

# The Mental Capacity Act 2005

A Guide for Practice

ROBERT BROWN, PAUL BARBER and DEBBIE MARTIN

3rd  
Edition

Updated to include the  
Mental Health Act Code of  
Practice 2015 and the crucial  
impact of the Supreme Court  
decisions in the Cheshire  
West cases

Series Editor  
Keith Brown

Post-Qualifying Social Work Practice



# The Mental Capacity Act 2005: A Guide for Practice

Third Edition

**ROBERT BROWN**  
**PAUL BARBER**  
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Series Editor: Keith Brown



Los Angeles | London | New Delhi  
Singapore | Washington DC



Learning Matters  
An imprint of SAGE Publications Ltd  
1 Oliver's Yard  
55 City Road  
London EC1Y 1SP

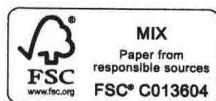
SAGE Publications Inc.  
2455 Teller Road  
Thousand Oaks, California 91320

SAGE Publications India Pvt Ltd  
B 1/I 1 Mohan Cooperative Industrial Area  
Mathura Road  
New Delhi 110 044

SAGE Publications Asia-Pacific Pte Ltd  
3 Church Street  
#10-04 Samsung Hub  
Singapore 049483

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Editor: Kate Wharton  
Development editor: Lauren Simpson  
Production controller: Chris Marke  
Project management: Swales & Willis Ltd,  
Exeter, Devon  
Marketing manager: Camille Richmond  
Cover design: Wendy Scott  
Typeset by: C&M Digital (P) Ltd, Chennai, India  
Printed in Great Britain by  
CPI Group (UK) Ltd, Croydon, CR0 4YY



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First published in 2008  
Second edition published in 2010  
Third edition published in 2015

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**Library of Congress Control Number: 2015942765**

**British Library Cataloguing in Publication Data**

A catalogue record for this book is available from the British Library

ISBN 978-1-4462-8726-2  
ISBN 978-1-4462-9421-5 (pbk)

# The Mental Capacity Act 2005: A Guide for Practice



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## *Foreword from the Series Editor*

This third edition builds on the success of the original text by adding material to cover the implications of the recent Supreme Court judgments on what amounts to a deprivation of liberty. The Mental Capacity Act 2005 affects all mental health professionals who work with people over the age of 16 who may lack capacity in relation to any decision.

Robert Brown, Paul Barber and Debbie Martin have written this text in a style that is accessible to all professionals, and their detailed knowledge and experience of working in this field is very apparent. All professionals need to be aware of the Mental Capacity Act 2005 and its implications for their practice and this text clearly spells out these implications. Mental health professionals and other workers with adults would be wise to have a copy of this text close to hand to help inform their practice.

I warmly commend this text to all professionals, which together with the two companion texts from this series – *The Approved Mental Health Professional's Guide to Mental Health Law* and *The Approved Mental Health Professional's Guide to Psychiatry and Medication* – make a valuable contribution to the development of the best possible mental health practice in our society.

Keith Brown

Director of the National Centre for Post-Qualifying Social Work and Professional Practice

Bournemouth University

## *About the authors*

**Robert Brown** is a Visiting Fellow at Bournemouth University and was a Founding Director of Edge Training and Consultancy Limited. He was a Mental Health Act Commissioner from 1992 until 2010. He provides refresher training for Approved Mental Health Professionals (AMHPs) and Best Interest Assessors (BIAs) and contributes to the training of section 12 approved doctors and Approved Clinicians in South West England and Wales. He provides consultation and supervision for the AMHPs/BIAs in the Deprivation of Liberty Team in Cornwall. Rob also provides consultation to Lead AMHPs in Hampshire, Lambeth and West Berkshire. He has published widely in the field of mental health and mental capacity law.

**Paul Barber** qualified as a solicitor in 1976. From 1979 until December 2003 he was a partner at Bevan Ashford (now Bevan Brittan), where for many years he led the firm's NHS Litigation Department, increasingly specialising in the field of mental health, mental capacity and human rights law, being involved in a number of leading cases. Still associated with the firm, he is now largely a freelance trainer and lecturer. He has been extensively involved in training on section 12, Approved Clinician and DOLS courses, and also provides training to AMHPs, nurses, managers and others. Among other publications he is co-author of *Mental Health Law in England and Wales* (2nd edition, 2012).

**Debbie Martin** is Director of the Bournemouth University Approved Mental Health Professional's course in South West England. She is also involved in the training of section 12 Approval and Approved Clinician courses, and provides training to various NHS Trusts, Health Authorities and Local Authorities. She has published in the field of mental health and mental capacity law. She is a registered social worker, and has practised as a social worker, a mental health manager and an Approved Mental Health Professional.

## *Preface to the 2015 edition*

Welcome to this guide to the Mental Capacity Act 2005. This third edition has been revised and enlarged to include the crucial impact of the Supreme Court decisions in the 'P' and 'MIG and MEG' cases. We hope that the book will be useful for a wide range of people including health and social care professionals, service users, carers and others interested in the fields of mental health, physical health, learning disability and old age. The law as described relates to England and Wales. Note that the law is significantly different in Scotland, in Northern Ireland, in the Isle of Man and in the Channel Islands.

There are two companion texts in this series. *The Approved Mental Health Professional's Guide to Mental Health Law* is issued to many trainee and practising AMHPs. It covers mental health law in some detail, and the third edition considers the overlap between mental health and mental capacity law. There is significant potential overlap between these two areas of law. There is also the *Approved Mental Health Professional's Guide to Psychiatry and Medication*. This book contains a brief summary of current law in both areas in so far as they affect treatment for mental disorder. Readers who need a more detailed analysis of the Mental Health Act 1983, together with access to that Act and accompanying regulations, may wish to see *Mental Health Law in England and Wales* which is also published by Sage.

With the exception of the DOLS provisions the Mental Capacity Act has been operational since October 2007 in England and Wales. The DOLS provisions cover people who lack capacity to make a decision about being in hospitals, nursing homes or care homes in situations which amount to deprivation of liberty. This part of the Act came into effect in April 2009. As well as the amendments to the Act itself this volume contains new chapters to explain the procedures.

The Mental Capacity Act 2005 takes, adapts and clothes in statutory form a number of areas of common (judge made) law, in particular:

- the test for incapacity;
- the means of establishing 'best interests';
- the authority to intervene in relation to a person lacking capacity and the limits to that authority;
- the law relating to advance decisions.



Just when the common law will continue to apply in relation to dealing with those lacking capacity is an interesting issue and outside the scope of this book. What is left of the common law will depend to some extent upon how the courts construe the Mental Capacity Act, whether broadly or narrowly. Perhaps the safest advice would be to confine the use of common law powers in relation to a person lacking capacity to emergencies and short-term interventions.

This book is not just aimed at social workers because the Mental Capacity Act 2005 affects all those who are dealing with anyone over the age of 16 who may lack capacity in relation to any decisions. This long awaited Act should assist staff in these circumstances. Hopefully this book will make the law accessible and understandable to a wide range of practitioners.

At the end of each chapter we have included key points and questions, sometimes in multiple choice form, in an attempt to aid learning. Some of the most important points are then summarised in Appendices to try and help busy practitioners.

We would like to thank Tracy Gallagher and Anthony Harbour who read and commented on the original text when it was in its draft form. Their views, based on their experience and knowledge of how the law operates in practice, were very helpful to us. However, we accept responsibility for any inaccuracies which remain within the text.

Robert Brown, Visiting Fellow, Bournemouth University

Paul Barber, Consultant, Bevan Brittan, Solicitors

Debbie Martin, South West England AMHP Programme Director, Bournemouth University

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