



This year Stop Adult Abuse Week will be focusing on the Mental Capacity Act (2005), which came in to force in 2007 followed by an amendment that introduced the Deprivation of Liberty Safeguards from 2009

Introduction to the Mental Capacity Act

What is it?

The Mental Capacity Act (MCA) is designed to protect and empower people who may lack the mental capacity to make their own decisions about their care and treatment. It applies to people aged 16 and over.

It covers decisions about day-to-day things like what to wear or what to buy for the weekly shop, or serious life-changing decisions like whether to move into a care home or have major surgery.

Examples of people who may lack capacity include those with:

- dementia
- a severe learning disability
- a brain injury
- a mental health illness
- a stroke
- unconsciousness caused by an anaesthetic or sudden accident

However, just because a person has one of these health conditions it doesn't necessarily mean they lack the capacity to make a specific decision.

Someone can lack capacity to make some decisions (for example, to decide on complex financial issues) but still have the capacity to make other decisions (for example, to decide what items to buy at the local shop).

What does the Mental Capacity Act Say?

The MCA says:

- assume a person has the capacity to make a decision themselves, unless it's proved otherwise
- wherever possible, help people to make their own decisions
- don't treat a person as lacking the capacity to make a decision just because they make an unwise decision
- if you make a decision for someone who doesn't have capacity, it must be in their best interests
- treatment and care provided to someone who lacks capacity should be the least restrictive of their basic rights and freedoms

The MCA also allows people to express their preferences for care and treatment, and to appoint a trusted person to make a decision on their behalf should they lack capacity in the future.

People should also be provided with an independent advocate, who will support them to make decisions in certain situations, such as serious treatment or where the individual might have significant restrictions placed on their freedom and rights in their best interests.

How is mental capacity assessed?

The Mental Capacity Act sets out a 2-stage test of capacity:

1. Does the person have an impairment of their mind or brain, whether as a result of an illness, or external factors such as alcohol or drug use?
2. Does the impairment mean the person is unable to make a specific decision when they need to? People can lack capacity to make some decisions, but have capacity to make others. Mental capacity can also fluctuate with time – someone may lack capacity at one point in time, but may be able to make the same decision at a later point in time.

Where appropriate, people should be allowed the time to make a decision themselves.

The Mental Capacity Act says a person is unable to make a decision if they can't:

- understand the information relevant to the decision
- retain that information
- use or weigh up that information as part of the process of making the decision

What are the Deprivation of Liberty Safeguards?

The Deprivation of Liberty Safeguards (DoLS) were introduced as an amendment to the Mental Capacity Act and came in to force in 2009. They currently apply to people living in hospitals and registered care homes. The law says that no one should be deprived of their liberty unless this has been done through a process prescribed by law, and that they have speedy access to a right of appeal.

The definition remains the one set out by the Supreme Court in the Cheshire West case (2014)

A person is deprived of their liberty if:

- a) They are 'not free to leave' = choose where to live; **and**
- b) They are subject to continuous supervision **and** control; **and**
- c) These restrictions are applied for a 'not negligible period of time'; **and**
- d) The person has not given valid consent or lacks capacity to give consent

Where it appears a deprivation of liberty might be occurring, the provider of care (usually a hospital or a care home) applies to the local authority for an authorisation.

What does the Mental Capacity Act have to do with Safeguarding?

People who lack capacity are also more likely to be vulnerable to abuse or neglect. A failure by organisations and/or their staff to properly understand and comply with the Mental Capacity Act has repeatedly been highlighted in Safeguarding Adult Reviews locally and nationally. The types of concern with practice include:

- Assumptions made about an individual's capacity
- Missing or poorly performed assessments, and in some cases an absence of explicit best-interests decision-making
- Assessments not initiated or completed at appropriate points, even where multi-agency meetings had concluded that they were necessary or where there were significant concerns that a person's decisions about care choices were placing them at serious risk
- Insufficient discussion amongst the organisations involved of differences of opinion, failure to question and explore choices and decisions with individuals
- Staff lacking confidence when an individual's capacity is unclear or fluctuating, and where 'unwise choices' lead to ongoing harm to the individual
- Failure to achieve an appropriate balance between the right to choose, duty of care and mental capacity
- Lack of consideration of whether an individual's decision-making was compromised by duress and undue influence, despite evidence of abusive relationships involving coercion and control
- Failures to question and explore choices and decisions with individuals, for example where someone may initially present as having capacity but lack the

ability to action what they have said they would do. This is often referred to as 'executive functioning' and appears to be particularly associated with Safeguarding Adult Reviews about people who self-neglect and/or have an acquired brain injury

- Failures to understand the complexity of the situation, for example the impact of the abuse of prescription medications or other substances on an individual's cognitive abilities