

Implementing the Mental Capacity Act 2005 – Guidance for Police

Introduction

The Mental Capacity Act 2005 (MCA 2005) came fully into force on 1 October 2007. It is designed to provide a legal basis for providing care and treatment for people aged 16 and over, who lack the mental capacity to give their consent. The principle of the Act is that people who lack mental capacity must be treated in their best interests.

Whilst the Act is primarily aimed at health professionals and carers when making decisions about a person's welfare, it will in some circumstances be applicable to police officers when dealing with members of the public. In practical terms it has the effect of formalising and clarifying the current powers and tactics employed by police officers. Police Community Support officers (PCSO) are not required to engage in any form of restraint and must act within their own rules of deployment. A PCSO dealing with the kind of situation described in this guidance must observe and report the activity to a police officer, but must not physically restrain the individual.

The Act only applies to people who lack mental capacity or who are reasonably believed to lack mental capacity. It applies to public and private locations. When officers encounter a person, whom they reasonably believe to lack mental capacity, they should consider taking action to safeguard the person's best interests, always having regard to how that purpose can be achieved in a way that places the least restrictions on the person's rights and freedom of action.

The Act will be of primary importance to policing when officers deal with someone lacking mental capacity in an emergency situation, whose life may be at risk or who may suffer harm if action is not taken. Obvious situations will include people attempting and threatening suicide, victims of serious assaults and casualties following major incidents. In practice there may be many more examples.

Police occasionally come across individuals with serious injuries that may result in serious harm or death, but who decline medical aid. If such a person has the mental capacity to make this decision there is no power to compel her/him to accept medical treatment. If an officer reasonably believes that a person lacks mental capacity then the Act will apply and that person may be treated in their best interests. Officers must always weigh up the risks of forcing help on an unwilling person against the benefits it may offer.

Unlike medical and ambulance personnel, police officers are not trained in the assessment of mental capacity. Where police are the only service on scene it may be necessary to make an assessment and act accordingly before other services arrive, where the seriousness or urgency of the situation dictates. When a doctor, member of the ambulance service or other appropriate service arrives on scene, or is already present, police will defer to their expertise and provide support as appropriate.

Any power to restrain a person as a result of the MCA 2005 does not interfere with any existing powers of arrest for criminal offences, or under S136 Mental Health Act 1983.

Applying the Act to practical policing situations

When faced with an emergency situation, where death or serious harm may occur to someone who refuses treatment or help, the following 4 steps will provide guidance to help in decision-making. In many such situations you will not have time to discuss, negotiate or explain but urgent immediate action will be required.

Remember that if a person has capacity there is no power to treat them without their consent, but that someone who is attempting suicide may be suffering from a mental illness that affects their capacity, and someone who has suffered physical injuries may have their capacity affected by pain or shock. Where you reasonably believe that someone lacks capacity you may act to save life or prevent harm to them.

Where time permits, you should take all practical and appropriate steps to help the person make the decision themselves to prevent death or serious harm. These might include offering practical assistance with childcare, securing of their property etc.

Step 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:

- Significant learning disabilities
- Mental illness
- Dementia
- Brain damage
- Physical or mental conditions that cause confusion, drowsiness or loss of consciousness
- Delirium
- Concussion following a head injury
- The symptoms of alcohol or drug use

A person is only unable to make a decision when they cannot do any **one** of the following

- Understand information about the decision to be made
- Retain that information in their mind
- Use or weigh that information as part of the decision making process
- Communicate their decision

An apparently irrational or wrong decision does not, by itself, provide evidence of lack of capacity.

You should take all reasonable and practical steps to explain the risks and benefits and foreseeable consequences of making the decision (e.g. refusing medical help for serious injury) or not making it at all. Questioning along the lines of *"Do you realise you have an injury?" "Do you realise how serious it is?" "If you don't get treatment quickly, you might not make it"*. Whilst this style of questioning might seem obvious and even pointless, it is essential if officers are going to benefit from the safeguards provided within the Act against allegations of unlawful restraint or assault. Asking questions and noting responses will help the officer decide if the person has capacity to make decisions about their own emergency needs at that time.

A healthy person with no previous history of mental illness, who sustains serious injuries or is suffering from shock or trauma, may consequently lack the mental capacity to make a decision about their own emergency life support needs.

A person suffering from the effects of a substance misuse, who has serious injuries, may give replies to the questions shown above that indicate he does not understand the risks to his health if he does not receive emergency treatment.

Where the person is seriously injured or unwell and they will not acknowledge the seriousness of their condition, this in itself could strongly suggest their incapacity because they appear unable to comprehend the risks involved. Asking people to recall what you have just said will also help to provide evidence that they are unable to retain information.

Whenever possible and practicable, officers should consult friends, partners, relatives or anyone the person wants contacted.

Step 2

Determining what is in someone's best interests

Deciding what is in the person's best interests will be relatively uncomplicated for the emergency situations faced by police.

The Mental Capacity Act Code of Practice provides the following guidance for emergency/life and death situations

Para 5.31 – All reasonable steps should be taken to preserve life.

Para 5.61 – In 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.

Remember that this only applies where the person is reasonably believed to lack capacity, and that the risks of having to use force to enable treatment to be given must be taken into account.

Rarely, there may be non-urgent situations where police officers are properly involved, in which case, where time and practicality allows, the following should be considered in deciding upon best interests.

- Don't decide best interests simply on someone's age, appearance, condition or behaviour. (These factors mixed with others may help decide best interests, but not in isolation)
- All relevant circumstances should be considered
- Every effort should be made to encourage and enable the person who lacks capacity to take part in making the decision
- If there is a chance that the person may regain the capacity to make a particular decision then it may be possible to put off the decision until later if it is not urgent
- The person's past and present wishes and feelings, beliefs and values should be taken into account
- The views of other people, who are close to the person who lacks capacity, should be considered as well as the views of an attorney or deputy

Finally – is it reasonable to believe that the proposed act is in the person's best interest?

Step 3

Consider using restraint

Using restraint involves using force or threatening force to make someone do something that they are resisting OR restricting a person's freedom of movement, whether they are resisting or not. Police officers will be protected from liability when they use restraint in the kinds of emergencies previously described if they observe the following 2 conditions:

You must reasonably believe that restraint is necessary to prevent harm to the person who lacks capacity

AND

The amount and type of restraint used and the amount of time it lasts must be a proportionate response to the likelihood and seriousness of harm.

Step 4

Record your decisions and actions

When you act in someone's best interests, who you have assessed as not having mental capacity, you must record your actions and file it in accordance with your local policy. In particular the following guide will help you ensure the right information is recorded.

- The information you used to decide the person lacked capacity including questions you asked and their replies
- How you reached your decision and why you acted
- What other options you considered
- What you did, who was consulted and why
- If you needed to act quickly without the time for consultation or questioning of the person an account as to why that was
- Any other factors you took into account
- How you restrained the person, who was involved and for how long

Practical Examples

The following practical examples are offered for illustrative purposes to aid understanding of how this guidance might work when applied to real life situations.

Example 1 – A person with a serious injury who is lacking mental capacity

A male is found in the street with a serious injury following a stabbing. It is clear that the male has a deep wound and requires urgent treatment. He refuses to accept any help or treatment and starts to walk away. He appears to be distressed and disorientated. Based upon a dynamic assessment the officer concludes that he lacks capacity and that it is in his best interests to be treated. The officer could use the Mental Capacity

Act 2005 to prevent him walking away, restrain him and force First Aid whilst awaiting the arrival of an ambulance. However using restraint may well increase the risks of further blood loss and/or further injury. Therefore the officer follows the male whilst calling an ambulance. The officer keeps visual contact with the male to direct the ambulance crew when they arrive. Further decisions and actions are then the responsibility of the ambulance crew.

Example 2 – A person with a serious injury who is not lacking mental capacity

A male is found in the street with a serious injury following a stabbing. It is clear that the male has a deep wound and requires urgent treatment. He refuses to accept any help or treatment and starts to walk away. Based upon a dynamic assessment the officer concludes that he seems lucid and able to understand the risks to himself if he is not treated. The officer feels he does not lack capacity and so cannot force treatment or use restraint. In these situations it would not be appropriate for police to simply leave the scene. The officer follows the male and calls an ambulance in exactly the same way as in the previous example. Once the ambulance service, arrive further decisions and actions about health care will be that of the crew.

Example 3 – A person is threatening suicide on private premises

Officers are dealing with a female who is threatening suicide. She is in a very distressed state. Whilst speaking to the female she appears to be depressed. It is reasonable to suppose that most people who are threatening to commit suicide are most probably suffering from a depressive illness and therefore the officer forms the opinion she is lacking capacity at that time. In these circumstances the ambulance service are required to deal with the health risks to the female. The officer remains with the female until an ambulance arrives to make a proper assessment. In the meantime, if she attempts to commit suicide before the ambulance arrives the officer will restrain her under the Act as he believes it is in her best interests to get medical help.

In these circumstances where an immediate threat to life is apparent, it is appropriate to use S17 Police and Criminal Evidence Act 1984 to enter to save life or limb and then rely on the Mental Capacity Act legislation to restrain. If it later transpires that the person had capacity, then under Section 5 of the MCA 2005, an officer will have a defence provided he took reasonable steps to establish the person lacked capacity and reasonably believed they did.

FAQs

Q - These examples are very similar, how can I be expected to make an assessment of capacity in this type of urgent fast-moving situation?

A - The Act does not expect perfect scientific decisions. It 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

Q - The end result of the two examples above is the same, what is the relevance of lacking or not lacking capacity?

A – Where someone is reasonably believed to lack capacity it is lawful to restrain them in these kinds of situation, but before using restraint, officers should consider the risks of aggravating the person's condition.

Q – If we can enter private premises to save life or limb and then restrain to await the ambulance as in example 3 above, does this mean we no longer need a warrant under S135 Mental Health Act 1983 to conduct a mental health act assessment?

A – No. The powers and tactical approach in example 3 must only be used in situations where an immediate threat to life is present. Most mental health assessments on private premises would never fall into this category.

Q – How does section 136 Mental Health Act 1983 work with the MCA 2005?

A – Section 136 Mental Health Act 1983 is unaffected by this new legislation. So, for example if a person is attempting or threatening suicide in a public place it would be entirely appropriate to use section 136 as a means of preventing harm and ensuring prompt mental health assessment at a place of safety.

Diversity Considerations

Officers must be aware that people from some diverse groups may react in different ways. Further guidance about diversity issues can be found through the NCALT site under Police Race and Diversity Learning and Development. Some basic advice is shown below.

Speech impairments – Will normally use their hands to communicate. Handcuffing effectively disables their communication mechanism. However this does not prevent the use of handcuffs where necessary.

Deaf/Hearing impaired – communicate in writing if possible. In some circumstances, this will be entirely impractical – for example where there is an immediate risk of harm or death or the person is violent. Whilst it is well known that a blind person will carry a white stick, note that a deaf and blind person will carry a red and white stick.

Learning difficulties or language barriers – Reasonable attempts should be made at communication before physical contact is made. However, as described above where the person is violent or there is an immediate risk of harm or death, this will not be practical.

A Muslim female may be more responsive and cooperative when dealing with a female police officer, especially when restraint is used. This will obviously not be possible where the first officer on scene is male and the situation requires immediate action.

The 5 statutory principles of the Mental Capacity Act 2005

- 1) A person must be assumed to have capacity unless it is established that they lack capacity.
- 2) A person is not to be treated as unable to make a decision unless all practicable steps to help her/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 she/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 her/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.

Section 44 Mental Capacity Act 2005 – offences of ill-treatment or wilful neglect

Finally, the act introduces two new offences (either ill-treatment or wilful neglect). Further guidance can be found in paragraphs 14.23 to 14.26 of the Mental Capacity Act 2005 code of practice.

(1) Subsection (2) applies if a person ("D")—

- (a) has the care of a person ("P") who lacks, or whom D reasonably believes to lack, capacity,
- (b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P, or
- (c) is a deputy appointed by the court for P.

(2) D is guilty of an offence if he ill-treats or wilfully neglects P.

For further guidance and information please contact Inspector Mike Partridge 020 7161 1019 or Inspector Tony Aubrey 020 7161 1028. Metropolitan Police, 15th Floor, Empress State Building. Empress Approach, Lillie Road, London. SW6 1TR