

The Mental Capacity Act-Is It Equal?

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The aim of the workshop

- Quick recap on the principles of the MCA
- Quick recap on the best interests checklist
- Are there any barriers to equal implementation of the MCA?
- If there are any, how could these be overcome/minimised?

The 5 principles of the Mental Capacity Act 2005

- A person must be assumed to have capacity unless established otherwise.
- 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.
- A person is not to be treated as unable to make a decision merely because they make an unwise decision.
- 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.
- 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.

The '2 stage test of capacity'

- Is there an impairment or, or disturbance in, the functioning of the mind or brain?
- Is this impairment sufficient that they lack capacity to make the decision in question?

Under the MCA, the following factors have to be considered when assessing if someone has capacity to make a decision:

- whether they are able to understand the information
- whether they are able to retain the information related to the decision to be made
- whether they are able to use or weigh that information as part of the process of making the decision
- whether they are able to communicate that decision – by any means, including blinking an eye or squeezing a hand.

The factors that must be taken into account when determining what is in someone's best interests are set out in the best interests checklist (MCA, Section 4; Code of Practice, 5.13):

- **Considering all relevant circumstances** – these are circumstances of which the decision maker is aware and those which it is reasonable to regard as relevant.
- **Regaining capacity** – can the decision be put off until the person regains capacity?
- **Permitting and encouraging participation** – this may involve finding the appropriate means of communication or using other people to help the person participate in the decision-making process.
- **Special considerations for life-sustaining treatment** – the person making the best interests decision must not be motivated by the desire to bring about a person's death.
- **Considering the person's wishes, feelings, beliefs and values** – especially any written statements made by the person when they had capacity.
- **Taking into account the views of other people** – take account of the views of family and informal carers and anyone with an interest in the person's welfare or appointed to act on the person's behalf.

Is the MCA being applied equally?

- Case Studies
- What do you think?

Some Issues to consider

- When assessing capacity:
 - Environment
 - Time of Day
 - Lived Experience of Person
 - Lived Experience of Assessor
 - Is anyone making assumptions?
 - Use of language?
 - Use of familiar people?
 - Anything else?

Some Issues to consider

- When making best interests decisions:
 - What approach are you using?
 - Objective
 - Subjective-substituted judgement
 - Risk assessment-the decision makers view
 - Organisational considerations
 - Resource Provisions

My contact details

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