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

- The Mental Capacity Act (MCA) is the law that protects you if you are not able to make decisions.
- You may lack mental capacity if:
  - you cannot understand,
  - remember,
  - or weigh up information to make a decision, or
  - you can’t communicate this decision,
- Being unwell or having a mental illness does not mean you lack mental capacity.
- Sometimes a doctor will need to assess whether you have mental capacity.
- The MCA sets out who can make decisions for you if you lack capacity.
- You can make decisions about your wishes for treatment and care in case you lose capacity in the future.
- If someone makes decisions for you because you lack capacity, they need to be in your ‘best interests’.
This factsheet covers:

1. **What is mental capacity?**
2. **What is the Mental Capacity Act (MCA)?**
3. **How do you assess mental capacity?**
4. **How are decisions made for me if I lack capacity?**
5. **Who gets involved if I lack capacity?**
6. **What else does the MCA do?**
7. **What is the difference between the Mental Capacity Act 2005 (MCA) and the Mental Health Act 1983 (MHA)?**
8. **What else is the MCA used for?**

1. **What is mental capacity?**

   Mental capacity is the ability to make your own decisions. When you make a decision you need to be able to:
   - understand all the information you need to make that decision,
   - use or think about that information,
   - remember that information, and
   - be able to communicate your decision to someone else.

   Communicating your decision is not just telling someone. You can communicate in any way such as using diagrams or pictures. Making an unwise decision is different than not being able to make a decision.

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

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

   The Mental Capacity Act (MCA) is for anyone over 16 living in England and Wales who is unable to make their own decisions. The MCA is there to:
   - make sure you are allowed to make as many decisions for yourself as long as you can,
   - make sure you can make decisions about your future care before you lose capacity,
   - allow you to choose someone who can make decisions for you if you lose capacity in the future - these decisions can be about your health or other things such as decisions about money,
   - make sure any decisions made for you are in your best interests,
   - make sure the NHS or local authority pick an independent mental capacity advocate (IMCA) if you do not have any family or friends who can support you. An IMCA helps to make decisions about your treatment or decisions if you are in care home or hospital, and
• protect carers against legal action if they have made decisions for you which were made in your best interests.

What is the MCA based on?
The MCA is based on five rules called ‘key principles’. These rules must be followed if someone is making a decision for you. The key rules are below.¹

1. You must be treated as if you have capacity unless it is proven you do not.
2. You must be supported to make your own decisions before medical professionals decide you do not have capacity. An example might be giving you the information in a different way and trying different ways to explain it. If you have other symptoms which are causing you to lack capacity the medical team should treat those first and then assess your capacity again.
3. You have a right to make decisions others may think are unwise as long as you have mental capacity.
4. Anything done for you if you do not have capacity must be in your best interests.
5. Anything done for you if you lack capacity must be the least restrictive option available.

3. How do you assess mental capacity?

• How could I lose capacity?
• Who will assess my capacity?

The Mental Capacity Act (MCA) has a test to see if you have the capacity to make a decision when you need to. Professionals must do this test for every decision you are making. This is because you might have capacity to make a decision about one thing but not something else. An example of this is that you might be able to decide what treatment you want but not about paying bills or looking after your money. The test has two stages.²

1. Part 1:
   • medical professionals must decide if you have an illness or injury that affects the way your brain or mind works, and
   • if you do, does it affect you so much that you are unable to make the specific decision.

2. Part 2 of the test will show that you do not have capacity if you cannot:
   • understand the information you need to make the decision,
   • remember and use that information again,
   • understand what will happen when you make the decision, or
   • tell people your decision in any way, such as talking, sign language or squeezing someone’s hand.³
Doctors can only assess your mental capacity using this test. They cannot base it just on your symptoms or diagnosis.

**How could I lose capacity?**

You might lose capacity to make decisions if you become unwell. For example, if you have bipolar disorder you may lack the capacity to make financial decisions when you are in a manic phase.\(^4\) Even if you can understand and recall information and communicate your decision, you may not be able to understand what will happen when you make that decision.

**John’s story**

John has schizophrenia. He believes that his doctors want to kill him. Unless John gets medical treatment, he will develop an illness which could cause him to die. John is given information about his situation and what could happen without treatment. John is also given information about the treatment they want to give him and what to expect. He decides not to have the treatment because, he believes, the doctors will definitely kill him and that he might survive without the treatment. John can understand the information, remember the information and tell them his decision. However, he is not able to understand the possible result of not having the treatment compared to taking the treatment. There is a strong argument here that John lacks the capacity to make this decision. However, he should not be forced to accept treatment just because he has a diagnosis of schizophrenia. He would need to have an assessment of his mental capacity to make this decision.\(^5\)

**Who will assess my capacity?**

The person who will assess your capacity depends on the type of decision you are making. It will usually be someone who knows you when you are making the decision. For most day-to-day decisions, your carer could assess your capacity. But if a doctor says that you need a type of treatment, they will have to decide if you have capacity to agree to the treatment.

4. **How are decisions made for me if I lack capacity?**

- Day-to-day support, medical treatment and money matters
- Lasting Power of Attorney
- Deputyship
- What are my best interests and how are they decided?
Day-to-day support, medical treatment and money matters

The Mental Capacity Act (MCA) protects carers and healthcare professionals. If they think you need care or treatment and you lack capacity they have a legal right to treat you without your consent. They are not legally responsible if they believe you lack capacity and the care or treatment is in your best interests. If your carer or doctor thinks you lack the capacity to make the decision, they have to assess your capacity. They have to check if you can make the decision for yourself with their support.6

Carers may not use this protection as much as healthcare professionals. Doctors may need this protection if they are making a decision about your treatment, for example if you refuse treatment for a physical illness which you need.

The Mental Capacity Act (MCA) allows other people to make decisions about your money or personal welfare matters if you lack capacity. These people are called ‘attorneys’ and ‘deputies’. Money matters can include buying property, managing bank accounts, investing money or claiming benefits. Personal welfare matters can include day-to-day care, medical treatment, or where you should live.

Lasting Power of Attorney (LPA)

In case you lose capacity in the future, you can pick someone to make decisions for you. This means that you give them Lasting Power of Attorney (LPA).

An LPA means that if you lose the ability to make a decision, that person can make decisions for you. If you do this, you are called the ‘donor’ and the person you pick to make decisions is called the ‘attorney’. You must be over 18 and have capacity to make this decision when you are giving someone the power to be your ‘attorney’. You can pick more than one person to be the attorney.

There are two different types of LPA.

- Property and financial decisions
- Health and welfare decisions

Welfare LPAs can only come into force when you lose capacity but financial LPAs can be used straight away if you want them to.

You can pick more than one person to make decisions about either one or both of these.7

Once an LPA document is made, you have to register it with the Office of the Public Guardian. You or the person you pick to be an attorney can do this. You will have to pay £82 per application. If you got a welfare LPA and financial LPA the total cost would be £164.8 If you get benefits or are on a low income, then you may only have to pay part of the fee.9
You write what things an attorney can decide on in your LPA document. An attorney can only make the decisions that the LPA document allows them to. The attorney must always think about the five key principles of the Mental Capacity Act (MCA). (Explained in section 2). They also have to follow the MCA Code of Practice and only make decisions that are in your best interests.  

Attorneys must:

- make decisions carefully and correctly,
- follow your instructions as written on the LPA,
- not take advantage of their position and only make decisions which benefit you,
- not let other people make any decisions, unless they have the right to, such as a doctor,
- aim for the best decision,
- respect you privacy,
- follow directions given by the Court of Protection,
- not give up the role without telling you and the court first.

Attorneys who have an LPA to make financial decisions have to:

- keep financial records,
- keep your money and property separate from theirs.

LPAs are similar to the old Enduring Power of Attorney (EPA). EPAs are only about making financial decisions so attorneys cannot make welfare decisions. You would need to make an LPA for welfare decisions. If you already have an EPA it will continue, you do not need to replace it with a LPA.

You can find out more in our factsheet ‘Options for dealing with someone else’s financial affairs’ which you can download at www.rethink.org.

**Deputyship**

A deputy makes decisions for someone who does not have mental capacity. When you do not have an attorney The Court of Protection (CoP) is the only one can choose a deputy.

The CoP will make a decision for you if it is only one decision. If you need many decisions over a period of time, then the CoP will pick someone to be your deputy. A deputy can be a friend, relative or professional like an accountant. The CoP will decide who the best person to be your deputy is. The CoP will also decide what the deputy should make decisions about. The deputy will usually make financial decisions. Deputies for welfare decisions are only picked in more difficult cases.

Deputies must follow the five key principles of the MCA. They also have to follow the Mental Capacity Act Code of Practice and only make decisions that are in your best interests.
The CoP can only appoint a deputy if they are sure your mental illness is severe. They would need to make sure that you would need decisions made for you regularly.

**What are my best interests and how are they decided?**

Your best interests are individual to you and are based on several things. To decide what your ‘best interests’ they need to consider:

- your views,
- your beliefs (moral, religious, political),
- how long you may lack capacity for, and
- any other relevant factors depending on the circumstances

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

Carers, family members, attorneys and deputies should be asked what they think you would want.\(^\text{14}\)

If you have an advance statement, this should also be taken into account when someone is considering your best interests. An advance statement is a way for you to say what treatment you would like in the future, if you ever lose the ability to decide for yourself. But best interest decisions cannot include any advance statements about refusing treatment.

Some personal decisions can never be made for you such as:

- having a sexual relationship, and
- decisions controlled by other types of law (for example, voting).\(^\text{15}\)

If your carer does not agree with a best interest decision, they should talk to the person who is making the decision. Your carer can try and clear up any disagreement informally or formally. Informally your carer can use an advocate or ‘mediator’. Your carer can contact the Office of the Public Guardian for more advice and guidance.\(^\text{16}\) The Court of Protection may have to make a decision if an agreement can’t be made.

5. **Who gets involved if I lack capacity?**

**The Court of Protection (CoP)**

The Court of Protection (CoP) can protect you if you lack capacity. It can:\(^\text{17}\)

- decide if a lasting power of attorney (LPA) is reliable and official,
- pick deputies to make decisions in your best interests,
- make decisions in difficult cases, and
- remove deputies or attorneys who have not carried out their role properly.
The Office of the Public Guardian (OPG)

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

- registers LPAs and deputies,
- sends Court of Protection Visitors who visit people in their own homes and report back to the Court and the OPG,
- supervises deputies and give information to help the CoP make decisions,
- works with other agencies such as the police and social services to act on any concerns about the way an attorney or deputy is behaving, and
- does background checks and risk assessments on possible deputies to make sure they are trained and supervised.

6. What else does the Mental Capacity Act do?

- Independent mental capacity advocates (IMCAs)
- Advance statements
- Deprivation of Liberty Safeguards (DOLS)
- Restraint
- Criminal offence

Independent mental capacity advocates (IMCAs)

The Mental Capacity Act (MCA) brought in the need for independent mental capacity advocates (IMCAs). IMCAs are people who speak for you if you have important decisions to make, if you have no friends or relatives to speak for you. The IMCA makes sure your wishes, feelings and beliefs are known. They can also help make sure that all options are considered before any decision is made. The IMCA can disagree with a decision made in your best interests if you lack capacity.

Advance statements

You can make decisions now for future treatment if there is a risk you may lack capacity in the future. You can make decisions about wanting or refusing treatment.

You can find out more about Planning your care – Advance statements at www.rethink.org. Or contact 0121 522 7007 and ask for a copy of the information to be sent to you.

Deprivation of Liberty Safeguards (DOLS)

Sometimes if you are in a hospital or care home and lack capacity, Deprivation of Liberty Safeguards (DoLS) can be used. ‘Deprivation of liberty’ means loss of freedom.
When you are given care it should be done in the least restrictive way possible. The hospital or care home has to get permission through DoLS if they want to deprive you of your freedom to treat you in a safe way. They are there to make sure that any loss of freedom is lawful.

The safeguards are there to make sure:

- you get a representative,
- you or your representative get the right to challenge a deprivation of liberty through the Court of Protection, and
- that the deprivation of liberty is assessed and reviewed.

You can be restrained under the MCA if:

- your mental capacity has been assessed,
- you lack capacity about why you are being restrained and restraining you is in your best interests,
- there is a risk you will harm yourself unless they restrain you, or
- the type and amount of restraint used must be equal to the risk of you harming yourself.

If you are in hospital or a care home they must prove these things before you can be restrained.

DoLS does not apply if you are under the Mental Health Act (when you are ‘sectioned’).

**Restraint**

Restraint under the MCA is when you are:

- verbally or physically stopped from moving your body, such as keeping you on a stretcher or chair, or
- stopped from leaving somewhere whether you want to or not, such as not allowing you to leave a room or hospital.

You should only be restrained if you need to be stopped from harming yourself or others. The amount and type of restraint used needs to equal the level of risk.\(^\text{19}\)

**Criminal offence**

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

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

If you need mental health treatment you can be taken to hospital and given treatment without your consent under the Mental Health Act 1983 (MHA). However, just because you are mentally ill it does not mean you lack capacity. If you need treatment immediately that you are not agreeing
to, and you have mental capacity, then you would have to be treated under the MHA.

If you lose mental capacity and you need treatment you can be taken to hospital and treated without your consent under the Mental Capacity Act (MCA).

There are important differences between being treated under the MHA and the MCA. If you are treated under the MCA you must not have mental capacity to make the decision, or to refuse the treatment. If you have mental capacity and are refusing treatment you should be treated under the MHA.

The Mental Health Act 1983 is used when you:

- made an advance statement when you had capacity which refuses important treatment,
- regain mental capacity and then refuse important treatment you need,
- have mental capacity to refuse important parts of a treatment which you need, or
- are a risk of harm to yourself or other people without treatment that you are refusing.

If you are kept in hospital and treated against your will under the MCA you must be unable to make these decisions for yourself the entire time you are treated.

**Getting treatment for a physical illness**

You cannot be given treatment for a physical illness without your consent under the Mental Health Act 1983. If you cannot make a decision about treatment for a physical illness then the MCA can be used. If you have capacity to make a decision then you can refuse treatment for a physical illness even if you need it.

If you are unwell and refusing treatment for physical illness, the healthcare staff will try and treat your mental health first. However, if your physical illness is serious they might treat you under the MCA. If they treat you under the MCA they have to follow the rules set out in section 2 of this factsheet.

**8. What else is the Mental Capacity Act used for?**

The Mental Capacity Act (MCA) can be used to make decisions in other situations including:

- signing a legal agreement,
- getting a bank loan, or
- travelling abroad.
The MCA cannot be used in the following situations, as other laws are used instead.22

- Making a will
- Making a gift or donation
- Entering into a contract
- Capacity to litigate (take part in legal cases)
- Getting married

Office of the Public Guardian (OPG)

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

**Telephone:** 0300 456 0300. Lines are open Monday, Tuesday, Thursday, and Friday 9am-5pm, and Wednesday 10am-5pm.
**Address:** PO Box 16185, Birmingham, B2 2WH
**Email:** customerservices@publicguardian.gsi.gov.uk

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1 Mental Capacity Act 2005 s.1
2 Department of Constitutional Affairs (2007) Mental Capacity Act Code of Practice, at para 4
3 As note 2, para 4.14
6 As note 1, s5
7 As note 1, s10 para 4
10 As note 4, chapter 7
11 As note 4, para 7.48
12 As note 4, para 8.38
13 As note 1, s4
14 As note 1, s27, s29
15 As note 4, chapter 5
16 As note 4, chapter 7 para 69
17 As note 4, para 7.5
18 As note 4.15
19 As note 4, 6.40
20 As note 1, s28
21 As note 4, Para 13.14
22 As note 4, para 1.10
Rethink Mental Illness Advice Service

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

Email advice@rethink.org

Did this help?
We’d love to know if this information helped you.

Drop us a line at: feedback@rethink.org

or write to us at Rethink Mental Illness:
RAIS
PO Box 17106
Birmingham B9 9LL

or call us on 0300 5000 927.

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

Need more help?
Go to www.rethink.org for information on symptoms, treatments, money and benefits and your rights.

Don’t have access to the web?
Call us on 0121 522 7007. We are open Monday to Friday, 9am to 5pm, and we will send you the information you need in the post.

Need to talk to an adviser?
If you need practical advice, call us on 0300 5000 927 between 9:30am to 4pm, Monday to Friday. Our specialist advisers can help you with queries like how to apply for benefits, get access to care or make a complaint.

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