

Mental Capacity Act and IMCA

Sue Lee

Empowerment Matters CIC



Training overview

- Mental Capacity Act
- Supported decision-making
- Assessing capacity
- Best Interests
- IMCA
- Non instructed advocacy
- Deprivation of Liberty safeguards (DoLS)
- Advocacy and the Care Act

What is 'Mental Capacity' ?

Mental Capacity is the ability to make a decision at the time the decision needs to be made.

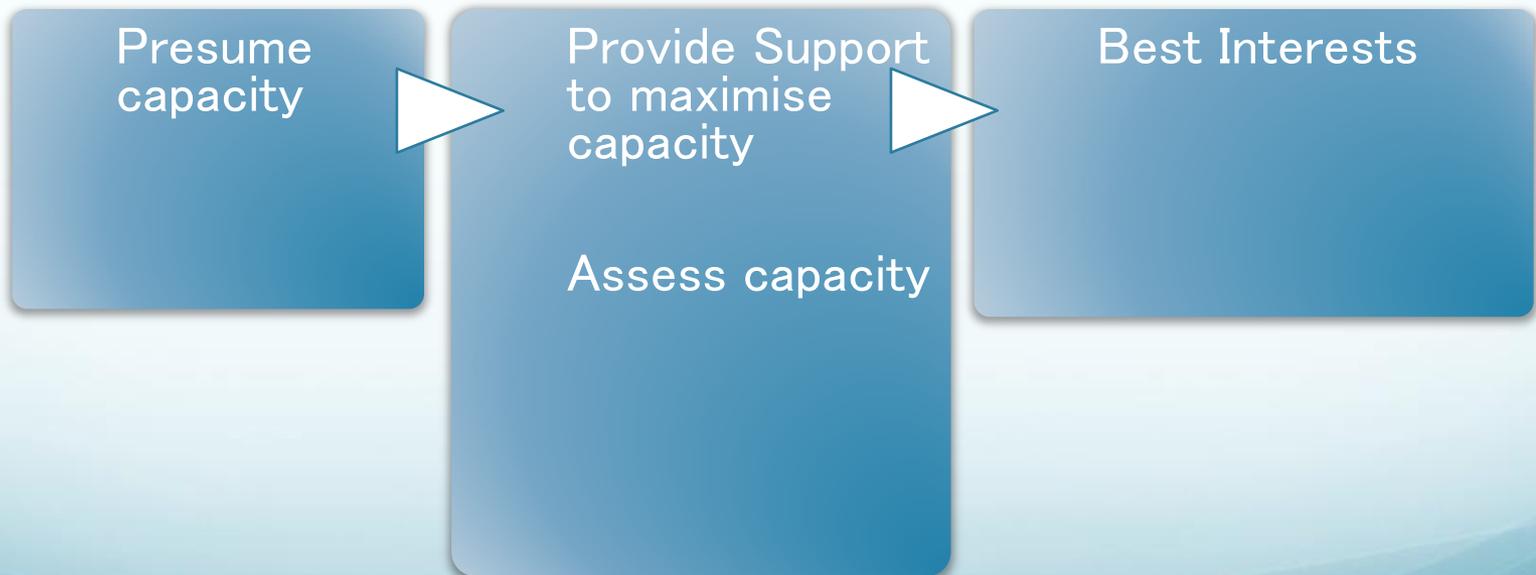
Mental Capacity Act



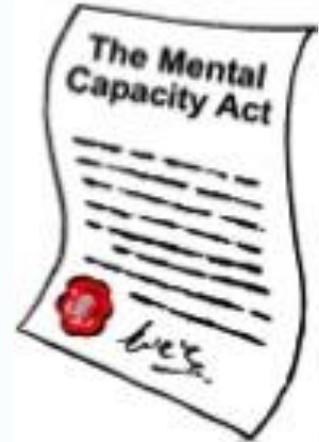
- Applies to people aged 16 and over.
- Everyone working with/providing support for an individual who lacks the capacity to make a particular decision must comply with the Act.
- The Act clarifies good practice when supporting/providing treatment when an individual lacks capacity to make a specific decision.
- The Act covers a wide range of decisions.
- The Act aims to balance the right for individuals to make decisions for themselves with the right to be protected from harm.

Mental Capacity Act

- The Act makes it clear that a person's ability to make a decision, or to participate in the decision-making as far as they are able, should be maximised through the support they receive.



Mental Capacity Act – what do you need to know?



- 5 core principles
- Best interests
- Independent Mental Capacity Advocates (IMCAs)
- Assessing capacity
- Powers to make decisions on behalf of someone who lacks capacity
- Deprivation of Liberty Safeguards

Five Principles of the Act

1 A person must be assumed to have capacity unless it is proved otherwise.

2 A person should not be treated as unable to make a decision unless all practicable steps to help them have been taken without success.

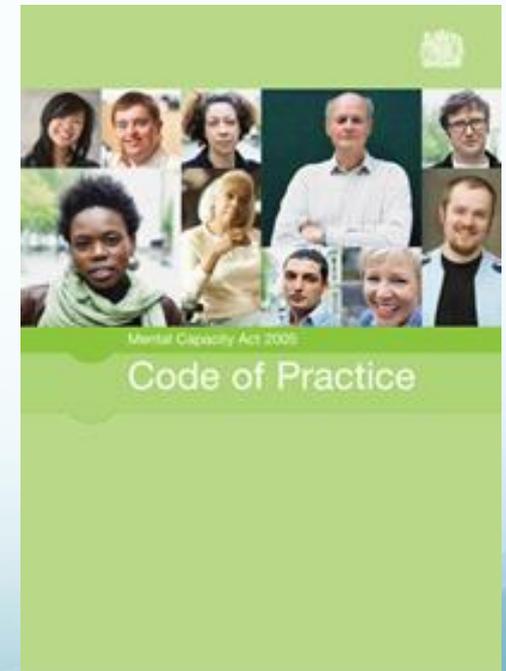
3 A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

4 Any act done or decision taken on behalf of a person who lacks capacity must be in their best interests.

5 When any decision is being contemplated on behalf of a person, the least restrictive option must be considered.

Mental Capacity Act – what do you need to know?

- Court of Protection
- Deputies for personal welfare and for finance
- Advance decision to refuse treatment
- Criminal offence – wilful ill-treatment
or neglect



Court of Protection

- The Court of Protection has powers to:
 - Decide whether a person has capacity to make a particular decisions for themselves
 - Make declarations, decisions or orders on financial or welfare matters
 - Appoint deputies to make decisions for people lacking capacity to make those decisions
 - Decide whether an LPA or EPA is valid
 - Remove deputies who fail to carry out their duties

Court appointed deputies

- Deputies must be at least 18 years of age
- Health & welfare or property and affairs
- Property & affairs deputies can be an individual or a trust corporation or an office-holder in the Local Authority
- Court can appoint more than one deputy and state whether they should act ‘jointly’ or ‘severally’.
- Deputies have no authority if the person can make a particular decision for themselves
- Deputies must follow the Act’s statutory principles

Advance decisions to refuse treatment

- Enables someone aged 18 years of age or over to refuse specified medical treatment for a time in the future when they may lack capacity to consent or refuse treatment.
- The individual must have capacity to refuse the particular treatment at the time the advanced decision is made.
- An advance decision must be valid and applicable to the person's current circumstances. If it is, it has the same effect as a decision that is made by a person with capacity.

MCA updates

- House of Lords select committee carried out a review of the MCA in 2014
- Some evidence submitted regarding MCA Principle 2:

“there is less focus on supporting people with making decisions than assessing whether they can make those decisions or not.”
Irwin Mitchell Law Firm

“there is still a tendency to understand the Act as a framework for making decisions for or on behalf of a person rather than encouraging and maximising their participation in the decision making” Challenging Behaviour Foundation

Themes from cases heard in the Court of Protection

- The Court hears complex cases where a best interests decision or a decision about capacity must be made.
- Judges have been clear that the views of the person are extremely important when decisions are being considered.
- Key messages about supporting an individual to enable them to make a decision for themselves and the importance of considering risk in a balanced manner.
- Judgments from cases heard in the Court of Protection have made it very clear that capacity assessments should not be made so difficult that it creates an unrealistic ‘test’ for a person that someone who has capacity would have difficulty with.

Handout 1

Mental Capacity Act

QUIZ

Supported decision making

A person should not be treated as unable to make a decision unless all practicable steps to help them have been taken without success. **MCA Principle 2**

- Puts individuals at the centre of decision-making.
- Starts from the perspective that all people have a right to make their own choices and to have control over their lives.
- It's important to think about the stages of decision-making: getting information, considering options, weighing up the options, thinking about consequences, talking to others.
- And what particular aspects of decision-making an individual has difficulties with.
- Think about **'decisional supports'**

Supported decision making

- Is the environment right? Is it the best time to discuss the decision?
- Are the choices/options clear?
- Is the information in the right format?
- Breaking big decisions down into smaller decisions.
- Discuss risks and benefits and any foreseeable consequences.
- **Have you given the person the best chance to make the decision for themselves?**



Care Act 2014

- “Some people will need assistance to make plans and decisions, and to be involved in the planning process. The modern care and support system should routinely **enable supported decision making**, where options and choices are presented simply and clearly.” (Care Act Guidance 10.4)
- “In ensuring that the process is **person-centred**, the local authority should ensure that any staff responsible for developing the plan with the person are trained in the Mental Capacity Act if appropriate, familiar with best practice..” (10.35)

Handout 2

Supported decision making

Capacity Assessment



- I. Does the person have an impairment or disturbance (for example, a disability, condition or trauma) that affects the way their mind or brain works? (diagnostic test)

- II. If so, does the impairment mean that the person is unable to make a particular decision at the time it needs to be made? (functional test)

Assessing capacity

- How do you know if someone has the capacity to make a particular decision?

A person is unable to make a decision for himself if he is unable:

- to **understand** the information relevant to the decision
- to **retain** that information
- to **use or weigh** that information as part of the process of making the decision or
- to **communicate** his decision (whether by talking, using sign language or any other means).

N.B. Decision-making capacity can be fluctuating or temporary.

Who should assess capacity?

- The person who assesses an individual's capacity will usually be the person who is directly concerned with the individual at the time a decision needs to be made. Eg doctor, social worker
- For day-to-day decisions it will be the person providing care at the time a decision needs to be made.
- For a legal transaction – it will be a solicitor or legal practitioner
- The more complex the decisions, the more formal the assessment will need to be.

Reasonable Belief

- The person who assesses capacity is usually the person who is directly concerned with the individual at the time the decision needs to be made.
- For most day-to-day decisions this will be the person providing care/support.
- For care, the support worker/carer must have a 'reasonable belief' that the person lacks capacity to agree to the action or decision to be taken.
- Carers do not have to be experts in assessing capacity.

Reasonable Belief

- To have a ‘reasonable belief’ a support worker/carer must have taken ‘reasonable steps’ to find out if the person lacks capacity to make a decision or consent to treatment/care.
- The support worker/carer must also establish that the act or decision is in the person’s best interests.
- They must be able to describe the steps they have taken.

MCA 'process'

1

- Identify the decision.
- Support the person to make their own decision.
- If person has capacity – has absolute right to make the decision.

2

- If 'reasonable belief' person lacks capacity – carer/support worker can make everyday decisions in person's best interests.
- More significant decision – more formal the assessment of capacity.

3

- If person assessed to lack capacity – a best interests decision can be made.

Mental Capacity Act

- The Act makes it clear that a person's ability to make a decision, or to participate in the decision-making as far as they are able, should be maximised through the support they receive.



Best Interests

- Only when a person has been given every chance to make the decision themselves with appropriate support

AND

- The capacity assessment shows that the person lacks capacity to make the particular decisions
- The best interests decision-making process can start

Best Interests – a ‘checklist’

- 1 Encourage participation of P.
- 2 Identify all relevant circumstances.
- 3 Find out P’s views.
- 4 Avoid discrimination – don’t make assumptions.
- 5 Consider whether the person may regain capacity.
- 6 If the decision concerns life-sustaining treatment – do not make assumptions about P’s quality of life or be motivated to bring about P’s death.
- 7 Consult others where practical & appropriate.
- 8 Avoid restricting P’s rights.

Who can make best interests decisions?

- Health and social care professionals – as long as they follow the framework set out in the Mental Capacity Act.
- An attorney under a Lasting Power of Attorney – the LPA will specify what decisions can be made. Attorneys can refuse life-sustaining treatment on behalf of an individual if the LPA specifies this.
- A deputy appointed by the Court (with the relevant authority).
- Serious decisions may be made by the Court.

Example case in the Court

- A NHS Trust v DE EWHC 2562
- First reported case in which the court has found that it was in the best interests of an incapacitated learning disabled adult to have a vasectomy as a method of contraception.
- DE was 37 years old and had a long-term partner PQ, with whom he had fathered a child, XY.
- At the time the child was conceived, DE probably lacked capacity to consent to sexual relations. He consistently expressed the view that he did not want to have more children.
- DE did not gain capacity to make decisions about contraception, including a vasectomy, and he was judged to be unable to acquire such capacity even with further support.
- The court held that it was in DE's best interests to have a vasectomy, notwithstanding that this would permanently remove his ability to have children.

BREAK

Duty to instruct an IMCA

- The LA/NHS (known as the responsible body) **must** instruct an IMCA where: a decision is being made about either
 1. serious medical treatment
 2. long-term accommodation changes
 3. deprivation of liberty**and** the person does not have the capacity to make that decision
and there are no family or friends who are appropriate to consult.

Power to instruct an IMCA

The LA/NHS **may** instruct an IMCA where the person does not have the capacity to agree to the arrangements for:

- care reviews, where there are no family or friends able to support and represent the person
- adult safeguarding proceedings, for subject of abuse or alleged perpetrator, regardless of family/friends involvement.

Appropriate to consult

- IMCA is a safeguard for those people who lack capacity and have nobody close to them (in an *unpaid* capacity) who it would be ‘appropriate to consult.’
- Nobody who would be willing or able to be consulted about the decision to be made.
- If it is not possible, practical and appropriate to consult anyone, an IMCA should be instructed.

Serious Medical Treatment

- SMT is defined in the MCA as treatment which involves:
 - Giving new treatment
 - Stopping treatment that has already started
 - Withholding treatment that could be offered

In circumstances where:

- if a single treatment is offered there is a fine balance between the likely benefits, the burdens & the risks involved
- a decision between a choice of treatments is finely balanced OR
- what is proposed is likely to have serious consequences for the person

Change of Accommodation

- The responsible body has a duty to instruct an IMCA if a long term accommodation (hospital or a care home) decision is being considered and if it will be:
 - In a hospital for longer than 28 days
 - In a care home for longer than 8 weeks

Care Review

- Care Reviews relate to decisions about accommodation that will be provided for a continuous period of 12 weeks or more.
- A responsible body can instruct an IMCA to support a person who lacks capacity when:
 - They have arranged the accommodation for the person
 - They aim to review the arrangements
 - There are no family or friends who are appropriate to consult

Adult Safeguarding

- Responsible bodies can instruct an IMCA to support and represent a person who lacks capacity where it is alleged that:
- The person has been abused or neglected by another person
OR
- The person is abusing or has abused another person
- Access to IMCA is not restricted to people who have nobody appropriate to consult.
- An IMCA can be instructed if it's considered of benefit even if the person has family & friends.

IMCA eligibility

- IMCAs cannot be instructed if:
 - A person who now lacks capacity previously named a person who should be consulted and that person is available to be consulted.
 - The person who now lacks capacity previously appointed an attorney under a lasting power of attorney
 - The court of protection appointed a deputy (who has authority to make the relevant decision).

IMCA role and functions

- Meet, support and represent the person.
- Ascertain the person's wishes, feelings, preferences and values.
- Evaluate information, including accessing relevant records under Section 35(6) of the Act.
- Ascertain alternative courses of action, including the least restrictive options.
- Consult with others involved in the person's life.
- Establish if the person has been supported as much as possible in the decision making process.

IMCA role and functions

- IMCAs have the right to seek a further medical opinion.
- Prepare a report, which the decision maker has a legal duty to consider.
- Challenge the decision where relevant, informally first and through the Court of Protection as a last resort.
- Check that the Mental Capacity Act principles and best interests checklist are being followed.

Responsible Body NHS/LA

Responsible body's duties:

- Instruct the IMCA where they have a duty or power
- When an IMCA has been instructed, take into account the information provided by the IMCA when working out the person's best interests.
- Make a decision in the person's best interests

Handout 3

IMCA QUIZ

Handout 4

IMCA Case Studies

LUNCH

Deprivation of Liberty Safeguards (DoLS)

How did it all start?

The 'Bournewood' story
HL v The United
Kingdom
October 2004

European Court of Human Rights

- Judge said:
- The deprivation of liberty had not been in accordance with ‘a procedure prescribed by law’ .
- Breach of Article 5 as HL had no means of applying quickly to court to see if the deprivation of liberty was lawful.

Why do we have DoLS?

- After ‘Bournewood’ needed a way of making sure that this situation could not happen to anybody else.
- Legal protection.
- Rules introduced about when a person can be deprived of their liberty.
- A deprivation of liberty must be ‘authorised’.
- To ensure that people who are deprived of their liberty have their rights respected.

What are the DoLS?

- The MCA DoLS provide protection for people who are accommodated in a hospital or a registered care home.
 - In circumstances that amount to a deprivation of their liberty.
 - Lack the capacity to consent to their care or treatment (under Mental Capacity Act).
 - It is in their best interests and necessary to keep them safe.

2 cases in the Supreme Court

- P v Cheshire West and Cheshire Council
- P and Q v Surrey County Council
- The appeals concerned the criteria for judging whether the living arrangements made for a mentally incapacitated person amount to a deprivation of liberty.
- And if they do, the deprivation of liberty must be authorised by a court or the DoLS process.

Why do we have the DoLS?

“It is merely a recognition that human rights are for everyone, including the most disabled members of our community, and that those rights include the same right to liberty as has everyone else.” *

* Lady Hale in

P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents)

P and Q (by their litigation friend, the Official Solicitor) (Appellants) v Surrey County Council (Respondent)

The Supreme Court judgement

- The 'acid test'
- 2 key questions to ask:
 - ◆ Is the person subject to continuous supervision and control?
 - ◆ Is the person free to leave?
- For a person to be deprived of their liberty they must be under continuous supervision and control AND not free to leave (and lack capacity to agree to the arrangements).

IMCA roles within the DoLS

- 39a IMCA – during the DoLS assessment process
- 39c IMCA – if there is a gap in appointing a relevant person's representative
- 39d IMCA – supporting a person and/or their representative to understand their detention and to challenge it if the person is showing verbally or through their actions that they want to challenge

IMCAs challenging decisions

- IMCAs may want to challenge either the best interests decision or the process used to make the decision
- They should challenge informally at first through discussion
- The IMCA report is a useful way of highlighting any concerns the IMCA may have
- The IMCA may use formal processes such as asking for the decision to go to Judicial Review or seek permission to go to the Court of Protection
- The IMCA may seek legal assistance for their client

IMCA Report

- The IMCA must write a report on their findings for the local authority or NHS body
- The Local Authority or NHS Body must take properly into account the information that the IMCA provides
- The report should be balanced and contain the views of the person and all those the IMCA consulted
- The report should have a conclusion but does not recommend the decision that should be taken

Care Act –who will be eligible for advocacy?

- Adults who need care and support
- Carers of adults or children in transition
- Young carers
- Young people when they are moving to adult services (transition)

Eligibility

Local authority:

- Assessing an individual's care/support needs
- Involving an individual in care and support planning
- Carrying out a safeguarding enquiry or review (SAR)
- Additionally, some individuals may need advocacy support to access information and advice

In situations where:

- Individuals would have 'substantial difficulty' in engaging with local authority care/support/safeguarding processes
AND
- There is nobody 'appropriate' to support them

‘Substantial Difficulty’

- Care Act defines 4 areas where ‘substantial difficulty’ may be found:
- Understanding relevant information
- Retaining information
- Using or weighing the information as part of engaging
- Communicating views, wishes and feelings
- If an individual is experiencing difficulty with **any one** of these areas, they may be eligible for advocacy if other criteria are met.
- Both the Mental Capacity Act and the Care Act recognise the same areas of difficulty.

What situations?

- Carrying out a needs assessment
- Carrying out a carer's assessment
- Preparing a care and support plan
- Preparing a support plan (carer)
- Revising a care and support plan
- Revising a support plan
- Carrying out a child's needs assessment
- Carrying out a child's carer's assessment
- Carrying out a young carer's assessment

Who is 'appropriate' ?

- The role of the appropriate person is to **support** the person's **active involvement** with the local authority processes
- The duty to appoint an advocate does not apply if there is a person –
 - Who would be an appropriate person to represent and support the individual for the purpose of **facilitating** the individual's involvement, and
 - Who is not engaged in providing care or treatment for the individual in a professional capacity or for remuneration.

Who is ‘appropriate’

- This at 7.64 of the Statutory Guidance is interesting:
- “..the duty to provide independent advocacy under the Care Act is broader and provides support to...people for whom there is someone appropriate to consult for the purpose of best interests decisions under the Mental Capacity Act, but who is not able and/or willing to facilitate the person’s involvement in the local authority process..”

Example situations – eligible for advocacy

- There are family & friends but they don't know the individual very well
- Family & friends do not want to be involved in supporting the person through the process
- A person who would otherwise be 'appropriate' is suspected of abusing the individual or abuse has been evidenced.
- The person has strongly held views and would find it difficult to support the individual to express their own views.
- A spouse finds it difficult to understand the LA processes themselves
- A family member lives some distance away and would find it difficult to offer the support an individual needs.

Care Act – exceptions

Provision of an advocate even where the person has family or others who can facilitate their involvement

There are 2 exceptions:

- Where the exercising of care assessment/planning might result in placement in either a NHS funded provision in a hospital for 4 weeks or more, or a care home for 8 weeks or more AND the LA believes it would be in the individual's best interests to appoint an advocate.
- Where there is a disagreement, relating to the individual, between the LA and the appropriate person and both agree that it would be in the individual's best interests to appoint an advocate.

Practical example

- Simon is a 39 year old man with autism who lives with his mum Joan who is 70 years old. Joan has asked for an assessment of Simon's needs as whilst she provides the majority of his care needs she is beginning to struggle with this due to her own health issues and age.
- The needs assessor meets with both Simon and Joan and deems that Simon would benefit from advocacy due to substantial difficulty. Joan due to her health needs does not feel able to fully facilitate his involvement.

Practical example cont

- Joan is also entitled to a carer's assessment. It is not felt that she requires an independent advocate at this stage as she does not have substantial difficulty in being involved in the process.
- A referral is made to the local advocacy provider and Stan is appointed as Simon's advocate. Stan is also a practicing IMCA.

Advocates supporting individuals

Assist the individual in:

- Understanding the assessment/care planning/safeguarding processes;
- Attending assessment/review/care planning/safeguarding meetings;
- Being involved and, wherever possible, making their own decisions;
- Communicating their views, wishes or feelings and desired outcomes;

Supporting individuals

Assist the individual in:

- Understanding how their care or support needs could be met by the local authority or otherwise;
- Understanding support plans;
- Understanding their rights under the Care Act and any other rights;
- Challenging the local authority decisions or process, if the individual so wishes, or where the person cannot challenge even with assistance, to challenge on their behalf

Thank you!

www.empowermentmatters.co.uk

sue@empowermentmatters.co.uk