



COT/ BAOT Briefings

Mental Capacity Act 2005

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Introduction

From April 2007 the Mental Capacity Act (MCA) will apply to everyone who works in health and social care and is involved in the care, treatment or support of people over 16 years of age living in England and Wales, who are unable to make all or some decisions for themselves (Wall 2007). **This legislation is not just aimed at those with mental health problems or learning disabilities, it covers any condition that affects a person's cognitive processes.**

What is capacity?

Under the act, capacity refers to a service user's ability to make decisions for themselves. This will include their ability to retain, understand and weigh up information and be consistent in decision making. Capacity may change over time and loss of capacity may be partial or temporary, for example, a service user may have the capacity to make certain decisions but not others or a service user's illness may fluctuate (Department of Constitutional Affairs- DCA- 2007).

Code of Practice

The Act has a Code of Practice (2007) of statutory guidance that all care staff are legally required to follow. Family and friends of service users should use the Code of Practice for guidance.

Examples of people covered by the Act include those with:

- cerebro-vascular accident
- concussion or ongoing impairment following brain injury
- degenerative neurological conditions
- mental illness
- learning disability
- dementia
- symptoms of alcohol/drug use
- physical/medical conditions that cause confusion, drowsiness or loss of consciousness



Five Core Principles

The Act is based on five core principles that must underpin practice:

- 1- It is to be assumed that a service user has capacity unless proven otherwise
- 2- Service users must be supported to make their own decisions
- 3- Service users have the right to make unwise or eccentric decisions
- 4- Anything carried out on a service user's behalf because they lack capacity must be in their best interests
- 5- Anything carried out on a service user's behalf because they lack capacity should be the least restrictive of their basic rights and freedoms.

How to comply with the Act

All care staff must have the ability to make an assessment of capacity and select what is in a service user's best interests before providing any care or interventions (Wall 2007). This will include support staff who are carrying out interventions that have been prescribed by an occupational therapist. It is not acceptable to rely on medical colleagues to provide this. Capacity should be assessed and determined on a decision-by-decision basis by the person directly concerned with the service user at the time. For most day-to-day decisions, this will be the person caring for them (DCA 2007). There is no statutory format for documentation but a record must be made of the assessment process and decisions made.

Assessments of capacity must use the two stage test of capacity. Decisions about what is in a person's best interests must use the best interests checklist (DCA 2007).

Two stage test of capacity

1, Does the service user have an impairment or disturbance of the mind/brain and does proof of this exist?

2, Does the impairment/disturbance mean that the service user is unable to make a specific decision when they need to?

2a - Can the service user understand the information needed to make the decision?

2b - Can the service user retain the information in their mind?

2c - Can the service user weigh this information up?

2d - Can the service user communicate their decision?

If a service user is unable to do any of the above they will be judged to not have the capacity to make the decision (DCA 2007).



Best Interests Checklist

After a service user is assessed as not having capacity, a decision should be made which will be in the service user's best interests and should include the following considerations:

1. The service user's participation and views should be encouraged
2. All relevant circumstances need to be identified
3. Avoid discrimination and assumptions about best interests based on a service user's age, appearance, condition or behaviour
4. Assess whether the service user may regain capacity
5. Consult with others e.g. carers, close relatives, friends and those legally approved to be involved in consultation e.g. Lasting Power of Attorney (see further on)
6. Avoid restricting the service user's rights including looking at other options that will be less restrictive
7. Weigh up all of the above in order to establish what will be in the service user's best interests (DCA 2007).

Review of Capacity

A judgement of a service user's lack of capacity should be regularly reviewed as they may develop skills and improve their capacity. Review of capacity can be linked to:

- The Single Assessment Process in England for older people
- The Unified Assessment Process in Wales
- Person Centred Planning for people with learning disabilities
- The Care Programme Approach for people with mental illness

Unwise Decisions

Everybody has the right to make unwise decisions and this is not necessarily evidence of lack of capacity. Staff must be able to differentiate between:

- An unwise decision that a service user has the capacity to make
- An unwise decision based on lack of mental capacity when intervention may therefore be necessary to act in the service user's best interests (DCA 2007).

Liability

The Act has created a new criminal offence of ill treatment or neglect of a service user who lacks capacity. This can carry up to a five-year prison sentence, £2000 fine and removal from professional registers.



However, from 1st October 2007 the MCA offers protection from liability for acts that need to be carried out in the best interests of a service user who lacks capacity. This protection can only be upheld if there is documentary evidence of a valid assessment of capacity and best interests decision. Examples of actions covered will be providing assistance with personal activities of daily living, education, social or leisure activities, ongoing services to help at home e.g. meals on wheels, going to someone's home to check they are well, carrying out therapy.

Planning ahead for lack of capacity

People who currently have capacity can plan ahead under the Act, for a time in the future when they may lack capacity. This is through three ways (Wall 2007):

1 - Appointing a Lasting Power of Attorney (LPA)

From 1st October 2007, the Act introduces the new provisions of LPAs for welfare and LPAs for finance. These are people who are appointed to make decisions on another person's behalf. The LPA must agree to the role and be registered with the office of the Public Guardian. They must be consulted in welfare or financial decisions, can have access to care plans and must act in line with advanced decisions.

2 - Advanced decisions to refuse life sustaining treatment

These must be in a prescribed format in writing, signed and witnessed with a solicitor, clearly stating that the decision applies even if life is at risk. They must be followed up by staff who need to check that the document exists, is valid and is applicable to current circumstances. (DCA 2007).

Advanced decisions to refuse any other form of treatment do not need to be in a prescribed format. Advanced decisions to refuse treatment for mental disorder are over ruled by the Mental Health Act (2007) if the care team decide there are sufficient grounds to warrant assessment and compulsion under the act (DCA 2007).

3. - Advanced statements

These can be used to help determine what a treatment package may contain and how it may be delivered.

Independent Mental Capacity Advocate (IMCA)

This role has been newly created and is different from an ordinary advocacy service. It is a statutory requirement that IMCAs must be used for those who lack capacity, who have no family, friends or LPA to consult with and about whom important decisions need to be made about **serious medical treatment** or **changes to accommodation**. They



will work with and support the person to represent their views and aim to provide independent safeguards. They may also be used in care reviews and adult protection cases (DCA 2007).

Court of Protection

The Court of Protection will be in place from 1st October 2007. This court of law will have the same authority as the High Court. It is the office of the Public Guardian who maintain the register of LPAs that sit within the Court of Protection. Applications can be made to the Court of Protection over particularly difficult decisions or disagreements. They can consider cases about property, finance, healthcare and personal welfare. They can appoint deputies to make decisions for a service user who lacks capacity (DCA 2007).

Research

For research to be carried out on a service user who lacks capacity, the researcher must find a consultee who can say whether the service user would want to take part. This consultee can be a family member, carer, attorney, deputy or IMCA but cannot be a professional or member of staff (NHS R&D Forum 2007).

Relationship between the MCA (2005) and MHA (2007)

If a service user with a mental health problem who lacks capacity can be safely assessed and treated under the MCA, there will not be any need to use the MHA (2007) (DCA 2007).

However there will be instances when the service user who lacks capacity needs to be detained under the MHA (2007) because they need to be restrained, deprived of their liberty or treated compulsorily as either they or somebody else might suffer harm if they do not receive treatment.

Once a service user is detained under the MHA (2007) they can be treated without their consent even if this goes against their advanced decision to refuse treatment. The MHA (2007) cannot be used to treat physical illness/disability or if the mental disorder does not justify detention. However once a service user is detained under the MHA (2007), their capacity to consent to treatment cannot simply be ignored. It is good practice to record whether they have capacity and whether they have consented to treatment or not (DCA 2007).

Deprivation of Liberty (DoL)

Amendments to the MCA have been introduced since 2005 to provide legal safeguards for those who are over 18 years old and who:

1. Lack capacity



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2. Are suffering from a disorder of the mind
 3. Are not detained under the MHA (2007)
 4. Need to be deprived of their liberty because it is in their best interests in order to protect them from harm e.g. where service users with severe autism, profound learning disabilities or dementia live in locked residential units.

Deprivations of liberty in the above circumstances have to be authorised by the local authority or primary care trust. They will base this decision on the results of assessments completed by medical staff, Approved Mental Health Practitioners, nurses, occupational therapists, chartered psychologists and social workers. The local authority or primary care trust will have to assess individual cases, and if satisfied that deprivation of liberty is necessary, will authorise this for up to 12 months (Department of Health 2006).

Implications for Occupational Therapy

- All occupational therapists and support staff who work with those with impaired cognitive processes aged over 16 years need to be aware of the MCA and its implications (this will not just be those working in mental health or learning disabilities). Employers should be organising training and the Department of Health has produced downloadable training packs, available at:
www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_074491 Accessed 11/0/07
- Occupational therapy staff are legally required to follow the Code of Practice (2007). It is available to download at:
www.opsi.gov.uk/acts/en2005/ukpgaen_20050009_en_cop.pdf
Accessed 11/7/07. Hard copies can be ordered from The Stationary Office on 0870 242 2345 or e-mail
esupport@tso.co.uk

Occupational therapy staff can be particularly involved in supporting service users to make their own decisions for example through communicating in an appropriate way and making the person feel at ease (MCA Code of Practice 2007). This may be by using communication aids or a language translator/interpreter. It will be vital to consider the service user's first language (even if they speak English) and how this may affect a service user's ability to retain, understand and weigh up information.

- Occupational therapy staff who are proposing to carry out interventions with those who may lack capacity must carry out the two stage test of capacity, the best interests checklist and document the results of these.



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- Occupational therapy staff should ensure that a review of the person's capacity is linked to the Single Assessment Process in England, the Unified Assessment Process in Wales, the Care Programme Approach and the Person Centred Approach.
 - Occupational therapy staff must be aware if the following exist and when they need to be involved in decision making: Lasting Powers of Attorney, advanced decisions, advanced statements, Independent Mental Capacity Advocate or deputies appointed by the Court of Protection. It is advisable for teams to have copies of advanced decisions and evidence of LPAs.
 - Occupational therapy staff who wish to conduct research with service users who lack capacity must seek and abide by a consultee's opinion as to whether the service user would want to participate.
 - Complex or major decisions may need an occupational therapist's professional opinion. Occupational therapists should not express an opinion about a service user's capacity without carrying out a proper examination of the service user and assessment of their capacity.
 - Occupational therapy staff can, where appropriate, offer interventions, which will improve a person's capacity to make their own decisions.



References

Department of Constitutional Affairs (2007) *Code of Practice Mental Capacity Act 2005*. London: Stationary Office.

Department of Health (2006) Bournemouth Briefing Sheet.

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NHS Research and Development Forum (2007) A Simple Guide to the MCA 2005 in relation to research. Available at www.rdforum.nhs.uk/docs/mca_guidance.doc
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Wall C (2007) Personal Care Consultants Update - MCA 2005 - 2007/01.

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Further Information

For information on the Act relating to Wales please go to:

http://new.wales.gov.uk/topics/health/nhswales/healthservice/mental_health_services/mentalcapacityact/?lang=en

Useful information is also available from the Department of Justice at:

www.justice.gov.uk/whatwedo/mentalcapacity.htm