.

For more information on the liability of carers and health professionals please see the Code of Practice.

Taking part in research

The MCA sets out a clear framework for many types of research involving people who lack capacity to consent to taking part in such research. If you're advising someone who wants to know about research, see the Code of Practice for more information or refer them to a specialist adviser.

Other information booklets in this 'Making decisions' series also have information on this that you will find useful.

Resolving disputes and rights of appeal

If your client is unhappy with the result of a capacity assessment, or decisions that have been made on their behalf (including those made by their Attorney or Deputy), or the way they or the person they help are being treated, you may need to help them resolve the dispute.

In most cases it should be possible to informally resolve the dispute between the people involved. If this doesn't work, a more formal route should be tried, such as making a complaint through the organisation's complaints procedure or complaining to an ombudsman. In some situations such as disputes between family members, mediation may help to find a solution. See page 38 for useful contacts.

If someone doesn't agree with the result of a capacity test they should raise it with whoever made the assessment. The assessor will have to show they have applied the test correctly and stuck to the five principles. If it is a professional who made the assessment, they will also have to show that they had regard to the Code of Practice.

Anyone who is unhappy about how an Attorney or a Deputy is acting on behalf of a person who lacks capacity (including the person themselves) will also be able to raise their concerns with the Office of the Public Guardian (OPG) (see page 30). The OPG can also provide general information about disputes under the Mental Capacity Act.

If a dispute can't be resolved in any of these ways it may have to be taken to the Court of Protection (see page 30). For information about how to access the Court and seek permission for Court action, contact the OPG (see page 30) and visit:

www.publicguardian.gov.uk

An adviser's story, continued

I visited Ruby again to tell her what I'd found out. She and Marie were very keen to take up the help available, and Ruby was particularly excited about the meals on wheels option. The problem remained, though, that Ruby was worried that her doctor might try to get her to move again in the future. She said she would be able to relax if he agreed that she was able to make day to day decisions which allow her to stay at home.

At my last visit Marie had mentioned that she thought the GP was just making a 'knee jerk' reaction because Ruby has dementia. I was able to assure her that although her illness was relevant it shouldn't be the deciding factor about Ruby's future.

I talked them both through the new rules which say that if you aren't happy with someone's assessment of your mental capacity, you start by taking it up with them directly.

We agreed that Marie will go with Ruby to her doctor and talk it through - it may just be a misunderstanding or that he doesn't know what help she has.

In the meantime I'll get hold of the NHS complaints procedure to see what we need to do if we need to take it up more formally. Failing that, I told Ruby that if necessary, she could always take her case to Court to appeal the GP's assessment but think it should be sorted well before then. Ruby seemed much more relaxed than when I'd first visited, and was keen to get on with choosing her next week's menu.

6. Who can help?

The Office of the Public Guardian

The Mental Capacity Act created a new public official, the Public Guardian, who is supported by the Office of the Public Guardian (OPG). The main functions of the OPG are to:

- set up and maintain a register of LPAs and EPAs;
- set up and maintain a register of Court-appointed Deputies;
- supervise Court-appointed Deputies; and
- provide information to the Court of Protection.

The OPG provides a customer contact centre which is the first point of contact for anyone wanting general information about the Mental Capacity Act, advice on being an Attorney or Deputy and on making or registering LPAs or registering EPAs.

The Court of Protection

The previous Court of Protection has been replaced by a new Court of Protection (referred to in this guide as the 'Court') with wider jurisdiction. Although the Court is based in London, Court judges can hear cases around England and Wales.

The Court deals with all issues related to the Mental Capacity Act, including the health and welfare and property and affairs of people lacking capacity, and mental capacity issues which were previously dealt with by other courts.

It is particularly important in resolving complex or disputed cases, for example, about whether someone lacks capacity or what is in their best interests.

Some decisions are so serious that they will always go to the Court. These include decisions about serious medical issues such as organ donation, sterilisation, abortion or possible death.

Generally people will need to get the Court's permission before they make an application; however some groups of people will have the right to take their case straight to Court. The OPG has more information on this.

If your client has a complicated or serious case, it's probably best for you to refer them on to a solicitor who specialises in mental capacity issues (see 'Some useful contacts' on page 38). They can explain the rules for applying to the Court and help them make an application.

You can get more information on how to access the Court of Protection from the OPG website or the OPG customer contact centre.

Court of Protection Deputies

If the Court decides that there is a need for ongoing involvement in a case, for example, if there is a need for someone to make several decisions on someone's behalf, they can appoint a Deputy (or joint Deputies).

The previous system of Receivers, appointed by the Court to deal with the property and affairs of someone who lacks capacity, is now ended. Unlike Receivers, Deputies can be appointed to deal with personal welfare decisions or with financial ones, as specified by the Court. The scope of their authority may be very limited or quite wide depending on the amount of involvement the Court decides is needed.

Existing 'Receivers'

Since 1 October 2007 when the Mental Capacity Act came into effect, existing Receivers have continued to act in the same way as previously and are now known as Deputies for financial affairs.

The person appointed as a Deputy could be, for example, the carer concerned, a professional (such as Director of Adult Services), or a financial institution, depending on the needs of the case. If you have a client who wants to apply to become someone's Deputy they should contact the OPG for more information on this.

Court of Protection visitors

The Court is able to send official 'Visitors' to visit people who have Attorneys or Deputies acting for them. Visitors can check on someone's general welfare or investigate suspected problems and also offer support and advice. They will provide reports of their visits to the Court or the OPG.

The Independent Mental Capacity Advocate (IMCA) service

The Mental Capacity Act introduces a new IMCA service for certain types of decisions. This service was set up to provide extra support to people who lack capacity and are particularly vulnerable because they don't have an Attorney, Deputy, close friends, family or carers who can support them.

Generally IMCAs will be involved in decisions about serious medical treatment provided by the NHS and changes in long-term accommodation if there is no one appropriate who can be consulted.

It is the duty of the person in the NHS, Local Authority (in England) or Local Health Board (in Wales) who is making the decision to involve an IMCA.

An IMCA is not the decision-maker, but the decision-maker has a duty to take into account the information given by the IMCA.

If you have a client who has a major decision to make about one of these issues you should refer them to the service which is involved in the decision, for example social services or the NHS, who should themselves contact the IMCA service. Please see the Code of Practice for more details.

In England, Local Authorities and the NHS, and in Wales Local Authorities and Local Health Board have powers to extend the IMCA service to care reviews about accommodation and adult protection cases if they think it would be beneficial.

7. Jargon buster

Jargon	What it means in the Mental Capacity Act
Advance decision to refuse treatment	When someone who has mental capacity decides to refuse future medical treatment which might be offered to them when they're unable to refuse or consent to the treatment themselves. They can specify that it is to apply even if life is at risk.
Attorney	A person given power to act on a Donor's behalf through an LPA or an EPA
Capacity	Refers to the mental ability of a person to make a particular decision at a particular time, whether minor, like when to eat, or major, like whether to move house
Code of Practice	Provides practical guidance on the Mental Capacity Act and explains in more detail its key features. Certain people have a duty to have regard to the Code
Court of Protection	The specialist court that deals with cases relating to capacity issues
Court of Protection Visitor	Someone sent by the Court or the Public Guardian to visit people who have Deputies or Attorneys acting for them to make general welfare checks or investigate suspected problems. They can offer support and advice, and/or report to the Court or the OPG
Deputy	A person appointed by the Court of Protection to deal with a specific issue or range of issues to help a person who lacks capacity who hasn't got an Attorney
Donor	A person who appoints an Attorney (by making an LPA or EPA)

Jargon	What it means in the Mental Capacity Act
Enduring Power of Attorney (EPA)	When someone (a Donor) appoints someone else (an Attorney) to act for them with regard to their property and financial affairs. New EPAs can't be made after 1 October 2007 but existing ones will still be valid
Fluctuating capacity	When a person has capacity to make their own decisions at some times, but not at other times (for example, during an acute phase of a psychotic illness)
IMCA (Independent Mental Capacity Advocate)	When a person lacking capacity has no personal support such as family, friends, an Attorney or Deputy, an IMCA will be appointed when there is a major decision to be made about serious medical treatment or a long-term care move, to help represent them and help assess their best interests. An IMCA may also be appointed for care reviews about accommodation and for adult protection cases
Lacking capacity	When someone is unable to make a particular decision at a particular time because the way their mind or brain works is affected (for example due to a stroke or brain injury, mental health problem or a learning disability). Many people will lack capacity in relation to some issues or at some times, but have capacity in other instances or at other times
Lasting Power of Attorney (LPA)	<p>A legal document where someone (a Donor) appoints someone else (an Attorney) to make decisions about certain things for them in the future. There are two types of LPA:</p> <ul style="list-style-type: none"> • Personal Welfare LPAs which can only be used when the Donor lacks capacity to make relevant personal welfare or health decisions • A Property and Affairs LPA which can be used whether the person has or lacks capacity to make the decisions for themselves unless they have specified otherwise in their LPA

Jargon	What it means in the Mental Capacity Act
Public Guardian / Office of the Public Guardian (PG or OPG)	Monitors Court-appointed Deputies, keeps a register of, and investigates concerns about, Attorneys and Deputies. Also provides general information about the MCA, advice on becoming a Deputy, making LPAs and registering LPAs and EPAs
Reasonable belief	Before you can act on someone's behalf you must have a reasonable belief that your assessment of their capacity is correct. This means that you must be able to point to objective reasons for your belief
Receiver	Someone appointed by the previous Court of Protection to manage the financial interests of someone who lacks capacity. Since April 2007 Receivers have been known as Deputies for financial affairs

8. What if I want to know more about the Mental Capacity Act?

If you would like to know more about the Mental Capacity Act you can call 0845 330 2900 or email customerservices@publicguardian.gsi.gov.uk

Other sources of useful information and guidance includes:

Title	Available from
Other information booklets like this one	You can view these electronically by going to: www.publicguardian.gov.uk
The Mental Capacity Act 2005	You can view this for free by going to: www.publicguardian.gov.uk Or you can order a hard copy from TSO by calling 0870 600 5522 or emailing customerservices@tso.co.uk
The Code of Practice for the Mental Capacity Act	You can download it for free by going to: www.publicguardian.gov.uk You can order a hard copy from TSO by calling 0870 600 5522 or emailing customerservices@tso.co.uk .
Information on the IMCA service, IMCA Pilots and training materials for IMCAs	www.dh.gov.uk/imca

9. Some useful contacts

The following government departments work together to implement the Mental Capacity Act

Department	What it is/does	Contact
Office of the Public Guardian (OPG)	The Office of the Public Guardian supports and promotes decision-making for those who lack capacity or would like to plan for their future, within the framework of the Mental Capacity Act 2005	www.publicguardian.gov.uk T 0845 330 2900 E customerservices@publicguardian.gsi.gov.uk
Department of Health (DH)	Responsibilities include setting health and social care policy in England. The Department's work sets standards and drives modernisation across all areas of the NHS, social care and public health	Wellington House, 133-155 Waterloo Road, London, SE1 3UG www.dh.gov.uk T 020 7210 4850
Welsh Assembly Government	Develops policy and approves legislation that reflects the needs of the people of Wales	Cathays Park, Cardiff, CF10 3NQ www.wales.gov.uk T 029 2082 5111

Contact details for a number of organisations that have an interest in the Metal Capacity Act

Organisation	What it is/does	Contact
Action for Advocacy	A resource and support agency for the advocacy sector, information, training and advice	PO Box 31856, Lorrimore Square, London, SE17 3XR www.actionforadvocacy.org
Age Concern England	The UK's largest organisation working to promote wellbeing of all older people. It provides vital services, information and support to thousands of older people - of all ages and backgrounds	Astral House, 1268 London Road, London, SW16 4ER www.ageconcern.org.uk www.accymru.org.uk Information line 0800 00 99 66
Alzheimer's Society	The UK's leading care and research charity for people with dementia, their families and carers	Gordon House, 10 Greencoat Place, London, SW1P 1PH www.alzheimers.org.uk Helpline 0845 300 0336
ASA ADRnow	A website providing independent information about a wide range of alternative dispute resolutions options, so that advisers and the general public can make an informed decision about how best to resolve a dispute	www.adrnow.org.uk
ASA Advicenow	An independent, not-for-profit website providing accurate, up-to-date information on rights and legal issues	www.advicenow.org.uk

Organisation	What it is/does	Contact
British Medical Association (BMA)	BMA represents doctors from all branches of medicine all over the UK	BMA House, Tavistock Square, London, WC1H 9JP www.bma.org.uk T 020 7387 4499 F 020 7383 6400
Carers UK	Looks after family, partners or friends in need of help because they are ill, frail or have a disability	20/25 Glasshouse Yard, London, EC1A 4JT www.carersuk.org T 020 7566 7637 F 020 7490 8824
Citizens Advice Bureaux (CABx)	Help people resolve their legal, money and other problems by providing free information and advice	Myddelton House, 115-123 Pentonville Road, London, N1 9LZ www.citizensadvice.org.uk T 020 7833 2181 You can find your local CAB by visiting their website or looking under 'Citizens Advice Bureaux' in The Phone Book.
Community Legal Service Direct	CLS Direct is a free, confidential service to help people deal with their legal problems. Their website has a database of lawyers and a range of legal information leaflets	www.communitylegaladvice.org.uk T 0845 345 4 345
Down's Syndrome Association	Provides information and support for people with Down's Syndrome, their families and carers, as well as being a resource for interested professionals	Langdon Down Centre, 2a Langdon Park, Teddington, Middlesex, TW11 9PS www.dsa-uk.com T 0845 230 0372 F 0845 230 0373
Foundation for People with Learning Disabilities	Works with people with learning disabilities, their families and those who support them to improve the quality of their lives and promotes the rights, quality of life and opportunities of people with learning disabilities and their families	Sea Containers House, 20 Upper Ground, London, SE1 9QB www.learningdisabilities.org.uk T 020 7803 1100

Organisation	What it is/does	Contact
Headway – the brain injury association	Promotes understanding of all aspects of brain injury; and provides information, support and services to people with a brain injury, their family and carers	4 King Edward Court Service, King Edward Street, Nottingham, NG1 1EW www.headway.org.uk Helpline 0808 800 2244
Law Centres Federation	The national body for a network of community based Law Centres. Law Centres provide help in solving everyday problems, such as getting decent housing, dealing with discrimination, or obtaining the correct benefits	Duchess House, 18–19 Warren Street, London W1T 5LR. www.lawcentres.org.uk T 020 7387 8570
Law Society	The regulatory and representative body for 116,000 solicitors in England and Wales	www.lawsociety.org.uk/choosingandusing/findasolicitor.law T 0870 606 6575
MENCAP	Charity working with people with learning disabilities, their families and carers	123 Golden Lane, London, EC1Y 0RT www.mencap.org.uk T 020 7454 0454
Mental Health Foundation	A leading UK charity that provides information, carries out research, campaigns and works to improve services for anyone affected by mental health problems, whatever their age and wherever they live	Sea Containers House, 20 Upper Ground, London, SE1 9QB www.mentalhealth.org.uk T 020 7803 1100
Mental Health Lawyers Association	A professional association of mental health lawyers in England and Wales. Their website includes a database of lawyers	www.mhla.co.uk E admin@mhla.co.uk
MIND	Leading mental health charity, working to create a better life for everyone with experience of mental distress. Provides information and support	15-19 Broadway, Stratford, London, E15 4BQ www.mind.org.uk Infoline 0845 766 0163

Organisation	What it is/does	Contact
National Autistic Society (NAS)	Champions the rights and interests of all people with autism and to ensure that they and their families receive quality services appropriate to their needs	393 City Road, London, EC1V 1NG www.autism.org.uk Helpline 0845 070 4004
National Care Association (NCA)	Represents the interests and provides services to support small and medium sized providers of social care in England and Wales	45-49 Leather Lane, London, EC1N 7JT www.nca.gb.com T 020 7831 7090
The National Family Carer Network	A network that provides a focal point for issues affecting families that include an adult with a learning disability	Merchants House, Wapping Road, Bristol, BS1 4RW www.familycarers.org.uk T 0117 930 2600
The National Family Carer Support Service	A network that provides support and information for family carers	Merchants House, Wapping Road, Bristol, BS1 4RW www.hft.org.uk T 0117 930 2608
Patient Concern	An organisation committed to promoting choice and empowerment for all health service users. Provides information to service users	PO Box 23732, London, SW5 9FY www.patientconcern.org.uk E patientconcern@hotmail.com
The Relatives and Residents Association	An organisation for older people needing, or living in, residential care and the families and friends left behind. Offers support and information via a helpline	24 The Ivories, 6-18 Northampton Street, London, N1 2HY www.relres.org Helpline 020 7359 8136
RESCARE	The national society for children and adults with learning disabilities and their families	Steven Jackson House, 31 Buxton Road, Heaviley, Stockport, SK2 6LS www.rescare.org.uk T 0161 474 7323

Organisation	What it is/does	Contact
RESPOND	Provides a range of services for both victims and perpetrators of sexual abuse who have learning disabilities and those who have been affected by other trauma. Their services extend to support and training for families, carers and professionals	3rd Floor, 24-32 Stephenson Way, London, NW1 2HD T 020 7383 0700 F 020 7387 1222 www.respond.org.uk Helpline 0808 808 0700
Scope	Disability organisation in England and Wales, whose focus is people with cerebral palsy	6 Market Road, London, N7 9PW www.scope.org.uk T 020 7619 7100
Sense	Charity providing specialist information, advice and services to deaf blind people, their families, carers and the professionals who work with them. Funded to develop training materials which address the advocacy issues for deaf blind people	11-13 Clifton Terrace, Finsbury Park, London, N4 3SR www.sense.org.uk T 0845 127 0060 F 0845 127 0061 Text 0845 127 0062
Solicitors for the Elderly	A national organisation of lawyers who are committed to providing independent legal advice for older people, their family and carers	Room 17, Conbar House, Mead Lane, Hertford, SG13 7AP www.solicitorsfortheelderly.com
Turning Point	The UK's leading social care organisation, providing services for people with complex needs, including those affected by drug and alcohol misuse, mental health problems and those with a learning disability	Standon House, 21 Mansell Street, London, E1 8AA www.turning-point.co.uk T 020 7481 7600
United Response	A national organisation creating opportunities and services with people with learning difficulties and people with mental health problems	113-123 Upper Richmond Road, Putney, London, SW15 2TL www.unitedresponse.org.uk T 020 8246 5200 F 020 8780 9538 Minicom 020 8785 1706

Other booklets in this series include:

- OPG601** Making decisions...about your health, welfare or finances.
Who decides when you can't?
- OPG602** Making decisions:
A guide for family, friends and other unpaid carers
- OPG603** Making decisions:
A guide for people who work in health and social care
- OPG605** Making decisions: An Easyread guide
- OPG606** Making decisions:
The Independent Mental Capacity Advocate (IMCA) service

Making decisions booklets are available to download at:
www.publicguardian.gov.uk and are available in English, Welsh and Braille formats. There is also an Easyread booklet and Easyread Audio version. Contact the Office of the Public Guardian for more information.

- OPG607** Deprivation of Liberty Safeguards:
A guide for primary care trusts and local authorities
- OPG608** Deprivation of Liberty Safeguards:
A guide for hospitals and care homes
- OPG609** Deprivation of Liberty Safeguards:
A guide for relevant person's representatives

Deprivation of Liberty Safeguards booklets are available at:
www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm

The Mental Capacity Implementation Programme published this booklet.
It was written by the team at Advice Services Alliance Advicenow.

- OPG604** Making decisions: A guide for advice workers (04.09)

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