

The Mental Capacity Act

Why should I use it? What difference does it make?

1. I want to deliver excellent care



The state of health care and adult social care in England 2017/18

In its last annual *State of Care* report summarising all inspections across health and social care services, the CQC stated: ‘**Good practice in applying the Deprivation of Liberty Safeguards (DoLS) and the Mental Capacity Act (MCA) closely aligns with putting the person at the centre of care and focusing on human rights.**’ and ‘**Services that use overly restrictive practices often do so because they lack understanding of the MCA and DoLS legislation.**’ (www.cqc.org.uk)

2. I want to safeguard adults effectively

Learning from SARS: A report for the London Safeguarding Adults Board

July 2017: An analysis of 27 safeguarding adult reviews from 17 different safeguarding boards across London. The majority of reviews were statutory (Section 44) which meant the person died or suffered serious abuse or neglect. One of the key findings was:

‘**Twenty one of the 27 reports commented on mental capacity, which represents therefore the most frequently represented learning about direct practice...much, of the learning in the SARs is about missing or poorly performed capacity assessment, insufficient scepticism and respectful challenge of decision-making and possible consequences, and in some cases about an absence of best interests decision-making.**’ (www.londonadass.org.uk/learning-from-sars-report)

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March 2019: **Ombudsman case of Peterborough City Council (17015817)**
‘**The safeguarding process, while it can be used to mitigate risk to a vulnerable adult, does not remove the Council’s (or other professionals’) need to act in accordance with the MCA.**’ and ‘**In this case neither a decision-specific mental capacity assessment nor a Best Interests meeting happened before the AAR meetings [after action review].**’

The Ombudsman found fault leading to injustice in restricting contact between a married couple by not using the MCA.

3. I want to save lives

Confidential Inquiry into premature deaths of people with learning disabilities (CIPOLD)

www.bristol.ac.uk/cipold/reports

The deaths of 247 people with learning disabilities were reviewed and 43% were found to be premature or unexpected. One of the key finding was:
‘**..professionals in both health and social care commonly showed a lack of adherence to and understanding of the Mental Capacity Act 2005, in particular regarding assessments of capacity, the processes of making “best interests decisions..**’

See also: The Learning Disability Mortality Review (LeDeR) Programme *Annual Report* (2019):www.bristol.ac.uk/sps/leder

4. I want to protect Human Rights



Human Rights Act 1998

High Court - Mrs Justice O’Farrell:

‘**The MCA was introduced to create the legislative framework so that the fundamental rights, including Article 2 rights, of persons who lack capacity, could be protected. The principles in section 1 of the MCA are intended to ensure that the rights of vulnerable persons are protected.**’

Case of: NHS Trust v Mr and Mrs Y [2017] EWHC 2866 (QB) Download from: www.bailii.org

5. I want to act legally (and have a defence in court)



Court of Appeal - Master of the Rolls, Lord Dyson:

‘**As I have said, the Mental Capacity Act does not impose impossible demands on those who do acts in connection with the care or treatment of others. It requires no more than what is reasonable, practicable and appropriate.**’

A case concerning failure of police officers to use the MCA when dealing with a man with autism in a public swimming pool. The judge found the officers liable (responsible) for assault, battery and false imprisonment because of the way the young man was restrained and deprived of his liberty.

Case of: ZH v Commissioner of Police for the Metropolis [2013] EWCA Civ 69 Download from: www.bailii.org

6. I want to ensure the legal rights of my clients are respected

The Act is full of rights for individuals but only by following and applying the Act can staff respect those rights. In relation to assessing mental capacity the following rights apply:

- a) Just because a person has dementia, learning disability or mental health problems you cannot say they lack the mental capacity to make decisions (*Section 1(2) the **assumption of capacity***)
- b) You have to help the person when you assess capacity (*Section 1(3) **duty to take practicable steps***)
- c) Just because the person makes what others think are unwise decisions, you cannot say they lack mental capacity (*Section 1(4) **unwise decisions***)
- d) You have to provide information in simple and basic terms and/or in a way appropriate for the person (*Section 3(2) **understand relevant information***)
- e) *The person only has to remember the information long enough to make a decision (Section 3(1)(b) **retain information**)*
- f) *The person can communicate their decision in any way that can be recognised (Section 3(1)(d) **communicate**)*
- g) You cannot say a person lacks mental capacity based solely on their age, appearance, behaviour or condition (*Sections 2(3)(a) & (b)*)
- h) *You cannot generalise and say a person lacks mental capacity to make all decisions (Section 2(1) **decision specific**)*
- i) *You cannot say a person who lacks mental capacity now will necessarily lack it forever (Section 2(1) **time specific**)*

7. I don't want to get in trouble with the Ombudsman (and I want to save the council money)

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Complaint against Liverpool City Council (Ref: 18 002 803) December 2018

*'The Council accepted it should have carried out an assessment of Mr X's capacity to make decisions about his care and support needs sooner. It has agreed to do this. In acknowledgement of this fault, the Council agreed to **cancel the accrued care costs of £25,000.**'*

Case concerning the failure of local authority staff to assess the mental capacity of a man with a brain injury who repeatedly stated he wanted to move out of a supported living placement and live independently.

See also: Ombudsman report *The Right to Decide: Towards a greater understanding of mental capacity and deprivation of liberty* (July 2017). Approximately **20% of all complaints to the Ombudsman** involve mental capacity or DoLS. 69% of these cases were upheld (fault found) which is much higher than the rate for other types of complaints.

8. I want to meet NICE standards

NICE

National Institute for
Health and Care Excellence

[www.nice.org.uk/
guidance/ng108](http://www.nice.org.uk/guidance/ng108)

Nice Guideline: Decision Making and Mental Capacity October 2018

*'The Care Quality Commission (CQC) estimates that around **2 million people** in England and Wales may lack the capacity to make certain decisions for themselves at some point because of illness, injury or disability. The Mental Capacity Act 2005 was designed to **empower and protect** individuals in these circumstances. However, the **CQC identified serious issues** with the practical implementation of the Act.'*

*'All assessments of mental capacity **must be recorded** at an appropriate level to the complexity of the specific decision being made at a particular time.'*

9. I want to meet my professional standards of practice

Nursing & Midwifery Council: The Code: Professional standards of practice and behaviour for nurses and midwives

*'4.2 make sure that you get **properly informed consent** and document it before carrying out any action'*

*'4.3 keep to all relevant **laws about mental capacity that apply** in the country in which you are practising'*

General Medical Council: Good medical practice

*17. 'You must be satisfied that you have **consent or other valid authority** before you carry out any examination or investigation, provide treatment or involve patients or volunteers in teaching or research.'*

Social Work England: Professional standards

*3.1 'Work within **legal and ethical frameworks**, using my professional authority and judgement appropriately.'*

Health & Care Professionals Council: Standards of conduct, performance and ethics

*1.4 'You must make sure that you have **consent from service users or other appropriate authority** before you provide care, treatment or other services.'*

Note: in the absence of consent (health or social care) '*other valid authority*' or '*other appropriate authority*' referred to above will, in the vast majority of cases, mean use of the MCA.