

Hampshire MCA Toolkit 2010

GUIDANCE NOTES



What to look for

The first principle of the MCA is that a person should be assumed to have capacity unless it is established that they lack capacity.

Our default position is that people should make their own decisions and that we should support them to do this.

We should only assess capacity if we have reason to doubt the person's capacity to make the particular decision, we must not assess or screen capacity as a matter of course.



What to write

We should remember that it is for us to demonstrate that someone lacks capacity; they do not have to prove that they have capacity to make a decision.

The second principle of the MCA means that 'before deciding that someone lacks capacity to make a particular decision, it is important to take all practical and appropriate steps to enable them to make that decision themselves.' (Chapter 3 of the MCA Code of Practice p29).

This includes ensuring that they have all the relevant information and that we communicate with them in the most appropriate way.



Stop and think

What is the decision that needs to be made?



'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.' (Chapter 4 of the MCA Code of Practice, p40). We cannot and should not assess someone's 'general capacity' to make all decisions.

Mental capacity relates to a person's ability to make a specific decision, for example, a decision about the management of their finances.

It is not a test of a person's physical ability to carry out tasks such as getting to the bank or using a cash point machine. Mental Capacity relates to the specific decisions.

Be clear what decision the person needs to make and record it on the Toolkit. If you are not clear what the decision is, you cannot assess whether they can make it or not, neither can you help them to make that decision if they do have capacity.

Avoid mixing lots of decisions up in one, or making the decision too vague or too broad.

If there are several different decisions to be made, you should record a separate MCA assessment for each one. This will enable you to be clear about what you have assessed and which decisions a person can make for themselves.

Our first objective should be to ensure that a person is assisted to make all the decisions that they have capacity to make for themselves.

A person's capacity to make a particular decision may vary over time. Mental capacity should be assessed when the decision is to be made. If it is felt that a person's capacity to make a particular decision has changed, the assessment may need to be repeated.



Try to write the decision down in clear unambiguous language:

'Can John decide whether to give consent to have 2 teeth extracted by his Dentist at the Surgery on Wednesday 10th June, under local anaesthetic.'

'Does John have mental capacity to decide where to live following discharge from hospital,' or

'Can John consent to immediate admission to hospital for assessment of mental state.'

Decision Maker / Assessor



The decision maker will be the person who is most closely involved in the decision that needs to be made.

This is the person who would need to step in and make the decision about the care or treatment should the person lack capacity to do this themselves.

For example – if a person who is 18 or over is felt to need dental treatment, and the dentist believes that the person doesn't have sufficient understanding of the treatment to give consent, the dentist should use the MCA.

They **cannot ask anyone else to give consent** for the person, unless that person has a health and welfare LPA or is a Court Appointed Deputy for health and welfare decisions, who is authorised to make decisions about dental treatment (MCA code of practice chapters 7 and 8).

If the person lacks capacity to give consent and no LPA or deputy has authority to consent on their behalf, the dentist will become the 'decision maker' and should therefore be the one to assess the person's capacity.

They may ask for someone else's opinion, for example from another professional if there are communication issues that would require specialist support, but they cannot relinquish responsibility for assuring themselves of the person's level of capacity. They can assure themselves of the person's lack of capacity based upon the other person's opinion, their own assessment or a combination of both.

MCA assessments require the involved professional to make a reasonable judgement about the person's ability to make a particular decision at a moment in time. Their judgement should be based upon a balance of probabilities – is the person more likely than not to lack capacity to make the decision?

Only if they use the 2 stage test as outlined below and in the MCA code of practice will that judgement be protected from liability under section 5 of the Act.

Anyone can be a decision maker under the MCA. It doesn't require special training and should not be considered a purely medical or mental health role.

Assessment Stage I (Diagnostic Test)

Q. 1) Is there an impairment or disturbance in the functioning of the mind or brain? (permanent or temporary).



The purpose of this stage of the assessment is to identify first if there a cognitive impairment or disturbance that may be affecting the decision making process.

Without an impairment or disturbance the person cannot be deemed to lack capacity under the MCA.

If the answer is 'No' the assessment stops.

You cannot go on to use failure of the functional test to prove the diagnostic test.



'dementia', 'bi-polar disorder', 'autistic spectrum disorder', 'infection causing confusion', 'addiction to xxxxxx', 'delirium.' But not 'behaving a bit oddly' or 'old age'.



The quality/wisdom of a decision cannot be used as proof of an impairment or disturbance; neither can other factors such as age, appearance, or ethnic background. Your evidence must be either a professional diagnosis, or clear symptoms that suggest a probable impairment or disturbance. The disturbance / impairment may be a permanent condition or temporary.

Assessment Stage 2 (Functional Test)

The second part of the 2 stage assessment is the functional test, designed to judge whether the impairment or disturbance identified in Q. 1 prevents the person from being able to make the particular decision at the time it needs to be made. (MCA Code of practice Chapter 4).

The person must be able to chain together all four functions of decision making; understanding, retaining, weighing-up and communicating, in order to have capacity to make the decision.

Remember, the person should be given all necessary and reasonable assistance to make the decision for themselves (MCA 2nd Principle), which will also allow you to fairly and accurately assess if they are unable to make the decision for themselves.

Q. 2a) With all possible help given is the person able to understand the information relevant to the decision?



Before undertaking the assessment you need to be clear what information the person needs to understand to make a valid decision.

The assessment should be undertaken by discussing the decision to be made with the person and gauging their understanding of the decision, the options available to them and associated issues.

On the assessment document, record specific information that relates to the discussion you have had regarding the decision. How much you record will depend on the complexity and likelihood for dispute of the decision, as in any other assessment.

What you record should relate to the decision. Direct quotes from the questions you ask the person can be a useful way of demonstrating why you have answered 'yes' or 'no.'



In an assessment of someone's capacity to make decisions about managing their finances, you could record, *'I asked Mr Jones how he could get his money out of the bank,' he replied 'My daughter does that for me,' I asked what bank accounts he had and he appeared confused and told me 'I like to sit in the garden.'*



To give all reasonable assistance you should consider:

- **What?** language or other communication needs including using pictures etc.
- **Who?** should be present to support the person whilst you assess
- **Where?** should the assessment happen, to help the person to participate.
- **When?** is the person best able to concentrate, time of day, length of interview etc.
- **How?** should you present information, what do they need to know to make a valid choice,

This is not an exhaustive list and for each person and each decision you should consider what assistance is required and reasonable.

Q. 2b) Are they able to retain the information long enough to make the decision.



Long enough to make the decision means being able to see the decision making process through to the end. Practically this means the individual must be able to maintain an understanding of the information long enough to do the remaining steps of ‘weighing-up’ and ‘communicating a decision’.

This is not a memory test, and it is perfectly acceptable to use other methods, such as a notebook or picture chart, to support memory. What is important is that the person can remember how the information relates to the decision.

There is neither a requirement for the person to remember their decision after they have made it, nor to remember anything else to meet the criteria for the MCA.



In a decision about accommodation you might record, *‘I asked Sharon what she liked about the home we had just visited, Sharon did not recognise the picture of it and asked ‘are you taking me to get a cat?’*



If a person can retain the information long enough to make the decision, but is then likely to forget the decision, we may need to support them to remember what they have decided.

- Reminding them.
- Writing things down
- Agreeing with them if they want the decision shared with someone who can support them.

Q. 2c) Are they able to weigh the information as part of the decision making process?



To complete this part of the assessment you need to speak to the person about how they are making their choice.

You must judge whether they demonstrate that they are able to use the information to make the decision. This should include the person having some regard to, or acknowledging risks and consequences.

It may also involve the person having insight into and considering their condition and how that may affect the decision they have to make. If a person is expressing a wish that does not take their condition or their assessed needs into account, they may be demonstrating a lack of capacity to make that decision.

The person is entitled to ignore identified risks or make what appears to be an unwise decision (MCA 3rd principle) without being considered to lack capacity. This is not a judgment about the wisdom or quality of the decision they make, it is a judgement about how they reach that decision.

The answer to this question should only be ‘no’ if the person appears unable to use the information to make a decision i.e. they could not use that information in the process even if they wanted to.



Record the reasons you have for believing the person was or was not using or weighing information, such as: *‘I discussed with Mr Smith the risk of further falls at home, he told me that he knew he could fall again but said “all I want to do is go home and I would rather take that risk than go into a home.” I conclude that he was weighing the information and considering risks’*



The MCA code of practice (4.21) says that some people may be able to understand information (as per Q.2a above) but their impairment or disturbance will prevent them from using it, or will lead them to making a decision without using the information.

This may be due to impulsiveness, or an inability to consider the risks or consequences of a decision that they may need to make.

The code of practice gives the example of a person with an eating disorder, who may understand the consequences of not eating but the compulsion 'not to eat' may be too strong for them to decide to ignore it.

There may be other conditions or situations which constrain a person's ability to make a choice to such a degree that we conclude they are not able to use the information.

Q. 2d) Are they able to communicate the decision in any way?



Where an individual has been able to complete the first three questions in the functional test they will normally be able to communicate by some method.

The question here is only **are they able** to communicate? You cannot enter a 'no' answer because someone refuses to or is reluctant to decide.



For example you could write: *Marcia communicates with nurses using hand-squeezing. The question was asked in several ways..a.b.c.... and Marcia consistently indicated she did not want treatment.* It is ambiguous to write 'I asked George several times and couldn't get an answer' as this does not distinguish ability from unwillingness.



Where a person is unable to communicate the reason will normally be very clear, e.g. unconsciousness or 'locked-in syndrome'.

It will probably be quite rare to enter 'no' in this box, therefore before doing so you should doublecheck that you have taken reasonable steps to make communication possible.

Conclusion

Fluctuating Capacity and Outcome



Fluctuating capacity refers to a person who may have different levels of capacity to make a particular decision at different times. This may relate to changes in health, effects of medication or times of day as well as a whole range of other factors.

Fluctuating capacity is **not to be confused** with a person who has capacity but is simply changing their mind, even if they do so regularly. People are allowed to change their minds, although it may be a sign that they need some help to make a decision that is truly their own.



Either record 'Mr King has capacity', 'Mr King lacks capacity', or 'Mr King lacks capacity but is likely to regain some when injury trauma has passed. A decision is not needed until ready for discharge, re-assessment required dd/mm/yyyy'



If someone really does have fluctuating capacity, the best outcome would be for them to make the decision at the time when they do have capacity.

For someone who lacks capacity, consider if the person is likely to regain capacity and whether the decision can wait. If it can then the person should make their own decision when they regain capacity. If it cannot and it must be made now to keep the person from harm, then a 'best interests' decision should be made.

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