



The Mental Capacity Act 2005

This briefing note covers considerations for police officers in the application of the Mental Capacity Act 2005 (MCA) during health or wellbeing related incidents. (Wilful neglect of someone who lacks capacity under s44 MCA will be covered separately.)

There is an overview of the legislation and practical examples for its application.

Part I of the Act offers the framework by which to determine and defend actions taken on behalf of people who may lack capacity, whether through illness, injury or other kinds of vulnerability, including temporary or permanent impairments from intoxication. As a general rule, actions taken on behalf of vulnerable people are for determination by healthcare professionals, where available. Officers should seek support from health professionals wherever possible in the support of people who they believe lack capacity.

Where officers must act without waiting for NHS support, the Act provides a framework to approach and to justify actions which interfere with a person's liberty if they lack capacity.

Applying the MCA

In practice, police officers should only find themselves having to consider the MCA in urgent situations of potentially significant risk. The engagement of paramedics, mental health professionals or out-of-hours GPs will be more appropriate than police decisions, wherever possible.

Even if officers accept a health professional's assessment of a lack of capacity, it is still their responsibility to understand whether *their* actions are in accordance with the act, especially if 'restraint' or a 'deprivation of liberty' are considered. Police officers need to understand the principles of the Act and how legal assessment of capacity is approached.

Five Principles of the MCA (s1)

- 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 / her to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because he / she makes an unwise decision.
- 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 / her 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.

Assessing Capacity (s3)

- A person is unable to make a decision for themselves if he is unable –
 - to understand relevant information
 - to retain that information
 - to use or weigh that information
 - to communicate his decision
- A person is not to be regarded as unable to understand if the information can be presented in a way that allows understanding (visual aids.)
- The fact that someone may retain information for a short period only does not prevent being regarded as able to make a decision
- Information relevant to a decision is information about reasonably foreseeable consequences of deciding one way or another or failing to make the decision.

Practical Guide to Assessing Capacity

This mnemonic summarises the factors officers must be satisfied of, before they can consider acting in someone's best interests.

The **ID a CURE** framework –

- **Impairment** OR
- **Disturbance** of the mind or brain.
And can the person –
- **Communicate** their decision OR
- **Understand** the information OR
- **Retain** the information OR
- **Employ** or **Evaluate** the information?

The Least Restrictive Principle (s4)

Where an officer decides to intervene in someone's best interests, whether or not because of a request by a health professional, the intervention must be done in the least restrictive way. E.g., where a person has taken an overdose from which they may die if untreated, there is no other route to effective care than enforced removal to A&E.

If a patient lacked capacity because of alcohol consumption and had declined treatment for a minor injury where there was a possible but unlikely risk of infection, it is not life-threatening and removal to A&E would not be justifiable. This is especially true if they were in the care of friends or family who could keep an eye on them and encourage to seek treatment once sober.

In Defence of Actions (s5)

Actions taken will be justifiable under the Act if –

- A person acts in connection with the treatment of care of someone who lacks capacity if –
- Before doing the act, they take reasonable steps to establish whether the person lacks capacity in relation to the matter in question;
- Whilst acting, they reasonably believe that the person lacks capacity AND that it will be in their best interests for the act to be done.

It does not matter whether the individual did, in fact, have capacity at that material time – it is sufficient that someone did reasonably believe them to lack capacity.

Restraint (s6)

If the action proposed in someone's best interests involves restraint, two further conditions must be satisfied –

- The person acting must reasonably believe that this action is necessary in order to prevent harm to the person lacking capacity.
- The action taken must be proportionate to that likelihood and seriousness of that harm.
- 'Restraint' occur if someone uses, or threatens to use force to secure the doing of the Act which the person resists; OR
- Restricts the person's liberty of movement, whether or not P resists.

Urgent Deprivation of Liberty (s4B)

Nothing outlined so in this summary guidance should be taken to suggest *anything* that would justify a person being deprived of their liberty.

The so-called '**acid test**' to determine whether something amounts to a deprivation of liberty is whether the person is –

"Under constant supervision, control and unable to leave." (LJ HALE – *Cheshire West*, 2014)

Someone may only be deprived of their liberty in urgent circumstances under the MCA if –

- It is necessary to provide a life sustaining intervention; OR
- It is a vital act to prevent a serious deterioration in their condition.

The Sessay and ZH cases

These two cases encapsulate difficulties officers can get into, by not understanding the MCA and its specific frameworks on restraint and deprivation of liberty –

Sessay (2010) – in this case officers sought to justify removing a woman from her own home to a 'place of safety', as if they had used section 136 MHA. The court ruled that the Mental Capacity Act provided no basis for this action, because it did not involve a set of circumstances that were life-threatening. They should have contacted an AMHP and a DR to assess under the MHA

– <http://tinyurl.com/c9ho26q>

ZH (2013) – a severely autistic teenage boy become fixated with water at the swimming pool and was staring at it. Officers sought to restrain him and after he jumped in, when they pulled him from the pool they deprived him (briefly) of his liberty. The court ruled this was a human rights violation

– <http://tinyurl.com/pgqj4xc>



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Further Information

The Mental Health Coordinator at the College of Policing is –

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