

The Mental Capacity Act

2005

Implementation in Practice

Hull Adult Social Care



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Introduction

The Mental Capacity Act 2005 (MCA) provides a statutory framework to empower and protect people, aged 16 or over who lack capacity to make their own decisions. The framework covers a wide range of decisions on personal welfare and financial matters. The MCA sets out who can make decisions with and for people, in which situations, and how they should do so. The MCA also enables people to plan ahead for a time when they may lose capacity to make decisions. The MCA provides recourse, where necessary, to a court with power to deal with personal welfare and financial decisions on behalf of individuals lacking capacity.

The MCA introduced two criminal offences which apply to anyone caring for an individual who may lack capacity, an attorney under **Lasting Power of Attorney** or **Enduring Power of Attorney**, and a **Court of Protection (CoP)** appointed deputy. The offences carry a range of penalties from a fine to a prison sentence of up to five years or both. The offences are:

i. Ill treatment of an individual who lacks capacity to make relevant decisions; a person will be guilty of ill treatment if they have either deliberately ill-treated someone or been reckless in the way they treated that individual, with disregard for harm or damage to the individual's health.

ii. Wilful neglect of an individual who lacks capacity to make relevant decisions; commission of the offence is dependent on the circumstances, but usually arises where a person has deliberately failed to carry out an act they knew they had a duty to carry out.

The majority of the provisions within the MCA apply to individuals of 16 years and over who may lack capacity to make specific decisions (excepting the Deprivation of Liberty Safeguards and the creation of statutory Wills, Lasting Powers of Attorney and Advance Decisions to Refuse Treatment). Matters concerned with the care and welfare of children and young people are resolved largely by reference to the Children Act 1989 and case law.

The MCA applies to children under 16 years in two ways:

- The CoP can make decisions about the property and affairs of a child where it is likely that the child will lack capacity to make those decisions once 18
- The criminal offences of ill treatment and neglect apply regardless of the victim's age.



Deprivation of Liberty Safeguards (DoLS) and Deprivation of Liberty

The **DoLS** aim to ensure that adults (**DoLS apply only to those of 18 years of age and over**) lacking capacity to consent to being accommodated in a hospital or care home to receive care and treatment, are only deprived of their liberty in their best interests. DoLS offer a process for authorising a deprivation of liberty and a means to challenge such deprivation.

The DoLS apply to hospitals (general and psychiatric) and care homes, collectively referred to as 'standard settings'; they do not extend to supported living, shared lives or domestic settings ('non-standard settings'). Applications to authorise deprivations in non-standard settings must be made to the Court of Protection (CoP). The CoP's jurisdiction to authorise deprivation of liberty of those lacking relevant mental capacity is available only from the age of 16; the inherent jurisdiction of the High Court is available regardless of age.

For further information relating to Court of Protection please see the CoP protocol - [download here](#)

The ECHR has defined a deprivation of liberty for the purposes of Article 5(1) as having 3 elements, all of which need to be satisfied before a particular set of circumstances will amount to a deprivation of liberty falling within the scope of Article 5:

- a) the objective element of confinement in a particular restricted place for a non-negligible period of time.*
- b) the subjective element of lack of valid consent to that confinement; and*
- c) the attribution of responsibility to the state.*

The test for establishing the objective component of a deprivation was further defined by the UK Supreme Court in the Cheshire West case (*P v Cheshire West and Chester Council and P and Q v Surrey County Council* [2014] UKSC 19); the 'acid test' for a deprivation of liberty requires that the individual concerned is:

- a) under continuous supervision and control and**
- b) not free to leave.**

Where a 16- or 17-year-old lacks capacity to give their own consent to circumstances satisfying the 'acid test' in Cheshire West, and the state either knows or ought to know of the circumstances, then the child is deprived of their liberty for the purposes of Article 5 and requires the protections afforded by that Article.

This is the case whether or not their parent(s) consent to the circumstances amounting to a deprivation of liberty imposed by others, or whether directly imposing those circumstances themselves.

The Liberty Protection Safeguards (LPS) are expected to replace DoLS and equivalent CoP processes in 2023.



Assessing Capacity - Relevant Information

Understanding and identifying the decision

When assessing capacity this needs to be time specific and decision specific. This means that the person cannot lack capacity in general; they can only lack capacity in relation to a specific decision.

It is important to clearly define and record the specific decision that you are assessing capacity for. Without this clearly defined decision it is not possible to determine what information is relevant to the decision.

Examples of specific decisions

- To decide where they want to live
- To agree to a package of care being provided
- To manage their finances effectively and safely



Understanding relevant information - key points

- What is the relevant information for the specific decision? Be clear around this, salient factors only
- The level of understanding expected should not be set too high
- You must provide the individual with the relevant information – not just expect them to know it – have a conversation. Record the information you give them and their responses i.e. you came to stay in the care home as when you were at home you were leaving your property during the middle of the night and placing yourself at risk and then record their response etc.
- The individual needs to understand the reasonable, foreseeable consequences of making, or not making a decision
- Provide the individual with the options available
- Focus on capacity rather than wise decision making
- Provide all reasonable support to the individual for example having someone present during the assessment that knows the person well. Avoid distractions and evidence attempts to remove distractions i.e. if the tv is turned off P becomes very upset and agitated, which would not enable him to engage effectively in the conversation
- Always assess capacity at the “highest point” i.e. when an individual is most likely to be considered to have capacity and evidence this i.e. from discussions with P’s family I was able to determine that he becomes more confused in the evenings due to this I ensured that I visited in the morning in order to speak to him at his optimum time.

Understanding relevant information - key points

continued ...

- You need to check out information if there is reason to doubt what the individual is saying i.e. if the person is saying that they are able to get themselves a meal and they eat regularly, but there are concerns this is not happening check this out with others, and check what is happening in the persons environment. It is often useful to say 'can you show me?' or 'let's do it together' to gain further evidence
- Communicate in a way that is appropriate for the person i.e. short sentences, if a person is only able to say yes or no ask the same question in a number of ways to check out the answer is the same each time

Please note: The person does not need to be able to remember general information such as their DOB, the name of the placement or the name of their assessor to make a decision unless this could be directly related to the decision and this should not be used as evidence of incapacity unless it is actually relevant i.e. the person is unable to remember their DOB and believes that they are in their 20's living with their parents would be relevant if this meant they were unable to understand that they are actually in the 80's and require a great deal of support but just not being able to remember the date would not be relevant on its own. The assessor needs to clearly link the information to the decision and explain why this is relevant and how it evidences that the person lacks capacity.

Care

LBX v K and others [2013] EWHC 3230 at [48]

Relevant information



- What areas they need support and how these would be met
- Who will provide the support
- What would happen without support or if support was refused, i.e., the risks to that individual if the care was not provided
- What carers may not always treat the person being cared for properly and that they can raise a complaint if they wish



Care



NOT Relevant

- How their care is funded (unless the reason the person is not willing to go into a care home is because they are unwilling to spend money. If this is the reason, but they can understand the consequences and risk and are still refusing a care home, this would be relevant)
- How overarching arrangements for monitoring and appointing care staff works

Residence

LBX v K, L, M [2013] EWHC 3230 (Fam) at [43]



Relevant information

- What the options for living are – type and nature of accommodation
- Broad information about the area – including any known specific risks (beyond those faced by people living in any given area)
- The difference between living somewhere and just visiting – the courts have approved the use of pictures e.g picture of bed meaning you stay overnight
- The activities the individual would be able to do in each place
- Whether and how they would be able to see family and friends
- Payment of rent and bills (if applicable)
- Rules of compliance and general obligations of a tenancy (if applicable)
- Who they would be living with in each place
- The sort of care they would receive in each placement
- If applicable, what impact it may have upon their relationships



NOT Relevant



- The cost of the placement (unless the person would be more willing to go into a care home if the care home was more reasonably priced (in their opinion) i.e. if they have always been thrifty and consider one care home to be more extortionately priced than another which is impacting on their decision)
- The value of money
- The legal nature of the tenancy agreement
- What their relationship with family would be like in 10 to 20 years' time should they choose to live independently now

Contact with others

LBX v K, L, M [2013] EWHC 3230

Relevant information ✓



- Who they are and in broad terms the nature of their relationship with the person the individual is going to have contact with
- What sort of contact could be had to include different locations, durations and arrangements – such as in the presence of a support worker
- The positive or negative aspects of having contact with each person. This will require a broad discussion which must be kept structured in the assessor’s mind. Evaluations must only be disregarded as irrelevant if they are based on “demonstrably false beliefs”. The discussion should include not only current experiences but also a discussion of past pleasant experiences with the contact, of which, in appropriate circumstances, the person under assessment should be reminded.
- What a family relationship is and that it is in a different category to other categories of contact. But the assessor must take care not to impose their own values in this assessment
- Whether the person with whom contact is being considered has previous criminal convictions or poses a risk to the protected party. If so, there must be a discussion of the potential risk that the person poses to the protected party, and if such a risk exists, whether the risk should be run. This may entail looking closely at the reasons for conviction and the protected party’s ability to understand the danger posed to themselves or others around them [PC and NC v City of York Council [2013] EWCA Civ 478 at para 13]

NOT Relevant X

- Abstract notions like the nature of friendship and the importance of family ties; these need to be specific to the person i.e. if the person has always been close to a family member this is relevant but for someone who has never had close contact this does not suddenly become important because they lack capacity
- The long-term possible effects of contact decisions
- Risks which do not directly relate to the issue of whether contact takes place ie financial abuse

**** If contact is to be restricted / stopped long term in relation to an individual who lacks the relevant mental capacity, an application must be made to Court of Protection as this is a potential infringement of their Article 8 Rights to private and family life and any restrictions or limitations must be approved by the Court as being in their best interests.***

Sexual relations



Local Authority v JB [2020] EWCA Civ 735

Relevant information



- Understanding the basic mechanics of the act
- Understanding that sexual relations can lead to pregnancy and/or infection and that these risks can be reduced by using appropriate precautions, such as using a condom
- Knowing that he / she has a choice and can refuse or consent to the act
- Understanding that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity

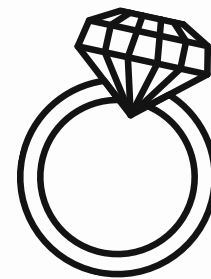
NOT Relevant



- Identity of potential partner (decision is act specific and not person specific)
- An understanding of what is involved in caring for a child
- The risk that may be caused to herself through pregnancy, or the risk to future children
- The ability to understand or evaluate the characteristics of some particular partner or intended partner

****No one including the court can consent to sexual relations on behalf of an incapacitated person (excluded decision s.27 MCA)***

Marriage



Local Authority v KA & MA & RN [2016] EWHC 661

Relevant information



- Understanding the nature of the marriage contract (it is the act of getting married which is the relevant decision and not the person concerned)
- Duties and responsibilities which usually attach to marriage, i.e., there may be financial consequences and that spouses have a particular status and connection with regards to each other
- The essence of marriage is for two people to live together and love one another.
- That marriage will make any existing will invalid

NB It has also been held by a judge that the person must not lack capacity to enter into sexual relations [LB Southwark v KA (Capacity to Marry) [2016] EWCOP 20 at para 76] although another judge has said that this rule is not an absolute rule [NB v MI [2021] EWHC 224 (Fam) at para 17]

NOT relevant



- Suitability of potential spouse (it is the act which is the decision and not the person)
- That in a family which facilitates arranged marriage the person is much more likely to find a spouse than if they were unaided;
- How financial remedy (i.e., divorce) law and procedure works and how the principles are applied.

***No one including the court can consent to marriage on behalf of an incapacitated person (excluded decision s.27 MCA)**

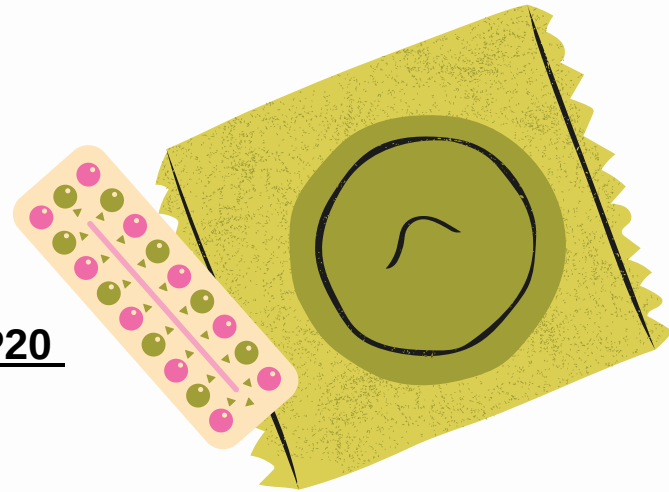
Contraception

The Hospital Trust v Miss V [2017] EWCOP20

Relevant information



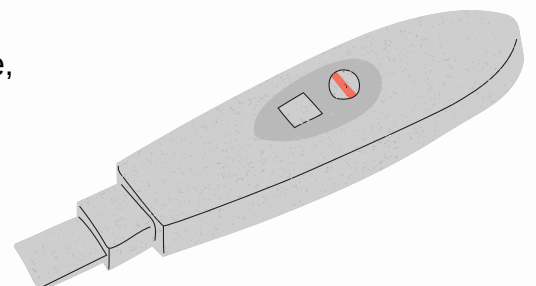
- A rudimentary understanding of the reproductive process. This would involve an understanding that pregnancy is a result of sexual intercourse and not other activity.
- The reason for contraception and what it does (including likelihood of pregnancy if not used during sexual intercourse)
- The types available and how each is used
- The advantages and disadvantages of each type
- Possible side effects of each and how they can be dealt with
- How easily each type can be changed
- Generally accepted effectiveness of each
- If medically necessary, the important medical information associated with a pregnancy, delivery or future pregnancy.... This is highly specific to the person involved but could include the risk of development of specific medical conditions or complications due to pregnancy or childbirth,



NOT Relevant



- No need to understand what bringing a child up is like
- Any opinion of the woman or other expert or authority as to how she would be likely to get on with child rearing
- Whether any child would be likely to be removed from her care,





Re A (capacity; Social Media and Internet Use: Best Interests) [2019] EW COP2

Relevant information:



- Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it
- It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location' settings on some internet and social media sites
- If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended
- Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are (they may disguise or lie about themselves); someone who calls themselves a friend on social media may not be friendly
- Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm
- If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime.

Not Relevant:



- Information that internet use may have a psychologically harmful impact on the user



Items and belongings



AC and GC (Capacity: Hoarding: Best Interests) [2022] EWCOP 39

Relevant information:



- Volume of belongings and impact on use of rooms; the relative volume of belongings in relation to the degree to which they impair the usual function of the important rooms in the property for you (and other residents in the property) (e.g. whether the bedroom is available for sleeping, the kitchen for the preparation of food etc.). Rooms used for storage (box rooms) would not be relevant, although may be relevant to issues of (3) and (4).
- Safe access and use; the extent to which you (and other residents in the property) are able or not to safely access and use the living areas.
- Creation of hazards; the extent to which the accumulated belongings create actual or potential hazards in terms of the health and safety of those resident in the property. This would include the impact of the accumulated belongings on the functioning, maintenance and safety of utilities (heating, lighting, water, washing, facilities for both residents and their clothing). In terms of direct hazards this would include key areas of hygiene (toilets, food storage and preparation), the potential for or actual vermin infestation and risk of fire to the extent that the accumulated possessions would provide fuel for an outbreak of fire, and that escape and rescue routes were inaccessible or hazardous through accumulated clutter.
- Safety of building; the extent to which accumulated clutter and inaccessibility could compromise the structural integrity and therefore safety of the building.
- Removal/disposal of hazardous levels of belongings; that safe and effective removal and/or disposal of hazardous levels of accumulated possessions is possible and desirable on the basis of a 'normal' evaluation of utility.



Assessing Mental Capacity

Do *these things...*



- Assume capacity
 - Take all practicable steps to support the person to make a decision
 - Remember people have the right to make unwise decisions and just because a decision is not one you would make yourself does not mean they do not have capacity
 - Ensure all decisions made on behalf of the person are in their best interests
-
- Ensure that the less restrictive option is taken that will meet the person's identified needs
 - Provide all relevant information i.e., the nature of the decision, the reason the decision is needed and the consequences one way or another of making a decision
 - Communicate in a way the person can understand
 - Record fully and clearly evidencing defensible decision making



Assessing Mental Capacity

Don't ...



- Fail to complete an MCA just because the outcome is that the person has capacity. If there was cause to question capacity an MCA must be completed
 - Forget that capacity is decision and time specific. Just because someone lacks capacity in one area doesn't mean they do in all area
 - Copy and paste the same information for each of the sections of the MCA
 - Fail to provide evidence that consideration has been given as to whether the person may regain capacity or if the decision could be delayed
-
- Forget to evidence that the information provided by P has been verified where there is cause to question it
 - Forget to evidence clearly the nature of the decision and relevant information given to P
 - Have conversations in public places
 - Use a failure to remember trivial pieces of information as evidence that person lacks capacity

Making a best interest decision

Do *these things...*

- Check if anyone holds the relevant decision-making status
 - Encourage participation by doing whatever is possible to improve the person's ability to make a decision
 - Identify all the things the person would take into account if they were making the decision
 - Find out the person's views including past & present wishes, feelings, beliefs and values
 - Consider whether the person is likely to regain capacity and if so whether the decision can wait
-
- Consult others who can provide information on the person's wishes and feelings and what is in their best interests
 - Weigh up all of the above in order to work out what is in the person's best interests
 - Remember that any use or threat of force, or restriction of a person's freedom of movement is considered a restraint
 - Ensure that any restraint is necessary to prevent harm and a proportionate response to the likelihood and seriousness of that harm



Making a best interest decision

Don't ...

- Forget relevant advance decisions
 - Forget to see evidence of Lasting Power of Attorney / Court Appointed Deputy status
 - Restrict the person's rights – always consider other options that may be less restrictive
 - Make assumptions and discriminate based on age, appearance, condition or behaviour
-
- Make the decision based on what you want to do if you were the person who lacked capacity
 - Make decisions in isolation without taking into account the persons, and other relevant others, points of view
 - Make assumptions about a person's quality of life
 - Forget that the person still has the right to keep their affairs private, so it would not always be right to share every piece of information with everyone

Mental Capacity Act 2005

Resource Suite...

Practice Tools and Guidance

Mental Capacity

Mental Capacity Guidance Note – Assessment and recording of capacity

The purpose of this document is to provide for social workers and those working in front-line clinical settings an overview of the law and principles relating to the assessment of capacity. Its focus is on (a) how to apply the MCA 2005 principles when assessing capacity; and (b) how to record your assessment, primarily in the context of health and welfare decisions



Capacity Guide

Guidance for clinicians and social care professionals on the assessment of capacity

Mental Capacity Act 2005

Decision Making, Care & Support and Treatment (2021)



This Practice Tool aims to support the practical application of the Mental Capacity Act 2005 across health and social care. It provides information about the legislative context alongside practice examples and tools that can be used by practitioners when working with people who may lack capacity.



What is the Mental Capacity Act 2005 (2017) – easy read

Working with People who Self-neglect



Working with People who Self-neglect – A Practice Tool (2020) - This resource aims to support adult social care practice with people who self-neglect through lack of self-care (for example, neglect of personal hygiene, nutrition, hydration and/or health) and/or lack of care of the domestic environment (for example, squalor or hoarding) where risks to health or wellbeing are extreme and there is reluctance to take action to mitigate those risks. The tool is supported by a webinar, which brings together research evidence and provides additional resources to support practitioners working in this area.



Working with People who hoard: Frontline Briefing (2017) **Mental Capacity Toolkit**

Mental Capacity Act 2005

Resource Suite...

Practice Tools and Guidance

Mental Capacity continued...



Mental Capacity Act 2005 Resource and Practice Toolkit

Resource to support practitioners to under the Act and practice confidently when supporting people to make decisions, assessing mental capacity and applying the Best Interests principle.



Mental Capacity Act 2005 - MCA Resource Directory

A useful resource for all Mental Capacity Act resources provided by Social Care Institute for Excellence.



Social Care Institute of Excellence (SCIE)

Information, guidance, and accredited training for care and health staff to support, protect and empower people who may lack capacity



Edge Training

Resources and guides and to support practice

**Mental
health
matters**

Mental Capacity Act 2005

Resource Suite...

Practice Tools and Guidance

Inherent Jurisdiction of the High Court - Practice Guidance 2020



This resource aims to help health and social care practitioners to understand and identify the circumstances in which it might be appropriate to seek orders under the inherent jurisdiction.

Supporting good court craft (2019)



This resource, and the tools contained within it, supports people working in adult social care to develop their skills and knowledge in relation to writing for, and appearing at, court.

Deprivation of Liberty / Liberty Protection Safeguards

Preparing for the Liberty Protection Safeguards; Practice Guidance (2021)



Deprivation of Liberty and 16-17 year olds; Practice Guidance (2020)



Deprivation of Liberty and 16-17 year olds; Practice Guidance (2020) - This Practice Guidance aims to support health and social care practitioners and managers who work with young people to identify the circumstances in which young people may be 'deprived of their liberty', and highlight the importance of taking action to ensure that any deprivation of liberty is authorised.

Mental Capacity Act 2005

Resource Suite...

Recorded Webinars

Exploring Complexity: Mental Capacity Assessment



Adult social care practitioners need to be comfortable with assessing mental capacity in a range of complex circumstances and in working with people where they are found to lack capacity to make their own decisions.

This webinar with Alex Ruck Keene explores how relevant legislation fits with national policy, including the strengths based perspective, and professional ethics. Complex practice examples to support delegates to develop their skills in mental capacity assessment will be explored.

Liberty Protection Safeguards; Preparing for Implementation ***



The webinar explores the background to the LPS and why the new framework has come about. The roles and responsibilities under the LPS system of people working in different roles across health and social care will also be explained, as well as the key changes the LPS bring about for social care practice.

Human Rights Principles in practice ***



Deprivation of Liberty and 16-17 year olds; Practice Guidance (2020) - This Practice Guidance aims to support health and social care practitioners and managers who work with young people to identify the circumstances in which young people may be 'deprived of their liberty', and highlight the importance of taking action to ensure that any deprivation of liberty is authorised.

Mental Health Law; Risks, Rights and Responsibilities ***



An overview of the outcomes of the independent review of the Mental Health Act, and the implications for Adult Social Care Practice

Supporting people with learning disabilities to have positive sexual relationships



This recorded Webinar focuses on the ways in which practitioners can work with people with learning disabilities to enable them to fulfill their wishes to have relationships.

Case Law and Legal Summaries

Updated on a monthly basis.

***** Please Note:** All webinars marked with an asterix require you to logon to your **Research in Practice** account.