Supporting people who may lack Capacity to make decisions

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Mental Capacity Act 2005

The Mental Capacity Act came into force in 2007. It provides a statutory framework for people:

• Who lack capacity to make some or all decisions for themselves

• Who have capacity and want to prepare for a time when they lack capacity in the future
Be aware of 'Legal Status'...

**Primary Legislation**
e.g. Care Act 2014  
Mental Health Act 1983, HRA 1998

**Statutory Codes of Practice**
Legal duty on professionals and paid workers to 'have regard' to them.

**Policy/guidance**
Safeguarding Policy, NMC or HCPC codes, National Service Frameworks, etc
Two stage test of Capacity

• Does the person have an impairment or disturbance, affecting the way their mind or brain works (whether temporary or permanent)

• Does the impairment or disturbance mean that the person is unable to make the DECISION in question at the TIME it needs to be made
5 statutory principles

• Assume capacity
• Take all practical steps to enable person to make their own decision
• Don’t treat person as unable to make their own decision merely because they make an unwise decision
• Decision must be in person’s best interests
• Consider if there is a less restrictive option
Remember

Capacity is time and issue specific

The decision maker should be the person who will carry out the task. Eg Dentist for dental treatment
Establishing lack of capacity

If the person is unable to do one or more of the following they lack capacity:

1. **understand** the information relevant to the decision
2. **retain** that information
3. **use and weigh** that information as part of the process of making a decision
4. **communicate** their decision (whether by talking, using sign language or any other means)
James

• James lives in Flexicare accommodation, he is 45 with a learning disability. James’ mother is worried about the risks of him going out alone and wants staff to stop James leaving and only allow him out if someone can accompany him.

1. Discuss your thoughts on this
2. If you were to stop James leaving what would you need to do.
Consider when recording your findings

- Do not consider whether it makes the job easier
- You MUST consider what is in Ps best interests only.
Best interests checklist

• Do whatever is possible to permit and encourage the person to take part or improve their ability to take part in making the decision

• Find out their views, their past and present wishes and feelings, beliefs and values (e.g. religious, cultural moral or political)

• Any other factors that they would have considered
BI checklist cont’d

- Avoid discrimination (on the basis of age, appearance, condition, behaviour etc)
- Assess whether person might regain capacity - if so & decision can wait – then wait
- Must not be motivated by desire to bring about person’s death
- Consult with others for their views concerning the person’s best interests. They may also have information about the person’s past and present wishes, views, values, beliefs or feelings.
- Consider if there is a less restrictive option?
Janet

• Janet has Dementia, she also has a UTI and has been incontinent. You have been asked to support her to change her clothes and freshen up, make her flat comfortable for her, but when you get to her flat she is refusing your help.

• What do you need to do?
Janet Continued

- You have assessed Janet’s capacity to consent to your help and she can’t understand the risks of staying in wet clothes and is still refusing to accept your help

- What now???
The 5 Section 5 Conditions

S5 offers protection from liability when working with incapacitated people when:

1. The act is one undertaken in connection with another person’s care or treatment.
2. The person doing it takes reasonable steps to establish whether the recipient has capacity.
3. S/he reasonable believes that the recipient lacks capacity.
4. S/he reasonably believes that it is in the person’s best interest for the act to be done.
5. If s/he uses restraint s/he reasonably believe both that it is necessary to the act in order to prevent harm to the person and that the act is a proportionate response to the likelihood of their suffering harm and the seriousness of that harm.
Why should it matter

- MCA was a visionary piece of legislation
- Marked the turning point for people who lacked capacity
- Places Individual at centre of decision making
- Support individual as far as possible to make own decisions
- Unwise decisions not an indicator of lack of capacity
- Empowers those with impairments to entitlement to make poor decisions
- If lacking capacity Best Interests principle means that wishes and feelings are central to decision making process.
- Provides protection from harm for Vulnerable adults.
Front line staff are very busy people

I'm juggling so many day to day things - now I have to add "Capacity"

But "Capacity" isn't an "add-on" - it should be a part of ALL the things you're juggling.
Decision making mechanisms

MAKING DECISIONS

ADVANCE DECISION

LPA DONEE

COURT OR DEPUTY

USE OF SECTION 5

Require capacity
Sources of useful information

- The Mental Capacity Act Code of Practice and some useful booklets are available at:
  www.justice.gov.uk/mental-capacity-act/index.htm

- The DoLS Code of Practice is available at the Department of Health website: by searching for ‘deprivation of liberty safeguards code of practice’.

- SCIE
  www.scie.org.uk

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