

# The Mental Capacity Act 2005

*A unified legal framework  
addressing capacity to make decisions  
concerning – health (**consent**) ,  
social care & finances*

## Why use it?

- ▶ It replaces common law (case law) for health and social care where a person lacks capacity to consent to care or treatment.
- ▶ It provides protection for clinicians making decisions and providing care to people who lack capacity to consent. Also protects the person who lacks capacity.
- ▶ You have a legal duty to use the legislation when making healthcare decisions for people lacking capacity



## When, where, who...

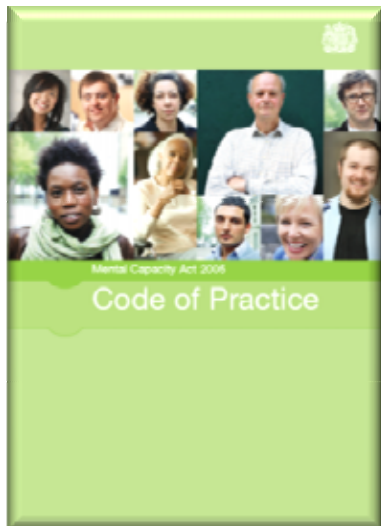
**Where?** Effective in England & Wales



**When?** All powers triggered from October 2007



**Age?** Adults from age 16 and over



**Code of Practice:** professionals have a duty to adhere to it

## Who?

1.2 million people

Dementia, learning disability, brain injury, mental illness, autism, confusion, substance misuse, unconscious

## Where?

Anywhere a healthcare decision is made

home, hospital, General Practice, care home, day centre, prison

## IMPACT

## Which decisions?

All healthcare decisions and social care decisions  
(to give, withhold or stop treatment)

includes medication, surgery, diagnostic tests, emergency care and any other medical decision.  
*Also nursing care and allied health therapies such as physiotherapy and dentistry*



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

Until all practicable steps have been taken to help someone make a decision without success, they cannot be treated as lacking capacity

Mental Capacity Act  
**Principles**  
(Section 1)

Any act or decision taken on behalf of someone lacking capacity must be in the person's best interests

Must consider if there are less restrictive options to the person in terms of their rights and freedom of action

An unwise decision is **NOT** to be taken as a lack of capacity

# Defining Capacity

(Section 2)

*"..a person lacks capacity in relation to a matter if at the **material time** he is unable to make a decision for himself in **relation to the matter** because of an **impairment of, or a disturbance** in the functioning of, the mind or brain."*

- ***Time specific*** – capacity relates to a specific moment in time and may change over time (capacity fluctuates – temporary or long term, improves or deteriorates)
- ***Decision specific*** – capacity relates to a specific decision and may vary depending on the decision
- ***Impairment/disturbance*** – gateway to the Act
- ***Not*** solely based on appearance, age, behaviour or condition

## **The Test for Capacity**

(Section 3)

At a specific time and for a specific decision  
a person can..

**Understand the information relevant to the decision**



**Retain the information**



**Use/weigh the information as part of the  
decision making process**



**Communicate the decision**

# Testing Capacity



## Understand the Relevant Information

- Nature, purpose, consequences of decision
- Information - broad terms and simple language
- Ask questions to check the person's understanding
- ▶ *Practical steps?* Give information appropriate to the person – pictures, location, time of day, break down information into small parts. Consult/use others- family, carers, interpreter..

## Retain the Information



- ❖ Long enough to use the information to make the decision
- ▶ *Practical steps?* Support to retain information, notebooks, pictures, voice recorders.



# Testing Capacity

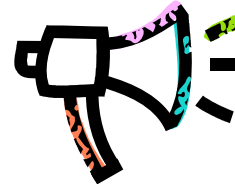


## Use or Weigh the Information

- ❖ Believe and use the information to make the decision ie acceptance of risk.

Example – blood transfusion

- ▶ *Practical steps?* Give more time, use others the person trusts.



## Communicate the Decision

- ❖ Communicate in any recognisable way - blinking an eye, squeezing a hand

- ▶ *Practical steps?* Use communication aids, interpreters, speech & language therapists, family and others who know how the person communicates.

## Test of capacity - continued

- **Reasonable belief** – sufficient for the person making the assessment to hold a 'reasonable belief' about the outcome.
- Who can make the assessment? **Anyone.**
- Using professionals when needed – complex cases, disputes, legal consequences.  
*Note: others will give advice but not 'take over' the test.*
- Record keeping – any professionals or paid staff expected to keep records

# BEST INTERESTS - Making Decisions

## (Section 4)

- ❖ Checklist must be used to make a decision whenever a person lacks capacity to consent to that decision
- ❖ The checklist is a mandatory minimum
- ❖ Not necessarily best *medical* interests
- ❖ 'Best interests' depends on the individual lacking capacity not a group of patients.
- ❖ Must be an objective test, not substituted judgment

# 'Best Interests' checklist

- ▶ All relevant circumstances
- ▶ Will the person have capacity sometime in the future in relation to the matter?  
*For example, can the decision be delayed if their capacity will improve?*
- ▶ The person's *reasonably ascertainable* past and present wishes/statements.
- ▶ The person's beliefs and values  
*For example, religious, lifestyle or political beliefs*
- ▶ Other factors the person would consider if able to do so.
- ▶ For life-sustaining treatment the decision maker must not be motivated by a desire to bring about the persons death.
- ▶ Encourage and permit the person to participate.  
*For example, bring the person into care planning meetings*



## 'Best Interests' checklist contd..

- ▶ Consult others if '*practicable and appropriate*' (including anyone named by the person to be consulted + anyone caring for them + anyone interested in their welfare + a lasting power of attorney or deputy if they have one).
  - Practicable = can you contact them in time?*
  - Appropriate = not an abuser or those with no contact with the person*
  - Consult = do not have to follow what they say.....*
  - Note: next of kin not used as phrase but those with an "interest in the welfare of the person"*
- ▶ Must *consider* the least restrictive option- can the same result be achieved in a less restrictive way?
  - For example, less drastic surgery or medication?*
- ▶ Don't base the 'best interests' decision solely on age, appearance, behaviour or condition