Mental Capacity Act (MCA)

The Mental Capacity Act (MCA) 2005 has been in force since 2007 and applies to England and Wales. It applies to young people over the age of 16 and adults. The primary purpose of the MCA 2005 is to promote and safeguard decision-making within a legal framework. Everyone working with (or caring for) any young person from the age of 16 who may lack capacity must comply with the Act.

The MCA sets out 5 core principles:

	Principle	**In Practice**
1.	A person must be assumed to have capacity unless it is established that they lack capacity.	Every young 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 young 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 to do so have been taken without success.	Young people should be supported to help them make their own decisions. No conclusion should be made that a young person lacks capacity to make a decision unless all 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 he makes an unwise decision.	Young people have the right to make a decision that others would see as 'unwise'. This does not 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 best interests.	If the young person lacks capacity any decision that is made on their behalf, or subsequent action taken must 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 that is less restrictive of the person's rights and freedom of action.	As long as the decision or action remains in the young person's Best Interests it should be the decision or action that places the least restriction on their basic rights and freedoms.

These principles must be considered and followed in every instance when working with someone who may lack capacity to make a decision or decision for themselves.

Examples of people who may lack capacity include those with:

- dementia
- a severe learning disability
- a brain injury

- a mental health condition
- a stroke
- unconsciousness caused by an anaesthetic or sudden accident

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).

However, just because a person has one of these conditions does not necessarily mean they lack the capacity to make a specific decision.

Code of Practice

There is a Code of Practice to support effective implementation of the Mental Capacity Act 2005

There is a duty under the Act for all persons and organisations with a responsibility for making decisions, or carrying out acts when a young person lacks capacity to have regard to the code at all times, regardless of the existence of other guidance.

If it appears to a Court or Tribunal conducting any criminal or civil proceedings that a failure to comply with the code has occurred this will be taken into account in any subsequent determination they make.

The information on this page summarises the few parts of the Act that may affect children under 16 years of age. It also explains the position of young people aged 16 and 17 years and the overlapping laws that affect them.

Within the Mental Capacity Act's Code of Practice, 'children' refers to people aged below 16. 'Young people' refers to people aged 16-17. This differs from the Children Act 1989 and the law more generally; where the term 'child' is used to refer to people aged under 18.

In this summary, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Please note the lack of capacity to make a decision is caused by an impairment or disturbance that affects how the mind or brain works and is specific to time and decision specific. The impairment or disturbance may be temporary or permanent. A lack of capacity cannot be determined solely by a person's age or appearance, condition or an aspect of their behaviour, which might lead others to make unjustified assumptions about the person's 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 a young person (from the age of 16) is able to make their own decision if they can do all of the following four things:

- Understand information given to them;
- Retain that information long enough to be able to make the decision;
- Weigh up the information available to make the decision; and

- Communicate their decision.

Assessing Capacity

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

This means that:

A young person cannot lawfully be deemed or assumed to 'lack capacity' generally; and

The Mental Capacity Act must be applied for each time that a decision needs to be made.

If any of the following indicators are present the young person may not be able to make their own decision:

- Lacking a general understanding of the decision that needs to be made, and why it needs to be made;
- Lacking a general understanding of the likely consequences of making, or not making the decision;
- Being unable to understand, remember and use the information provided to them when making the decision; and
- Being unable to, or unable to consistently communicate the decision.

There may also be cause for concern if a young person:

- Repeatedly makes an unwise decision that puts them at serious risk of harm, abuse or exploitation; or
- Makes a particular unwise decision that is obviously irrational or out of character.

A mental capacity assessment must be carried out when:

- There are indicators that the young person may not be able to make the decision at the time that it needs to be made; and
- There is evidence that the young person has (or may have) an impairment of, or disturbance in the functioning of the mind or brain; and
- The reason that the young person may not be able to make the decision is related to (or may be related to) the impairment in, or disturbance of the functioning of the mind or brain.

Stages of a Mental Capacity Assessment

The Mental Capacity Act sets down the 2 stage test of capacity. Any assessment should begin with stage 1 and only proceed to stage 2 if the first stage is met.

- Stage 1 – There must be an impairment, or disturbance in the functioning of the mind or brain.
- Stage 2 – There me mind or must be an inability to make the decision in question as a result of the impairment of, or disturbance in the functioning of, the mind or brain.

- The same 2 stage test applies for every assessment of mental capacity. However the nature of the information and practicable steps will vary depending on:
- The young person's needs;
- The nature of the decision to be made; and
- The urgency in which the decision needs to be made.
- A person is unable to make a decision for themselves if they are unable:
- To understand the information relevant to the decision
- To retain that information
- To use or weigh that information as part of the process of making a decision or
- To communicate their decision (whether by talking, using sign language or any other means)
- Even though the impairment or disturbance does not have to be diagnosed you must not make a judgement that it exists solely on the basis of:
- The young person's age;
- The young person's outward appearance; including
- Any physical disability or sensory impairment; or
- The young person's behaviour (including making an unwise decision).

Recording the Assessment

- A formal record of the assessment and determination should be recorded as soon as possible after it has been carried out.
- The record must demonstrate that the statutory principles of the Act have been applied and each element of the functional test assessed.
- The record should contain all of the following:
- The evidence that has been used to confirm the presence of an impairment or disturbance of the mind or brain;
- The decision to be made;
- The relevant information that has been provided to the young person;
- The practicable steps that have been taken to support the young person to make their own decision;
- The outcome of each element of the functional test of capacity;
- The reason that the young person has been deemed to have, or to lack capacity to make the decision for themselves; and
- Where the young person has been deemed to lack capacity, the consideration that has been given to delaying the decision.

Notifying Others

- You should take steps to notify the following people of the outcome of the assessment:
- The young person who lacks capacity;
- Any representative of the person;
- Any Donee of a Lasting Power of Attorney or Deputy;
- Anyone that the young person has asked you to notify; and
- Anyone else that you deem it relevant to notify, either with the young person's consent or in their Best Interests if they lack capacity to consent.

Children under 16

The Act does not generally apply to people under the age of 16 but there are two exceptions:-

- The Court of Protection can make decisions about a child's property or finances (or appoint a deputy to make these decisions) if the child lacks capacity to make such decisions within Section 2(1)* of the Act and is likely to still lack capacity to make financial decisions when they reach the age of 18 (Section 18(3));
- Offences of ill treatment or wilful neglect of a person who lacks capacity within Section 2(1)* can also apply to victims younger than 16 (Section 44);
- Young people aged 16-17 years.

Most of the Act applies to young people aged 16-17 years, who may lack capacity within Section 2(1)* to make specific decisions but there are three exceptions:-

- Only people aged 18 and over can make a Enduring Power of Attorney;
- Only people aged 18 and over can make an advance decision to refuse medical treatment;
- The Court of Protection may only make a statutory will for a person aged 18 and over.

Assessing Competence in under 16's

The test for assessing whether a child under 16 can give valid consent differs from that of a young person aged 16 or 17. The test for children under 16 is determined by considering whether they are 'Gillick competent'. The concept of Gillick competence reflects the child's increasing development to maturity. The understanding required to make decisions about different interventions will vary considerably. A child may have the competence to consent to some information but not others. The child needs to be given the relevant information in an appropriate manner and given as much support as possible to help them make the decision.

See NSPCC Gillick Competency and Fraser Guidelines.

Care and Treatment for Young People aged 16-17

There is a range of critical areas for practitioners to consider when making decision with people who may (at times) lack capacity. These are;

- Decisions about Leaving Care;
- Decisions about moving home;
- Decisions about managing risk and controlling behaviour;
- Decision about money matters.

People carrying out acts in connection with the care or treatment of a young person aged 16-17 who lacks capacity to consent within Section2(1)* will generally have protection from liability (Section 5), as long as the person carrying out the act:

- Has taken reasonable steps to establish that the young person lacks capacity;
- Reasonably believes that the young person lacks capacity and that the act is in the young person's best interests; and
- Follows the Act's principles.

When assessing the young person's best interests, the person providing care or treatment must consult those involved in the young person's care and anyone interested in their welfare – if it is practical and appropriate to do so.

This may include the young person's parents. Care should be taken not to unlawfully breach the young person's right to confidentiality (see Mental Capacity Act's Code of Practice).

Nothing in Section 5 of the Act excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in carrying out the act.

Money Matters for 16-17 Years old and those Leaving Care

Local authorities may be appointed by the Court of Protection as a Deputy, when there is no one else who could act on behalf of the person lacking capacity to manage their financial affairs and/or personal welfare decisions.

The Local Authority will need to satisfy itself that there is no conflict of interest in exercising the duties of deputy. Financial management of an individual's monies through the local authority deputy comes under the Finance section, and is audited.

Advice for young people can be found at Money and Mental Health

Legal proceedings involving Young People aged 16-17

Sometimes there will be disagreements about the care, treatment or welfare of a young person aged 16 or 17 who lacks capacity to make relevant decisions. Depending on the circumstances, the case may be heard in the family courts or the Court of Protection. The Court of Protection may transfer a case to the family courts, and vice versa. This means that the choice of court will depend on what is appropriate in the particular circumstances of the case. For example, if the parents of a 17 year old

who has profound learning difficulties cannot agree on the young person's residence or contact, it may be appropriate for the Court of Protection to deal with the disputed issues as any orders made under the Children Act 1989 will expire on the young person's 18th birthday.

Useful Links and Resources

Capacity guide | Guidance for clinicians and social workers on the assessment of capacity

Mental Capacity Act Code of Practice

Mental Capacity Act – Easy Read Guide

Using the Mental Capacity Act – Guidance from SCIE including videos

Mental Capacity Act – NHS Choices Guidance

Mental Capacity Act – Rights Card