



Mental Capacity Act 2005 for those aged 16 and 17 years

Learning from Reviews

18th July 2023 developed by Strategic Support Unit, Swindon Safeguarding Partnership

Thanks to the Wirral Safeguarding Children Partnership for the use of their resources in developing this brief.

About this resource

The [Mental Capacity Act 2005](#) (MCA) has been in force since 2007 and applies to 16- and 17-year-olds (young people), as well as adults. There is a [Code of Practice](#) to support effective implementation of the MCA.

The primary purpose of the MCA 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.

A local child safeguarding review identified that the Mental Capacity Act was not being used by professionals to help inform decision making in relation to young people over the age of 16 years. Highlighting that professionals need to consider the use of the MCA in the context of unwise decisions vs not being supported by an adult to make a sensible decision.

This resource provides information for professionals to consider when working with young people aged 16 and 17 years in relation to the MCA.

The next slides provides a brief reminder of the principles of the MCA.

Reminder of the Principles of the Mental Capacity Act

The [Mental Capacity Act 2005 \(MCA\)](#) is designed to protect and empower individuals aged 16 and over and help to safeguard the human rights of people who lack (or may lack) mental capacity to make decisions about their care and treatment.

These include decisions about whether or not to consent to care or treatment. This may be because of a lifelong learning disability or a more recent short-term impairment, for example due to drug or alcohol abuse and mental ill health or long-term impairment resulting from injury or illness.

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

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

Resources for further information:

- Short video clip MCA (duration 3:19 minutes [Mental Capacity Act Overview and the National Mental Capacity Forum - YouTube](#))
- Easy read guide to the MCA can be accessed [here](#)
- SSP 7 Minute brief [Mental capacity act - Swindon Safeguarding Partnership](#)

MCA - Five Statutory Principles

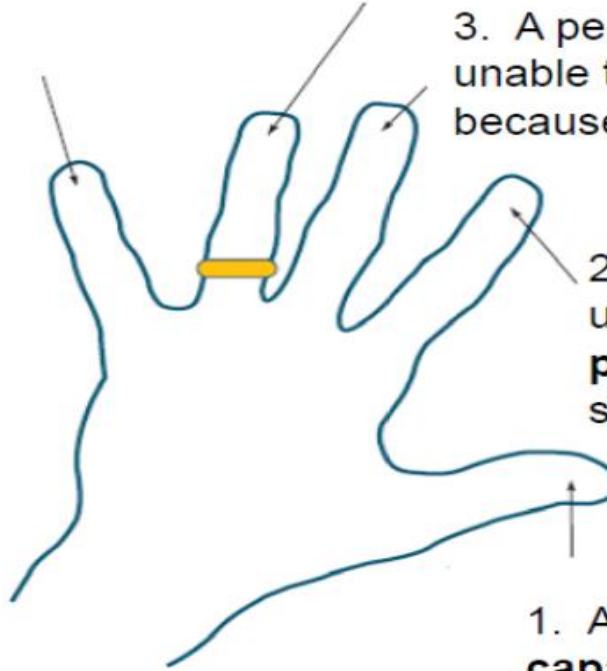
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is **less restrictive** of the persons rights and freedom of action.

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**.

3. A person is not to be treated as unable to make a decision merely because he makes an **unwise decision**.

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.

1. A person must be **assumed to have capacity** unless it is established that they lack capacity.



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

MCA Five Core Principles In Practice

| | 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. |

Source: [Mental Capacity Act \(MCA\) - Wirral Safeguarding Children Partnership](#).

MCA for 16 and 17 year olds - Definitions

The following definitions apply in the [MCA](#) and the [Code of Practice](#):

- “Adult” is a person aged 18 years or over.
- “Young Person” is a person aged 16 or 17 years old.
- “Child” is a person under the age of 16 years old.
- 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.

MCA (2005) applies to all people over the age of 16 years who live in England and Wales and who may lack the capacity (within section 2(1)) to make all or some decisions for themselves

Certain parts of the MCA do not apply to young people aged 16-17 years. These are:

- Only people aged 18 and over can make a Lasting Power of Attorney, (LPA);
- Only people aged 18 and over can make an advanced decision to refuse medical treatment;
- Making a will. The law generally does not allow people under 18 to make a will and the MCA confirms that the Court of Protection has no power to make a statutory will on behalf of anyone under 18.

Where the MCA applies to Children under the age of 16

In most situations, the care and welfare of children under 16 will continue to be dealt with under the Children Act 1989.

There are, however, two parts of the MCA that apply to children under 16:

- The Court of Protection can make decisions about a child's property or finances, (or can appoint a deputy to make these decisions), if the child lacks capacity to make 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.
- The criminal offence of ill treatment or wilful neglect of a person who lacks capacity applies to children under 16 as no lower age limit is specified for the person caused harm/victim.

Parental Responsibility (PR) and the MCA

- Parental Responsibility, refers to the “rights, duties, powers, responsibilities and authority which by law a parent has in relation to a child”, (Children Act 1989).
- PR lasts until the young person, (“child” under Children Act 1989), is 18.
- People with PR for a young person may make decisions on behalf of that young person.
- The decisions that a person with PR can make are those decisions that are seen to sit within the scope of parental responsibility (previously referred to zone of parental control). This is a legal concept describing which decisions a parent should be able to take concerning their child's welfare.
- There is no codified statement of which decisions come into the scope of parental responsibility. However, the [Mental Health Act Code of Practice](#), (section 9 – paragraph 19:41, pages 178-179), sets out two key questions that should be borne in mind when considering whether a decision comes within the scope of parental control:
 - Is this a decision that a parent should reasonably be expected to make?
 - Are there any factors that might undermine the validity of parental consent?

Professionals are advised to refer to [Mental Health Act Code of Practice](#), section 9 para 19:41, pages 178-179 for further information/guidance.

Consent to treatment

- Under the Family Law Reform Act 1969, all people over the age of 16 are presumed to have the capacity to consent to surgical, medical or dental treatment and to associated procedures, such as investigations, anaesthesia and nursing care.
- However, this presumption does not mean that a young person is able to make the relevant decision and decision makers should assess the young person's capacity to consent to the proposed care/treatment. **If the young person lacks capacity to consent, then the MCA will apply in the same way as it does to adults.**
- However, the Code of Practice says that if a young person lacks the capacity to make a specific care/treatment decision, the healthcare staff providing treatment, or the care staff providing care, can carry out treatment/care with protection from liability whether or not a person with PR consents.
- They must follow the Act's principles, consider all the factors in the checklist and ensure that the acts they carry out are in the young person's best interests.
- They must take into account the views of everyone interested in the young person's welfare, including those with PR.

Capacity at 16 years

- The moment that a young person wakes up on the morning of their 16th birthday, they are presumed to have the capacity to make their own decisions under the MCA.
- All those involved in supporting a young person are obliged to have regard to the MCA in all that they do in relation to that young person. If you work with young people who lack capacity and you are a professional and/or you are paid for the work you do, you have a legal duty to have regard to the MCA Code of Practice.

Gillick competency and Fraser guidelines

- Gillick competency and Fraser guidelines help people who work with children to balance the need to listen to children's wishes with the responsibility to keep them safe.
- When practitioners are trying to decide whether a child is mature enough to make decisions about things that affect them, they often talk about whether the child is 'Gillick competent' or whether they meet the 'Fraser guidelines'. Although the two terms are frequently used together and originate from the same legal case, there are distinct differences between them.
- Both Gillick competency and Fraser guidelines refer to a legal case from the 1980s which looked at whether doctors should be able to give contraceptive advice or treatment to young people under 16-years-old without parental consent.

Applying Gillick competence and Fraser guidelines

- The Fraser guidelines still apply to advice and treatment relating to contraception and sexual health. But Gillick competency is often used in a wider context to help assess whether a child has the maturity to make their own decisions and to understand the implications of those decisions.
- You should always encourage a child to tell their parents or carers about the decisions they are making. If they don't want to do this, you should explore why and, if appropriate, discuss ways you could help them inform their parents or carers. For example, you could talk to the young person's parents or carers on their behalf.
- If the young person still wants to go ahead without their parents' or carers' knowledge or consent, you should consider the Gillick and Fraser guidelines. The following information looks at how this can be applied in practice.

Gillick competency

- Gillick competency applies mainly to medical advice but it is also used by practitioners in other settings. For example, if a child or young person:
 - would like to have therapeutic support but doesn't want their parents or carers to know about it
 - is seeking confidential support for substance misuse
 - has strong wishes about their future living arrangements which may conflict with their parents' or carers' views.
- Medical professionals need to consider Gillick competency if a young person under the age of 16 wishes to receive treatment without their parents' or carers' consent or, in some cases, knowledge.
- If the young person has informed their parents of the treatment they wish to receive but their parents do not agree with their decision, treatment can still proceed if the child has been assessed as Gillick competent.

Assessing Gillick competence

There is no set of defined questions to assess Gillick competency. Professionals need to consider several things when assessing a child's capacity to consent, including:

- the child's age, maturity and mental capacity
- their understanding of the issue and what it involves - including advantages, disadvantages and potential long-term impact
- their understanding of the risks, implications and consequences that may arise from their decision
- how well they understand any advice or information they have been given
- their understanding of any alternative options, if available
- their ability to explain a rationale around their reasoning and decision making.

Remember that consent is not valid if a young person is being pressured or influenced by someone else.

Children's capacity to consent may be affected by different factors, for example stress, mental health conditions and the complexities of the decision they are making. The same child may be considered Gillick competent to make one decision but not competent to make a different decision.

If you don't think a child is Gillick competent or there are inconsistencies in their understanding, you should seek consent from their parents or carers before proceeding.

Refusal of medical treatment

- Gillick competency can be used when young people wish to refuse medical treatment.
- However, if a young person refuses treatment which may lead to their death or severe permanent harm, their decision can be overruled.

Fraser guidelines

These apply specifically to advice and treatment about contraception and sexual health and may be used by a range of healthcare professionals working with under 16-year-olds, including doctors and nurse practitioners.

Following a legal ruling in 2006, Fraser guidelines can also be applied to advice and treatment for sexually transmitted infections and the termination of pregnancy (*Axton v The Secretary of State for Health*, 2006).

Practitioners using the Fraser guidelines should be satisfied of the following:

- the young person cannot be persuaded to inform their parents or carers that they are seeking this advice or treatment (or to allow the practitioner to inform their parents or carers).
- the young person understands the advice being given.
- the young person's physical or mental health or both are likely to suffer unless they receive the advice or treatment.
- it is in the young person's best interests to receive the advice, treatment or both without their parents' or carers' consent.
- the young person is very likely to continue having sex with or without contraceptive treatment.
(*Gillick v West Norfolk*, 1985)

Further information and guidance on Gillick competency and Fraser guidelines can be found on the NSPCC webpage - <https://learning.nspcc.org.uk/child-protection-system/gillick-competence-fraser-guidelines>

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Assessing and Recording Capacity

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.

Assessing Capacity continued

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.

Two Stage Test

To decide whether an individual has the capacity to make a particular decision you must answer two questions:

- **Stage 1** – Is the person unable to make a particular decision (the functional test)?
- **Stage 2** – Is the inability to make a decision caused by an impairment of, or disturbance in the functioning of, a person's mind or brain?

This could be due to long-term conditions such as mental illness, dementia, or learning disability, or more temporary states such as confusion, unconsciousness, or the effects of drugs or alcohol (the diagnostic test).

The MCA says that a person is unable to make their own decision if they cannot do one or more 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
- Communicate their decision – this could be by talking, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand.

Two Stage Test continued

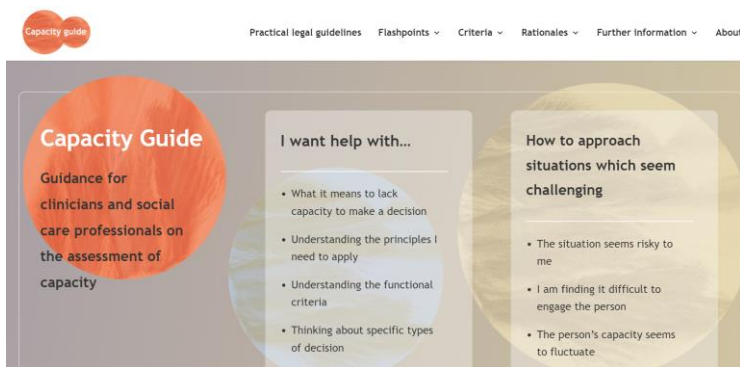
The same 2 stage test applies for every assessment of mental capacity. However the nature of the information and practicable steps will vary depending on:

- The young person's needs;
- The nature of the decision to be made; and
- The urgency in which the decision needs to be made.

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).

Useful resources for professionals



[Mental capacity - Guidance for clinicians and social care professionals on the assessment of capacity](#) - Guidance aimed at clinicians and social workers on the assessment of capacity. May also be useful as a reference to other professionals.

A range of resources regarding MCA are available:

[Using the Mental Capacity Act \(MCA\) \(scie.org.uk\)](#) and **[MCA: Assessing capacity | SCIE](#)**

[Mental Capacity Act Code of Practice](#)

[Mental Capacity Act](#) – NHS Choices Guidance



[Mental capacity toolkit](#) - Bournemouth University and Burdett Trust for Nursing have developed a toolkit to help support health and social care professionals working with individuals whose decision-making capacity is limited, fluctuating, absent or compromised. May also be beneficial to other professionals.

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.

Training

If you would like to find out more about the MCA below are some free resources

- Free eLearning SCIE: [Mental Capacity Act \(MCA\): e-Learning course | SCIE](#) (need to register which is free) Expires on: 10/09/2023
- Other MCA resources [Mental Capacity Act \(MCA\) training courses | SCIE](#)
- Free [Understanding mental capacity - OpenLearn - Open University](#)
(24 hours study online introductory course)

If you have access to Community Care inform there is practice guidance [The Mental Capacity Act in relation to children and young people - Childrens \(ccinform.co.uk\)](#)

SSP Training: [Legal training 1 - Consent, capacity and information sharing - Swindon Safeguarding Partnership](#)



We hope you have found this resource useful.

We would really like your comments.
It will only take a couple of minutes either click on this
link <https://forms.office.com/e/idq5a07WRt>
or use the QR code.

