

Mental Capacity Act Policy

Inmind Reference:	CLN05
Category:	Clinical Policies
Version Number:	1.2
Reviewed on:	September 2018
Next review date:	September 2020
Lead Officer:	Director of Nursing
Equality Impact Assessment completed:	Yes

Applicable Legislation/Regulations:
The Mental Capacity Act (including DOLS) 2005; The Mental Health Act 1983 [as amended by the MHA 2007]; Human Rights Act 1998; The Care Act 2014; The Deprivation of Liberty Safeguards 2008 (Code of Practice); The Data Protection Act 2018
Codes of Practice:
Mental Capacity Act 2005 – Code of Practice P & Q and Cheshire West (Supreme Court Judgment, laid down on the 19 March 2014)
Purpose:
To ensure that InMind Healthcare protects service users who are not able to make their own decisions and that InMind staff are able to execute their statutory duty under The Mental Capacity Act 2005.

Version Control Table		
Date Ratified	Version Number	Status
	1.2	Live

Date	Key Revision
18/09/18	Police title change. Full review to reflect current guidance and legislation.

Please check to ensure this is the most current electronic copy of this document as it is updated and published in electronic format only (hard copies may become out of date).

1.0 The Policy

- a) The Mental Capacity Act governs decision-making on behalf of people who lack capacity. The approach under the Act is a person-centred approach, meaning that the person who lacks capacity is the focus of the decision or action that is being proposed.
- b) InMind Healthcare will:
- Ensure that every adult has the right to make his or her own decisions and that every adult is assumed to have capacity to do so unless it is proved otherwise
 - Ensure the provision of all practicable help before concluding that someone cannot make their own decisions
 - Ensure that individuals retain the right to make what might be seen as eccentric or unwise decisions
 - Ensure that anything done for or on behalf of people without capacity will be in their best interests
 - Ensure that every adult has the right to make his or her own decisions and that every adult is assumed to have capacity to do so unless it is proved otherwise
 - Ensure the provision of all practicable help before concluding that someone cannot make their own decisions
 - Ensure that individuals retain the right to make what might be seen as eccentric or unwise decisions
 - Ensure that anything done for or on behalf of people without capacity will be in their best interests
 - Ensure that anything done for or on behalf of people without capacity will be the least restrictive of their basic rights and freedoms
- c) Please note that the Mental Capacity Act does not apply to service users who are detained under the Mental Health Act.
- d) InMind will provide training, information and supervision to staff to ensure they are competent and capable of delivering the requirements of the policy
- e) **This policy provides general guidance only.**
This policy is not a replacement for the Mental Capacity Act Code of Practice (2007) as well as the Deprivation of Liberty Safeguards Code of Practice (2008), which serves as an addendum to the Mental Capacity Act Code of Practice which should be consulted to guide on good practice.
- f) For definitions please see Appendix 2, **ALSO** refer to Mental Capacity Act Code of Practice (2007) as well as the Deprivation of Liberty Safeguards Code of Practice (2008)

2.0 The Procedure

2.1 What is Capacity?

- a) Mental capacity is a person's ability to make a decision about a particular matter at the time the decision needs to be made. This includes the ability to make a decision that affects daily life – such as when to get up or what to wear. It also refers to a person's ability to make a decision that may have legal consequences - for themselves or others.
- b) An assessment of capacity must be made in relation to a particular decision at the time the decision needs to be made.
- c) **The Mental Capacity Act sets out five 'statutory principles' that underpin the Act and these must be followed.**

The Five key statutory principles are as follows: The Act is underpinned by five key principles (Section 1, MCA). It is useful to consider the principles chronologically: principles 1 to 3 will support the process before or at the point of determining whether someone lacks capacity. Once you've decided that capacity is lacking, use principles 4 and 5 to support the decision-making process:

1. 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.

2. 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.

3. 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.

4. Principle 4: Best interests

Anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.

5. 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.

MCA Code of Practice Guidance

The Act does not impose a legal duty on anyone to 'comply' with the Code – it should be viewed as guidance rather than instruction. But if they have not followed relevant guidance contained in the Code then they will be expected to give good reasons why they have departed from it.

Certain categories of people are legally required to '**have regard to**' relevant guidance in the Code of Practice. That means they must be aware of the Code of Practice when acting or making decisions on behalf of someone who lacks capacity to make a decision for themselves, and they should be able to explain how they have had regard to the Code when acting or making decisions.

The categories of people that are required to have regard to the MCA Code of Practice 2007, include anyone who is:

- an attorney under a Lasting Power of Attorney (LPA) (see chapter 7 MCA CoP 2007)
- a deputy appointed by the new Court of Protection (see chapter 8 MCA CoP 2007)
- acting as an Independent Mental Capacity Advocate (see chapter 10 MCA CoP 2007)
- carrying out research approved in accordance with the Act (see chapter 11 MCA CoP 2007)
- acting in a professional capacity for, or in relation to, a person who lacks capacity working
- being paid for acts for or in relation to a person who lacks capacity.

The last two categories cover a wide range of people. People acting in a professional capacity may include:

- a variety of healthcare staff (doctors, dentists, nurses, therapists, radiologists, paramedics etc.)
- social care staff (social workers, care managers, etc.)
- others who may occasionally be involved in the care of people who lack capacity to make the decision in question, such as ambulance crew, housing workers, or police officers.

People who are being paid for acts for or in relation to a person who lacks capacity may include:

- care assistants in a care home
- care workers providing domiciliary care services, and
- others who have been contracted to provide a service to people who lack capacity to consent to that service.

(MCA CoP 2007 p1&2)

2.2 When should Capacity be assessed?

- a) Where doubt exists about the person's ability to make a specific decision at a time the decision needs to be made, a formal capacity assessment should be undertaken to establish if the person lacks capacity.
- b) For the purpose of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- c) Anyone assessing someone's capacity to make a decision for themselves should use this two-stage test of capacity below:
 - Does the person have an impairment or disturbance that affects the way their mind or brain works, And
 - Does that impairment or disturbance means that they are unable to make a specific decision at the time it needs to be made.

2.3 Points to consider when assessing a person's capacity

- a) When assessing a person's capacity it is important to ask the following:
 - Does the person have all the relevant information they need to make the decision?
 - If they are making the decision that involves choosing between alternatives do they have information on all the different options?
 - Would the person have a better way of understanding if information was explained or presented another way?
 - Does the person understand information about the decision to be made?
 - Can the person retain the information in their mind?
 - Can the person use or weigh up that information as part of the decision making process?
 - Can they communicate their decision?
- b) In order to determine whether a person lacks capacity to make a particular decision, the Act precisely defines what is meant by 'lack of capacity' and 'inability to make a decision'.

There are two basic questions that staff need to consider:

Stage 1 - Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain? (If 'No', the person cannot be assessed as lacking capacity. If 'Yes', proceed to stage two).

Stage 2 - Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?

- c) A person is deemed unable to make a decision if they cannot:
- Understand information relevant to the decision to be made – a person is not to be regarded as being unable to make a decision if s/he is able to understand through the use of appropriate means for example; using simple language, visual aids etc.
 - Retain that information – the fact that the person is only able to retain the information for a short period of time does not prevent him/her from being able to make a decision.
 - Use and weigh up the information - as part of the process of making that decision. It is not enough to just understand and retain the information the person needs to be able to consider the consequences of the decision.
 - Be able to communicate that decision – all attempts should be made to enable a person to communicate their decision, this may include, visual aids, non-verbal gestures etc. A complete inability to communicate is rare. However, in these circumstances the Act is clear that a person should be treated as if they are unable to make a decision
- d) **An answer NO to any one of the above will constitute a lack of capacity to make a particular decision.**

2.4 Who should assess capacity?

- a) The person who assesses an individual's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made.
- b) Carers and care workers do not have to be experts in assessing capacity. But to have protection from liability when providing care or treatment, they must have a 'reasonable belief' that the person they care for lacks capacity to make relevant decisions about their care or treatment. To have this 'reasonable belief' they must have taken 'reasonable' steps to establish that the person lacks capacity to make a decision or consent to an act at the time the decision or consent is needed. They must also establish that the act or decision is in the person's best interests. (See points to consider when assessing a person's capacity in section 2.3 above, ALSO refer to MCA Code of Practice 2007.)
- c) If a doctor or healthcare professional proposes treatment or an examination, they must assess the person's capacity to consent. In hospital settings this can involve the multidisciplinary team (who share responsibility for the patient). But ultimately it is up to the professional responsible for the person's treatment to make sure that capacity has been assessed.
- d) For a legal transaction, a solicitor or legal practitioner must assess the clients' capacity to instruct them. They must assess that the client has the capacity to satisfy any relevant legal test. In cases of doubt they should get an opinion from a doctor or other professional expert.
- e) More complex decisions are likely to need more formal assessments. A professional opinion on the persons capacity might be necessary but the final decision about a person's capacity must be made by the person intending to make the decision or carry out an action on behalf of the person who lacks capacity - not the professional, who is there to

advise. Any assessor should have the skills and ability to communicate effectively with the person.

2.5 What practical steps should be taken when assessing capacity?

- a) Anyone assessing someone's capacity will need to decide which of these steps are relevant to their situation:
- You should make sure that they understand the nature and effect of the decision to be made themselves. Can the person retain the information?
 - You may need access to relevant documents and background information. (For example, details of a person's finances if assessing capacity to manage their own affairs.)
 - You may need other relevant information to support the assessment. (For example, healthcare records or the views of staff involved in the persons care.)
 - Family and close friends may be able to provide background information but their personal views and wishes of what they want for the person must not influence the assessment.
 - You should explain to the person all the information relevant to the decision. The explanation must be in the most appropriate and effective form of communication for that person.
 - Check the persons understanding after a few minutes. The person should be able to give a rough explanation of the information that was explained.
 - Avoid questions that need only "yes" or "no" answer (for example, did you understand what I just said). They are not enough to assess the person's capacity to make decision.
 - Skills and behaviour do not necessarily reflect the person's capacity to make specific decisions. The fact that someone has good social or language skills, polite behaviour or good manners doesn't necessarily mean they understand the information or are able to weigh it up.

Repeating these steps can help confirm the result.

2.6 Who should keep a record of assessments?

- a) Assessments of capacity to take day to day decisions or consent to care require no formal assessment procedure or recorded documentation.
- b) It is good practice for paid care workers to keep a record of the steps that take when caring for the person concerned especially if a "reasonable belief" has been reached that someone lacks capacity to make a particular decision at a particular time.
- c) A doctor or healthcare professional proposing treatment should carry out an assessment of the person's capacity to consent and record it in the service user's clinical notes, in addition to completing a Mental Capacity Assessment record (Appendix 2).
- d) Solicitors should assess a client's capacity to give instruction or carry out a legal transaction and record it on the clients file. An assessment of a person's capacity to consent or agree to the provision of services will be part of the care planning process for

health and social care needs, and should be recorded in the relevant documentation. This includes Person Centred Planning and The Care Programme Approach

2.7 What if someone refuses to be assessed

- a) Where a person whose capacity is in doubt refuses to undergo an assessment of capacity or refuses to be examined by a doctor or other professional, those involved in their care should explain to the person why the assessment is needed and what the consequences of refusal are.
- b) Threats or attempts to force the person to agree to an assessment are not acceptable.
- c) If it is already established that the person lacks capacity to agree or refuse, the assessment can normally go ahead, as long as the person does not object to the assessment, and it is in their best interests.
- d) Nobody can be forced to undergo an assessment of capacity. If there are serious concerns about the person's mental health, consideration should be given under the Mental Health Act 1983. Refusing an assessment of capacity is however on its own no way sufficient grounds for an assessment under the Mental Health Act 1983.

2.8 What does the Act mean by best interests?

- a) One of the key principles of the Act is that any act done for or any decision made on behalf of a person who lacks capacity must be done or made in the persons best interests.
- b) The term "best interest "is not actually defined in the Act. However the Act explains how to work out the best interests of a person who lacks capacity to make a decision at the time it needs to be made
- c) This principle covers all aspects of financial, personal welfare and healthcare decision making and actions. It applies to anyone making decisions or acting under the provisions of the Act.
- d) A person trying to work out the best interests of a person who lacks capacity to make a particular decision should:
 - **Encourage participation**- do whatever is possible to permit and encourage the person to take part or to improve their ability to take part, in making the decision.
 - **Identify all relevant circumstances**- try to identify all the things that the person who lacks capacity would take into account if they were making the decision or acting for themselves.
 - **Find out the persons views**- including the persons past and present wishes and feelings. Any beliefs and values that would be likely to influence the decision in question.
 - **Avoid Discrimination**- do not make assumptions about someone's best interests simply on the basis of the person's age, appearance, condition or behaviour.
 - **Assess whether the person might regain capacity**- If so can the decision wait until capacity has been regained? (e.g. after receiving medical treatment)

- **If the decision concerns life-sustaining treatment-** not be motivated in any way by a desire to bring about the person's death. You should not make assumptions about the person's quality of life.
- **Consult others-** if it is practical and appropriate to do so, consult other people for their views about the person's best interests to see if they have any information about the person's feelings, wishes, beliefs and values.
- **Avoid restricting the person's rights-** see if there are any other options that may be less restrictive of the person's rights.
- **Take all of this into account-** weigh up all of these factors in order to work out what is in the person's best interests.

Appendix 1

Equality Impact Assessment for this policy

Protected Characteristic (domain)	Area of conflict	Resolution
Age	Nil	N/A
Disability	Nil	N/A
Gender Reassignment	Nil	N/A
Pregnancy & Maternity	Nil	N/A
Race	Nil	N/A
Religion or Belief	Nil	N/A
Sex	Nil	N/A
Sexual Orientation	Nil	N/A
Marriage and Civil Partnership	Nil	N/A

All relevant persons are required to comply with this policy and must demonstrate sensitivity and competence in relation to diversity in race, faith, age, gender, disability and sexual orientation. If you feel you are disadvantaged by this policy, please contact the Registered Manager and the service will actively respond to the enquiry.

Appendix 2

Definitions

- **Mental Capacity** broadly refers to the ability of an individual to make a decision about specific elements of their life. It is also sometimes referred to as “competence”. It is not an absolute concept – different degrees of capacity are needed for different decisions, and the level of competence required rises with the complexity of the decision to be made. Neither does it matter whether the condition is temporary or permanent but, in the case of a temporary condition, the judgement would have to be made as to whether the decision could be delayed until capacity returns. It is clear from both the Act and the Code of Practice that this refers specifically to a person’s capacity to make a particular decision **at the time it needs to be made**.

- **What is an IMHA?**
An Independent Mental Health Advocate (IMHA) is a specialist advocate. The right to an IMHA was introduced in 2007 under amendments to the 1983 Mental Health Act. This gave legal rights to IMHAs which are not available to other advocates. These rights mean that IMHAs may:
 - meet qualifying patients in private
 - consult with professionals concerned with the patient's care and treatment
 - see any records relating to the patient's detention, treatment or after-care, for the purpose of providing help to the patient and where the patient consents
 - request access to records where the patient lacks capacity to consent, if accessing the records is necessary to carry out the functions as an IMHA.
 - IMHA services are independent, confidential and free of charge. People do not have to accept help from an IMHA, and may change their mind at any time. IMHA does not replace other forms of advocacy or legal support, but can work with them.

IMHA is not the same as Independent Mental Capacity Advocacy (IMCA). IMCA provision is a separate statutory duty to provide non-instructed advocacy for people who lack capacity to make certain decisions and who have no one able to support and represent them. It may be appropriate for someone to have both an IMHA and an IMCA. An IMHA can also work in a non-instructed way with people lacking capacity who are detained under the Mental Health Act.

- **Qualifying patients who have access to IMHA’s**
 - IMHAs work with a specific group of qualifying patients. These people are all entitled to speak with an IMHA by law. The legislation requires mental health service staff to inform them of their right to an IMHA.
 - People who are eligible to use IMHA services in England are:
 - people detained under the Mental Health Act 1983 amended in 2007 (even if on leave of absence from the hospital), but excluding people who are detained under certain short term sections (4, 5, 135, and 136)
 - conditionally discharged restricted patients

- people subject to guardianship
- people subject to supervised community treatment orders (CTOs).
- Other patients, who are informal, are eligible for IMHA services if they are being considered for section 57 or section 58A treatment (i.e. treatments requiring consent and a second opinion). This includes people under the age of 18 who are being considered for electroconvulsive therapy (ECT).

- **The role of IMHAs**

- IMHAs can help people who use services to understand:
 - their legal rights under the Mental Health Act
 - the legal rights which other people (e.g. nearest relative) have in relation to them
 - the particular parts of the Mental Health Act which apply to them
 - any conditions or restrictions to which they are subject
 - any medical treatment that they are receiving or might be given, and the reasons for that treatment
 - the legal authority for providing that treatment
 - the safeguards and other requirements of the Act which would apply to that treatment.
- IMHAs will also help people to exercise their rights, which can include supporting them to self-advocate and/or representing them and speaking on their behalf.
- IMHAs can support people in a range of other ways to ensure that they can participate in the decisions about their care and treatment.

- **Access to IMHAs**

- Mental health service staff have a legal duty to ensure that everyone who qualifies is aware of their right to speak to an IMHA. This includes hospital managers, nurses, psychiatrists, administrators, social workers, approved mental health practitioners (AMHPs), community psychiatric nurses (CPNs) and ward managers. This information should be provided verbally as well as in a written format, and consideration given to providing this information more than once.
- Some groups of people are less likely to access advocacy. Individuals from these groups may need additional support to access the IMHA service.
 - These include:
 - people from black, Asian and other minority ethnic groups
 - people on CTOs
 - people with learning difficulties
 - people who are hearing impaired or deaf
 - older people who lack capacity
 - children and young people
 - people who normally live in a different local authority (from the one they are being treated in).

- **Independent mental capacity advocate (IMCA)**

The Mental Capacity Act 2005 introduced the role of the independent mental capacity advocate (IMCA).

- IMCAs are a legal safeguard for people who lack the capacity to make specific important decisions: including making decisions about where they live and about serious medical treatment options. IMCAs are mainly instructed to represent people where there is no one independent of services, such as a family member or friend, who is able to represent the person.
- **Role of the IMCA:**

[The Mental Capacity Act 2005 \(Independent Mental Capacity Advocates\) \(General\) Regulations 2006](#) set out the IMCA's role and functions. These are grouped below into four areas.

1. Gathering information

- Meet and interview the person (in private if possible).
- Examine relevant health and social care records.
- Get the views of professionals and paid workers.
- Get the views of anybody else who can give information about the wishes and feelings, beliefs or values of the person.
- Find out other information which may be relevant to the decision.

2. Evaluating information

- Check that the person has been supported to be involved in the decision.
- Try to work out what the person's wishes and feelings would be if they had capacity to make the decision and what values and beliefs would influence this.
- Make sure that different options have been considered.
- Decide whether to ask for a second medical opinion where it is a serious medical treatment decision.

3. Making representations

- IMCAs should raise any issues and concerns with the decision maker. This could be done verbally or in writing. IMCAs are required to produce a report for the person who instructed them. In most cases this should be provided to the decision maker before the decision is made.
- People who instruct IMCAs must pay attention to any issues raised by the IMCA in making their decision.

4. Challenging decisions

- In many cases IMCAs will be able to resolve any concerns they have with the decision maker before the decision is made. Where this has not been possible IMCAs may formally challenge the decision-making process. They can use local complaint procedures or try to get the matter looked at by the Court of Protection.

- **Who should get an IMCA?**

- An independent mental capacity advocate (IMCA) must be instructed for people in the following circumstances
- The person is aged 16 or over
- A decision needs to be made about either a long-term change in accommodation or serious medical treatment
- The person lacks capacity to make that decision, and
- There is no one independent of services, such as a family member or friend, who is “appropriate to consult”
- An IMCA may also be provided to people for other decisions concerning
- Care Reviews or
- Adult Protection
- In adult protection cases an IMCA may be instructed even where family members or others are available to be consulted.

- **Deprivation of Liberty Safeguards**

- IMCAs must be instructed for people who are being assessed as to whether they are currently being, or should be deprived of their liberty, where there is no-one “appropriate to consult”.

- IMCAs must also be made available to people who are subject to a standard authorisation in the following circumstances:

- To fill gaps between appointments of person’s representatives
- If a person has an unpaid representative, when requested by the person, their representative, or if the Supervisory Body believes either could benefit from the support of an IMCA.
- IMCAs can only work with an individual once they have been instructed by an appropriate person/ body. For accommodation decisions and care reviews this is likely to be the local authority responsible for the arrangements. For serious medical treatment decisions this will be a medical practitioner who has responsibility for the person’s treatment. For adult protection cases this will be the local authority coordinating the adult protection proceedings. For the IMCA roles in DOLS this will be the Supervisory Body.
- Most parts of the Mental Capacity Act apply to people aged 16 and over. This includes the provisions relating to IMCAs. Some parts of the MCA only apply to people over the age of

18. Examples include the ability to make a Lasting Power of Attorney and to be deprived of their liberty under the MCA.
- This includes accommodation arranged by a local authority or NHS which is likely to be for longer than eight weeks and placement in hospital for a period that is likely to exceed 28 days.
 - Serious medical treatment is defined in the MCA as treatment which involves giving new treatment, stopping treatment that has already started or withholding treatment that could be offered in circumstances where:
 - if a single treatment is proposed there is a fine balance between the likely benefits and the burdens to the patient and the risks involved
 - a decision between a choice of treatments is finely balanced, or
 - what is proposed is likely to have serious consequences for the patient.
- The person's capacity to make the specific decision must be assessed. This is the two stage test set out in the MCA.
 - They have an impairment or disturbance (for example, a disability, condition or trauma) that affects the way their mind or brain works, and
 - The impairment or disturbance means that they are unable to make a specific decision at the time it needs to be made.
 - IMCAs are primarily intended to be a safeguard for people who do not have family or friends who can represent them. The MCA identifies this as having no -one other than paid staff with whom "it would be appropriate to consult". The Code of Practice 10.74 - 10.78 provides more information about how this decision can be made. For example, if someone has limited family contact or if family live some distance away an IMCA can be instructed.
 - IMCAs can only work with an individual once they have been instructed by an appropriate person/ body. For accommodation decisions and care reviews this is likely to be the local authority responsible for the arrangements. For serious medical treatment decisions this will be a medical practitioner who has responsibility for the person's treatment. For adult protection cases this will be the local authority coordinating the adult protection proceedings. For the IMCA roles in DOLS this will be the Supervisory Body.
 - The Deprivation of Liberty Safeguards are an amendment to the Mental Capacity Act. They were implemented in April 2009.
 - **Consent** is the voluntary and continuing permission of the person to the intervention or decision in question. It is based on an adequate knowledge and understanding of the purpose, nature, likely effects and risks of that intervention or decision, including the likelihood of success of that intervention and any alternatives to it. Permission given under any unfair or undue pressure is not consent.
 - **Best Interests** is a core principle that underpins the Act. In brief, it stresses that any act done or decision made on behalf of an individual who lacks capacity, must be done or made in their best interests. This principle covers all aspects of financial, personal welfare, health care decision-making and actions.

- **Decision-maker** under the Act, many people may be required to make decisions or act on the behalf of someone who lacks capacity to make decisions for themselves. The person making the decision is referred to as the decision-maker and **it is the decision-maker's responsibility to work out what would be in the best interest** of the person who lacks capacity.
- **Restraint** is:- "Use force or threaten to use force to make someone do something that they are resisting or restrict a person's freedom of movement whether they are resisting or not." Any action intended to restrain a person who lacks capacity will not attract protection from liability unless the following two conditions are met:
 - (i) The person taking the action must reasonably believe that restraint is necessary to prevent harm to the person who lacks capacity, and
 - (ii) The amount or type of restraint used and the amount of time it lasts must be a proportionate response to the likelihood and seriousness of harm.
- **Lasting Power of Attorney (LPA)** under the Act, for an individual with capacity aged 18 or over to appoint an attorney (or attorneys) to make decisions about the welfare once they lose capacity. This can cover personal welfare decisions (including decisions about health care) and/or decisions relating to their property or affairs. An LPA must be registered with the Office of the Public Guardian (OPG) before it can be used. A 'donor' is the person who makes an LPA while they still have capacity.
- **Court of Protection** is a specialist court which deals with all complex issues relating to people who lack capacity to make specific decisions.
- **Independent Mental Capacity Advocate (IMCA)** is a person who can represent and support an individual who lacks capacity in situations where the person has no one else to support them.
- **Court Appointed Deputy** is someone who has been appointed by the Court of Protection to make decisions on behalf of an individual who lacks capacity.
- **Office of the Public Guardian (OPG)** in addition to keeping a register of deputies, LPA and Enduring Powers of Attorney, it also has the responsibility of monitoring deputies and attorneys' and investigates any complaints about attorneys or deputies.

i) People Covered by the Mental Capacity Act

The Act Applies to people aged 16 or over who lack capacity to make their own decisions. Having mental capacity means that a person is able to make their own decisions. Capacity can vary over time and by the decision to be made. A lack of capacity could be the result of a permanent, temporary or fluctuating condition. The MCA identifies that a person is unable to make a particular 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; and

- 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. The MCA is specifically designed to cover situations where someone is unable to make a decision because their mind or brain is affected, for instance, by illness or disability, or the effects of drugs or alcohol. A lack of mental capacity could be due to:
 - A stroke or brain injury;
 - A mental health problem;
 - Dementia;
 - A Learning Disability;
 - Physical or mental conditions leading to confusion, drowsiness or loss of consciousness including Delirium, Concussion, and the long-term effects of brain damage; or
 - The symptoms of alcohol or drug use. However, it is important to know that having a particular diagnosis or disability should not of itself be taken as an indication that the person does or does not lack capacity.

All individuals must be presumed to have capacity, unless it is established otherwise under the capacity test set out in the Act.