

# Mental capacity

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Written by College of Policing

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## Definition of mental capacity

Under the [\*\*Mental Capacity Act 2005 \(MCA\)\*\*](#), a person (aged 16 or older) lacks capacity in relation to a matter if, at the material time, they are unable to make a decision for themselves in relation to the matter because of an impairment or disturbance in the functioning of the mind or brain. It does not matter whether the impairment or disturbance is permanent or temporary.

A lack of capacity cannot be established merely by reference to ([\*\*Section 2 of the MCA\*\*](#)):

- a person's age or appearance
- a condition or an aspect of their behaviour, which might lead others to make unjustified assumptions about their capacity

Any question about whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

## Principles

The following five principles should govern police responses when applying the MCA ([\*\*Section 1 of the MCA\*\*](#)).

1. Officers must assume that a person has capacity unless it is established that they lack capacity.
2. Officers should not treat a person as unable to make a decision unless they have taken all practicable steps to help the person to do so without success.
3. Officers should not treat a person as unable to make a decision merely because they make an unwise decision.
4. Officers should act or make decisions under this Act for or on behalf of a person who lacks capacity in that person's best interests.

5. Before acting or making the decision, officers must have regard to whether they can achieve the purpose for which it is needed as effectively in a way that is less restrictive of the person's rights and freedom of action.

## Purpose of the Mental Capacity Act 2005

The MCA provides a statutory framework for people who lack capacity to make specific decisions for themselves, or who have capacity and want to make preparations for a time when they may lack capacity in the future.

Examples of an impairment or disturbance in the functioning of the mind or brain may include conditions associated with some forms of mental ill health, significant learning disabilities, dementia, brain damage, physical or mental conditions that cause confusion, drowsiness or lack of consciousness, delirium, concussion following a head injury or the symptoms of drug and alcohol abuse.

The impairment or disturbance does not have to be permanent. It also covers temporary incapacity due to drug or alcohol abuse and mental ill health.

Some people will experience fluctuating capacity. A person can lack capacity to make a decision at the time it needs to be made, even if the loss of capacity is partial, the loss of capacity is temporary or their capacity changes over time.

The MCA sets out who can take decisions, and in which situations, and how they should go about this. This legal framework is supported by two codes of practice:

- Mental Capacity Act Code of Practice
- Code of Practice for the Deprivation of Liberty Safeguards

These codes provide guidance on how the law should work in practice and they have statutory force.

## Police role applying the Mental Capacity Act 2005

The MCA gives a legal basis for providing care and treatment for people aged 16 years and over who lack the mental capacity to give their consent to such care and treatment.

Police officers may need to make immediate decisions that relate to containing, controlling and potentially restraining an individual who lacks the capacity to make the decision in question for themselves, while awaiting further input or direction from a health or social care professional.

The MCA protects decision makers where they take reasonable steps to assess someone's capacity and then act in the reasonable belief that the person lacks capacity, and that such action is in their best interests.

## When is police intervention appropriate?

The MCA is most likely to be necessary in emergency situations when officers are faced with someone lacking mental capacity, whose life may be at risk or who may suffer harm if action is not taken. For example:

- people attempting and threatening suicide
- victims of serious assaults
- casualties of major incidents
- individuals with serious injuries who decline medical aid

In non-emergency situations (such as a pre-planned mental health assessment) other powers and tactical approaches may be more appropriate. If there is a chance that the subject may regain capacity to make a particular decision, and the matter is not urgent, then the decision should be delayed until later.

In emergency circumstances (such as those that are life-threatening) police intervention will be justified when it is the least restrictive option in the best interests of someone who lacks capacity.

**Section 4B, s 5, and s 6** of the MCA are legal instruments that allow police forces to defend their officers' actions.

The **MCA Code of Practice** provides that:

*In emergencies, it will almost always be in the person's best interests to give urgent treatment without delay.*

**The MCA Code of Practice, paragraph 6.35**

## How will this work in practice?

When faced with a situation where death or serious harm may occur to someone who refuses treatment or help, officers may not have time to discuss, negotiate or explain their actions.

In situations where health or social care professionals are on the scene, police should defer to their expertise and provide support as appropriate and in accordance with local protocols

The MCA does not specifically apply to any agency or individual, and the MCA Code of Practice chapter 6 outlines where the police, other agencies and individuals may justify action taken by the police to detain, restrain and convey a person to hospital (this includes actions taken in private premises).

If police officers are the only professionals present at an incident in which questions of mental capacity are raised, they are accountable for ensuring that any assessment or intervention is lawful under the MCA.

In any such situation, if it is necessary to restrain or remove a person, the officer must first consider and decide whether they are comfortable that any restraint and removal is lawful and proportionate given the circumstances.

Police officers may refuse a request from an approved mental health professional (AMHP), doctor or any other health care professional to restrain or remove that person where this is not the case.

For further information see:

- [\*\*restraint\*\*](#)
- [\*\*requests for police assistance from healthcare partners\*\*](#)
- [\*\*hospital patients presenting healthcare management problems\*\*](#)
- [\*\*transport requests from external agencies\*\*](#)
- the case of [\*\*R\(G\) v Nottingham City Council \[2008\] EWHC 400 \(Admin\)\*\*](#). (This case supports the requirement for officers to satisfy themselves that they are acting lawfully where other agencies have assessed a person's capacity)

## Assessing capacity

**Does the person lack the capacity to make their own decisions in their best interests?**

Everyone is presumed to have capacity unless there is evidence that they cannot make a decision because of an impairment or disturbance in the functioning of their mind or brain.

People may be deemed unable to make a particular decision if they cannot do one or more of the following four things:

- understand information given to them about the decision to be made
- retain that information long enough to be able to make the decision
- use or weigh up that information as part of the decision-making process
- communicate their decision

It does not matter whether the impairment or disturbance is permanent or temporary ([MCA s 2](#)).

## Best interests

A checklist that supports the definition of 'best interests' is provided in [the MCA s4](#).

In the case of ZH v Commissioner of Police for the Metropolis (2013) EWCA Civ 69 it was established that, when forming a reasonable belief as to what (if any) action is in the person's best interests, a police officer is obliged to take into account the views of, among others, anyone caring for the person, (but only if it is practicable and appropriate to consult the carer).

## Can you ID a CURE?

A useful tool for remembering these criteria is ID CURE. To use the MCA to briefly detain somebody, the following criteria must be satisfied:

- a person is suffering from either an **Impairment** or **Disturbance** of the mind or brain

and

- they cannot **Communicate**, **Understand**, **Retain** or **Evaluate** information relevant to a particular decision

Officers have to observe one of the things in the first bullet point and just one of the four things in the second bullet point.

## Questions to ask

Police officers may ask questions such as, 'do you realise you have an injury?' and 'do you realise how serious it is?' and note the responses to help them decide if the person concerned has capacity to make decisions about their need for emergency treatment. In addition, such questions may prevent officers from unlawfully and inappropriately using restraint.

If ID CURE indicates that the person lacks capacity, then the officer must do the least restrictive thing. In some circumstances (for example, those that are life-threatening) police intervention (that includes restraint and use of force) will be justified when it is the least restrictive option in the best interests of someone who lacks capacity.

#### **Suicidal intent and mental capacity**

See [\*\*Suicide and bereavement response\*\*](#).

Where a person who is threatening suicide appears to know exactly what they are doing and why, others may be reluctant to conclude they lack capacity – basing this judgement on principle 3 of the [\*\*MCA\*\*](#) (namely, a person is not to be treated as unable to make a decision merely because he makes an unwise decision).

It is not the decision to take their own life that necessarily shows lack of mental capacity, however, but rather their inability to consider or fully think through alternative options such as counselling, medical assistance or help from statutory or voluntary agencies (weighing that information as part of the process of making the decision – [\*\*MCA s 3\(c\)\*\*](#)).

Determining whether someone has capacity is not a scientific or medical assessment, but should be a properly considered decision. Whether or not someone can take a decision for themselves is determined by the approach set out in the [\*\*MCA s 3\*\*](#).

A police officer may undertake proportionate acts to safeguard someone's best interests ([\*\*MCA s 4\(9\)\*\*](#)) in accordance with the principles of the Act ([\*\*MCA s 1\*\*](#)). Officers will then be protected by a defence against any legal liabilities ordinarily arising from that act, under the [\*\*MCA s 5\*\*](#), as long as they acted in the best interests of someone whom they reasonably believed lacked capacity. If this involves restraining a person, it must be done in accordance with the [\*\*MCA s 6\*\*](#).

## **Removal to hospital and deprivation of liberty**

## **R (Sessay) v South London and Maudsley NHS Trust and Commissioner of the Police for the Metropolis. QBD, [2011] EWHC 2617 (QB).**

The Sessay case is the judgment which highlighted that the MCA and common law doctrine of necessity cannot be used by the police to remove a person from a private premises as an alternative to using the MHA 1983 s 135 (where a warrant must be obtained) or s 136 (where the power can only be used in a place to which the public has access).

### **Life-threatening situations**

Removing a person who lacks the mental capacity to take the decision in question for themselves will usually amount to a deprivation of liberty (**MCA s 4B**) and may only occur where it is necessary to provide a life-sustaining treatment or to do a ‘vital act’ necessary to prevent a serious deterioration in their health.

Officers may only continue to rely on the MCA s 4B regarding any intervention while a decision on their detention is sought from the Court of Protection. It would most usually be a matter for the hospital to make any application to the court that it felt was required. If a hospital confirms that it will not seek such an order, the police officer’s ability to continue to deprive a person of their liberty in this way ends.

- There is no specific power under the MCA to remove somebody to hospital (and compulsory removal may not be justified) in less serious circumstances.

Where police officers have attended a mental health crisis incident in private premises and the life-threatening criteria are not satisfied (under **the MCA s 4B**), officers should consider that:

- AMHPs have the power to make urgent applications (under the **MHA 1983 s 4**)
- the police are able to request that an AHMP considers applying for a warrant for removing the individual to a place of safety (for assessment) under the MHA 1983 s 135(1)

Forces should work with partners to ensure access to AMHPs, where required, and may find it useful to develop a joint understanding with partners about roles and responsibilities through an agreement or joint training around the operation of the MCA.

### **How does this work in less life-threatening situations?**

The statutory framework for removing patients to a place of safety is the MHA 1983 [s 135](#) and [s 136](#) and the framework for urgent assessment and admission is the MHA 1983 [s 4](#).

When officers have attended a mental health crisis incident on private premises and considered the MCA's relevance to keep someone safe from harm but have concluded that no justification exists to remove someone from where they were found for urgent treatment, they should consider using the MHA 1983.

When the incident has occurred in someone's own home or a private place, then police powers under the MHA 1983 s 136 cannot be used. The MCA s 5 and s 6 do not confer on police officers any authority to remove people to hospital or other places of safety for the purposes of mental health assessment.

In such situations, officers should consider contacting the duty AMHP (see Sessay case above). The AMHP may then consider arranging a statutory assessment under the MHA 1983. Such an assessment will involve a doctor (approved under the MHA 1983 s 12) and, if need be, removal to a place of safety using a warrant under the MHA 1983 s 135(1).

## Restraint and use of force

Reasonable force may be used to protect and control someone who does not have the mental capacity to take action to protect themselves. The officer must reasonably believe that it is necessary to use restraint or other force in order to prevent the subject being harmed or harming themselves.

The degree of force used must be proportionate to:

- the likelihood of that person suffering harm, and
- the seriousness of that harm

The power to restrain a person under the MCA does not interfere with existing powers of arrest for criminal offences or detention under [MHA 1983 s 136](#).

## Recording decisions about mental capacity

Having assessed someone as not having the mental capacity to make the decision in question, and taking action in their best interests, officers should supply a rationale for their decisions.

The record should include:

- the information used to decide the person lacked capacity, including questions asked and the person's replies
- what options were considered (including each one's potential benefits and harms, and whether each one was lawful, necessary and proportionate)
- any other factors taken into account (for example, powers and policies)
- the action that was taken
- the effect of the action taken

## Tags

Mental health