



This document should be read in conjunction with the College's briefing note on the Mental Capacity Act 2005.

Frequently Asked Questions

What is Mental Capacity?

We often hear people referring to 'a person who lacks capacity'. In itself, this is legally meaningless as a person must lack capacity to make a particular decision or take a particular action for themselves. People may lack capacity to make some decisions for themselves, but simultaneously retaining capacity to make other decisions. People may lack capacity for a decision now, but they may have capacity later.

If someone is ill, injured or intoxicated, can that also affect their Mental Capacity?

Yes – this may be because they have an illness or condition that means their capacity fluctuates. It may also arise because at the time the decision needs to be made, they are unconscious or barely conscious whether due to an injury or being under anaesthetic. People who are incapable of standing because of alcohol consumption will lack capacity for a range of important decisions, unable to process the relevant information.

What if someone is making an unwise decision?

The law presumes everyone over the age of 16 has capacity to take any decision they wish, unless an assessment of capacity suggests otherwise. It reminds us that a person should not be deemed to lack capacity purely by virtue of making unwise choices. There may be concern if somebody repeatedly puts themselves at significant risk of harm or exploitation, they make decisions that are obviously irrational or out of character. These things do not automatically indicate a lack of capacity but there might be need for further investigation.

When can I use the Mental Capacity Act?

In circumstances of non-imminent threat, decisions about the use of the MCA are for healthcare professionals. Police Officers can only restraint someone or deprive them of their liberty if the person has an impairment or disturbance of the mind or brain (temporary or permanent) which prevents them from being able to Communicate, Understand, Retain, Employ – ID a CURE. A formal assessment of this is not required, unlike Mental Health Act assessment and if an officer must make a decision, they may do so. Intervention should be restricted to those circumstances where you absolutely *must* intervene in order to preserve life, prevent serious injury or prevent someone's health seriously deteriorating. This is a very high threshold.

Is this a solution to incidents where police respond to Mental Health Crisis in a private address?

No – although the MCA can be used in a private address. The statutory response to mental health crisis in a private address is a Mental Health Act assessment. The police have no powers in a private dwelling to coercively manage such situations unless there is criminal offending, Breach of the Peace (beware of case of *Hicks v MPS Commissioner, 2014*), or where the circumstances described on the previous point are apparent. (*Sessay v SLAM & MPS Commissioner, 2010*.)

Who decides whether the patient has capacity?

The person who assesses an individual's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made. It is up to the professional responsible for the person's treatment to make sure that capacity has been assessed. (4.38, 4.40 *Mental Capacity Act Codes of Practice*). Therefore, if a paramedic or doctor are on scene, they are responsible over any police officer.

Once I've detained someone under the Mental Capacity Act, what should I do next?

If an ambulance has not yet been called or on scene, call for one. The ambulance should then convey to an Emergency Department. Remember the reason for detaining under the MCA – for life saving treatment, so it is not suitable to convey to a Place of Safety at a mental health facility.

Does the Mental Capacity Act allow me to use force, restraint or to detain someone?

Section 6 of the Act covers the issue of restraint; Section 4B covers an 'urgent deprivation of liberty' (DoL). If restraint is being considered, it has to be necessary to prevent harm to the person who lacks capacity, and a proportionate response to the likelihood of the person suffering harm and to the seriousness of that harm. If an urgent DoL is determined to be the least restrictive option, it must relate to the need for a "life sustaining intervention" or to "prevent a serious deterioration" in someone's condition. Assuming these criteria are satisfied, section 5 of the Act will ensure legal protection to officers for their actions. Taking someone to hospital for assessment/treatment and/or providing care in an emergency are just two examples provided under the codes (6.5 MCA Codes of Practice).

What happens in a scenario where someone is threatening their own life at their home, with a knife held to their throat and police officers present alone determine in the brief time available to assessment the circumstances that they lack Mental Capacity?

Anybody considering restraint must show that a person lacks capacity for the decisions they are taking. If restraint is necessary to prevent harm to the person, it must be the minimum amount required, ***for the shortest time possible***. If the knife were removed and there was no injury to the person, restraint should be stopped altogether. If whilst waiting for other professionals' statutory response to mental health crisis in a private address, the patient re-attempts to harm themselves, minimum force for the shortest time possible could be applied. If under the similar circumstances, life-saving treatment were required, police may need to restrain and urgently deprive someone of liberty *en route* to an Emergency Department. (Para 6.44, 6.47 MCA Code of Practice.)

Does the Ambulance Service have any additional powers that Police don't, under the Mental Capacity Act?

No – the Act is not specific to any group of people or professionals and anyone may act in accordance with it.

Practical Example One

Police officers attend a domestic address in response to a 999 call from a man who states his girlfriend has mental health problems and is self-harming with a knife. Upon arrival the woman is located in the kitchen and in possession of a large, serrated bread knife. She has been drinking alcohol but is not drunk, she has superficial cuts marks to her arms, wrists and neck and the caller informs officers has a history of bipolar disorder, including attempts to take her own life and she has been depressed for days, having taken a quantity of drugs in the lead up to the 999 call.

Officers spend 10-15 minutes talking to the woman and attempting to de-escalate the situation, build a rapport and encourage her to put the knife down. That progresses well enough, but officers form the view that she is very unwell and they are worried about whether she has overdosed. Paramedics arrive but remain outside the address until the scene is safe and despite all indications that things are slowly leading to a safe, non-coercive resolution, the woman suddenly starts attempting to cut at her own neck using the knife and it's quickly apparent she is inflicting very serious damage to her own throat.

Application of the MCA – this serious situation which could easily become life-threatening, if it isn't already. Officers are aware she suffers from an impairment or disturbance (bipolar disorder) and there is doubt about whether she understands the implications of her actions and she lacks capacity to take the decision to end her life.

Restraint will be justified to stop her from using the knife on her neck and inflicting a potentially fatal injury –evaluation of her injuries by paramedics will determine whether it may also be justifiable to remove her to Accident & Emergency for urgent treatment.

Practical Example Two

Officers attend a 999 call to a report of a burglary in progress – a man is in rear gardens and appears to be attempting to force entry to a rear window. Upon officers' arrival, the man runs across gardens and over fences, climbing onto the roof of a single story extension to an adjacent property. He continues attempt to flee and falls from the roof, disappearing from view. When officers get to him, they find he is extremely intoxicated and has suffered a head injury in the fall. Checks confirm there is no sign of entry or attempted entry to any of the properties in that street.

An ambulance is called to the scene and the man is escorted from the private gardens to the public street. He is verbally aggressive, abusing the officers and when paramedics make a visual examination of his injury, the express concerns that it could well be as serious as a fractured skull. The man resists attempts to assess him, shouting at the paramedics and officers to let him go and he doesn't appear able to comprehend attempts to explain to him that he could be seriously injured. One paramedic states that unless he receives treatment for his injury, his condition is likely to seriously deteriorate.

Application of the MCA – this man has an impairment of his cognitive functions because of the considerable quantity of alcohol he has consumed and also because of his potentially significant head injury. Paramedics are trying to explain the importance of assessment and treatment that, his condition may seriously deteriorate without medical care. He is unable to understand this information or evaluate it, because of the alcohol and injury.

Depriving this man of his liberty is the only available way to ensure effective care and treatment for a serious head injury otherwise his condition will seriously deteriorate.

Practical Example Three

The police are contacted by a mental health crisis team – they have concerns about a patient who has contacted them. They do not attend domestic address overnight and have asked the police to undertake a welfare check. Their patient lives alone with her 4yr old daughter, suffers from depression and she has is believed to have self-harmed this evening. Upon arrival, officers find an adult woman who has consumed alcohol but is not drunk and who has superficial cuts to her arms. She appears to be incoherent in her communication, mumbling about Jesus Christ and her daughter is crying. There appears to be little or no food in a cold house and she is sitting in an armchair talking to herself.

Officers believe that she is very unwell and they take the view that if they had encountered her in a street they would have justified using s136 of the Mental Health Act. They take the young girl into emergency police protection under the Children Act and remove her from the premises and into the care of Social Services. They know that the patient is suffering from a mental disorder and is in need of assessment, potentially of admission to a mental health unit, they believe she lacks capacity to refuse psychiatric treatment that the Crisis Team had indicated may be necessary.

Application of the MCA – there is no ability to rely upon the MCA in these circumstances. Notwithstanding the impairment or disturbance because of a mental disorder, and regardless of any difficulties this lady may have in communicating, understanding, retaining or employing / evaluating information, this is a situation that should be dealt with under the Mental Health Act. She is sitting in a chair mumbling to herself and not at imminent, literally life-threatening risk.

If there are no other, less restrictive options by which to safeguard this patient (street triage / Crisis Team), then an AMHP should be contacted to consider undertaking a Mental Health Act Assessment with a Doctor. The MHA provides a framework by which to safeguard her, if required. This approach is what the judge in the 'Sessay' case outlined.

Key Messages

- Most capacity assessments under the Mental Capacity Act are for health and / or social care professionals.
- Officers may act in **urgent circumstances** to provide life-sustaining care or prevent a serious deterioration in someone's condition – a very high threshold.
- Ensure subsequently involved NHS staff are aware the MCA was relied upon.
- **An unwise decision will not necessarily mean someone lacks capacity.**