Decision-making in relation to adults who lack capacity is governed in England and Wales by the Mental Capacity Act 2005 (MCA). This section contains a brief outline of the legislation, emphasising the aspects most relevant to safeguarding. Professionals are strongly advised to refer to the detailed guidance signposted at the end of the card.

Adults lacking capacity to make decisions that would protect and promote their interests are potentially at risk of abuse or neglect. Although, in accordance with the principles of the Act, adults lacking capacity should be supported to enable them to participate as far as possible in decision-making, and to express their views, emphasis should shift to ensuring that decisions made on patients’ behalf promote their overall best interests.

Assessing capacity
An assessment of capacity involves three stages:

Stage 1: Does the person have an impairment of the mind or brain?

Stage 2: Is the person able to:

– understand the decision they need to make?
– understand, retain, use and weigh the information relevant to the decision?
– understand the consequences of making, or not making the decision?
– communicate the decision – by any means?

If the answer to any of these questions is no, the adult lacks capacity.
Stage 3: Is the lack of capacity a result of the person’s impairment of the mind or brain (the causal nexus)?

*Mental Capacity Act 2005*

The MCA sets out several basic principles that must govern all decisions taken in relation to adults lacking capacity. This is a brief list:

- A presumption of capacity – adults are assumed to have the capacity to make decisions on their own behalf unless it is proven otherwise.
- Maximising decision-making capacity – everything practicable must be done to support individuals to make their own decisions, before it is decided that they lack capacity.
- The freedom to make unwise decisions – the fact that an adult makes a rash, unwise or impulsive decision is not in itself evidence of lack of capacity.
- Best interests – where it is determined that an adult lacks capacity, any decision or action taken on their behalf must be in their best interests.
- Less restrictive alternative – whenever a person is deciding on behalf of an adult who lacks capacity, he or she must consider if it is possible to make the decision in a way that is less restrictive of that person’s fundamental rights or freedoms.

An assessment of mental capacity is decision-specific. The question is whether the individual has the capacity to make a specific decision at a specific time, including with the provision of appropriate support. Although some patients, such as those who are unconscious, will not be able to make any decisions, most individuals will be able to participate in at least some decisions, even very straightforward ones such as what to wear.
Best interests
Under the MCA, all decisions taken on behalf of someone who lacks capacity must be taken in his or her best interests. Although a best-interests judgement is not an attempt to determine what the person would have wanted, the courts have made it clear this must be considered and may be determinative. Any decision taken that contradicts an adult’s previously expressed wishes would need clear justification.

A best-interests decision will involve taking into account all relevant features, including:

– the likelihood that the person will regain capacity, and whether the decision can be delayed until that time
– the person’s past and present wishes and feelings, including any relevant written statement
– his or her beliefs or values where these would have an impact on the decision
– other factors the person would have considered if able to do so, such as the effect of the decision on other people.

A crucial part of a best-interests decision is a discussion with those close to the individual, including, where appropriate, family, friends or carers, bearing in mind both the duty of confidentiality (see card 9) and the caution required if the adult was believed to be in an abusive relationship.
Lasting Powers of Attorney (LPA)
The MCA allows individuals aged 18 or over and who have capacity to appoint an attorney under an LPA, to make financial and health and welfare decisions on their behalf once they lose capacity. Unless it is an emergency, consent from the attorney is required for all decisions that would have required consent from the adult had he or she retained capacity. Attorneys are under a duty to act in the incapacitated adult’s best interests.

Independent mental capacity advocates (IMCAs)
Under the Act, an IMCA must be instructed in relation to individuals who lack capacity and who have no family or friends whom it is appropriate to consult when:

- an NHS body is proposing to provide, withhold or withdraw ‘serious medical treatment’, or
- an NHS body or local authority is proposing to arrange accommodation or a change in accommodation in a hospital or care home, and the stay in hospital will be more than 28 days, or the stay in a care home more than eight weeks.

Responsibility for instructing an IMCA lies with the NHS body or local authority providing the treatment or accommodation. In some situations where adults require safeguarding, local authorities are also able to instruct IMCAs.
Key points

– Decision-making in relation to adults who lack capacity is regulated in England and Wales by the Mental Capacity Act 2005.
– Adults lacking capacity to make decisions that would protect or promote their own interests can be at risk.
– All decisions made on behalf of individuals lacking capacity must be made in their best interests.
– Where appointed, welfare attorneys are under a duty to act in an incapacitated adult’s best interests.