

CSHS AND HOUSING LIN SEMINARS

THE MENTAL CAPACITY ACT AND THE HOUSING SECTOR



Overview of the day

- To give an overview of the Act highlighting its relevance to providers of sheltered and supported housing
- To be followed by some case studies which illustrate these points
- Afternoon session to focus on issues relating to tenancy and capacity – presentation and then case studies
- LPAs and applications to CoP
- Focus on own organisation and experience

Linked issues

- Very close links between:
 - Capacity issues – MCA
 - Abuse of vulnerable adults – Safeguarding adults procedures
 - Disability issues – DDA
- An act that may be acceptable if someone gives informed consent may be abusive or an infringement of rights if they don't

Meaning of Capacity

- A person who lacks capacity is “**a person who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken**”
- It is **decision-specific** – so for example someone might well have the capacity to decide what they'd like for breakfast but not to sign a tenancy agreement
- It is **time-specific** – People with certain conditions fluctuate in their level of mental functioning, e.g. those with a dementia, so whether or not they have capacity to make a particular decision can only be assessed at the time they are being asked to make the decision.
- **No-one can be labelled incapable simply because they have a particular diagnosis or medical condition.**

- So...Why is the Mental Capacity Act relevant to the housing sector?

Code of Practice

- Anyone “being paid for acts for or in relation to a person who lacks capacity” is legally required to “have regard” for the code – it applies to you.
The Code of Practice has statutory force
- What does that mean? You need to take it into account in your work with people who may lack capacity to make various decisions, and if you don’t comply with it you need to be able to justify why not.
- Worry not.....
 - easy to read and just fleshes out duties and principles of Act;
 - is mostly plain good practice

Code Chapter Headings*

1. What is the Mental Capacity Act?
2. What are the statutory principles and how should they be applied?
3. How should people be helped to make their own decisions?
4. How does the Act define a person's capacity to make decisions and how should capacity be assessed?
5. What does the Act mean when it talks about 'best interests'?
6. What protection does the Act offer for people providing care and treatment?
7. What does the Act say about Lasting Powers of Attorney?
8. What is the role of the Court of Protection and court-appointed deputies?

Code Chapter Headings*

9. What does the Act say about advance decisions to refuse treatment?
10. What is the new Independent Mental Capacity Advocate service and how does it work?
11. How does the Act affect research projects involving a person who lacks capacity?
12. How does the Act apply to children and young people?
13. What is the relationship between the MCA and Mental Health Act 1983?
14. What means of protection exist for people who lack capacity to make decisions for themselves?
15. What are the best ways to settle disagreements and disputes about issues covered in the Act?
16. What rules govern access to information about a person who lacks capacity?

Who assesses capacity?

- Everybody who works with people who may lack capacity has a responsibility to assess capacity in the given context.
- *e.g. Housing provider draws up a support plan. What if s/he has doubts about the person's capacity to agree?*
- You will be in situations when
EITHER you need to assess someone's capacity yourself, OR
You need to refer to an expert
- *e.g. Service user refuses referral to Social Services, and your needs and risk assessment suggests he is at significant risk. Is there evidence of mental impairment or is he simply making an unwise decision?*

- So...what do you need to know?

S 1 - Five Key Principles

- **A presumption of Capacity** – every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise
- **Supporting individuals to make their own decisions** – a person must be given all practicable help before anyone treats them as not being able to make their own decisions. Good practice to help build capacity.
- **Unwise decisions** – just because an individual makes what might be seen as an unwise decision, they should not be assumed to lack capacity to make that decision
- **Best Interests** – an act done or decision made under the Act for or on behalf of a person who lacks capacity must be done in their best interests - genuinely
- **Least restrictive option** – anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms

Two-stage test of Capacity

- Is there an impairment or a disturbance in the functioning of the mind or brain? (doesn't have to be permanent)
- If there appears to be:
 1. Does the person understand the decision they need to make, why they need to make it, and the likely consequences of making, or not making the decision?
 2. Can they retain the information long enough to make an effective decision?
 3. Can they use the information to objectively weigh up the pros and cons against their own (subjective) value system and arrive at a decision?
 4. Can they communicate it somehow?

- If there is significant evidence, on the balance of probabilities, that the person cannot do one or more of these last four things, then you no longer presume capacity.
- In that scenario their “decision” is merely a preference, and if, in acting upon it, the person comes to harm which could have been anticipated, those with a duty to care could be deemed negligent.
- There is a new criminal offence introduced in the Act of ill-treatment or wilful neglect which applies to someone who has care of or is an LPA or donee for someone who lacks capacity.

Most housing staff would not be expected to be experts in assessing capacity but must have a “reasonable belief”, based on the above test and objective reasons, that the person lacks capacity.

What if you're uncertain?

- If in doubt, you would need to call in professional expertise – maybe GP, psychiatrist, clinical psychologist, social worker or multi-disciplinary approach depending on the issue.
- There are also specialists for particular types of decisions
 - A solicitor in relation to Power of Attorney or signing legal documents
 - A surgeon in relation to informed consent for an operation
 - The local authority in relation to care plans
- The more complex or serious the decision, or the greater the potential consequences, the more important it becomes to be sure about capacity, and the more formal the assessment needs to be

Formal assessments of capacity*

- Some decisions require a formal assessment of capacity e.g.
 - Where a legal document may later be challenged, such as signing a will or other legal document
 - Where someone who may lack capacity is involved in a legal case

- You may need to take action to protect someone pending capacity assessment
- *e.g. A tenant with a history of bi-polar disorder who has been refusing to take his medication has become increasingly depressed and heads out of his accommodation saying he is going to jump in front of a train at King's Cross station*

If you intend to act for someone who lacks capacity, you need to know*

- What sorts of actions you can take and which you cannot (slide 18)
- The limits of the steps you can take (slide 20)
- The processes and principles which you must apply (slides 16 & 19)
- How to assess best interests (slide 17)
- That you must record what and why

If intending to take action on behalf of the person.....

- Take all practical steps to help person decide for themselves – including picking the right time and environment and considering any steps to enhance capacity
- **Apply the two stage test of capacity**
- If reasonable grounds for concluding person lacks capacity, **must have reasonable grounds for believing action in person's best interests** (see next slide) – no longer can protectionist acts masquerade as best interests. *e.g. of intercepted letter*
- **Keep a record of steps taken and reasons for decision (p72)**
- Proportionate to situation

S4 - How to decide on someone's best interests

Applies to any act or decision made on behalf of someone where there is reasonable belief that the person lacks capacity, whether a day-to-day decision or one made by the court.

- Is capacity likely to be regained? If so can decision-making wait till then?
- Don't simply assume on the basis of someone's age, appearance, ethnicity, medical condition or behaviour
- Do whatever is possible to involve the person in the decision
- Try to identify issues and circumstances of relevance to the decision in question
- Try to find out the views of the person who lacks capacity:
 - As expressed in the past or currently, or by habits and behaviour
 - Any beliefs and values known to be held that would influence the decision
 - Any other factors the person would be likely to consider if able to do so
- Consult other relevant people (P84)
- Weigh up all the factors to decide what is the person's best interests

Acts in relation to “care and treatment” that can be taken

- Families, friends or formal care staff who look after and act on behalf of someone who becomes incapable of giving consent, can continue to fulfil that role within certain constraints without fear of liability (See section 5 protection). The sorts of things they can do include:
 - Physical assistance with washing, dressing and personal hygiene
 - Helping with eating or drinking
 - Helping with mobility
 - Doing shopping or buying essential goods
 - Arranging household services, e.g. repairs
 - Arranging domiciliary or other services required for the person’s care (e.g. cleaning or meals provision)
 - Acts in relation to other community care services
 - Acts associated with a change of residence, e.g. house moving and clearing
- They can also pay for “necessary” goods and services (S7) related to these acts with the person’s money or by “pledging the person’s credit” (S8)
Normally doing these without informed consent could be seen as an excuse for assault, trespass to persons or property or the “tort of conversion”
- There is a similar list of healthcare and treatment acts.

S5 - Protection or immunity “in connection with care or treatment”

- To be protected, the above acts need to comply with the following:
 - **Doctrine of necessity** – The act can be justified as being necessary and proportionate
 - **Best interests** – The act can be argued to be in the person’s best interests and the correct steps have been taken, e.g. consulting a range of relevant people
 - **Restraint** – If the act is intended to restrain the person in any way, the act must be “necessary to prevent harm to the person” and must be proportionate to the likelihood of the harm and its seriousness. (pp105 -106)
 - **Least restrictive** – the step taken must be the least interventionist and least restrictive necessary to prevent the harm; reducing the risk but not necessarily eliminating it altogether
- *Example of Ryan O’ Reilly*

Caveats

- You would not be protected from immunity if you had a duty of care and failed to act to prevent serious harm – this would be seen as negligence. You have immunity if you DO something which normally requires consent, not if you FAIL to do something.
- S5 does not appear to provide protection if something is done which requires specific authority to act on someone's behalf (e.g. LPA or deputyship) and which would otherwise not be effective, e.g. signing a legal document. i.e. must have specific authority to do that to make it legally valid and to gain legal protection
- Family carers and other carers are not expected to be experts in assessing capacity, and it is therefore sufficient for them, amongst others using the Act to hold a reasonable belief that the person lacks capacity in order to receive statutory protection from liability

It would be useful to know

- Who can act for the person who lacks capacity (slide 24)
- In what circumstances (slide 25 – 30)
- The hierarchy of authority
So that you know what powers others have – or have not - over your tenants
- What to advise people who are starting out on this process, e.g. setting up an LPA or applying to Court of Protection

Who can act for a person who lacks capacity?

- Family and other informal carers
- Staff paid to work with the person – e.g. care workers, ambulance staff and housing staff
- Public authorities – e.g. health and social care professionals
- The donee of a Lasting Power of Attorney or existing Enduring Power of Attorney
- IMCAs – don't make decisions but advocate for person
- A Court appointed deputy (prev receiver)
- The Court of Protection

Lasting Power of Attorney

- A person with capacity can appoint someone e.g. a relative, friend or solicitor, to act on their behalf if they should lose capacity in the future. This replaces the Enduring Power of Attorney.
- It can cover
 - Property and Affairs – includes things like control and management of finances, sale or acquisition of property, carrying out of any contract
 - Health and Welfare Decisions – includes things like deciding where someone should live, consenting to or refusing medical treatment

Court of Protection

- The new Court of Protection will deal with all aspects of the new Act
- Where there is a dispute, or a decision needs to be made relating to someone who lacks, or may lack, capacity to act or decide on a particular matter – could be property, affairs, health or well-being

Office of the Public Guardian

- The administrative arm of the Court. It is headed by the

Public Guardian

- Appointed by the Lord Chancellor and provided with officers and staff

More detail in this afternoon's session

Role of Public Authorities

- Local Authorities (Adult Social Services) and the NHS have various duties and powers under a range of legislation in relation to assessment, care provision, treatment and adult protection.
- They are also subject to the provisions of the Human Rights Act
- They sometimes have to intervene to protect or treat an adult who lacks capacity to consent, but this does not give them carte blanche to do anything (See Section 5 protection)
- In the case of uncertainty or dispute, they can apply to the Court of Protection for a declaration

Independent Mental Capacity Advocates

- The government must make arrangements to enable people to be available to represent and support people to whom decisions in relation to long term accommodation or serious medical treatment relate.
- These people must be independent of the public authority proposing the move or treatment
- They are called IMCAs
- IMCAs are only brought in where there is no-one else to speak for them. They are appointed by the “responsible body”
- They must be brought in if serious medical treatment is proposed or a move to long-term accommodation following a community care assessment – where PA will be holding the contract
- They may be appointed in adult protection cases and care reviews
- IMCAs have the power to
 - Interview the person s/he is representing in private
 - Examine and take copies of any health record, any social services related record, or any registered provider’s record considered relevant to the investigation of the IMCA

More about IMCAs*

- IMCAS will
 - Provide support so the incapacitated person participates as fully as possible
 - Obtain and evaluate relevant information
 - Ascertain the likely wishes, feelings and values of the person
 - Ascertain any alternative courses of action
 - Obtain further medical opinion if IMCA thinks it desirable
 - Challenge or provide assistance in challenging any relevant decision
- The relevant public authority (“responsible body”) must take into account the views of the IMCA

Change of residence

- A decision to move to alternative long-term accommodation is recognised in the act as a major, life-changing decision
- Families don't have to have specific legal authority to make the decision to move on behalf of someone who lacks capacity, but should apply the principles of the Act in making such a decision
- Someone with a health & welfare LPA can formally take the decision
- If local authorities or health staff want to move someone as part of the person's care plan, they have to go through the best interests process and consider whether there is a less restrictive option
- If there are no family members to consult, they must appoint an IMCA, but only if they are making the placement under the National Assistance Act 1948 or NHSA 2006
- Disagreements can ultimately be resolved by the Court of Protection

Decisions which cannot be made on someone else's behalf (Sec 27)*

- Consenting to marriage or civil partnership
- Consenting to have sexual relations
- Consenting to a decree of divorce/dissolution of civil partnership
- Consenting to child being placed for adoption or the making of an adoption order
- Discharging parental responsibility for a child
- Giving consent under the Human fertilisation and embryology Act 1990

Advance Decisions to Refuse Treatment

- Allows adults over 18 to refuse specified medical treatment in advance.
- They are legally binding but the Act includes safeguards – NB to review and update
- Must be made when person has capacity but only comes into effect if capacity lost
- Must be clear about which treatment it applies to and be in writing and witnessed if applying to life-sustaining treatment
- Doctors can provide treatment if they have any doubt that advance decision not valid and applicable

Making wishes and feelings known*

- A person can help those making decisions on their behalf if s/he makes sure that particular wishes and feelings are known.
- There is no formal process for this, but written statements given to professionals, carers, family or friends are likely to carry weight
- Not legally binding but when deciding on best interests, decision-makers must consider a person's wishes and feelings

Differences between AD and Welfare LPA

- With an advance decision, the person themselves is deciding
- With an LPA, the person delegates the decision-making within defined boundaries to someone else
- Both apply only when the person doesn't have the capacity to decide for themselves
- While a valid AD is legally binding, expressed wishes and preferences are not but must be taken into account

Research involving person who lacks capacity – safeguards*

- Act covers 'intrusive' research – i.e. Where consent normally needed
- Research requirements
 - Must be linked to an impairing condition that affects person who lacks capacity
 - Must be linked to the treatment (broadly defined) of that condition
 - Must have some chance of benefitting person. Benefit must be proportional to burden of taking part, or
 - Aim of research must be to provide knowledge about the cause, treatment or care of people with the same, or similar, condition

Researcher must:*

- Get approval of 'appropriate' body
- Consider the views of carers and other relevant people
- Treat person's interests as more NB than those of society or science
- Respect any objections or signs of distress made by person during research

Also:

- Risk to person who lacks capacity must be negligible
- Must be no significant interference with the freedom of action or privacy of the person who lacks capacity
- Nothing must be done which is unduly invasive or restrictive

Conclusions for housing providers

- The Act is quite empowering for housing sector staff in their dealings with other agencies – both as potential decision maker and as someone who knows the resident. Fits well with Supporting People.
- There is an important role for housing providers in:
 - monitoring the well-being of service users
 - advocating on their behalf
- Housing providers need to be aware of capacity issues and take steps if someone's capacity is in doubt, applying the Act's principles and "having regard for" the Code of Practice
- When undertaking needs and risk assessments they need to encourage arrangement of LPAs, and keep a record of these and any Advance Decisions or expressed wishes

Information Sources

- Housing LIN briefing on “Housing Provision and the Mental Capacity Act 2005”

<http://www.icn.csip.org.uk/housing/index.cfm?pid=521&catalogueContentID=1940>

- MCA toolkit for organisations

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4137745

- Code of Practice

<http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf>

- Other formal documents

<http://www.dca.gov.uk/menincap/legis.htm>

- Specific short guides –

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_074491

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