

BCSSP 7 Minute Briefing: The Mental Capacity Act



01. What is the Mental Capacity Act?

The Mental Capacity Act 2005 is an Act of the Parliament of the United Kingdom applying to England and Wales.

Its primary purpose is to provide a legal framework for acting and making decisions on behalf of adults who lack the capacity to make particular decisions for themselves and applies to people aged 16 and over.

02. What is Mental Capacity?

Mental capacity is the ability to make your own decisions at any given time or situation. A lack of mental capacity could be due to permanent or temporary reasons, eg:

- *dementia*
- *a severe learning disability*
- *a brain injury*
- *a mental health illness*
- *a stroke*
- *unconsciousness caused by an anaesthetic or sudden accident*

But just because a person has one of these health conditions doesn't necessarily mean they lack the capacity to make a specific decision.

03. The Mental Capacity Act:

The MCA sets out a statutory test of capacity:

- 1. The functional assessment** – can the person understand, retain, use and weigh up the relevant information to make their own decision and can they communicate their decision in any way?
- 2. The diagnostic test** - if they can't make their own decision, is there an impairment or disturbance in the functioning of the person's mind or brain?
- 3. The causative nexus** – is there a *direct* link between the person's inability to make the decision and their impairment or disturbance in their mind or brain?

In all cases remember capacity is decision and time specific.

04. Principles of the MCA:

Section 1 of the MCA sets out 5 key principles which should underpin *all* actions taken under the MCA,

- 1. Assume capacity** – always assume capacity unless it is established otherwise
- 2. Practicable steps** - A person is not to be treated as unable to make a decision unless all practicable steps have been taken without success.
- 3. Unwise decisions** – do not assume incapacity merely because a person makes an unwise decision.
- 4. Best interests** - An act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- 5. Least restrictive** – aim to make the least restrictive decision possible in a way that is less restrictive of the person's rights and freedom of action.

06. Steps continued:

Failing one of the steps (point 5) means a lack of capacity to make that particular decision at that time as long as

this is directly linked to an impairment or disturbance in the functioning of the person's mind or brain.

A best interest decision should now be made unless there are substituted decision making arrangements in place such as a Lasting Power of Attorney, Court appointed deputy or a valid and applicable advanced decision.

05. Steps:

Can the person:

- 1. Understand the decision that needs to be made?**
- 2. Retain the information long enough to make the decision?**
- 3. Use/weigh up the information?**
- 4. Communicate their decision the way they would usually communicate?**

07. Deprivation of Liberty:

In certain cases, the restrictions placed upon a person who lacks capacity may amount to "deprivation of liberty" This must be judged on a case-by-case basis.

Where it appears a deprivation of liberty might be, or is occurring, a legal framework is required to authorise this and ensure that such arrangements are necessary, proportionate and in the person's best interests. This is covered by the Deprivation of Liberty Safeguards in care homes and hospitals or an application to the Court of Protection for cases in the community.

The Court of Protection oversees the operation of the Mental Capacity Act.