



# Mental Capacity

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## **Mental Capacity Act 2005 Policy**

### **Purpose**

To meet the provisions of the mental Capacity Act 2005.

### **Scope**

- All students who lack mental capacity as defined under the Act in England and Wales.
- The Mental Capacity Act 2005 protects both the student and the support worker provided the law is adhered to.

### **Policy**

All students assessed as lacking mental capacity will be subject to the provisions of the Act.

The John Graham Centre will have access to:

- The Act;
- The Code of Practice

### **Mental Capacity Act 2005 – Summary**

- The Mental Capacity Act (MCA) came into force in April 2007 and was implemented in October 2007.
- The MCA was substantially amended by the Mental Health Act 2007 to provide for a procedure to authorise the deprivation of the liberty of a mentally incapacitated person. This part of the act is called the Deprivation of liberty Safeguards (DOLS). The policy and procedure regarding this part of the Act is contained in the Deprivation of Liberty Safeguards policy and procedure.
- The MCA provides a statutory framework to empower and protect vulnerable people who are not able to make their own decisions. It makes it clear who can take decisions, in which situations, and how they should go about this. It enables people to plan ahead for a time when they may lose capacity.
- Guidance on the Act is provided in a Code of Practice. Everyone caring for, or working with an adult who may lack capacity to make specific decisions must comply with this Act. There is a Code of Practice which provides guidance and information as to how the Act works.

The whole Act is underpinned by a set of five key principles:

1. A presumption of capacity- every adult has the right to make his or her own decisions and must be assumed to have the capacity to do so unless it is proved otherwise.
2. The right for individuals to be supported to make their own decisions – people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
3. The individuals must retain the right to make what might be seen as eccentric or unwise decisions;
4. Best interests- anything done for or on behalf of people without capacity must be in their best interests, and;
5. Least restrictive intervention- anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

### **What does the Act do?**

The Act enshrines in statute best practice and common law principles concerning people who lack mental capacity and those who take decisions on their behalf. It replaced previous statutory schemes for enduring powers of attorney and Court of Protection receivers with reformed and updated schemes.

### **Assessing Lack of Capacity**

The Act sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. It is a 'decision-specific' test. No one can be labelled 'incapable' as a result of a particular medical condition or diagnosis. Section 2 of the Act makes it clear that a lack of capacity cannot be established merely by reference to a person's age, appearance, or any condition or aspect of a person's behavior which might lead others to make unjustified assumptions about capacity. The test for capacity is a two stage test. Firstly, is there an impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

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

### **Best interests**

Everything that is done for or on behalf of a person who lacks capacity must be in that person's best interests. The MCA does not define what it means to make a decision in someone's best interests. In considering what is in someone's best interest we would consider the factors outlined in this policy headed 'Best interest'. The Act provides a checklist of factors that decision-makers must work through in deciding what is in a person's best interest. A person can put his/ her wishes and feelings into a written

statement if they so wish, which the person making the determination must consider. This statement is an expression of wishes, and is not the same as an advance decision to refuse treatment which is referred to later in this policy.

### **Acts in connection with support or treatment**

Section 5 clarifies that, where a person is providing or treatment for someone who lacks capacity, then the person can provide support without incurring legal liability. The key will be proper assessment of capacity and best interests. This will cover actions that would otherwise result in a civil wrong or crime if someone had to interfere with the person's body or property in the ordinary course of caring, for example, by giving an injection or using the person's money to buy items for them. These two examples do not necessarily apply to the Centre.

### **Restraint/ Deprivation of Liberty**

Section 6 of the Act defines restraint as the use or threat of force where an incapacitated person resists, and any restriction of liberty of movement whether or not the person resists. Restraint is only permitted if the person using it reasonably believes it necessary to prevent harm to the incapacitated person, and if the restraint used is proportionate to the likelihood and seriousness of the harm.

Section 4A prohibits the deprivation of the liberty of the person unless deprivation is authorised by the Deprivation of Liberty Safeguards in part 2 of the Mental Capacity Act. Where a person may be being accommodated in circumstances that amount to a deprivation of liberty, authorisation under the DOLS arrangements should be sought.

The Act deals with two situations whereby a designated decision-maker can act on behalf of someone who lacks capacity:

- Lasting powers of attorney (LPA's)- The Act allows a person to appoint an attorney to act on their behalf if they should lose capacity in the future. There are two types of LPA, one to make health and welfare decisions and the other to make finance and property decisions. The provision replaces the previous role of Enduring Power of Attorney (EPA). An LPA can only be appointed by someone who has the capacity to do this.
- Court appointed deputies – The Act provides a system of court appointed deputies to replace the previous system of receivership in the Court of Protection. Deputies are able to take decisions on welfare, healthcare and financial matters as authorised by the Court but not able to refuse consent to life- sustaining treatment. They are only appointed if the Court cannot make a one-off decision to resolve the issues, and if the person has already lost capacity to make these decisions.

The Act created two new public bodies to support the statutory framework, both of which are designed around the needs of those who lack capacity.

- A new Court of Protection – The new Court will have jurisdiction relating to the whole Act and is the final arbiter for capacity matters. It has its own procedures and nominated judges.
- A new public Guardian- The public Guardian and his/ her staff are the registering authority for LPA's and deputies. They supervise deputies appointed by the Court and provide information to help the Court make decisions. They also work together with other agencies, such as the police and social services, to respond to any concerns raised about the way in which an attorney or deputy is operating.

The Act also includes three further key provisions to protect vulnerable people:

- Independent Mental Capacity Advocate (IMCA) - An IMCA is someone appointed to support a person who lacks capacity but has no one to speak for them. The IMCA makes representations about the persons wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision.
- Advance decisions to refuse treatment – Statutory rules with clear safeguards confirm that people may make a decision in advance to refuse treatment if they should lose capacity in the future. It is made clear in the Act that an advance decision will have no application to any treatment which a doctor considers necessary to sustain life unless strict formalities have been complied with. These formalities are that the decision must be in writing, signed and witnessed. An advance decision to refuse treatment that is not life sustaining does not have to be recorded in writing.
- A criminal offence- The Act introduces a new criminal offence of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years.

### **Best Interests**

- It is important not to make assumptions about someone best interests merely on the basis of the person's age, appearance, condition or nay aspect of their behavior.
- The decision-maker must consider all the relevant circumstances relating to the decision in question.
- The decision-maker must consider whether the person is likely to regain capacity (e.g. after receiving medical treatment). If so, can the decision that is being made on their behalf wait?
- If the decision concerns the provision or withdrawal of life-sustaining treatment the decision-maker must not be motivated by a desire to bring about the person's death.

The decision maker must in particular consider:

- The persons past and present wishes and feelings (in particular) if they have been written down).
- Any beliefs and values (e.g. religious, cultural or moral) that would be likely to influence the decision in question and any other relevant factors.

- As far as possible the decision-maker must consult other people if it is appropriate to do so and take into account their views as to what would be in the best interests of the person lacking capacity, especially:
  - Anyone previously named by the person lacking capacity as someone to be consulted.
  - Carers, close relatives or close friends or anyone else interested in the person's welfare.
  - Any attorney appointed under a Lasting Power of Attorney.
  - Any deputy appointed by the Court of Protection to make decisions for the person.

### **Procedure**

- Maintain awareness of the Mental Capacity Act principles and the DOLS.
- Staff to follow Mental Capacity Act training.

Four steps to remember when assessing a person's Mental Capacity:

- Bear in mind the key principles which emphasize the fundamental concepts and the core values of the Act.
- Management and seniors to complete MCA forms with students as necessary.
- If it is determined that the student does not have Mental Capacity to make a particular decision, any action taken or any decision made must be in his or her best interest.

### **What to do if there is a dispute about best interests?**

- Family and friends will not always agree about what is in the best interests of an individual.
- If you are the decision-maker you will need to clearly demonstrate in your record keeping that you have made a decision based on all available evidence and taken into account, all conflicting views.
- If there is a dispute, the following things may assist in determining what is in the person's best interests;
  - Involve an advocate who is independent of all parties involved.
  - Get a second opinion.
  - Hold a review meeting.
  - You must ensure that all documents you complete are both signed and dated.

**Assessment of Capacity**

In order to determine whether or not someone has capacity in relation to a specific decision, following the questions below will be helpful in reaching a conclusion. Remember that capacity should be assumed in the first place; evidence of incapacity must relate to the matter in hand.

Do not rely on questions with a yes/ no answer, as they can often produce an affirmative as an automatic response.

**Name of Student:** \_\_\_\_\_

**Name/s of Staff Assessing:** \_\_\_\_\_

**Communication**

<p>How does this person communicate?</p> <p>How do they indicate yes/ okay?</p> <p>How do they indicate no/ stop?</p> <p>How easily can they make their needs/ preferences known?</p> <p>How can information be presented to them to enable maximum comprehension?</p>
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**Information Sharing**

<p>Has the student been told about the decision which needs to be made?</p> <p>How was the information presented?</p>
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**Decision Making**

Ask the following questions, recording all responses or noting if no response. Use the communication methods preferred by the student when asking the questions (these are prompts and not definitive questions).

<p><u>Question One</u></p> <p>Can you tell me about .....? (the proposed action)</p> <p>What is going to happen?</p>	<p><u>Response</u></p>
<p><u>Question Two</u></p> <p>What would happen if you did not have/ receive/ do .....?</p>	<p><u>Response</u></p>
<p><u>Question Three</u></p> <p>What are the benefits/ good things?</p>	<p><u>Response</u></p>
<p><u>Question Four</u></p> <p>What are the risks/ bad things?</p>	<p><u>Response</u></p>
<p><u>Question Five</u></p> <p>Is it okay to .....?</p>	<p><u>Response</u></p>

If the student has answered questions 1,2,3,4 and 5 appropriately and demonstrated a basic understanding of the decision to be made/ procedure then capacity has been confirmed.

If they have shown little response to questioning or have not shown a basic understanding of the proposed action, then capacity has not been demonstrated.

**Outcome:**

Date of planned review: 03.02.20