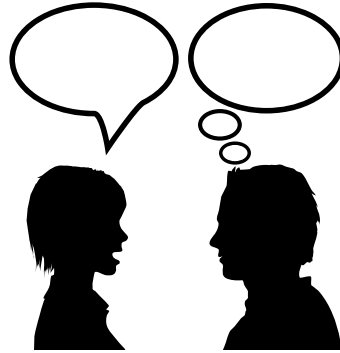


## Briefing Note on Applying The Mental Capacity Act 2005



May 2010

### PURPOSE

The Mental Capacity Act (MCA) 2005 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. The Act 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.

Although the MCA is primarily aimed at health and social care professionals and carers when making decisions about a person's welfare, it will in some circumstances be applicable to police officers. In such cases officers will usually need to make immediate decisions while awaiting further input or direction from a health or social care professional. This briefing note will help police officers and staff when making those decisions.

### PRINCIPLES

The following five principles of the MCA 2005 should govern police responses:

1. A person must be assumed to have capacity unless it is established that he lacks capacity;
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success;
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision;
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 best interests;
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 that is less restrictive of the person's rights and freedom of action.

*Mental Capacity Act 2005, Section 1*

### **POLICE USE OF THE MCA 2005**

In non-emergency situations involving a possible lack of mental capacity, such as a pre-planned mental health assessment, it may be more appropriate for officers to use other powers and tactical approaches than those involving the MCA 2005.

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

Examples include people attempting and threatening suicide, victims of serious assaults, casualties of major incidents, and individuals with serious injuries who decline medical aid, any sort of treatment or help.

In many such situations officers will not have time to discuss, negotiate or explain their actions. The following steps provide guidance to help in making decisions about a person's mental capacity.

#### **1. Determining someone's mental capacity**

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 because of: mental ill health; significant learning disabilities; dementia; brain damage; physical or mental conditions that cause confusion, drowsiness or loss of consciousness; delirium; concussion following a head injury; or the symptoms of alcohol or drug use.

People are 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.

Questioning along the lines of "Do you realise you have an injury?" and "Do you realise how serious it is?" and noting responses will help officers decide if the person concerned has capacity to make decisions at that time about their need for emergency treatment. In addition, such questions will help officers benefit from the safeguards provided within the Act against allegations of unlawful restraint or assault.

#### **2. Determining what is in someone's best interests**

The MCA Code of Practice provides that 'In an emergency, saving life or preventing someone suffering serious harm will almost always be in the person's best interests and treatment should be given without delay' (paragraph 5.61).

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 (ie, 'a person is not to be treated as unable to make a decision merely because he makes an unwise decision'). However, it is not the decision to take their own life that necessarily evidences lack of mental capacity, but rather their inability or refusal to consider or fully think through alternative options such as counselling, medical assistance or help from statutory or voluntary agencies.

### 3. Restraint

In situations where someone is reasonably believed to lack capacity it is lawful to restrain them. Before using restraint, however, officers must:

- (a) reasonably believe restraint is necessary to prevent harm to the person who lacks capacity; and
- (b) ensure the amount and type of restraint used and the amount of time it lasts is a proportionate response to the likelihood and seriousness of harm.

Officers should also consider the risks of aggravating the individual's condition, especially if forcing help on an unwilling person.

### 4. Recording decisions about mental capacity

Having assessed someone as not having mental capacity, 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, proportionate);
- Any other factors taken into account (eg, powers and policies);
- What action was taken;
- The effect of the action taken.

## PUBLIC AND PRIVATE LOCATIONS

If a person is attempting or threatening suicide in a public place it may be more appropriate to use section 136 MHA as a means of preventing harm and ensuring prompt mental health assessment at a place of safety than to rely on the MCA. In relation, however, to incidents in a public place involving people who are clearly seriously injured (eg, victims of serious assaults or casualties of major incidents) but who decline medical aid, it would be more appropriate to use the MCA. While section 136 is a route to a place of safety, the mental capacity legislation is simply a way of allowing the police to take decisions in connection with the care and treatment of someone who the police reasonably believe is not currently able to make such a decision in their best interests due to their - in most cases - temporary lack of capacity.

When an incident involving an immediate threat to life occurs in a private place, it is appropriate to use section 17 PACE to enter the premises to save life or limb, and then consider relying upon the MCA where appropriate (eg, where it is necessary to restrain an individual due to their lack of mental capacity). If the MCA is used, officers should ensure they record the steps they took to establish that the person lacked capacity.

## SUPPORTING SOMEONE WHO MAY LACK MENTAL CAPACITY

People should be supported as much as possible to make their own decisions before officers conclude that they lack capacity. For example, consideration should be given to:

- Consulting relatives, partners, friends, or anyone else the person wants contacted;
- Offering assistance to the person to ease any practical concerns they have, eg, about childcare or the welfare of their pets, or that their property is secure;
- Using an independent advocate to help with communication, or using different communication aids, such as pictures, signs, audiotapes or easy-to-read material.

### POINTS TO NOTE

- Sections 5 and 6 MCA 2005 work together to provide protection from criminal and civil liability for acts done in connection with care or treatment which can, in limited circumstances, include restraint.
- Every effort should be made to encourage and enable the person who lacks capacity to take part in making decisions that concern them.
- If there is a chance that the person may regain capacity to make a particular decision, and the matter is not urgent, then the decision should be delayed until later.
- 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 power to restrain a person under the MCA does not interfere with existing powers of arrest for criminal offences or detention under section 136 of the MHA.

### MULTI-AGENCY PROTOCOLS

To encourage consistent application of the MCA, police forces should ensure that local protocols with health agencies, including the Ambulance Service, include consideration of how the Act is applied by different professional groups or individuals (for example, the extent of each agency's role). Protocols should also establish referral processes to ensure an appropriate multi-agency response to particular situations. The MCA Code of Practice provides guidance on the powers to use, what questions to ask, how to make a basic assessment and what to record.

In some situations where partner agencies use the MCA, they will request that the police be involved. Local protocols should ensure that the legal obligations of those who initiate action under the MCA are clear and there should be agreement about when and how the police become involved.

### PRIMARY REFERENCE

This is **ACPO (2010) Guidance on Responding to People with Mental Ill Health or Learning Disabilities**, which is available from force leads on mental health.

For further information, please contact:  
Specialist Operations Centre  
Wyboston Lakes, Great North Road  
Wyboston, Bedford MK44 3AL

Telephone 0845 000 5463  
Email: [soc@npia.pnn.police.uk](mailto:soc@npia.pnn.police.uk) Website: [www.npia.police.uk](http://www.npia.police.uk)