

## History of the Mental Capacity Act

Brought into effect in 2005. The Deprivation of Liberty Safeguards additionally came into force in 2009, following the mental health act 2007 review. The act significantly hinges on case law for guiding practice. Throughout the MCA the person/ patient is referred to as 'P'.

MCA has age restriction of 16+years.

## What sections are important to you?

Section 1 – The principles

Section 2 – People who lack capacity

Section 3 – Inability to make decision

Section 4 – Best Interest (4A/4B)

Section 5 – Acts in connection with care or treatment

Section 6 – Section 5 limitations

## Section 2: Who lacks capacity?

Any decisions about capacity are in that 'material time' *only*. P **must** be unable to make decision due to '*an impairment of, or a disturbance in the functioning of, the mind or brain.*

s.2(2) impairment or disturbance can be temporary or permanent

s.2(3) age, appearance or conditions including behavior is not assumption for incapacity.

s.2(4) all decisions under MCA are made on the 'balance of probabilities'

## Section 1: Guiding Principles

(2) Assume capacity, unless formally established person lacks capacity.

(3) Do not treat a person as unable to make decisions, unless **all** practicable steps are taken, without success

(4) A person isn't incapacitated merely because they make 'unwise decisions'

(5) Any act or decision made under the MCA for or on behalf of a person who is confirmed to lack capacity **must** be made in their best interest

(6) Before any act or decision is made **must** evidence all less restrictive options for persons rights and freedom.



Mental Capacity Act 2005



## The Mental Capacity Act

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### Section 3: How to assess if unable to make decisions

Can P understand the 'salient information' relevant to the decision?  
Can P retain the information?  
Can P use or weigh the salient information towards making a decision?  
Can P communicate the decision? (verbal and nonverbal)

### Section 4: Best Interest Process

\*Use the best interest checklist\*

To consider all relevant circumstances to determine that capacity is permanent and if not when is it likely to return? P must be involved at all points regardless of incapacity, those involved must not place P at risk of death but listen to Ps wishes, consult family, friends & appointees.



### Important Case Law

- AM v South London and Maudsley NHS Foundation Trust [2013] UKUT (AAC): determined procedure for admitting a person to mental health wards and whether to use MHA or DoLS
- R (Sessay) v South London and Maudsley NHS Foundation Trust [2011] EWHC 2617: Inappropriate use of MCA to remove patient from home and convey to mental health ward
- HL v United Kingdom 45508/99 [2004] ECHR 471 (Bournewood Case): 'Informal' compliant incapacitated patient was deprived of his liberty, with lack of procedural safeguards or access to court, in breach of Art 5(1) and (4) of Human Rights.
- A Pct v LDV, CC and B Healthcare Group [2013] EWHC 272: Determined specific information a patient must know and have capacity regarding to be able to consent to informal admissions
- LBX v K, L 7 M [2013] EWHC 3230 (Fam): determines what the 'salient factors' are when assessing a person's capacity for residence.
- DP v London Borough of Hillingdon [2020] EWCOP 45: must explicitly state you are assessing mental capacity, the details of this and all the consequences for it to be considered legal.

Lord Justice Munby -

"What's the point of making someone safe if in doing so you just make them miserable?"

President James Madison -

"**Liberty may be endangered by the abuse of liberty, but also by the abuse of power**"

### Section 5: Acts in connection with care or treatment

Regarding care or treatment of P, we must reasonably establish lack of capacity and the intervention is in their best interest. P can still claim civil liability in the event of loss or damages as a result. Advance decisions cannot be overruled under section 5.

Can restrain and remove P under circumstances authorised in section 6.

### Section 6: Limitations of section 5

Restraint under section 5 may be used to prevent harm to P. If restraint is proportionate to likelihood of P suffering harm and the seriousness of the harm. 'Restraint' includes threats to use force, not just the physical act of restraint.