Mental Capacity Act 2005 at a Glance (card)

Five key principles

**Principle 1**  
A presumption of capacity  
Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. This means that you cannot assume that someone cannot make a decision for themselves just because they have a particular medical condition or disability.

**Principle 2**  
Individuals being supported to make their own decisions  
A person must be given all practicable help before anyone treats them as not being able to make their own decisions. This means you should make every effort to encourage and support people to make the decision for themselves. If lack of capacity is established, it is still important that you involve the person as far as possible in making decisions by providing all relevant information in a way that is understood.

**Principle 3**  
Unwise decisions  
People have the right to make decisions that others might regard as unwise or eccentric. You cannot treat someone as lacking capacity for this reason. Everyone has their own values, beliefs and preferences which may not be the same as those of other people.

**Principle 4**  
Best interests  
Anything done for or on behalf of a person who lacks mental capacity must be done in their best interests and in the least restrictive way.

**Principle 5**  
Less restrictive option  
Someone making a decision or acting on behalf of a person who lacks capacity must consider whether it is possible to decide or act in a way that would interfere less with the person’s rights and freedoms of action, or whether there is a need to decide or act at all. Any intervention should be weighed up in the particular circumstances of the case.

The test to assess capacity

In order to decide whether an individual has the capacity to make a particular decision you must answer two questions:

**Stage 1**  
Is there an impairment of or disturbance in the functioning of a person’s mind or brain? If so,

**Stage 2**  
Is the impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

**The test to assess capacity**

The MCA says that a person is unable to make their own decision if they cannot do one or more of the following four things:

- understand information given to them
- retain that information long enough to be able to make the decision
- weigh up the information available to make the decision
- communicate their decision – this could be by talking, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand.

Every effort should be made to find ways of communicating with someone before deciding that they lack capacity to make a decision based solely on their inability to communicate is not acceptable.

Also, you will need to involve family, friends, carers or other professionals.

The assessment must be made on the balance of probabilities – is it more likely than not that the person lacks capacity?

You should be able to show in your records why you have come to your conclusion that capacity is lacking for the particular decision.
**Best interest decision-making**

- If a person has been assessed as lacking capacity then any action taken, or any decision made for or on behalf of that person, must be made in his or her best interests (principle 4).
- The person who has to make the decision is known as the ‘decision-maker’ and normally will be the carer responsible for the day-to-day care, or
- a professional such as a doctor, nurse or social worker where decisions about treatment, care arrangements or accommodation need to be made.

**INDUCTION:**

**What is the Mental Capacity Act?**

The **Mental Capacity Act 2005**, or MCA as it is often referred to, was introduced into England and Wales in April 2007 and fully implemented in October 2007.

The Act was introduced to provide a statutory framework to protect those who lack the mental capacity to make their own decisions, such as those with severe dementia or any other significant brain dysfunction/cognitive impairment, and those who are dying and no longer capable of making decisions for themselves.

**Most importantly the Act sets out:**

- who can take decisions for people who lack capacity
- in which situations this can be done
- how they should go about this.

Certain groups of people are legally required to have regard to the Act and its associated **Code of Practice** when making decisions on behalf of people who lack mental capacity. This includes doctors, nurses, health and social care staff and care home managers and care home staff.

The Act applies only to people aged 16 years and over.

**Why was the Act needed?**

The MCA was deemed necessary as a measure to protect vulnerable adults and people who are in a vulnerable position, such as those who are nearing the end of their life.

In the past, many believe that people with dementia, learning disabilities and severe mental illness have often not been listened to and their rights to make decisions have not been recognised or sufficiently respected. Decisions have been made for them, not always in their best interests, including decisions around the time of their death such as whether or not to accept a certain treatment.

The Act makes it clear who can take decisions, in which situations, and how they should go about this. It also enables people nearing the end of life to plan ahead for a time when they may lose or lack capacity, safe in the knowledge that their wishes will be recorded and respected.

**Policy Statement**

The Mental Capacity Act 2005 and the accompanying Code of Practice is a vital piece of legislation which aims to make a real difference to people’s lives. It should empower people to make decision and protect those who lack capacity by providing a flexible framework that places individuals at the very heart of the decision-making process.

**Care Act 2014**

Throughout this Act, capacity or lack of it determines how adults will be supported and cared for by ensuring that person centred care is core to how services are delivered. Those services must reflect the needs and preferences of the person requiring care and support and where they lack capacity the Code of Practice must be followed. The Care and Support Statutory Guidance updated on May 9th 2016 issued under the Care Act 2014 - Chapter 6.
What does the Act mean by ‘lack of capacity’?

The ‘lack of capacity’ referred to in the MCA is concerned with the mental capacity to make a decision. Where a person is described as ‘lacking capacity’ then this means that the person is judged as being unable to make a decision for him or herself because of an impairment of (or a disturbance) in the functioning of the mind or brain, whether temporary or permanent.

A person’s capacity to make a decision can be affected by a range of factors such as a stroke, dementia, a learning disability or a mental illness or when they are near the end of life. A person’s capacity may also vary over time or according to the type of decision to be made. For example, making decisions about what to eat will demand less mental capacity than making decisions about whether or not to have life saving surgery, for instance.

Physical conditions, such as an intimidating or unfamiliar environment, can also affect capacity, as can trauma, loss, medication and health problems.

What are the key principles of the Act?

The Act is underpinned by five key principles set out in Section 1 of the Act:

1. **A presumption of capacity** – every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise.

2. **The right for individuals to be supported to make their own decisions** – people must be given all appropriate help to enable them to make their own decisions before anyone concludes that they cannot do so.

3. **Individuals must retain the right to make what might be seen as eccentric or unwise decisions** – it is human nature that people sometimes make poor decisions but that does not mean that they should be judged as unable to take those decisions.

4. **The principle of ‘best interests’** – anything done for or on behalf of people without capacity must be in their best interests.

5. **The least restrictive intervention principle** – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

According to these principles, which are legally enforceable in law, all staff involved in the care and treatment of a person who may lack capacity must show that they understand the rights of the person under the law and that they have assessed the person’s capacity appropriately. It is particularly important that they understand that a person’s capacity may change over time depending on the decision to be made and the individual circumstances.

How should the principles of the Act be implemented in practice?

The presumption of capacity is one of the most important elements of the MCA as this forms the basis of all other decisions.

Under the Act, family, care staff, doctors, nurses, care home managers, domiciliary care managers and healthcare or social care staff must assume that a patient, service user or resident has the capacity to make their own decisions, unless it can be established or reasonably suspected that they do not have capacity. In all cases the person should receive support to help them make their own decisions and, before concluding that individuals lack capacity to make a particular decision, it is important to take all possible steps to try to help them reach a decision themselves.

This is very important in the context of healthcare and social care. For some people their lack of capacity may be obvious and they may be incapable of communicating or of thinking for themselves. For others the situation may be less clear. They may be confused or difficult to communicate with or their abilities may come and go but, if approached at the right time and in the right way, they may be capable of registering their wishes in a way that shows they have understood the issues.

In these cases people who may lack capacity will require careful explanation of the implications of accepting or not accepting treatment for a condition. This may need to be repeated several times.
times with all efforts being made by care staff to ensure that they have understood and are capable of making an informed decision as to whether or not they want treatment.

Clearly, in emergency medical situations (for example, where a person collapses), urgent decisions will have to be made and immediate action taken in a person’s best interests. However, even in emergency situations the Act states that it should not merely be assumed that healthcare decisions can be made for a person. In such situations, healthcare staff should try to communicate with the person or his or hers representative / NOK and keep them informed of what is happening at all times.

The Policy

Within this organisation the Code of Practice referred to above will be used as the guidance on how to proceed in regard to individuals who may lack capacity. Individuals with capacity will be listened to, their needs and preferences taken into account during all aspect of the Care and Support Planning process. We will act in accordance with the five statutory principles, at all times unless guided otherwise by our local Mental Capacity Assessment team or statutory multi-agency partner.

The five statutory principles are:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done, or decision made, under this Act, for or on behalf of a person who lacks capacity, must be done, or made, in his best interests.
5. Before the act is done, or the decision is made, regard must be had as to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.

Throughout the Code of Practice a person’s capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

To summarise:

Every adult has the right to make their own decisions if they have the capacity to do so. Family carers and health care or social care staff must assume that a person has the capacity to make decisions, unless it can be established that the person does not have the capacity.

People should receive support to help them make their own decisions. Before concluding that individuals lack capacity to make a particular decision it is important to take all possible steps to try to help them reach a decision themselves.

People have the right to make decisions that others might think are unwise. A person who makes a decision that others think is unwise should not automatically be labelled as lacking the capacity to make a decision.

Any act done for, or any decision made on behalf of, someone who lacks capacity must be in their best interests.

Any act done for, or any decision made on behalf of, someone who lacks capacity should be an option that is less restrictive of their basic rights and freedoms, as long as it is in their best interests.

These basic tenets must be understood respect and incorporated into the organisation’s practice, at every level, by all members of staff. Anyone who claims that an individual lacks capacity should be able to provide proof. They need to show, that, on the balance of probabilities, the individual lacks capacity to make a particular decision, at the time it needs to be made. This means being able to show that it is more likely than not that the person lacks capacity to make the decision in question.

How should capacity be assessed?

The Act sets out a two-stage test for assessing whether a person lacks capacity to take a particular decision at a particular time.
Any competent person who is aware of the requirements of the MCA can apply this test; they do not have to be a doctor or a nurse. The test is ‘decision-specific’ which means that it must be applied for each specific decision. It should never be decided that someone lacks capacity as a result of a particular medical condition or diagnosis and therefore need never be asked.

Section 2 of the Act makes it clear that a lack of capacity cannot be established merely by reference to age, appearance, or any condition or aspect of a person’s behaviour which might lead others to make unjustified assumptions about capacity.

Most people will be able to make most decisions, even when they have a label or diagnosis that may seem to imply that they do not have mental capacity.

In a hospital, a care home, or in domiciliary care, for example, all care staff should be trained to use the two-stage test competently and within the underpinning principles framework of the Act. The test must be used and be shown to have been used by being properly recorded in the resident’s or patient’s notes.

Those assessing capacity must remember that an unwise or unpopular decision made by the person does not of itself indicate a lack of capacity. This is particularly important in end of life decisions where a person may not wish to continue with treatment at variance to the wishes of their family or even staff.

Where assessments of capacity relate to day-to-day decisions and caring actions, no formal assessment procedures or documentation is required. However, if a practitioner’s decision is challenged he or she must be able to describe why they had a reasonable belief of lack of capacity.

Where the decision is about more important matters, and particularly in end of life matters, the assessment process has to be clear and accountable and requires input from staff across the range of organisations involved in providing support for a person. In such cases it should include family and carers and where there is no family or carer, an Independent Mental Capacity Advocate (IMCA) may be assigned where appropriate.

1. What is the test of capacity?

To help determine if a person lacks capacity to make particular decision, the Act sets out a two-stage test of capacity, which must be undertaken using the appropriate forms (form ADL 1a)

**Stage 1:** Does the person have an impairment of, or a disturbance in the functioning of their mind or brain. IF the person does not have such an impairment or disturbance, they will not lack capacity under the Act.

Examples of impairment or disturbance include:
- Conditions associated with some forms of mental illness.
- Dementia
- Significant learning disabilities.
- The long-term effects of brain damage.
- Physical or mental conditions that cause confusion, drowsiness or loss of consciousness
- Delirium
- Concussion following a head injury, and
The symptoms of alcohol or drug use

Stage 2: *Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?* For a person to lack capacity to make a decision, the Act says their impairment or disturbance must affect their ability to make the specific decision when they need to. But first people must be given all practical and appropriate support to help them make the decision for themselves. *(Principle 2).* Stage 2 can only apply if all practical and appropriate support to help the person make the decision has failed.

"Inability to make a decision": A person is unable to make a decision if they cannot:
- Understand information about the decision to be made (the Act calls this “relevant information”).
- Retain that information in their mind.
- Use or weigh that information as part of the decision-making process, or
- Communicate their decision (by talking, sign language or any other means).

2. **Assessing ability to make a decision**

- Does the person have a general understanding of what decision they need to make and why they need to make it.
- Does the person have a general understanding of the likely consequence of making or not making the decision?
- Is the person able to understand, retain and use and weigh up information relevant to this decision?
- Can the person communicate their decision (by talking, using sign language or any other means)? Would the services of a professional (such as speech and language therapist) be helpful?

The member of staff who carries out the initial assessment will be trained and competent to do so. All care or support staff will be trained and competent in MCA 2005 as different people will be involved in assessing someone’s capacity to make different decisions at different times on day to day basis. Any assessor will have the skills and ability to communicate effectively with the person, where necessary they should get professional help to communicate with the person.

When assessing capacity, the following points are considering.
- Start by assuming the person has capacity to make the specific decision. Is there anything to prove otherwise?
- Does the person have previous diagnosis or disability or mental disorder? Does the condition now affect their capacity to make this decision? If there have been no previous diagnoses, it may be best to get a medical opinion
- Make every effort to communicate with the person to explain what is happening.
- Make every effort to try to help the person make the decision in question.
- See if there is a way to explain or present information about the decision in a way that makes it easier to understand. If the person has a choice, do they have information about all the options?
- Can the decision be delayed to take time to help the person make the decision, or to give the person time to regain the capacity to make the decision for themselves?
- Does the person understand what decision they need to make and why they need to make it?
- Can they understand information about the decision? Can they retain it, use it and weigh it to make the decision?
- Be aware that the fact that a person agrees with you or assents to what is proposed does not necessarily mean that they have capacity to make the decision.
- Anyone accessing someone’s capacity will not assume that a person lacks capacity simply because they have a particular diagnosis or condition. There must be proof. The following questions will be asked.
Does the person have a general understanding of what they need to make and what they need to make it.

Do they understand the likely consequences of making or not making the decision?

Can they understand and process the information about the decision? Can they use it to help them make a decision.

3. **Complex decisions**

When assessing someone’s capacity in making a complex decision, we will get a professional opinion when necessary. This maybe the G.P a specialist, speech a language therapist and in some cases a multi-disciplinary team.

4. **Record of a person’s capacity to consent to the provision of service**

Records of assessment will be kept as individual plans and be part of the care plan review. Care staff will keep records in the daily notes of the steps they take when carrying out an assessment for the individual.

5. **Professional records**

When professionals carry out an assessment of a person’s capacity to consent or make a particular decision the relevant professional records are kept in the resident’s care plan.

6. **Challenging a ” finding of lack of capacity”**

When a situation arises that a resident responsible person challenges the result of the assessment of capacity, the first step is to raise the matter with the person who carried out the assessment. If the resident has been assessed to lack capacity they should have support from family, friends or an advocate.

- The assessor must give the reason why they believe the person lacks capacity to make the decision
- Provide objective evidence to support their belief
- The assessor must show they have applied the principles of the Mental Capacity Act.
- If possible a second opinion from an independent professional or expert in assessing competence should be sought.
- If the disagreement cannot be resolved the person who is challenging the assessment may be able to apply to the Court of Protection.

**What does the Act mean by ‘best interests’?**

The concept of making decisions for someone in their ‘best interests’ is also a key part of the MCA. If a decision does have to be made for a person who lacks the capacity to make it for themselves, the Act makes it clear that all such decisions must be based upon the ‘best interests’ of the person concerned. When trying to work out the best interest the decision-maker must identify all the issues that would be most relevant to the individual who lacks capacity and to the particular decision.

**How are the best interests of a person judged?**

Anyone making a decision in the best interests of a person who lacks capacity is specifically warned in the Act not to make assumptions that cannot be clearly justified. The Act provides a checklist of factors that decision-makers must work through in deciding what is in a person’s best interests. A person can put his or her wishes and feelings into a written statement if they so wish, which the person making the determination must consider. Under the Act carers and family members have a right to be consulted.

One of the key principles of the MCA 2005 is that any decision made on behalf of a person who lacks capacity must be done or made, in that persons’ best interests.

This organisation follows these rules:

a) **For most day to day actions or decisions the decision maker will be the carer most directly involved in resident care as recorded in care plan**

b) **Where a decision involves the provision of medical treatment, the G.P or other health care staffs are the decision makes. All decisions are recorded in care plan.**
c) Where nursing or paid care is provided, the nurse or paid carer will be the decision makers.

d) If a Lasting Power of Attorney has been made or a deputy has been appointed under a Court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority.

e) Whenever possible, the person who lacks capacity will be involved in the decision-making process. A record is kept in the resident file and includes:
  ✓ How the decision about the person best interest was made
  ✓ What the reason for reaching the decision were
  ✓ Who was consulted to help work out best interests
  ✓ What particular factors were taken into account

f) For major decision based on best interests of a person who lacks capacity the responsible person is also given a record of the decision.

g) Factors which may indicate that a person may regain capacity in the future:
  ✓ The cause of the lack of capacity can be treated, either by medication or some other form of treatment or therapy
  ✓ The lack of capacity is likely to decrease in time (for example, where it is caused by the effect of medication or alcohol, or following a sudden shock)
  ✓ A person with learning disabilities may learn new skills or be subject to new experience which increase their understanding and ability to make certain decisions
  ✓ The person may have a condition which causes capacity to come and go at various times (such as more forms of mental illness) so it may be possible to arrange for the decision to be made during a time when they do have capacity.
  ✓ A person previously unable to communicate may learn a new form of communication

**What protection does the Act provide for staff?**

As long as care managers and staff are careful to implement the MCA properly and with common sense then they will find the Act a great help in clarifying the legal issues around capacity. In particular organisations should ensure that staff always use the 2 stage test of capacity for every decision and they never assume that a person lacks capacity and that they only make decisions for people in their best interests and after appropriate consultation with family, carers and other professionals.

There is a clause in the Act which further protects staff in connection with care or treatment. The Act states that, where a person is providing care or treatment for someone who lacks capacity, then the person can provide that care without incurring legal liability provided that a proper assessment of capacity has been conducted and the best interests of the person are being considered.

This covers actions that may otherwise result in a civil wrong or crime if someone has to interfere with the person’s body or property in the ordinary course of caring. For example, by giving an injection or by using the person’s money to buy items for them.

**What does the Act say about restraint and deprivation of liberty?**

Under the Act restraint should only be used as a last resort or in exceptional circumstances. It is only permitted if the person using it reasonably believes it is necessary to prevent harm to the person who lacks capacity, and if the restraint used is proportionate to the likelihood and seriousness of the harm.

This organisation understands that someone is using restraint if they:

1. use force or threaten to use force to make someone do something that they are resisting.
2. restricts a person’s freedom / liberty of movement, whether they are resting or not

Restraint can be physical, medical and mechanical. Addition staff must refer to and follow the organisations Restraint Policy.
**What does the Act say about advance decisions?**

Advance decisions are those made by a person in case there comes a time when they no longer have the capacity to make a decision. In such cases the advance decision, where properly made, should be acted upon.

Advance decisions typically involve a decision around whether or not to continue accepting certain treatments. In these cases they are often referred to as advance decisions to refuse treatment (ADRT).

In the past advance decisions had an uncertain legal status but they have been given legal recognition by the MCA. The MCA creates statutory rules with clear safeguards so that people may make a decision in advance to refuse treatment if they should lack capacity in the future.

**What is an Independent Mental Capacity Advocate?**

In situations where decisions are being made about serious medical treatment for a person who lacks capacity and has no one to speak for them, such as family or friends, the Act makes provision for them to be supported by an Independent Mental Capacity Advocate (IMCA).

An IMCA makes representations about the person’s wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge the decision-maker on behalf of the person lacking capacity if necessary. There are IMCA offices in all areas and a central training and coordination programme run by the Department of Health.

**Advocacy**

This organisation will encourage the resident or responsible person to use an advocate if:

- the person who lacks capacity has no close family or friends to take an interest in their welfare, and they do not qualify for an independent Mental Capacity Advocate
- family members disagree about the person’s best interests
- family members and professionals disagree about the person’s best interests
- there is a conflict of interest for people who have been consulted in the best interests assessment (for example, the sale of family property where the person lives)
- the person who lacks capacity is already in contact with an advocate
- the proposed course of action may lead to the use of restraint or other restriction on the person who lacks capacity
- there is a concern about the protection of a vulnerable adult

**What is the Court of Protection?**

The Court of Protection is a court that was set up to have jurisdiction over the MCA. Judges from the Court of Protection are able to hear cases covering all areas of decision-making and can determine whether a person has capacity in relation to a particular decision, whether a proposed action would be unlawful, and the meaning or effect of a lasting powers of attorney in disputed cases.

The Court is supported by appointed deputies who are able to take decisions on welfare, healthcare and financial matters as authorised by the Court but are not able to refuse consent to life-sustaining treatment.

**What is Lasting Power of Attorney (LPA)?**

The Act allows a person to appoint someone with Lasting Powers of Attorney to act on their behalf if they lose capacity in the future. An attorney must be over 18 and can be a family member, friend, care worker or professional. They are always subject to the provisions of the Act, particularly the core principles and the best interests requirements.
What is the offence of ill treatment or neglect?

The Act introduced a new criminal offence of ill treatment or neglect of a person who lacks capacity. Any person found guilty of such an offence may be liable to imprisonment for a term of up to five years.

Organisations may also be liable to prosecution under the new corporate manslaughter provisions if the ill treatment or neglect resulted in or contributed to the death of a person.

**CODE OF PRACTICE**

1. The purpose of the MCA is that people who use registered care, treatment and support services and their supporters can be confident that:
   - They will continue to make decisions about their own lives whenever possible, or be included in such decisions as much as possible at all other times.
   - If decisions have to be made on their behalf, they are always made in their best interests.
   - Care, treatment and support services and their staff are aware of their duties and responsibilities under the Act.
   - Their human rights will be respected.

Everyone working in health and social care who makes decisions for people who lack capacity has a duty to know about and follow the Act's codes of practice. There is a general code of practice covering decision-making, and a supplementary code of practice on the deprivation of liberty safeguards. They describe the responsibilities of ‘assessors’ of capacity, ‘decision-makers’, independent supporters, providers (including in relation to depriving people of their liberty).

2. The Act has five key principles:
   - **We must begin by assuming that people have capacity**
     “A person must be assumed to have capacity unless it is established that he/she lacks capacity.”
   - **People must be helped to make decisions**
     “A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success.”
   - **Unwise decisions do not necessarily mean lack of capacity**
     “A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.”
   - **Decisions must be taken in the person's best interests**
     “An act done, or decision made under this Act for or on behalf of a person who lacks capacity must be done, or made, in his/her best interests.”
   - **Decisions must be as least restrictive of freedom as possible**
     “Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.”

Staff must be trained in how the Act affects their work, so that they are able to comply with it. Local councils and primary care trusts (PCTs) have a lead role in implementing the Act across health and social care.

3. **Who makes assessments of capacity?**
   Anyone may be in a position where they need to make an assessment of capacity. In particular, people working in health and social care services may find themselves having to assess someone’s capacity to make a decision. It is therefore vital that staff knows where a copy of the Act’s codes of practice can be find and who may have to make such an assessment, and
how they affect their work.

In the codes of practice, the people who decide whether or not a person has the capacity to make a particular decision are referred to as ‘assessors’. This is not a formal legal title. Assessors can be anyone – for example, family members, a care worker, a care service manager, a nurse, a doctor or a social worker. *It is the responsibility of everyone who makes decisions on behalf of others to recognise their role and responsibilities under the code of practice.*

4. **When are assessments of capacity made?**
   Staff assess people’s capacity to make decisions as part of their normal assessment and care planning arrangements, whenever this is needed.

   **Having an illness such as Alzheimer’s disease, mental health difficulties, or a learning disability does not necessarily mean that a person lacks capacity to make any and all decisions.** A person may have the capacity to choose what to have for lunch or what to wear, but not whether to take vital medication. Capacity can vary over time, even over the course of a day.

5. **How are assessments of capacity made?**
   The code of practice includes an important ‘two-stage test of capacity’:
   a) Is there an impairment of, or disturbance in, the functioning of the person’s mind or brain? *If so:*
   b) Is that impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

   **A person lacks capacity to make a particular decision if they cannot either:**
   - Understand information relevant to the decision, or
   - Remember the information long enough to make the decision, or
   - Weigh up information relevant to the decision, or
   - Communicate their decision – by talking, using sign language, or by any other means.

   When deciding if or when to undertake an assessment, it is important to take individual circumstances and different capacities into account.

   Some decisions can never be made on someone else’s behalf, for example about:
   - Marriage
   - Civil partnership
   - Divorce
   - Sexual relationships
   - Adoption
   - Voting
   - Consent to fertility treatment.

6. **How detailed should capacity assessments and decisions be? The code of practice does not require care services and workers to undertake formal, recorded assessments for minor day-to-day decisions about giving routine care.**

   Normal assessment and planning arrangements for care, treatment and support should already be providing staff with full information on a person’s capacities, needs and abilities. Staff must ensure that these records are in place and are regularly reviewed.

   All assessments relating to capacity, whether formal or informal, must be undertaken under the five principles of the Act (see point 2). Staff must remember that what is ‘routine’ for some can be hugely significant to others.

   Staff should use their judgment over whether individual situations are significant enough to need a formal, written assessment of capacity, and who to involve in making the assessment.
As the significance of a decision increases (and significance must be judged for each person individually), the assessment and decision-making process – who is involved and how it is recorded – should become more detailed.

**Records about significant assessments and best interest decisions may become part of formal proceedings in the Court of Protection if they are challenged. They therefore need to be comprehensive and accurate.**

Staff will need to review assessments and decisions regularly to ensure that they continue to meet the requirements of the Act and the codes of practice.

### 7. How should people be involved in making decisions?

If there are doubts about a person’s capacity to make a decision, they must still be helped to make it as independently as possible. This will include:

- **Making sure that the person has all the relevant information they need to make the decision.** If there are choices, this includes information about the alternatives.
- **Explaining or presenting the decision in a way that is easier for the person to understand.** For example, some people will find it easier to understand if care staff use pictures, photographs, videos, tapes or sign language.
- **Discussing the matter at times of the day or in places where the person will be most likely to understand.** For example, asking someone to make a decision after they have taken medication that makes them drowsy is not the right time.
- **Asking someone to become involved who may be better able to help the person understand, for example a relative, friend or advocate who knows them well.**

### 8. What should be included in records of assessments and decisions?

Records of assessments and decisions must show:

- Details of two-stage assessments of capacity.
- How the person was helped to make a decision for themselves, and how effective the help was.
- How much the person is able to understand information that is relevant to the decision.
- Whether the person can remember relevant information long enough to make the decision.
- How well the person can weigh up relevant pros and cons when making the decision.
- How the person can let other people know what their decisions are, and how well they can do this.
- Information about the person’s past and present wishes and feelings, which should include:
  - any ‘advance decision’ (see below) made when the person had capacity
  - wishes expressed in other ways by the person when they had capacity
  - information provided by others who know about the person’s past wishes and feelings.

For decisions that have been made, they must show:

- Why, when and how decisions were made.
- The people who were involved in taking the decision.
- The amount of information included in written assessments should increase with the significance of the decision that needs to be made.
- Where a person’s capacity can vary (for example, due to the time of the day or the temporary effects of illness), the best way and time to help them make their own decisions should be fully taken into account and recorded.

### 9. When should health and social care practitioners and other experts / professionals be involved in assessments and decision-making?

Health and social care practitioners and/or other relevant professionals and experts must be involved when an assessment and/or decision has particularly significant consequences. These include when:

- **There are disagreements with the person, their family or others about their capacity to make a decision.**
The person’s capacity may be challenged by someone.
The decision is about life sustaining or other particularly significant medical treatment.
Where a decision not to resuscitate someone is being considered.
Reporting abuse or crime.
Other people may be at risk.
Considering whether the person should move to new accommodation or receive care, treatment or support at home.
The decision has legal complications or consequences, such as for liability.
Their are significant financial or property issues.

When more than one agency or other individuals are included in an assessment and/or decision, the written record will normally be shared.

10. What must be taken into account when making and recording a decision on someone’s behalf?
One of the key principles of the Mental Capacity Act is that decisions made on behalf of a person who lacks capacity are made in the person’s ‘best interests’.

The code of practice refers to people who make decisions on other people’s behalf as ‘decision-makers’. Decision-makers should follow the ‘best interests’ checklist in section 5 of the code of practice, which includes the following guidelines:

- **Decisions should not be made just on the basis of a person’s age or appearance, or on the basis of behaviour that might lead to unjustified assumptions.**
- **All relevant circumstances should be taken into account.**
- **If there is a chance that the person will have capacity in the future, the decision should, if at all possible, be delayed until they do.**
- **The person should be encouraged and helped to join in making the decision wherever and to whatever extent that is possible.**
- **If the decision is about life sustaining medical treatment, it must not be motivated by a wish to hasten the person’s death.**
- **The person’s past and present wishes, feelings, beliefs and values must be considered (see below ‘how does the Act help people who want to plan for a time when they might lack capacity’).**
- **The views of other relevant people should also be considered, in particular:**
  - Anyone the person has asked to be consulted
  - Those involved in caring for the person
  - Anyone else interested in their welfare
  - An Independent Mental Capacity Advocate (IMCA – see below)
  - Holders of a Lasting Power of Attorney (LPA - see below)
  - Any court appointed deputy (see below).

- **There should be no discrimination.**

- **The checklist applies equally to routine, day-to-day decision-making and will need to be taken into account when setting and reviewing care plans.**

11. How does the Act help people who want to plan for a time when they might lack capacity?
Advances in public health and medical technology mean that people are living longer. Health and social care services are becoming more regularly involved in supporting people and/or their families to make difficult choices over things like giving drugs covertly, resuscitation, and treating serious illness.

It is becoming more common for people to plan ahead for a time when their capacity might become impaired. Staff should ask people if they have done this as part of normal assessment and care planning arrangements, in particular when people are new to the service or during reviews.
Future planning is a complicated and difficult area. The Act describes two ways of planning for the future:

- Lasting Powers of Attorney.
- Advance decisions to refuse treatment.

**Lasting Powers of Attorney (LPA)**

People over 18 who have capacity can appoint other people to make decisions about their health, welfare, money and property if, in the future, they lose the ability to do so themselves. The Act calls the person appointing an LPA a ‘donor’, and the person they appoint the ‘attorney’ or ‘donee’.

‘Personal welfare’ attorneys can make decisions about health and welfare. ‘Property and affairs’ attorneys can make decisions about money and other financial matters. The LPA will specify if it is for one or both.

The same person can be both, or different people can take on responsibilities for different kinds of decisions. Each LPA agreement is different. Attorneys must act in accordance with the wishes the donor described in writing when they set up their LPA.

LPAs have to be registered with the Office of the Public Guardian and attorneys must always act in the person’s ‘best interests’ (following the five principles).

Staff must be made aware when people using services have LPAs and registered agreements. Staff must also know about any Enduring Powers of Attorney (see below ‘What about Enduring Powers of Attorney’). If the conditions for attorneys to take over a person’s decision-making are met, staff must involve them in relevant assessments and respect their decisions.

In general, the Mental Health Act does not affect the powers of attorneys and deputies to make decisions for people. But there are two exceptions:

- **They cannot give consent for treatment where a person is liable to be detained under Part 4 the Mental Health Act.**
- **They cannot make decisions about where a person subject to Mental Health Act guardianship should live, or refuse decisions that their guardian has a legal right to make.**

It is very important that staff know about the powers and duties of an attorney, and the limits placed upon them by the Mental Capacity Act and the Mental Health Act. Challenges to an attorney’s decision can only be made through the Court of Protection, though concerns about their decisions can also be referred to the Office of the Public Guardian.

**Advance decisions to refuse treatment**

Advance decisions can only be made about treatment that should not be carried out in particular circumstances. These circumstances must be specified and include such things as refusal of resuscitation or life-saving treatment. They must be respected and are legally binding on all who give care in every health and social care service.

There are a number of rules about advance decisions and how they have to be set up in order for them to be valid. It is vital that staff know about any advance decisions that people have made, and if the decision is valid, and applicable.

Staff should also take advance statements about care and treatment into account. These are where a person recorded their wishes and preferences about care and treatment when they had capacity, but not in a way that meets advance decision requirements. While these statements are not binding, they can be a clear indication of what the person would have wanted if they had capacity.

Health care staff must respect advance decisions to refuse treatment even if a person is detained under the Mental Health Act, unless the treatment is being given under Part 4 of the Mental Health Act. Part 4 of that Act allows treatment for a mental disorder without consent, but not for any other kind of treatment.

Advance decisions must also be respected if a person is the subject of a Mental Health Act guardianship or receiving after-care under supervision.
Other relevant representatives and questions:

1. **What about the pre-Mental Capacity Act Enduring Powers of Attorney (EPAs)?**
   
   LPAs have replaced EPAs and no new EPAs can be made. Pre-existing EPAs continue – even if these have not been registered – as the Office of the Public Guardian can still register existing EPAs (see ‘what does the Public Guardian do’ below). EPAs only cover property and financial matters. EPA attorneys have no power to make other kinds of decisions, such as those about health and welfare.

2. **Relevant Person:** means the service user or, in the following circumstances, a person lawfully acting on their behalf (this would only be someone with a lasting power of attorney or a court appointed deputy)
   
   a) on the death of the service user,
   b) where the service user is under 16 and not competent to make a decision in relation to their care or treatment, or
   c) where the service user is 16 or over and lacks capacity in relation to the matter;

3. **Next of Kin (NoK):** This term is commonly used and there is a presumption that the person identified has certain rights and duties.

   Health and Social Care colleagues should always consult the people closest to a person who lacks capacity to understand that person’s wishes and feelings to help them make a decision in that person’s best interest.

   However, the person identified as NoK should not be asked to sign and/or consent to certain interventions unless they have a legal basis for doing so such as an EPA or the appropriate LPA. This is a mistake often made in many hospitals, nursing or residential settings where family members are asked to sign care plans or end of life plans and other treatment options and provide consent which is not legally valid.

4. **What is an Independent Mental Capacity Advocate (IMCA)?**

   IMCAs safeguard the interests of people who lack capacity to make important decisions if they have nobody except paid staff to advise, support or represent them.

   *Local councils pay for IMCA services by contracting with organisations such as specialist charities to provide the service. Referrals to an IMCA service must be made by local council or NHS professionals when there is no family, friend, attorney or deputy to consult and:*

   - Medical professionals propose serious medical treatment.
   - Health service or local council staff want the person to be admitted to a hospital for more than 28 days or a care home for more than eight weeks.
   - A care home or hospital wants to deprive someone of their liberty.

   Referrals to an IMCA service may be made by a local council or an NHS professional when:

   - There is no-one else available to represent the person during a care review.
   - There is to be a multi-disciplinary adults safeguarding co-ordinating meeting concerning the person.
   - A person’s accommodation needs are being reviewed and they do not have the capacity to make choices for themselves.

   Staff can ask local social services or NHS professionals to request an IMCA to be involved in these and similar circumstances.

   It is very important that an IMCA is involved as soon as possible when they are needed. Delay can hold up medical treatment, discharge from hospital or placement in a care home.

   IMCAs have the right to see all relevant care records. They must be given a written copy of assessments and decisions, and the reasons for them.

5. **What do the Court of Protection and its deputies do?**

   The Court of Protection can rule on any matter covered by the Mental Capacity Act, for example:

   - Whether someone has capacity and what is in their best interests.
   - Whether someone should be deprived of their liberty.
The court can appoint a ‘deputy’ with powers to make decisions on a person’s behalf. Deputies have similar duties, powers and responsibilities to LPAs.

People who work in health and social care services will not usually be appointed as deputies because of conflict of interest problems.

6. **What does the Public Guardian do and how does it relate to the Court of Protection?**
The Office of the Public Guardian keeps a register of attorneys (EPAs as well as LPAs) and monitors what they do. It also keeps a register of court appointed deputies and supervises their activity and provides the Court of Protection with reports and information.

The Public Guardian’s ‘visitors’ can investigate concerns about the conduct of attorneys and deputies. Visitors have full access rights to people who have an attorney or deputy, and to relevant records.

7. **What if there is disagreement over the person’s best interests or a decision made on their behalf?**
Disagreements and concerns over a person’s best interests and the decisions made on their behalf will inevitably happen from time to time. Concerns should be raised with assessors and decision makers. Assessors should be asked to explain why they believe the person lacks capacity and provide evidence to support that conclusion.

Decision-makers should be asked to explain why they think their decision is in the person’s best interests and/or is consistent with any advanced decision.

Assessment and decision-making processes must follow the principles of the Mental Capacity Act and its codes of practice. Where there is concern that this is not happening and agreement cannot be reached, the matter should be referred to the office of the Public Guardian.

Ultimately, the Court of Protection can rule on whether a person has capacity to make the decision(s) included in an assessment and on whether a particular decision is in a person’s best interests.

8. **Does the Mental Capacity Act allow the use of restraint?**
‘Restraint’ covers a wide range of actions that include either the use, or threatened use, of force to ensure that a person does something they would otherwise refuse to do. It also includes the restriction of a person’s liberty, whether or not they resist the restriction. Examples include:

- Using ‘bed rails’ to prevent people from getting up.
- Using keypads or other devices to prevent people going where they want.
- Using pressure pads to monitor people’s movements.

The Act requires that two conditions must be satisfied for staff to be protected from legal action when using active or passive means of restraint. Staff must:

a) Reasonably believe that the restraint is absolutely necessary to prevent the person coming to harm, and

b) Ensure that the restraint used is reasonable and in proportion to the potential harm.

And, like all other decisions, staff must keep it under review.

Using unnecessary or excessive restraint could leave the home and staff liable to civil and criminal penalties, including the new Mental Capacity Act criminal offence of ill-treating or wilfully neglecting a person who lacks capacity.

9. **When should the Mental Health Act 1983 be used rather than the Mental Capacity Act?**
Before making an application for a person to be detained under the Mental Health Act, decision-makers should consider whether they could achieve their aims safely and more effectively by using the Mental Capacity Act.

The Mental Health Act 1983 should be used when:

- The person meets the conditions for detention under the Mental Health Act.
Required medical treatment cannot be given without detention under the Act.

The treatment cannot be given under the Mental Capacity Act (for example, where the person made a valid advance decision to refuse treatment they now require).

The person needs to be restrained in a way not allowed under the Mental Capacity Act.

The person is expected to regain capacity and may then refuse the treatment or part of the treatment they require.

There is some other reason the person might not get treatment and they or someone else may suffer as a result.

The Mental Health Act Code of Practice provides detailed guidance on the Mental Health Act and consent to treatment.

10. Who can give consent for a person to take part in research?

Properly undertaken research helps to develop new techniques and services, but normal research rules require people taking part to consent to being involved. Researchers sometimes ask care providers if people using the service can take part in research.

The Code of Practice includes guidelines on what should happen if someone lacks capacity to consent to being involved in research:

- A family member, friend, or another independent person must be consulted and agree to the person being involved.
- If the person shows any sign of not being happy to take part, their involvement must end.
- A research ethics committee must have checked and approved the research.
- The committee must have agreed that the research could not be carried out as effectively with people who have capacity.
- The committee must also have agreed to the researcher’s plans for what would happen if a person involved lost their capacity while the research was being carried out.
- All of the normal decision-makers’ guidelines and other code of practice principles also apply to making decisions about people taking part in research.

11. What protection does the Mental Capacity Act give to social and health care services and workers who have to make decisions on other people’s behalf?

The Act protects care services and staff from legal action when providing personal care or taking other action on behalf of people who lack capacity to make decisions about their care. Relevant care and other action includes:

a) Help with:
- Washing, dressing or attending to personal hygiene
- Eating and drinking
- Walking and assistance with transport
- Arranging household services such as power supplies, housework, repairs or maintenance.

b) And acts performed in relation to:
- Domiciliary care or other services
- Other community care services (such as day care, residential accommodation or nursing care)
- A change of residence
- The person’s safety
- Adult protection and safeguarding procedures
- Providing other activities regulated by the Health and Social Care Act
- Depriving people of their liberty to leave a care home or hospital.

c) BUT, in providing care and undertaking acts, care, treatment and support staff and services will need to be able to show that they:
- Are working within the principles and code of practice of the Act.
- Are working under a proper assessment of capacity and reasonably believe that the person cannot make decisions about the relevant aspect(s) of their care.
Reasonably believe that what they are doing is in the person’s best interests.
Believe that any restrictions of freedom are reasonable, proportionate and kept under review.

Training Statement
All staff, during induction are made aware of the organisations policies and procedures, all of which are used for training updates. All policies and procedures are reviewed and amended where necessary and staff are made aware of any changes via e-mail and on our website at www.bendigonursinghome.co.uk/resources. Direct observations and spot checks are undertaken to check skills and competencies. Various methods of training are used including one to one, on-line, staff meetings, individual supervisions and external courses are sourced as required.

Related Policies
Accessible Information and Communication
Advocacy
Adult Safeguarding
Dignity and Respect
Deprivation of Liberty Safeguards
Meeting Needs
Restraint

Related Guidance
- Lasting Power of Attorney https://www.gov.uk/power-of-attorney
- NICE guideline108 Decision-making and mental capacity https://www.nice.org.uk/guidance/ng108