

Service Users Who Lack Mental Capacity to Take Decisions: Implementation of the Mental Capacity Act (England) Policy

Policy Statement

This care service complies with the principles of the Mental Capacity Act 2005, which applies to England and Wales, by first treating all of its service users and prospective service users on the basis that they are able to take their own decisions and give valid consent to their care and treatment.

Consistent with the legislation, the care service is prepared to take a decision for a person in their best interests if there is evidence that they cannot take the decision (at the time it needs to be made) because of mental incapacity.

It is recognised that decisions under the Act include those to be made about matters of personal health, such as consent to medical intervention, care, general welfare and finance.

The service is aware that mental capacity laws and deprivation of liberty authorisations continue to apply during the coronavirus outbreak, though the processes of best interests' decision-making are being adapted to the current circumstances.

Background

The Mental Capacity Act, or MCA as it is often known, was introduced into England and Wales in April 2007 to provide a statutory framework to protect those who lack the mental capacity to make their own decisions, such as those with severe dementia or any other significant brain dysfunction, and those who are dying and no longer capable of making decisions for themselves.

The Act applies to people aged 16 years and over and sets out:

- who can take decisions for people who lack capacity
- in which situations this can be done
- how they should go about this.

Certain groups of people are legally required to have regard to the Act and its associated Code of Practice when making decisions on behalf of people who lack mental capacity. This includes doctors, nurses, health and social care managers and staff.

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Compliance with Registration Standards and Regulations

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 contain the following with respect to mental capacity.

- Regulation 9: Person-centred Care requires service providers to ensure that the care and treatment of service users must be appropriate, must meet their needs, and must reflect their preferences and wishes. The regulation specifically requires service providers to act in accordance with the Mental Capacity Act 2005 with regard to people who may lack capacity.
- Regulation 11: Need for Consent requires that care and treatment is only provided with the consent of the relevant person.

Definition of Capacity

The “capacity” referred to in the MCA refers to the mental capacity to make a decision. Where a person is described as “lacking capacity” this means that the person is judged as being unable to make a decision for themselves because of an impairment of (or a disturbance in the functioning of) the mind or brain, whether temporary or permanent.

Importantly, capacity can change and may relate to different decisions differently. Therefore, a lack of capacity should never be assumed or presumed.

Principles and Aims

The service supports the principles of the Mental Capacity Act, which consist of the following.

- Individuals must be assumed to have capacity unless it is established that they lack capacity.
- Individuals are not to be treated as unable to take a decision unless all practicable steps have been taken without success to help them to take the decision.
- Individuals must not be treated as unable to take a decision just because they might or have been known to make an unwise decision.
- When people take a decision on behalf of someone else who lacks capacity, they must act in that person’s best interests.

If anyone takes a decision on behalf of someone lacking capacity at the time, they must act to minimise any restriction of that person’s rights and freedom of expression and movement.

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Implementation

The service implements these principles in the following ways.

1. The service treats all current and prospective service users on the basis that they take their own decisions. This is confirmed in the service user plan of care.
2. Where the service has information that suggests the person might be unable to take some decisions at some of the time, it will carry out an assessment of that person's mental capacity. The assessment follows the two-step assessment process recommended in the MCA's Code of Practice.
3. The service knows about and acts on any advance directives or "living wills" that its service users have chosen to make in contingency situations where they might lose the ability to take a decision. Where appropriate, the service also encourages service users to make end-of-life plans so that their wishes are known in the event of their death.
4. The service ensures that it responds correctly where service users are admitted to the home who are subject to guardianship proceedings or who have arranged or want to arrange for others to assume decision-making powers on their behalf.
5. The evidence and methods used to make the assessment and the outcomes are recorded on the service user's needs assessment and plan of care respectively. The information indicates:
 - a. which decisions the person can take at all/most times
 - b. those that the person has difficulty in taking
 - c. those that the person is unable to take.
6. In respect of each area of decision-taking where there are difficulties or an inability to take decisions, the service user's plan of care records the actions to be taken for the person that are deemed in their best interests.
7. The individual is always as fully involved as possible. Decisions are only taken with the best information available and the agreement of those concerned in the person's care and future. All decisions taken for that person are fully recorded and made subject to regular review.
8. The service has a separate policy on restraint. Service users who lack mental capacity as any others, are only subject to any form of restraint when not doing so, would result in injury or harm to them or to other people. All incidents where restraint has been used following the home's procedures for reporting and recording.

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9. The service has access to independent advocates (IMCAs) and other professionals who can assist in the assessment and who understand the implications for that person's care.
10. The service is aware of the importance of protecting service users' rights and freedom, and will always work to make sure that no service user who might lack capacity is unlawfully deprived of their liberty. (See separate policy on Human Rights and Deprivation of Liberty.)

Note:

- If the service user, in this position, is in a care home, the care home will seek to safeguard the person's interests by applying for authorisation under the deprivation of liberty safeguards' protocols.
 - The service understands that the deprivation of liberty safeguards do not apply at present to service users living in their own homes, including under tenancy agreements and supported living arrangements. If it is evident to the responsible care service that any such service user is suffering loss of liberty because of the controls and restrictions placed on them, it will refer the matter to the local adults' safeguarding authority for action, which could result in applications to the Court of Protection to apply any safeguards necessary.
11. The care service will only take a decision for one of its service users after it has exhausted every means of enabling the person to take it of their own accord. It will also show its actions in taking the decision are reasonable and are in the person's best interests.
 12. It will always work closely with anyone with powers of attorney for an individual to determine the best interests of the cared for person, and with any representatives appointed by the Court of Protection.

Staff Involvement

The care service expects its care (and nursing) staff to implement the agreements and decisions that are identified on an individual's care or personal plan.

The care service also expects its staff to involve service users in all day-to-day decisions that need to be taken by seeking their consent and checking that the actions to be taken are consistent with their care or personal plan if the individual service user lacks capacity at the time.

Where the service user needs to take a decision that lies outside of their ability at the time, staff must do everything to help the service user to decide for themselves.

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The care service expects its staff to avoid taking decisions on behalf of a service user unless they can show that it is necessary and the service user at the time is unable to take that decision themselves. Any such incident must be fully recorded.

The care service expects its staff to take decisions for service users lacking capacity only because they have reasonable beliefs that they are necessary and in the person's best interests. When in doubt that they can proceed in this way they must seek advice from their line manager.

Training

The care service provides staff training on all aspects of mental capacity to improve their knowledge and develop skills in working with service users over their decision-making abilities. Staff new to care work will receive training in line with the Care Certificate Standards framework.

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