

Understanding the Mental Capacity Act 2005 in practice





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Welcome!



Please be aware that this session will be recorded for sharing later.

We want people to participate but please use the 'raise hand' facility to ask questions and contribute when others are talking or pop the questions in the chat.

Please be considerate to others - together we want to create a safe, open and reflective space to learn.

You can turn on live captions on by clicking on the 3 dots at the top of your screen if you need this.

Please do take the time to provide us with some feedback towards the end of the session.

Thank you!



Objectives

- Learn about the Mental Capacity Act 2005 and be introduced to its application in practice when working with 16-17yr olds.
- Explore case studies where the Mental Capacity Act has been applied.
- Provide signposting to useful support, tools and resources
- The opportunity to discuss queries and share practice ideas.

What is the Mental Capacity Act?

The Mental Capacity Act provides a legal framework to promote and safeguard decision making. This is done by supporting people to make decisions for themselves (whenever this is an option) and by offering a flexible framework to protect people who lack capacity. The Mental Capacity Act places the person at the centre of the decision making process.

Social Care Institute for Excellence, 2016

The Mental Capacity Act 2005 is applicable from the age of 16yrs. So 16 and 17yr olds have the same rights under this act as adults.

“It is important to remember that decision making is a skill and if a young person has not been taught that skill and has not had an opportunity to practice it they may appear to not have capacity when in reality they needed support to go through the decision making process”.

MCA - Five Statutory Principles

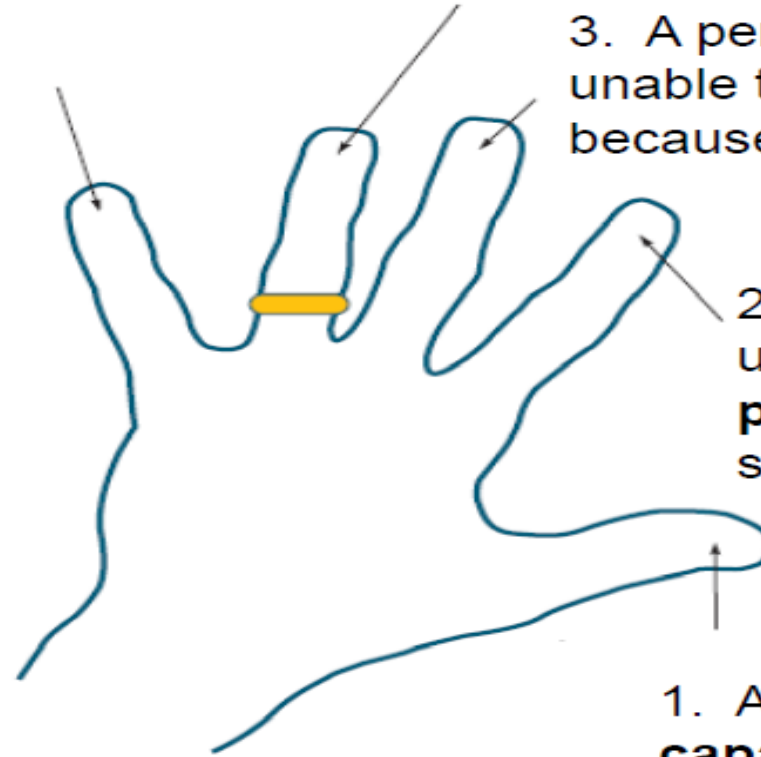
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is **less restrictive** of the persons rights and freedom of action.

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**.

3. A person is not to be treated as unable to make a decision merely because he makes an **unwise decision**.

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.

1. A person must be **assumed to have capacity** unless it is established that they lack capacity.



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2 stage assessment process

Stage 1:

If, because of an impairment of, or a disturbance in the functioning of, the mind or brain... (S2 1)

Stage 2:

- And (on the balance of probability) the person cannot:
 - (a) understand the information relevant to the decision,
 - (b) retain that information,
 - (c) use or weigh that information as part of the process of making the decision, or
 - (d) communicate their decision (s3)
- They lack capacity to make the decision.

What does 'Lack Capacity' mean?

Whenever the term 'a person who lacks capacity' is used, it means:

a person who lacks capacity to make a *particular decision or take a particular action* for themselves *at the time the decision or action needs to be taken*.

- This reflects the fact that people may lack capacity to make some decisions for themselves, but will have capacity to make other decisions. For example, they may have capacity to make small decisions about everyday issues such as what to wear or what to eat, but lack capacity to make more complex decisions about financial matters.
- It also reflects the fact that capacity can change over time

MCA 2005 Code of Practice 2007

Case Study 1

- Young person (age 17) living in a foster placement
- Whilst under 18 the foster carer was their appointee with the DWP to manage the young person's finances.
- PFAL were an completing assessment of care and support needs post 18
- Young person wished to move to an enablement placement post 18
- As there was no longer a plan to live with foster carer, they were no longer able to support with management of finances.
- The young person has a learning disability and appeared to struggle to understand their finances. Therefore, a Mental Capacity Assessment was completed around the young person's ability to manage their own finances.

Best Interest Decision

- When a person is assessed to lack capacity around a certain decision, the decision must then be made on behalf of the person. As per Principle 4 this decision **MUST** be in the Best Interests of the person. It is often called a Best Interests Decision.
- There is no definition of the term 'best interests' in the Act or the Code of Practice.
- What is in the Best Interests of the person will be a matter of Professional Judgement, taking into account the MCA Code of Practice. There is clear guidance about how to make a decision on behalf of someone who lacks capacity in the Code of Practice and this should be followed.
- There should be multi agency input into the decision and if necessary a joint decision made between different professionals. Best Interests Decisions and the factors considered in making them should be clearly recorded on the persons file.

Who makes a Best Interest Decision?

The person who makes the decision is called the Decision Maker

It is the Decision Maker's responsibility to work out what would be in the Best Interests of the person who lacks capacity.

Who the Decision Maker is will depend upon the decision that is to be made.

For example:

A decision about health care treatment should be made by the appropriate healthcare professional

A decision around social care should be made by a social care professional

Excluded Decisions

Under the MCA there are some decisions that are excluded – these decisions **cannot** be made on behalf of someone who lacks capacity.

Those likely to be relevant to Young People under 18yrs:

- consenting to have **sexual relations**
- consenting to a child being placed for **adoption** or the making of an adoption order
- **discharging parental responsibility for a child** in matters not relating to the child's property

Other excluded decisions more likely to be relevant to those over 18yrs:

- consenting to **marriage** or a **civil partnership**
- consenting to a decree of **divorce** on the basis of two years' separation
- consenting to the **dissolution of a civil partnership**
- giving **consent under the Human Fertilisation and Embryology Act 1990** (S27^)
- **Voting** (S29)
- **Unlawful killing or assisted suicide** (S62)

Case Study 2

- Young person lived in a foster placement and a Care Order was in place
- However, from 18 the Care Order restrictions around contact with family would no longer be applicable.
- The young person and their birth family were keen to increase contact.
- The young person had a significant learning disability which impacted their ability to communicate and understand information.
- An MCA was completed around their capacity to make decisions about their contact with their birth family.
- The MCA concluded that the young person lacked capacity around this decision but they were able to express that they did want to regularly see their parents.
- A Best Interest decision was made around family contact and a contact plan put in place.
- Please note here the importance of Article 8 of the Human Rights Act- the right to respect for private and family life.

Parental Responsibility

Under the MCA, Young people aged 16 or 17 are presumed, like adults, to have the capacity to consent to care and treatment. This includes the ability to make unwise decisions and we have a legal duty to protect their right to autonomy.

However, unlike adults (over 18yrs), their decisions can, in some circumstances, be overridden by a parent, someone with parental responsibility or a court. This is because parents/carers and professionals have an overriding duty to safeguard the young person and act in the young persons Best Interests.

This would include circumstances such as:

- Refusing medical treatment where refusal would likely lead to death, severe permanent injury or irreversible mental or physical harm.
- Young people who repeatedly make unwise decisions that put them at serious risk of harm or exploitation.

Everyone who works with children continues to have a responsibility to keep them safe and take prompt action if safeguarding concerns are identified.

If there are reasons to believe a young person aged 16 or over lacks capacity to make a specific decision, an assessment of their capacity must be completed under the Mental Capacity Act 2005.

Section 20 Accommodation

When discussing a plan of S20 with a parent (or other person with PR) you must consider:

- Their capacity to understand what you are discussing
- That they know they are able to seek legal advice about the proposed S20 arrangement before giving their view.
- That they know if a S20 arrangement begins, they can withdraw their child from that arrangement at any time and without notice. If the young person is 16 or 17 years old, they can leave the accommodation without parental consent.

Accommodation under S20 CANNOT be provided if anybody with PR objects.

NCC S20 Agreement Form

Further Information

- *Mental Capacity Act 2005 Code of Practice (2007)* TSO: London
- *Mental Capacity Act 2005 At A Glance* Social Care Institute for Excellence (SCIE) (2016)
- *Preparing for Adulthood Factsheet: The MCA 2005 and Supported Decision Making* Council for Disabled Children
- SEND Code of Practice: 0 to 25yrs
- Norfolk Children's Services Participation Strategy
- Norfolk SEND Participation Strategy

Further training

- MCA training NCC Children Services - [Mental Capacity Act - Level 1 for Children's Services](#)
- S20, Family Arrangements and Parental Responsibility
- PFAL drop in first Tuesday of every month 9am – 9.30 (contact Sasha Gilbert for TEAMS link)

Q and A

- Any questions?



Norfolk Multi-agency Practice Week



Feedback can be provided through the QR code on the left or through this link which will be shared in the chat:

<https://forms.office.com/e/EM5kEwrFLU>

