

Mental Capacity Implementation Programme

Mental Capacity Act 2005

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What is it and when was MCA implemented?

- Codified / made statutory the previous common law / case law – intended to make clear / remove confusion
- All of the Act – came into force on 1st October 2007 but did not before 1st April 2009 permit deprivation of liberty
- New Court of Protection / Court appointed deputies
- Office of the Public Guardian / Lasting Powers of Attorney
- Statutory advance decisions to refuse treatment
- New Independent Mental Capacity Advocate service (since April 2007 in England)
- New research provisions
- New criminal offence – ill treatment / wilful neglect (since April 2007)

Who Is Affected?

- Mental capacity could affect anybody – 16 years or older
- Over 2 million people in England and Wales lack mental capacity to make some decisions for themselves.
- The lack of capacity may be temporary or permanent and will include people with dementia, with brain injury, with learning disability and mental health needs, and those who are unconscious or barely conscious whether due to an accident, being under anaesthetic or as a result of other conditions
- Up to 6 million family carers, carers, health and social care staff

Principles of the Act (Section 1)

- Assume a person has capacity unless proved otherwise
- Do not treat people as incapable of making a decision unless you have tried all you can to help them
- Do not treat someone as incapable of making a decision because their decision may seem unwise
- Do things or, take decisions for people without capacity in their best interests
- Before doing something to someone or making a decision on their behalf, consider whether you could achieve the outcome in a less restrictive way

Ability to make decisions – diagnostic test

- For the purposes of this Act, a person lacks capacity in relation to a matter he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain – diagnostic test

Ability to make decisions – functional test

- Act says in 3(1)....a person is unable to make a decision for himself if he is unable –
 - a) to understand the information relevant to the decision
 - b) to retain that information
 - c) to use or weigh that information as part of the process of making that decision, or
 - d) to communicate his decision (whether by talking, using sign language or any other means) – functional test

Best Interests (Section 4)

- All decisions must be made in the best interests of the person who lacks capacity
- Must consider all relevant circumstances
- Act doesn't define best interests but does give a checklist:
 - Must involve the person who lacks capacity
 - Have regard for past and present wishes and feelings
 - Consult with others who are involved in the care of the person
 - There can be no discrimination

Main implications in matters of consent?

- It is largely business as usual except advance decisions are now statutory; and we now have personal welfare lasting powers of attorney and deputies and Independent Mental Capacity Advocates
- The fundamentals of consent / capacity that existed in common law prior to October 2007 are now enshrined in statute

Main implications for clinicians?

- **The individual who delivers the treatment** has to confirm the lack of capacity before moving to a best interests decision
- Has to consult those with an interest in the care or welfare of the person
- Can it wait?
- Recording

Implications for patients

- Have to be communicated with in the way that they need
- Can it wait?
- Those interested in their care or welfare have to be consulted