

## **The Mental Capacity Act in Practice: Part 1**

### **Introduction**

The Mental Capacity Act 2005 has been enshrined in UK law since October 2007, yet mental capacity assessment and the process of making decisions remain complex and challenging areas of practice for those working in both Children's Services and Adult Care and Support.

This briefing is part of a series to be provided over the coming months that will build into a useful tool to:

- a) Develop and increase understanding of the requirements of the Mental Capacity Act in regard to assessing capacity and making decisions; and
- b) Support practitioners to practice confidently when assessing mental capacity and making decisions.

Tri.x is also developing a user-friendly yet comprehensive online practice resource covering all aspects of the Mental Capacity Act. This will be available later in the year for all customers through the addition of a link during scheduled updates.

### **Using this briefing**

Part 1 of this briefing series aims to develop and increase understanding regarding the main principles of the Mental Capacity Act that **must** be regarded at all times and by everyone when applying the Act.

There is a statutory requirement under section 42 of the Act that regard **must** be given to the Code of Practice when carrying out any function or decision under the Act. This is regardless of the existence of other guidance.

The Code of Practice for the Mental Capacity Act 2005 can be accessed at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/497253/Mental-capacity-act-code-of-practice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf)

## The Purpose of the Mental Capacity Act

The Mental Capacity Act 2005 is a legal framework that:

- a) Protects the autonomy of people who have capacity to make their own decisions; and
- b) Protects people who lack capacity, by ensuring that they are always involved in decisions relating to them, and that any decisions made on their behalf are made in the right way.

Everyone working with (or caring for) any person over the age of 16 who may lack capacity **must** comply with the Mental Capacity Act.

## Defining Mental Capacity

Someone who has Mental Capacity is able to make their own decision at the time when that decision needs to be made.

Section 3 of the Mental Capacity Act says that any person over the age of 16 is able to make their own decision if they can do **all** of the following four things:

1. Understand information given to them;
2. Retain that information long enough to be able to make the decision;
3. Weigh up the information available to make the decision; and
4. Communicate their decision.

The Mental Capacity Act starts on the premise that everyone is able to make their own decision, and decisions can only be made on their behalf if it can be proven that they lack capacity to do so.

A person **cannot** be deemed to lack capacity to make their own decision based on:

- a) Their age;
- b) Their appearance;
- c) Their behaviour; or
- d) A physical or mental health condition.

## The 5 Statutory Principles of the Act

There are 5 principles (values) that underpin the Mental Capacity Act. These are defined in section 1 of the Act and set out in the following table.

The principles **must** be clearly applied when using and making a decision under the Act. If they are not clearly applied any decision that is made on behalf of a person who lacks capacity is not lawful.

	Principle	In Practice
1	A person must be assumed to have capacity unless it is established that they lack capacity.	Every person from the age of 16 has a right to make their own decisions if they have the capacity to do so. Practitioners and carers must

		assume that a person has capacity to make a particular decision at a point in time unless it can be established that they do not.
2	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.	People should be supported to help them make their own decisions. No conclusion should be made that a person lacks capacity to make a decision unless <i>all</i> practicable steps have been taken to try and help them make a decision for themselves.
3	A person is not to be treated as unable to make a decision merely because (s)he makes an unwise decision.	People have the right to make a decision that others would see as 'unwise'. This does <b>not</b> automatically mean they lack capacity and they should not be treated as such.
4	An 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.	If the person lacks capacity any decision that is made on their behalf, or subsequent action taken <b>must</b> be done using Best Interests, as set out in the Act.
5	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.	As long as the decision or action remains in the person's Best Interests it should be the decision or action that places the least restriction on their basic rights and freedoms.

## When to use the Mental Capacity Act

### When the Mental Capacity Act applies

The Mental Capacity Act should be used:

- a) Whenever there are doubts over the ability of any person aged over 16 to make a particular decision at a particular time; and
- b) The person has an impairment of, or a disturbance in the functioning of the mind or brain.

### Need to Know

Under the Act, mental capacity is both 'decision specific' and 'time specific'.

This means that:

- a) A person cannot lawfully be deemed or assumed to 'lack capacity' generally; and
- b) The Mental Capacity Act must be applied for each time that a decision needs to be made.

### When the Mental Capacity Act does not apply

If there are no concerns or doubts about a person's Mental Capacity, the Act does not apply and

the person should be permitted to make their own decision.

If a person does not have an impairment of, or a disturbance in the functioning of, the mind or brain, the Mental Capacity Act does not apply, and the person is likely exercising their right to make a decision that others deem to be unwise.

### **Impairments of or disturbances in the functioning of the mind or brain**

Under the Mental Capacity Act the impairment of, or disturbance in the functioning of, the mind or brain can be either:

- a) Permanent or temporary;
- b) Diagnosed or undiagnosed.

<b>Type of impairment of disturbance</b>	<b>Examples</b>	<b>Example</b>
<b>Permanent</b>	Any impairment or disturbance that is life-long or on-going	Dementia, learning disability
<b>Temporary</b>	Any impairment or disturbance that is short term	Coma, confusion following an accident
<b>Diagnosed</b>	An impairment or disturbance caused by a condition that has been formally diagnosed by a suitably qualified medical professional	A personality disorder, an acquired brain injury
<b>Undiagnosed</b>	An impairment or disturbance caused by a condition that has either not been diagnosed, is unlikely to be diagnosed or is under investigation	Drug use Alcohol use Forgetfulness without diagnosis

It is the responsibility of the person who has doubts about capacity to be satisfied, based upon the evidence available to them, that an impairment or disturbance of the mind or brain exists.

Having an impairment of or a disturbance in the functioning of the mind or brain is not in itself confirmation that a person lacks capacity. Many people will still be able to make their own decisions. Section 3 of the Mental Capacity Act recognises this and makes it unlawful to decide that a person lacks capacity on the sole basis that they have an impairment of, or disturbance in the functioning of, the mind or brain.

## Next time .....

The next briefing will develop and increase understanding by summarising the requirements of the Mental Capacity Act in regard to the assessment of capacity.

## Contact Us

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