# Mental Capacity Act (MCA) Guidance and Prompt Sheet

For practitioners working with adults who have intimate partners/family members

lancashire safeguarding adults board

02.09.2024 Version 2 MCA guidance and prompt sheet for practitioners working with adults who have intimate partners/ family members
Date of Review 25.06.2024 (Next Review 25.06.2026)

## 1. Introduction

This guidance has been developed as one of a number of recommendations resulting from the Safeguarding Adult Review of Mrs A (SAR Adult A[1]).

The SAR identified multiple opportunities where it would have been appropriate for professionals to have completed mental capacity assessments in relation to specific decisions that were being made. The SAR highlighted the challenging situations professionals can be in when assessments are not clearly documented, decision specific or not undertaken.

## 2. Background

Mrs A lived with her husband for 60 years. There was no previously reported domestic abuse between the couple although Mr A could be argumentative and difficult to engage. Mr A had a diagnosis of Alzheimer's and Mrs A had difficulties with memory and suffered low mood. Both suffered with confusion and hallucinations. Mr A was adamant that they did not require any support and declined a care package, nor would he agree to information being shared with his stepson. Sadly, Mrs A died following an incident with her husband, which was deemed to have contributed to her death. During a period of 4 – 5 months, several agencies and practitioners saw the couple at times when they were functioning well. They assumed both Mr & Mrs A had capacity to make welfare decisions.

The circumstances were not unusual. Many couples or families operate with one partner or family member acting as 'spokesperson', with the relevant person seemingly in agreement. However, the voice of the individual service user is at risk of being missed when they are viewed as a couple or family unit rather than as individuals, and issues of mental capacity and best interests can be overshadowed.

## 3. Mental Capacity Act Key Recommendations

- Professionals should always be mindful of completing a mental capacity assessment when working with individuals when there are concerns regarding mental wellbeing and confusion.
- When discussing issues of confidentiality with an individual or couple it is essential to consider mental capacity when assessing what information should be shared with family members. If it is agreed not to share information with family members this should not be seen as a barrier to listening to family concerns;

## 4. Challenges and Barriers

The following is a non – exhaustive list of the challenging situations that practitioners may face when working with couples and families.

---

[1] http://www.lancashiresafeguarding.org.uk/lancashire-safeguarding-adults/resources/safeguarding-adult-reviews.aspx

- A dominant partner or relative
- An acquiescent or 'silent ' partner or relative
- Restrictions on access to the relevant person
- Lack of a safe space to assess or see the relevant person on their own
- Marked differences of opinion of need between
  - couple/ family members themselves
  - couple/ family members and professionals
  - different professionals
- Refusal of care
- Impact of financial assessment - affordability of care
- Coercive and controlling behaviour by partner or relative (s)
- Domestic violence and when appropriate to make a referral
- Lasting Power of Attorney (LPA) or Court Appointed Deputy (CAD) not acting in best interests
- One partner / relative says practitioners cannot communicate with other members of the family

## 5. Mental Capacity Act Principles - a reminder

Section 1 of the Act sets out the five 'statutory principles' – the values that underpin the legal requirements in the Act. The Act is intended to be enabling and supportive of people who lack capacity, not restricting or controlling of their lives. It aims to protect people who lack capacity to make particular decisions, but also to maximise their ability to make decisions, or to participate in decision-making, as far as they are able to do so (MCA Code of Practice, Chapter 2 'What are the statutory principles and how should they be applied'?[2]).

**The five statutory principles are:**

**1. A person must be assumed to have capacity unless it is established that they lack capacity**. Every adult has the right to make their own decisions if they have the capacity to do so. Family carers and healthcare 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 capacity. ((*See MCA Code of Practice Chapter 4 – 'How does the Act define a person's capacity to make a decision and how should capacity be assessed?')

**2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.** 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.* (See MCA

[2] https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice

Code of Practice Chapter 3 'How should people be helped to make their own decisions?')

**3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision**. A person who makes a decision that others think is unwise should not automatically be labelled as lacking the capacity to make a decision. *BUT repeated unwise decisions that put the person at significant risk or an unwise decision that is obviously irrational or out of character indicates the need for further investigation around capacity.*

**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. All available options should be considered,** including whether there is need to act or make a decision at all. The Act sets out a *statutory checklist of steps to follow in order to determine what is in the best interests* of a person who lacks capacity to make the decision in question (See MCA Code of Practice Chapter 5 'What does the Act mean when it talks about 'best interests'?)

**5. 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.** 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 still in their best interests (*See MCA Code of Practice Chapters 5 'What does the Act mean when it talks about 'best interests'? and Chapter 6 'What protection does the Act offer for people providing care or treatment?').

## 6. Practitioners' duties – a reminder

Certain categories of people are legally required to 'have regard to' guidance in the MCA Code of Practice. They should be able to explain how they have had regard to the Code when acting or making decisions. The categories of people include:

- Health and social care professionals
- Paid health and social care workers
- Others such as ambulance crew, housing workers, or police officers.
- Lasting Powers of Attorney (LPAs) (Code of Practice Chapter 7)
- Court of Protection appointed Deputies (CADs) (Code of Practice Chapter 8)
- Independent Mental Capacity Advocates (IMCAs) (Code of Practice Chapter 10)

However, the Act applies more generally to everyone who looks after, or cares for, someone who lacks capacity to make particular decisions for themselves. This includes family carers or other carers

## 7. Prompt Sheet

The 'prompt sheet' below is an aide memoire to help practitioners address the challenges and barriers as outlined in Section 4, and to support the application of learning from Adult A SAR in practice. It should be used in conjunction with each organisation's own MCA Policies, Procedures and Guidance, and the Pan Lancashire & Cumbria Multi Agency Safeguarding Policies & Procedures[3]

**MCA Prompt Sheet for practitioners working with adults who have intimate partners/family members**

- Who are you listening to? Whose voice are you hearing?
- Where have you got information from?
- Are you taking matters at face value, or are you trusting your own instincts/ observations, and using professional curiosity to explore further?
- Have you gained consent or attempted to gain consent for what you are proposing from each party individually? No other adult can consent on behalf of another adult unless a valid Lasting Power of Attorney (LPA) or Court Appointed Deputy (CAD) is in place.
- If there is an LPA or CAD, have you checked the scope of their authority? You can contact the Office of the Public Guardian to check if an LPA or CAD is registered, or ask the OPG to investigate if you have concerns about the LPA or CAD.
- Have you gained or attempted to gain consent for information sharing from each party individually?
- Are you confident that the person has capacity to consent (or refuse)? Have you recorded your evidence for this?
- Is there evidence that either party has a condition affecting their mind or brain and that may impact on mental capacity? Is this a trigger for assessing capacity?
- Have you recorded capacity assessments and best interest's decisions?
- Have you revisited the issue of consent and capacity over a period of time? This is particularly important where a person's condition is known to deteriorate over time
- Have you considered that the more dominant partner/ family member may be an adult in need too? Do they also need a social care assessment?
- Does the more dominant partner/ family member have mental capacity to understand the relevant person's needs? Or their own?
- Have you considered the views of all family members, friends or neighbours to get as full picture as possible?
- Have you checked incident logs, complaints and safeguarding adult's alerts?
- Is there a history of domestic violence and /or coercive & controlling behaviour?

[3] http://www.lsab.org.uk/policies/

- Are you aware that coercive and controlling behaviour is a form of domestic violence?
- Have you considered a referral to local DV services (as well as a SGA alert)? (If the dominant person's behaviour is due to dementia, their partner / family member may not welcome this label as appropriate.)
- Do you know which other professional and agencies are involved, have been, or may be?
- Have you consulted other professionals and agencies? What is their view about mental capacity?
- Have you visited at different times of day? (Capacity can fluctuate over a 24 hrs)
- Have you been able to talk to the relevant person on their own in confidence? For example in a separate room in their own home?
- If not, have you considered meeting them elsewhere? For example liaising with the GP practice to coordinate an appointment (not necessary to have an actual GP appointment).
- If the dominant partner or relative (or person themselves) is refusing care on financial grounds, can arrangements be made to defer financial contributions? Is there a third party payment option?
- Does the dominant partner, relative or person themselves have capacity to manage their finances. Does a corporate appointeeship or deputyship need to be considered?
- Has Reablement been considered as a way of getting a clearer picture (without the need for financial contribution)? Reablement would need to be given clear guidance about what expected to do.
- Is there a night time support / roving service that could visit out of hours to get a clearer picture of the circumstances? Again would need to be given clear guidance about what expected to do.
- If unable to gain access, have you considered all other means of assessing the person(s)'s capacity? E.g. from outside the house talking through a window/ letterbox?
- As a last resort, have you contacted EDT or the police for support?
- Do you need a Court Order to access the property or to remove the person? Seek legal urgent advice around the legal framework: Care Act, MH Act, MCA, and Inherent Jurisdiction, and contact your Safeguarding/ MCA Lead or Champion

*Produced by members of the MCA DOLS Best Practice Group. 13th April 2018, and reviewed by the MCA Task and Finish Group June 2024.*