

Mental Capacity Act

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Presented by

Neil Dalby.

Who will be affected?

- Many people with the following:
 - dementia
 - learning disability (especially severe learning disability)
 - brain injury
 - severe mental health problems
 - anyone planning for the future
 - temporary loss of capacity, for example because somebody is unconscious because of an accident or anaesthesia or because of alcohol or drugs

What is mental capacity?

- What is mental capacity? Mental capacity is the ability to make a decision
- Capacity can vary over time
- Capacity can vary depending on the decision to be made
- Physical conditions, such as location, can affect a person's capacity
- Staff must not assume a lack of capacity because of a person's age, physical appearance, condition or an aspect of their behaviour.

The five core principles (*Code of Practice, Chapter 2*)

- 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 (doable) steps to help them to do so have been taken without success.
- 3. A person is not to be treated as unable to make a decision merely because they make 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 their 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.

What is lack of capacity?

- An individual lacks capacity if they are unable to make a particular decision
- This inability must be caused by an impairment or disturbance in the functioning of the mind or brain, whether temporary or permanent
- Capacity can vary over time and depends on the type of decision

How is capacity assessed?

Factors to be considered include:

- general intellectual ability
- memory
- attention and concentration
- reasoning
- verbal comprehension and expression
- cultural influences
- social context

How to assess capacity ***(Code of Practice, 4.11–4.13)***

- The two-stage test of capacity:
 - Is there an impairment of, or disturbance in, the functioning of the person's mind or brain?
 - If so, is the impairment or disturbance sufficient to cause the person to be unable to make that particular decision at the relevant time?
- Staff should always keep records of any assessment

Questions that must be considered when assessing capacity

- Does the person have the ability to:
- understand the information?
- retain information related to the decision?
- use or assess the information while considering the decision?
- communicate the decision by any means?

Common law tests of capacity

- Making a will
- Making a gift
- Litigating
- Entering into a complex contract
- Entering into marriage

What kind of help could someone need to make a decision?

- What kind of help could someone need to make a decision? Provide all relevant information
- Don't give more detail than required
- Include information on the consequences of making, or not making, the decision
- Provide information on options
- Consult with family and care staff on the best way to communicate
- Be aware of any cultural, ethnic or religious factors that may have a bearing
- Make the person feel at ease
- Try to choose the best time of day for the person
- Try to ensure that the effects of any medication or treatment are considered
- Take it easy – one decision at a time
- Don't rush
- Be prepared to try more than once

Best interests

Any decision or act must be in a person's best interests

- When making decisions, staff should take account of the following:
 - equal consideration and non-discrimination
 - considering all relevant circumstances
 - regaining capacity
 - permitting and encouraging participation
 - special considerations for life-sustaining treatment
 - the person's wishes, feelings, beliefs and values
 - the views of other people

The Bournemouth Case

- This tests the boundary between restraint and the loss of human rights under Article 5 of the European Convention on Human Rights (ECHR) – the right to liberty for people who do not have capacity
- Any deprivation of liberty is lawful only if there are safeguards such as the Mental Health Act 1983 or a court ruling
- **Get advice**

Lasting Powers of Attorney (*Mental Capacity Act, Sections 9–14; Code of Practice, Chapter 7*)

- **Lasting Powers of Attorney (*Mental Capacity Act, Sections 9–14; Code of Practice, Chapter 7*)**
- Two different LPAs to cover a range of circumstances:
 - personal welfare (including healthcare)
 - property and affairs (finance)
- **Who can be an attorney?**
 - family
 - friend
 - professional, e.g. lawyer
- An attorney must be over 18 years old
- An individual can be an attorney for more than one person
- Staff should **not** normally act as attorneys

Advance decisions

- An **advance decision** is prepared when a person has capacity
- It is a decision to refuse specific treatment and is binding
- Other expressions of an individual's preferences are not binding but must be considered
- Staff must be able to recognise when an advance decision is valid
- An advance decision must be written, signed and witnessed if life-sustaining treatment is being refused
- A relevant Lasting Power of Attorney will override an advance decision if it is made after the decision
- An advance decision can be withdrawn:
 - by the individual while they have capacity, or
 - if the individual does something that is clearly inconsistent with the advance decision, or
 - by the decision maker if treatment is now available that was not available when the advance decision was made

Independent mental capacity advocates (IMCAs)

IMCAs are a local service to represent the interests of:

- people lacking capacity when making a serious decision about medical treatment or a move, and in some adult protection cases, and if
- they have no one else to speak for them other than paid carers, and
- their care is arranged by their local authority or NHS

The IMCA has a right to information about the person who lacks capacity but is not a decision maker

Adult protection

- Any adult lacking capacity can be considered a vulnerable adult
- Staff should follow the adult protection guidance in *No Secrets* and remember that:
 - the lead agency is the local authority
 - all agencies have policies and procedures covering adult protection

New criminal offences of ill-treatment or wilful neglect

New offences apply to:

- People who have the care of a person who lacks capacity
- An attorney under a Lasting Power of Attorney or Enduring Power of Attorney
- A deputy appointed by the Court
- Criminal offences can result in a fine and/or a sentence of imprisonment of up to five years.

