



Mental Capacity Act Learning Briefing

The Mental Capacity Act 2005 (MCA) protects the right to self-determination for people whose capacity may be questioned and provides a legal process for professionals proposing making decisions for them. The decision-making provisions apply to people over 16, while some further provisions only apply to adults. It is essential that any person proposing to make a decision for a relevant person follows the Act.

The Act itself begins with these five principles:

- *A person must be assumed to have capacity unless it is established that they lack capacity.*
- *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.*
- *A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
- *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.*
- *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.*

The types of decision that can be made under the Act can include decisions about residence, care and support, social contact, medical treatment, accessing social media etc. Several types of decision are excluded, such as sex, marriage and family issues. The [Code of Practice](#) that accompanies the Act is essential to understand how to use the Act in practice. Also important is to familiar yourself key points from case law since 2005.

The test of capacity has three stages:

1. A permanent or temporary *impairment of or disturbance in the functioning of the mind or brain*. (The 'diagnostic' test – not to be confused with having a formal diagnosis.)
2. Can they understand relevant information for the decision, retain it for long enough, use and weigh it to make a decision and communicate it? (The 'functional test'.)
3. Does one cause the other? The diagnostic issue may not cause the functional problem in all cases, so a link must be shown. (The 'causative nexus'.)

As stated in the second principle, helping a person to make a decision themselves is crucial. It is also imperative that capacity is considered as **time-specific** and **decision-specific**. No-one should be considered or labelled as simply 'lacking capacity'. This must be assessed and in connection to a particular decision. The links below you will find reference to what is relevant to certain types of decision but do seek advice if you are not sure what to include.

If a person is assessed as lacking capacity to make a specific decision, then the principle of best interests is followed to guide the decision-maker. This is intentionally not defined in the law and guidance - what is in someone's best interests is **wholly individual** to them. The [Code of Practice](#) provides a list of points that must be considered (the 'checklist'). The person's wishes and feelings, their needs for support and the views of those close to them must be considered, but how much weight is given to each will depend on the circumstances.

The Act also provides protection from liability for those carrying out day-to-day care and treatment. This is on the condition that the person providing it:

- has taken reasonable steps to establish that the young person lacks capacity.
- reasonably believes that the young person lacks capacity and that the act is in the young person's best interests, and
- follows the Act's principles.

'Gillick' competency is relevant when considering a child under 16's maturity to make their own decisions and to understand the implications of those decisions. This is a wholly different test. A lack of maturity cannot be grounds to find young person aged 16 and over to lack mental capacity.

If decisions are being made under the Children Act 1989 for a young person who lacks capacity to make a particular decision, there is an overlap with the Mental Capacity Act 2005. Chapter 12 of the [Code of Practice](#) discusses this. Some decisions may be within parental control, but **parents do not have an automatic right** to give consent for decisions made for a young person aged 16 and 17 who may lack the required capacity. Family members are often very involved in the life of an incapacitated person, especially if they are or have been carers, but for a young person ages 16-17 they only have this right unless they have been granted appropriate authority by the Court of Protection. This is also where any intractable dispute concerning such a young person's care would be resolved. The [Code of Practice](#) has specific guidance on the role of the Act and the Court of Protection for 16-17 year-olds.

If care is in place that deprives a young person of their liberty in any setting, parents cannot give consent for this. Care that deprives a 16 or 17 year-old of liberty must be authorised in the Court of Protection until the introduction of the Liberty Protection Safeguards (estimated to be October 2020).

There may be circumstances where the mental capacity of parents may be a consideration in a young person's welfare. Parenting capacity is wholly different from mental capacity but seek Adult Social Care involvement for the parents if they have care and support needs as duties under the Care Act 2014 includes parenting responsibilities.

Coercion and undue influence can have an impact on a vulnerable person's capacity. Assessments should consider this and be as free as possible from this and other interference. Coercion can lead to a person *with capacity* being unable to make a decision. As well as being a safeguarding issue, in high-risk cases intervention can be made under the inherent jurisdiction of the Courts. Seek advice in such cases.

You will find the following resources useful:

Worcestershire's [Mental Capacity Assessment](#) and [Best Interests Decision](#) forms

[Mental Capacity Act 2005 Code of Practice](#)

This is highly readable and should be your first source of guidance.

[Mental capacity case law library](#)

A searchable resource of case law concerning how and when the MCA 2005 applies.

[Assessing Mental Capacity. Guidance note by 39 Essex Chambers.](#)

This includes explanations of what information is relevant for certain decisions.

[Making Best Interests Decisions. Guidance note by 39 Essex Chambers](#)

[Reference guide to consent for examination or treatment by Department of Health](#)

[Transitional Safeguarding. A strategic briefing by Research in Practice](#)

[The Liberty Protection Safeguards](#)

Resources on the LPS, due in October 2020 and applying to 16 and 17 year-olds.

If support is needed, firstly approach your organisation's Safeguarding services and always seek legal advice where this is appropriate.

Staff from any service working with young people aged 16 and 17 can also seek advice through the Council's DoLS and MCA team during office hours:

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