

## Mental Capacity Act 2005

### Introduction and Background

The Mental Capacity Act 2005 supports the rights of people to be **empowered** to make decisions for themselves where they can.

The Act also provides a legal frame work for acting and making decisions on behalf of individuals who lack capacity to make a particular decision and applies to everyone involved in care and treatment of people **age 16 and over**.

### How the Mental Capacity Act 2005 works

Under the Mental Capacity Act 2005 the issue of capacity is decision-specific; this means that the test of someone's capacity can only be made in relation to a particular decision that needs to be made at a particular time. This is an important safeguard against blanket assessments of someone's ability to make decisions based on their disability or condition. It also recognises the fact that someone may be able to make some decisions but not others.

The Mental Capacity Act 2005 sets out five key principles which must underlie all action in determining whether someone has capacity to make a decision or not:

#### **5 Statutory Principles:**

- 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 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 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 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.**

### Assessing capacity

There is a two-stage test of capacity in order to assess whether an individual has the capacity to make a particular decision. This involves asking:

# One Minute Guide

1. Is there an impairment of, or disturbance in the functioning of a person's mind or brain (such as a learning disability or a mental health problem)?
2. If so, is the impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

If the first stage of the test of capacity is met, the second test requires the individual assessing capacity to show that the impairment or disturbance of the brain or mind prevents the person from being able to make the decision in question at that time.

This is a functional test focusing on how the decision is made, rather than the outcome or the consequence of the decision.

**When considering the decision-making process it's necessary to consider whether the young person is able to:**

- a. understand the information relevant to the decision,
- b. retain that information,
- c. weigh that information as a part of the process of making a decision, and
- d. communicate his/her decision (whether by talking, using sign language or any other forms of communication)

## **Making decisions in someone's best interests**

If someone is assessed as being unable to make a decision themselves, another person may make the decision or act in their 'best interests'. In these situations the person who must lead the 'best interests' process is the person who requires the decision to be made; for example a doctor who requires consent before carrying out treatment. As far as possible the person must be involved in the process and those with an interest in the person's welfare should be consulted so that all the factors relevant to the decision can be weighed up, including the known wishes and feelings of the person, and any beliefs or values they have that might influence the decision. The decision-maker should be clear about their decisions and the reasons for arriving at it, and in the case of more serious decisions the process should be recorded in writing.

The Mental Capacity Act 2005 Code of Practice Section 4 sets out a Best Interests checklist to support this process.

- Working out what is in someone's best interests cannot be based simply on someone's age, appearance, condition or behaviour;
- All relevant circumstances should be considered when working out someone's best interests;

# One Minute Guide

- 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 will 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;
- Special considerations apply to decisions about life sustaining treatment;
- The person's past and present wishes and feelings, beliefs and values should be taken into account; and 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.
- Lasting Power of Attorney (for persons 18 and over)

It is a legal document which allows your chosen person(s) to act and make decisions on your behalf when you do not have the mental capacity to make decisions. If you do not make & register LPA, your children's or anyone who will be looking after you must go to the **Court of Protection** to get the authority to act on your behalf. This will be a long time consuming process. This provision allows a person to appoint an attorney to make decisions regarding personal welfare as well as property/financial affairs. The attorney is able to consent to or refuse treatment/placement on the person's behalf. The Attorney must act in the person's **best interests**.

- Advance Decisions

Previously called a living will or advance directive. An advance decision is where a person age 18 or over refuses particular treatment in particular circumstances, should they lack capacity in the future. The advance decision must be specific and clearly refer to the particular treatment.

If valid then this is legally binding and must be followed, even if it may result in the person's death. Advance decisions regarding life sustaining treatment must meet further requirements to be valid.

A person can change their mind at any time and the Advance decision can be withdrawn. The advance decision only applies once the person lacks capacity

## **IMCA - Independent Mental Capacity Advocate**

The aim of the IMCA is to provide independent **safeguards** for people who lack capacity to make certain important decisions where they have no other support or representative to consult on their behalf.

An IMCA **must** be instructed and consulted with whenever:

# One Minute Guide

- An NHS body is proposing to provide serious medical treatment
- An NHS body or Local Authority is proposing to arrange accommodation (or change of accommodation) in hospital or a care home and where the person will stay in hospital longer than 28 days or they will stay in the care home for more than 8 weeks.
- An IMCA can be instructed where the person has a family member but there are safeguarding concerns or a dispute about the persons care and treatment.

## **Disputes about the person's best interests:**

In the case of a dispute the following points should be used to determine a person's best interests

- Hold a formal or informal case conference
- Get a second opinion
- Involvement of an independent advocate of all parties involved
- Go to mediation
- An application could be made to the **Court of Protection** ( seek legal advice first)

## **When a person is Eligible for Continuing Health Care**

Where a person has been awarded CHC funded care, in accordance with the National CHC Framework, the person would be appointed a Health coordinator, this person will have the responsibility for undertaking the relevant assessments, and this includes a capacity assessment and Best Interest decision. If a case has been actively known to the Local Authority it is good practice to provide a comprehensive hand over to the CHC team and where necessary in complex situations remain involved with the case, providing professional advice to health colleagues.

## **Criminal Offence**

The Act created a new criminal offence of ill treatment or wilful neglect of a person who lacks capacity. The offence can be committed by a medical, healthcare and paid carer. Offences can carry custodial sentences.