

MENTAL CAPACITY ACT POLICY (England & Wales)

INTRODUCTION

The **Mental Capacity Act** 2005 became fully effective in October 2007 in England & Wales and applies to those who make decisions or deal with persons who may lack mental capacity. Within primary care the provisions will apply to GPs, nurses and those to whom a referral may be made. In Scotland the Adults with Incapacity Act provides similar legislation for people over the age of 16. Similar legislation is expected in N. Ireland.

Capacity in this context is the ability to reach a decision and the lack of this capacity may be on either a temporary or a permanent basis, due to physical as well as mental causes.

The **Mental Capacity Act** (the Act) does not generally apply to young persons under the age of 16 – a parent or guardian can normally make decisions on their behalf – however under some circumstances a Court of Protection may make decisions on their behalf.

This policy should be used in conjunction with Advance Directives [*] and Powers of Attorney [*].

5 CORE PRINCIPLES

1. A person is assumed to have capacity until it is proven that they lack it.
2. A person is not to be treated as unable to make a decision unless all practicable steps have been taken to help them do so, without success.
3. A person is not to be treated as unable to make a decision merely because they have made an unwise decision.
4. An act done for, or decision made on behalf of, a person who lacks capacity must be in that person's best interests.
5. Prior to an act or a decision under the act, due regard must be taken to whether the purpose for which the decision is needed can be effectively achieved in a way which is less restrictive of the individual's rights or freedom of action.

BASIC RECORDING

In normal consultations there is the assumption of capacity unless there is evidence to suggest that this may be in doubt. This may arise from behaviour or concerns raised by others such as family members. Clinical staff will, in the normal course of care, make decisions regarding capacity and the patient's ability to consent to the treatment proposed.

All practice clinicians will maintain a record within the clinical system of long-term or significant plans, decisions or considerations made in respect of a patient's capacity.

When making a record relating to capacity the record will include as a minimum:

- Why a particular decision has been made
- What information was used in arriving at the decision
- A record or copy of the information used
- What the decision was (or the outcome)
- What the process was in arriving at the decision - other staff involved, consultations, family involvement, referrals, etc.

The purpose of a full record and audit trail relating to both the individual decision and the full cycle of care may be required if the clinician needs in the future to justify the processes or the action taken.

ASSESSMENT OF CAPACITY

It is not within the scope of this policy document to provide full clinical guidance on the assessment of capacity. The following general considerations will be applied.

The Official Code of Practice (see Resources) provides for a 2 stage question test:

- Q** Is there an impairment of, or disturbance in, the functioning of the person's mind or brain?
- Q** If so, is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?

This test must be used and the records must record this and the response.

Consideration must be given to:

- Whether they are able to understand the information given to them
- Whether they are able to retain this information
- Whether they are able to assess this information whilst reaching a decision
- Whether they are able to communicate their decision using any effective means

Where the person is unable to do **any one** of the above they are unable to make the decision themselves.

In addition the practice will:

- Provide all necessary information, including the consequences of making or not making a decision
- Provide information on all available options

- Consult with family members
- Take into account ethnic cultural and personal preferences where known
- Select location carefully, with consideration for the patient, to ensure that the patient is at ease and comfortable in the surroundings.
- Pitch the consultation to the needs and level which suit the patient best
- Assess the patient at their best level of functioning.

The practice will also consider:

- Intellectual ability
- Memory
- Attention / concentration
- Reasoning
- Understanding
- Ability to communicate

The Code of Practice also provides a further 6 questions to aid in the assessment process:

1. Does the person have a general understanding of what decision they need to make and why they need to make it?
2. Do they understand the consequences of making or not making the decision, or of deciding one way or the other?
3. Are they able to understand the information relevant to the decision?
4. Can they weigh up the relative importance of the information?
5. Can they use and retain the information as part of the decision making process?
6. Can they communicate the decision?

See Appendix B for a checklist.

PRINCIPLES OF BEST INTEREST

“Best interest” is not defined. Avoid making assumptions of best interest based on age, appearance, behaviour etc. and consider their wishes and feelings. It is also important to take into account any written instructions which exist already (Advance Directives).

Take the views of family and carers and involve the person where possible. Assess whether the decision can be deferred if the person is likely to regain capacity.

Document your assessment processes and reasons. Consider taking the least restrictive alternative.

ADVANCE DIRECTIVES

These enable an adult with capacity to make provision for a time when they may lose capacity. An Advance Directive properly drawn up is as valid as a current decision. If an Advance Directive involves the refusal of life-sustaining treatment it must be made in writing and be signed and witnessed, however in other circumstances directives may be verbal and recorded / written down. See also Advance Directives ^[*].

A Lasting Power of Attorney will overrule an Advance Directive if made after and gives an attorney the right to consent or refuse treatment. An Advance Directive decision will also be withdrawn if the person subsequently did something inconsistent with it. See also Powers of Attorney ^[*].

INDEPENDENT MENTAL CAPACITY ADVOCATES (IMCA)

The IMCA is an independent service which provides safeguards for those people who lack capacity but have no-one else to make decisions for them or support them (other than paid persons).

An IMCA must be instructed and consulted, for people lacking capacity who have no-one else to support them whenever:

- an NHS body is proposing to provide serious medical treatment, or
- an NHS body or local authority is proposing to arrange accommodation (or a change of accommodation) in hospital or a care home and

- the person will stay in hospital longer than 28 days, or
- they will stay in the care home for more than eight weeks.

An IMCA may be instructed to support someone who lacks capacity to make decisions concerning:

- care reviews, where no-one else is available to be consulted
- adult protection cases, whether or not family, friends or others are involved

See Appendix A

The IMCA service is available in England and Wales.

In England the service is delivered through local authorities, who work in partnership with NHS organisations. In Wales the National Assembly for Wales delivers the service through local health boards.

Local authorities or NHS organisations are responsible for instructing an IMCA to represent a person who lacks capacity. In these circumstances they are called the 'responsible body'.

For decisions about serious medical treatment, the responsible body will be the NHS organisation providing the person's healthcare or treatment. Examples of serious treatment (amongst others) may be:

- chemotherapy and surgery for cancer
- electro-convulsive therapy
- therapeutic sterilisation
- major surgery (such as open-heart surgery or brain/neuro-surgery)
- major amputations (for example, loss of an arm or leg)
- treatments which will result in permanent loss of hearing or sight
- withholding or stopping artificial nutrition and hydration and
- termination of pregnancy.

For decisions about admission to accommodation in hospital for 28 days or more, the responsible body will be the NHS body that manages the hospital.

Staff in the NHS, for example doctors or consultants (the "decision makers") all have a duty, under the Mental Capacity Act, to instruct an IMCA where the eligibility criteria are met. This duty started, in England, on 1st April 2007 and in Wales on 1st October 2007.

The "decision-maker" is the person who is proposing to take an action in relation to the care or treatment of an adult who lacks capacity, or who is contemplating making a decision on behalf of that person. Who the decision maker is will depend on the person's circumstances and the type of decision. For example, the decision-maker may be a care manager or a hospital consultant. Staff working in statutory organisations, in the local authority or NHS, who are involved in making best interests decisions should know when a person has a right to IMCA and when they have a duty to instruct an IMCA. This duty may fall on GPs from time to time.

Practices are recommended to research the local method of referral to IMCA through the Patient Advice and Liaison Service (PALS) operating within their PCT area.

RESOURCES

DoH Primary Care Training Pack

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_074491?_sm_au_=iVVHD1j1NgS4S0jP

Mental Capacity Act 2005 Code of Practice

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

IMCA England

<http://www.medicalprotection.org/uk/england-factsheets/MCA-independent-mental-capacity-advocates>

Making decisions: the IMC service: Department of Health - Publications and statistics
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_073932?_sm_au_=iVVHD1j1NgS4S0jP

Powers of Attorney ^[*]

Advance Directives ^[*]

APPENDIX A - Criteria for referral to IMCA

Any person who meets the following criteria must be referred to the IMCA service:

- Is a decision being made about serious medical treatment or a change of accommodation; or a care review or adult protection procedures?
- Does the person lack capacity to make this particular decision?
- Is the person over 16 years old?
- Is there nobody (other than paid staff providing care or professionals) whom the decision-maker considers willing and able to be consulted about the decision? (This does not apply to adult protection cases).

APPENDIX B - ASSESSMENT OF CAPACITY CHECKLIST

QUESTION:	<p>Is there an impairment of, or disturbance in, the functioning of the person's mind or brain?</p> <p>If so, is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?</p>	
CONSIDER:	<p>Whether they are able to understand the information given to them</p> <p>Whether they are able to retain this information</p> <p>Whether they are able to assess this information whilst reaching a decision</p> <p>Whether they are able to communicate their decision using any effective means</p> <p>Consulting with family members</p> <p>Ethnic or personal preferences where known</p> <p>Consulting when the patient is at their best level of functioning</p> <p>Intellectual ability</p> <p>Memory</p> <p>Attention / concentration</p> <p>Reasoning</p> <p>Understanding</p> <p>Ability to communicate</p>	

PROVIDE:	<p>All necessary information, including the consequences of making or not making a decision</p> <p>Information on all available options</p> <p>A location with consideration for the patient, to ensure that the patient is at ease and comfortable in the surroundings</p> <p>A level of consultation to the needs of the patient</p>	
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