

Putting the Mental Capacity Act principles at the heart of adult social care commissioning:

A guide for compliance

Contents

Mental Capacity Act – five guiding principles	1
The Mental Capacity Act and adult social care commissioning	2
Why this guidance	2
The Mental Capacity Act in brief	3
Commissioning an MCA compliant service or activity	5
General MCA suggested areas to question:	5
Five guiding principles suggested areas to question	6
Lasting Power of Attorney (LPA) and deputies suggested areas to question:	9
Advance Decisions to Refuse Treatment suggested areas to question:	9
Independent Mental Capacity Advocate (IMCA) suggested areas to question:	10
Audit and governance suggested areas to question:	10
Summary	11
Useful links	12

Mental Capacity Act – five guiding principles

The Mental Capacity Act 2005 (MCA) is a significant piece of legislation affecting people who may lack the capacity to make their own decisions. It promotes autonomy and empowerment of individuals and protects their rights particularly to make their own decisions. The Act is built on five guiding principles which determine a person centred approach to decision making. The MCA provides a framework for social care commissioners when commissioning services for people who may be unable, either permanently or temporarily, to make some, or all decisions, about their care. This guidance has been written to support the commissioning process to apply the MCA.

Underpinning the MCA are five guiding statutory principles. These must underpin commissioning intentions, plans, procurement and monitoring arrangements to ensure that services meet the needs of a range of adults in a way which promotes their rights, autonomy and independence whilst striking a balance with protection where necessary.

These guiding principles are the heart of any interaction with adults and can act as a benchmark for compliant MCA practice.

Principle one: Assumption of capacity

This means that everyone from the age of 16 is assumed to have mental capacity unless it is established that they lack capacity. Most important here is that the person does not have to prove anything, the onus is on whoever doubts their mental capacity to prove that they are unable to make a particular decision.

Principle two: A person must not be assessed as lacking capacity unless all practicable steps have been taken to help them make the decision.

This principle once again passes responsibility back to whoever doubts capacity to consider how the information is being presented and how the person is being supported.

Principle three: A person is not to be treated as unable to make a decision just because they make an unwise decision.

This principle allows for people to make decisions others may view as eccentric even though they may have a mental impairment. It allows for everyone to have their own set of values and preferences, and to be unwise at times and to potentially learn from such decisions.

Principle four: Anything which is done for on behalf of someone who lacks capacity must be done in their best interests.

This principle ensures an objective decision making process is used when acting on behalf of others. It ensures that the person's best interests (rather than those of, say, their relatives, or the commissioners of services) are the focus of this decision-making.

Principle five: When taking action or making a decision on behalf of someone who lacks capacity thought must always be given to whether this could be achieved in a way which is less restrictive of the person's rights and freedom of action. This principle ensures that a person's liberty and freedom of choice are not restricted thoughtlessly in order to achieve the necessary outcome.

The Mental Capacity Act and adult social care commissioning

The Department of Health (DH) recently estimated that 70 per cent of those who use social care services may lack mental capacity for some decisions. Therefore commissioners will want assurance that the services they are commissioning on behalf of their local communities are being delivered in a way that both respects and promotes the rights of vulnerable individuals.

Through a good understanding of the Act, providers and commissioners can ensure that where appropriate, assessments of capacity are carried out and that decisions made on behalf of incapacitated people are made in their best interests, with the least possible restriction of freedoms.

There is other related legislation that providers and commissioners work to which ensure a person's rights are upheld which include:

- Human Rights (HRA) 1998
- Disability Discrimination Acts (DDA) 1995 and 2005
- Equality Act (EA) 2010
- Care Act 2014.

Why this guidance

Commissioning adult social care was a key aspect of implementation considered by the House of Lords post legislative scrutiny of the Mental Capacity Act in 2014 .

“The British Institute of Human Rights argued that commissioners of services are integral to ensuring the Act is correctly implemented and applied in practice. Commissioners needed to be “properly trained and equipped”... to ensure their decisions and practices supported people who lacked capacity”.

Commissioning adult social care with an MCA focus was seen by the House of Lords to be essential to getting the MCA embedded into social care and as such was one of their recommendations for Government to consider.

“Commissioning has a vital role to play in ensuring that the Act is implemented and complied with in practice. We have noted examples of how commissioners can promote good practice through support and contractual requirements. We recommend that the Government, and subsequently the independent oversight body, work with the Association of Directors of Adult Social Services (ADASS) and NHS England to encourage wider use of commissioning as a tool for ensuring compliance.”

This became Recommendation 9: “We recommend that the Government, and subsequently the independent oversight body, work with the ADASS and NHS England to encourage wider use of commissioning as a tool for ensuring compliance.”

¹ www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/13902.htm

The DH consequently included commissioning in their report 'Valuing every Voice Respecting every Right – Making the case for the Mental Capacity Act' and their ensuing action plan following the House of Lords scrutiny.

“6.19 Similarly in social care commissioning, MCA compliance should also be seen as an essential component of good quality care. In response to the House of Lords report, the ADASS has agreed to initiate work to examine how the MCA is currently reflected in the commissioning of social care in order to learn from good practice and to identify necessary improvements. Relevant partners will be identified, such as NHS England. ADASS shall report on their findings, via the DH led MCA Steering Group in early 2015. The conclusion of this work may result in a good practice guide for local authority commissioners.”

This good practice guidance arises directly out of this work to support councils in relation to adult social care commissioning.

The Care Act 2014 will also significantly impact the way in which local authorities 'do' adult social care commissioning and the statutory guidance addresses this in detail.

4.4. Local authorities should review the way they commission services, as this is a prime way to achieve effective market shaping and directly affects services for those whose needs are met by the local authority, including where funded wholly or partly by the state.

This MCA guidance must be read alongside Chapter 4 of the Care Act Statutory Guidance .

The purpose of this guidance is to embed the MCA specifically throughout the commissioning process, by the promotion of an individual's rights to autonomy and choice balanced with protection where necessary, which is inherent in the MCA. Adherence to MCA compliant commissioning will promote the wellbeing principle of the Care Act.

The Mental Capacity Act in brief

The MCA is, as recognised by the House of Lords, a visionary piece of legislation; its application extends across the work of local councils. It must be embedded across practice to achieve its aim of enablement and empowerment.

This short guide is not a detailed description of the principles of the Act, since much has been written elsewhere and there is a reference list at the end. This is a guide for commissioners of social care to assure and challenge themselves that the MCA principles are at the heart of all commissioned services.

The MCA covers the following areas and is underpinned by five guiding statutory principles outlined in chapter one:

- **Definition of capacity** – The MCA describes that a person lacks capacity in relation to a specific decision if, at the time they need to make it they are unable to do so because of any impairment or disturbance in the functioning of their mind or brain.
- **Test to assess capacity** – The MCA describes how the test of capacity should be carried out. This is, firstly, by establishing that the person does in fact have a mental impairment, and then by confirming that because of this they are unable to make the specific decision in question, at the time it needs to be made.

- 2 Valuing every Voice Respecting every Right – Making the case for the Mental Capacity Act
www.gov.uk/government/uploads/system/uploads/attachment_data/file/318730/cm8884-valuing-every-voice.pdf
- 3 Chapter 4 of the Care Act Statutory Guidance -
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315993/Care-Act-Guidance.pdf

- **Best interests** – the MCA provides a statutory checklist of factors that decision-makers must work through when deciding what is in the best interests of a person assessed as lacking capacity.
- **Protection from liability** – the MCA provides protection from liability where a person is carrying out an act in connection with the care and treatment of someone who lacks capacity, where the decision is made within the framework of the Act.
- **Restraint** – the MCA defines restraint and offers protection from liability where the person lacks capacity to agree to the measures needed and restraint (which includes restriction of movement) is in their best interests but both necessary to prevent harm to the person and also proportionate to the likelihood and seriousness of such harm.
- **Planning for the future** – the MCA introduced ways that a person, while they have capacity, can plan ahead for a time when they may lack it. One way is by appointing a person(s) under a Lasting Power of Attorney to take decisions in relation to either property and affairs or health and welfare on their behalf.
- **Advance decisions to refuse treatment** – the MCA introduced another way that people can plan ahead whilst they still have capacity: anyone with mental capacity can refuse in advance any medical treatment that they do not want to happen if they lack the capacity to consent or refuse it in the future. This includes refusal of life sustaining treatment in which case it must be written, signed and witnessed.
- **Court appointed Deputies** – the MCA introduced the new Court of Protection as the final arbiter in cases involving mental capacity. The Court is also able to appoint deputies on behalf of people lacking capacity to take decisions on health and welfare, and financial matters.
- **Court of Protection** – the MCA created this Court which has jurisdiction relating to the whole of the Act. Certain issues must always be decided by the Court of Protection and other welfare issues are often resolved by the Court in the case of dispute, such as contact and residence of an incapacitated adult.
- **Independent Mental Capacity Advocates (IMCAs)** – this specific advocacy arises out of the need to consult on a person's best interests. Where someone lacks capacity to take decisions in relation to accommodation changes or serious medical treatment, and has no-one other than paid carers who can be consulted there is a mandatory requirement to for a local authority or NHS body to instruct an IMCA. The IMCA does not become the decision-maker but their views must be taken into account. There is also the option of referring to an IMCA in adult safeguarding where the person lacks capacity even if there is someone available to consult with.
- **Ill treatment and wilful neglect** – the MCA introduced two new criminal offences of ill treatment or wilful neglect of a person who lacks capacity
- **Deprivation of Liberty Safeguards (DoLS)** – although introduced later in 2009 the DoLS are part of the MCA, and are an essential way to safeguard the rights of people who need to be deprived of their liberty, in their best interests, when they are in a care home or hospital in order to receive necessary care or treatment.

Commissioning an MCA compliant service or activity

The following is intended to assist commissioners with every stage of the commissioning process. By referring to the suggested points for consideration, commissioners can produce documents which have an MCA focus and measure a services compliance with the requirements of the MCA. This will help to embed the principles across social care and promote the rights of people who use services. Commissioners should adapt the questions within each area to suit their target audience.

There are some general MCA enquiries which would be made of any commissioning activity. You should have a MCA lead within your authority or region that may be able to assist you.

General MCA suggested areas to question:

- Does commissioning and contracting set out quality assurance and service standards which explicitly include the MCA?
- Are clear expectations and reporting requirements in relation to the MCA placed on providers?
- Are the duties of commissioners and providers clear in relation to the MCA and evidenced and is the Court of Protection used as the final stage in settling disputes?
- Does commissioning and contracting with regulated providers include Care Quality Commission (CQC) registration guidance in relation to MCA/DoLS?
- Are IMCA services commissioned with a clear focus on quality and timeliness as well as cost and are consideration given to commissioning them outside of the statutory role?
- Does contract monitoring have a focus on MCA compliance and on the application of the DoLS including monitoring compliance with conditions and addressing any shortfalls?
- Do tender documents and processes make it clear that the MCA principles must be embedded across the services provided?
- Do all contracts require compliance with the MCA including where appropriate the DoLS?
- Do commissioners expect and monitor compliance with the MCA?
- Do commissioned services all include statements that they promote and work within the MCA five guiding principles?
- Are job descriptions clear about expectations of staff roles in relation to the MCA?
- Rather than policies 'on' the MCA, is the MCA a feature in every policy and procedure of provider organisations?
- Is the wellbeing principle evident throughout the consultation, planning, procurement and monitoring of service delivery?

To assist commissioners of adult social care to promote the MCA and to assure themselves they are commissioning for compliance with the MCA the following sets of questions may assist with benchmarking and quality assurance. These have been set out under the five guiding principles of the MCA.

Five guiding principles suggested areas to question

1. An assumption of capacity

- Is the assumption of capacity clear in the service's ethos and practice?
- Are people treated as autonomous individuals and is this clear throughout the service?
- Are the rights of people who use the services protected?
- Does the service aim to enable and empower, or is the emphasis on protection and paternalism?
- Does the service provider have an understanding of when it is necessary to assess a person's capacity?
- Do the paperwork and processes reflect a difference between day to day decision making and complex decision making?
- Does the service and its managers demonstrate an understanding of when a formal assessment is needed and how to record it?
- Does the organisation offer choice which is real and valid?
- Is there a person centred approach to personal care, food, social activities?
- Is there a person centred approach to daily life such as meal times?
- Is the organisation clear when a person has the right to say 'no' and when this may arise from a lack of capacity?
- Can the organisation demonstrate person centred care planning?
- Does the organisation understand and practise an approach to safeguarding which is person centred and avoids unnecessary risk-aversion?
- Are staff trained and able to apply the principles of the MCA?
- Is MCA compliant practice an integral part of staff supervision, mentoring and evaluation?
- Does the service provider's training, induction and refresher training policy include the MCA?
- Does the service provider's staff induction include the MCA?
- Are there arrangements in place to ensure MCA-related case law is explained to staff; and evidence that staff are familiar with the Code of Practice and have easy access to it when seeking guidance?
- Is the assumption of capacity evident on admission and throughout consideration of deprivation of liberty?

2. Supported decision making

- Does the organisation have a clear commitment to enhancing communication?
- Is an appropriate level of detail kept in relation to a person's communication needs?
- Are basic matters such as wearing of hearing aids and glasses by those who need them, given prominence?
- Is the organisation aware how to contact interpreters including sign language and languages other than English if they are needed?

- Are there a variety of communication methods available for staff to use to enhance communication?
- Are people given the right information, at the right time, in the right way to enhance their ability to make their own decisions?
- Are risk assessments and care plans regularly reviewed allowing for the person's learning and development, together with as much freedom as possible?
- Is appropriate staff time allowed to support informed decision making?
- Is there an ethos to support decision making rather than one which seeks to impose decisions for people?
- Are staff appropriately trained to communicate with people who may have difficulty communicating?

3. Unwise decision making

- Does the organisation recognise that a person cannot be deemed to lack capacity simply because of an unwise decision?
- Is there an ethos which allows for, and accepts some element of risk in order to promote autonomy?
- Are people encouraged to reflect on their actions with the support of staff?
- Is the organisation flexible enough to adapt to a range of different decision making abilities?
- Are staff trained to recognise the inherent rights and value of all people whether they have a disability or not?
- Do staff understand their role in supporting decision making and not overruling a person's choice?
- Are behavioural techniques and other forms of restraint MCA compliant and is their use regularly reviewed?

4. Acting in the person's best interests

- Is there plainly a culture which clearly promotes autonomy and choice but recognises when decisions must be made for others?
- Does the service ensure staff fully understand and apply the best interests decision making principles?
- Is there evidence to clearly demonstrate that the statutory checklist for best interests decision making is followed when necessary?
- Is the service, its managers and staff able to demonstrate how people are involved in all decisions about them, whether they have capacity or not?
- Is the service able to demonstrate that appropriate consultation (principally with relatives or friends) is always carried out when making best interest decisions?
- Is the service able to show how people participate in decisions about them?
- Is it clear from recorded decisions what the person's wishes, feeling beliefs and values were and whether they could be adhered to or not?
- Are decision makers clearly identified with an appropriate level of responsibility?

- Is there evidence of the use of a balance sheet approach for complex decisions?
- Have staff received training in best interests decision making and is the learning embedded through one to one sessions, mentoring and other methods of staff support?
- Does the service have a clear, MCA compliant policy in relation to Do Not Attempt Cardiopulmonary Resuscitation DNACPR decision making?
- Is the right to liberty, privacy and family life reflected in care planning and in best interests decisions made on behalf of those lacking capacity?
- Are providers aware when a restriction of liberty may become a deprivation of liberty and do they know how this should be authorised?

5. Less restrictive option

- Does the service have a statement in relation to people's human rights?
- Does the service ensure its staff are trained in Human Rights Act, MCA and how to recognise deprivation of liberty?
- Is there a clear policy in relation to restraint which is MCA compliant?
- Can the service ensure it protects rights and balances protection but with appropriate use of restraint where necessary?
- Does the service have a clear understanding of everything that may amount to restraint including chemical restraint, diversion and dissuasion, physical restraint such as mats and lap belts, monitoring devices such as sensors, and locked doors to restrict freedom of movement?
- Are risk assessments clearly documented and regularly reviewed and updated?
- Is the service able to demonstrate an understanding of the difference between restriction and deprivation of liberty?
- Does the service have a clear policy that restrictions are regularly reviewed to assess if they can be lessened, prior to making an application for a DoLS authorisation?
- Are staffing levels appropriate to avoid unnecessary monitoring?
- Are all staff trained in appropriate restraint techniques at a level appropriate to their role?
- Is there a person centred approach to care which provides a rationale for every restriction in place e.g. why a door is locked, why a person has 2:1 support?
- Is there an ethos within the service which endeavours to reduce all restrictions in place and promote liberty, autonomy and wellbeing?

The Mental Capacity Act 2005 introduced a number of ways that people could plan for the future. In particular these are the ability to choose someone to make health and welfare or financial decisions in the future should the person lose capacity. It also created the ability to make Advance Decisions to Refuse Treatment. These have an impact on commissioning services for adult social care.

Lasting Power of Attorney (LPA) and deputies suggested areas to question:

Commissioners and service providers need to be aware of the role of Lasting Power of Attorney. The person who acts as attorney will have a document to evidence this and also which decisions they can make. It is essential that any provider is aware of the role and also the limitation on the role. It is essential that they know how to verify that someone acts as an attorney and how to report any misuse of the power. A deputy has the same role except this person is appointed to act for someone when they already lack capacity and so the deputy is appointed by the Court of Protection.

- Does the service promote the making of LPAs whilst people aged 18 or over still have capacity?
- Does the service collect information in relation to decision making, such as who has an LPA or Deputy?
- Does the service ensure that even where an LPA or Deputy exists people are supported to make decisions they have capacity to make?
- Are managers aware of the route to challenge the conduct of an LPA or Deputy?
- Are all staff aware of the limitations of the power of an LPA or Deputy?
- Is there evidence that the validity of LPAs are checked by staff to confirm their validity?

Advance Decisions to Refuse Treatment suggested areas to question:

The MCA introduced the term 'Advance Decisions to Refuse Treatment'. These were previously known as living wills. This is the ability to plan for the future by making a statement regarding specific treatment which the person does not consent to, under specific circumstances. This can range from fairly minor to life sustaining treatment. A decision not to be resuscitated is an example of this. An Advance Decision can only be made whilst the person has capacity and is aged 18 or over.

- Does the service promote the use of Advance Decision making for people who have capacity?
- Do the service, its managers and staff have a clear understanding of the application and limitations of advance decision making?
- Does the recording within the service highlight where Advance Decisions have been made?
- Is the DNACPR policy compliant with the MCA requirements for advance decision making?

Independent Mental Capacity Advocate (IMCA) suggested areas to question:

- All commissioners and providers of services to people aged 16 or over must be aware of the role and remit of the IMCA service.
- Can the service demonstrate clear policies and procedures in relation to IMCAs?
- Are staff aware of the mandatory referral requirements and as such are they able to alert the professionals who need to make the referral?
- Are IMCAs considered through the safeguarding adult process where they would be of benefit to a person who lacks capacity in relation to their engagement and involvement with the process?

Audit and governance suggested areas to question:

Commissioners will need to seek assurance that any service provider has an internal mechanism for audit and governance of MCA compliance. Additionally commissioners will want assurance as to how the service links to wider reporting mechanisms such as safeguarding adult boards (SAB).

- Is there evidence that the MCA is linked into the service's wider systems for audit and governance?
- Is there evidence that the audit of MCA compliance involves those who use services in order to improve their experience and the quality of their care as well as enriching the information-gathering?
- What data and information on compliance with the MCA is collected and is there a mechanism to report any trends and performance to a wider reporting structure such as SAB?
- Does the service provider maintain records in relation to seeking advice in relation to possible applications, where relevant, to the Court of Protection and do they have a procedure for such applications?

Summary

The MCA whilst far reaching and visionary has been implemented very variably across social care. It is an essential piece of legislation for adult social care commissioners who have a vital role to play in ensuring the principles at the heart of the MCA are embedded in all commissioned services and commissioning activity.

In many cases reliance on the proper application of the MCA provides a defence for action and as such providers of services must understand and apply it correctly and also understand the limitations of its powers. This guidance will provide social care commissioners with the necessary tools to commission and monitor for compliance with the MCA.

This guidance provides some good practice principles which if followed will allow for MCA compliant commissioning, benchmarking and quality assurance with providers.

Useful links

A brief guide to assessing capacity

www.39essex.com/docs/newsletters/capacityassessmentsguide31mar14.pdf

CQC Annual report Deprivation of Liberty Safeguards

www.cqc.org.uk/content/deprivation-liberty-safeguards-201314

Social Care Institute for Excellence: DoLS Good Practice Guide

www.scie.org.uk/publications/reports/report66.asp

Office of the Public Guardian (OPG)

www.publicguardian.gov.uk

Mental Health law Online

www.mentalhealthlaw.co.uk

Ministry of Justice

<http://www.gov.uk/government/organisations/ministry-of-justice>

MCA Code of practice

www.tsoshop.co.uk

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

<https://www.gov.uk/government/collections/mental-capacity-act-making-decisions>

Appendix One

Suggested template for commissioning activity with an MCA focus

The following template can be used at each stage of the commissioning process and can be tailored to any specific situation.

General MCA areas to question			
Areas to question specific to commissioned service/procurement <i>(select appropriate areas to question from guidance document)</i>	What assurance does the service give in relation to this area	What evidence does the service provide to support this	Is anything further required
Five guiding principles of the MCA			
Areas to question specific to commissioned service/procurement <i>(select appropriate areas to question from guidance document)</i>	What assurance does the service give in relation to this area	What evidence does the service provide to support this	Is anything further required

Lasting Powers of Attorney			
Areas to question specific to commissioned service/procurement <i>(select appropriate areas to question from guidance document)</i>	What assurance does the service give in relation to this area	What evidence does the service provide to support this	Is anything further required

Advance Decisions to Refuse Treatment			
Areas to question specific to commissioned service/procurement <i>(select appropriate areas to question from guidance document)</i>	What assurance does the service give in relation to this area	What evidence does the service provide to support this	Is anything further required

IMCA			
Areas to question specific to commissioned service/procurement <i>(select appropriate areas to question from guidance document)</i>	What assurance does the service give in relation to this area	What evidence does the service provide to support this	Is anything further required

Audit and governance			
Areas to question specific to commissioned service/procurement <i>(select appropriate areas to question from guidance document)</i>	What assurance does the service give in relation to this area	What evidence does the service provide to support this	Is anything further required



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