MAKING DECISIONS FOR PEOPLE WHO LACK CAPACITY
Mental Capacity Act 2005

ASSESSING CAPACITY

This is one of a series of resource materials for clinical ethics committees providing explanation and discussion of the sections of the Mental Capacity Act which are particularly relevant to their work.

Step 1: Establish person’s age
Most of the Mental Capacity Act (MCA) applies to adults of 16 years and above who lack capacity. However, because the MCA does not repeal the existing law of consent in relation to children and young people, there is an overlap between the common law, the Children Act 1989 and the MCA in relation to young people aged 16 and 17. If health professionals provide care and treatment to a 16 or 17 year old under the MCA they will not incur legal liability providing the young person lacks capacity to consent under the MCA, the actions are in the young person’s best interests and all the Act’s principles are followed.

Step 2: Assume person has capacity
Section 1(2) states:
A person must be assumed to have capacity unless it is established that he lacks capacity.

This is the first principle (of 5 statutory principles) set out in section 1 of the Act (see Overview of the Act). These five principles reflect the fundamental values that underpin the Act’s legal requirements, namely to protect people who lack capacity and help them to take part, as much as possible, in decisions that affect them. To remove any doubt that this is the case the Code of Practice(2.2) makes it clear that all the five principles apply to every act done or decision made under the Act.

The presumption of capacity is a well established common law principle. Its prominence in the section 1 list of five is a strong reminder that the starting point for all decision-making under the Act must be the assumption that people have the right and the ability to make their own decisions. It also acts as a reminder that just because someone has lacked capacity to make a previous decision that does not necessarily mean that they cannot make the decision in question.

The Act bolsters the presumption of capacity by adding two related principles. These are:

Step 3: Do everything possible to support the person make their own decision
Section 1(3) sets out the second principle:
A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
The Act does not define the words ‘practicable steps’. As this is a new principle, i.e. not one which was established by the courts prior to the Act, the Code gives very detailed guidance (in chapter 3) on the various ways patients can be helped to make their own decisions (Box 1).

**Box 1** ‘Practicable steps’

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<th>Code chap 3.1-16</th>
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Examples of how people can be helped to make their own decisions include:

- **provide relevant information**, e.g. explain purpose and effect of treatment, describe risks and benefits, explain effects of decision and possible choices

- **communicate in an appropriate way**, adopt the easiest form of communication such as simple language or use pictures or objects, speak at the right volume and speed, break down difficult information, be aware of cultural, ethnic or religious factors, use professional language interpreter or an advocate.

- **make the person feel at ease**, get the location and the timing right, e.g. quiet, private room when the person is at their most alert.

- **support the person**, consider whether someone such a person the patient trusts can give support.

- **treat a medical condition which may affect the patient’s capacity**

- **involve family/friends if they can provide practicable help** (as well as an IMCA (if appropriate, see File 5)

**NB** In emergency medical situations it may not be practicable to take any of the above steps although healthcare staff should still try to communicate with the patient and keep them informed.

*Change: Statutory principle 2 is new (i.e. it had not been established by the courts in common law before the Act).*

**Step 4: Be aware that a person has the right to make an ‘unwise’ decision**

Section 1(4) states:

*A person is not to be treated as unable to make a decision merely he makes an unwise decision*

The third fundamental statutory principle bolstering the presumption of capacity is another well-established common law principle. It is included to remind those assessing capacity that even though a person’s decision may seem unreasonable, irrational, unusual or eccentric, it may nevertheless make sense in the context of the person’s religious and personal beliefs and values. Accordingly the person should not necessarily be assumed to be incompetent.

But an ‘unwise’ decision may be evidence of incompetence –it may, for example, reveal that a patient is incapable of understanding the consequences of their decision. This is explained in the Code, Box 2).
Step 5: Apply the principle of equal consideration

Section. 2(3) states:

‘a lack of capacity cannot be established merely be reference to-

a) a persons’ age or appearance, or
b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity

This new principle is not one of the 5 ‘statutory principles underpinning the whole Act). However it bolsters them by ensuring that people are not treated less favourably than anyone else because of the preconceptions and prejudicial judgments that may be made about their abilities. The device used by the Act to avoid such discrimination is to expressly prohibit unjustified assumptions being made about a patient’s abilities based either of their age, appearance or condition, behaviour, Box 3.

Box 3 Appearance, condition and behaviour

Code (chap 4-9)

- ‘appearance’ means all aspects of the way people look,
- i.e. physical characteristics as well as skin colour etc.
- condition’ is similarly wide ranging, i.e. it includes physical disabilities, learning disabilities, illness related to age and temporary conditions such as drunkenness.
- ‘behaviour’ may include extrovert or withdrawn behaviour.

Change: The principle of equal consideration is new. Although not one of the five statutory principles underpinning the whole Act, it is nevertheless very significant in furthering the Act’s purpose, namely to ensure that those with capacity problems are given as much support as possible to help them make their own decisions.
**Step 6: Assess capacity**

This step in the assessment process will be reached if the person’s ability to make the decision seems questionable. Assessing capacity at this point involves applying the two-stage test (see below). This means deciding whether a patient has the ability to make a specific decision at the time it needs to be made, i.e. about surgery - rather than whether they have the capacity to make decisions in general. The legal test for capacity is therefore functional and decision-specific. This means that no-one can be labelled incapable just because they have a certain medical condition or diagnosis.

The Act adopts a two-stage legal test of capacity which essentially involves asking two questions, namely:

1. Does the person have an impairment of, or disturbance of the mind or brain and, if so,
2. Does the impairment or disturbance mean they are unable to make a particular decision?

**Stage 1: The impairment/disturbance**  
The impairment/disturbance can be partial, temporary or change over time but it must exist - if it does not then the person will not lack capacity under the Act. Examples of conditions that may affect a person’s ability to make decisions are given in the Code (chap 4.11). They include conditions associated with mental illness, dementia, long-term effects of brain damage and so on.

**Stage 2: The inability to make a particular decision**  
Stage 2 involves establishing whether the person is unable to make a decision for himself. The Act briefly sets out a definition of when a person is deemed unable to make a decision (but is supplemented by the Code (see Box 4).

According to section s.3:

’a person is unable to make a decision if he is ‘unable

a) to understand the information relevant to the decision

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<th>Box 4</th>
<th>‘Relevant information’</th>
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<td>‘Relevant information’ is defined in s 3(4) as information about the reasonably foreseeable consequences of a) deciding one way or another, or b) failing to make the decision.</td>
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<td>The Code (4.16) adds that relevant information also includes:</td>
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<td>• the nature of the decision</td>
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<td>• the reason why the decision is needed</td>
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<td>NB. Remember</td>
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<td>• to provide information in an appropriate way (using simple language, visual aids etc (s 3(2))</td>
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<td>• to consider whether a broad explanation is sufficient or because of the nature of the decision more detailed information should be given</td>
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<td>• that if the decision has serious consequences it is even more important that the person understands the information</td>
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b) to retain that information

A person retains information if he holds it in his mind long enough to use it to make an effective decision. Note that the Act states just because a person can only retain information for short period this alone should not prevent him from being regarded as able to make the decision (s 3(3)). The Code (4.20) also stresses how aids to retention should be used, such as notebooks, videos and voice recorders.

c) to use or weigh up that information as part of the process of making the decision

As the Code (4.21) explains, sometimes people can understand information but the impairment or disturbance stops them using it. In other cases, although a person may make a specific decision, the impairment or disturbance means they have made it without understanding or using the information they have been given.

d) to communicate his decision (whether by talking, using sign language or any other means).

The Code suggests that few people will be in this position. Nevertheless even in such cases, those assessing capacity must comply with statutory principle 2 and ensure that all practicable and appropriate efforts must be made to help them communicate ( Box 1 above).

NB. To ‘pass’ the capacity test all for elements (i.e. a) – d) need to be satisfied.

Factors that may need to be considered in applying the 2 stage test are:

- general intellectual ability
- memory
- attention and concentration
- reasoning
- information processing – how a person interprets what they are told
- verbal comprehension and all forms of communication
- cultural influences
- social context
- ability to communicate

Nobody can be forced to undergo an assessment of capacity. Threats or attempts to force the person to agree to an assessment are not acceptable (Code 4.57).

Change: The Act broadly adopts the common law test for capacity established in Re C [1994]. Although it makes no specific reference to the need for the person to believe the information it can be assumed that belief is now to be viewed as part of understanding. The statutory version of Re C also differs from the common law test as it adds a requirement that information relevant to the decision be given in a way that is relevant to the person’s circumstances (using simple language, visual aids or any other means, s.3(4)).
Step 7: Prove lack of capacity

The burden of proving a person lacks capacity is on the person making the claim. In healthcare contexts this will usually be the health professional (e.g. doctor or nurse) who is proposing to provide the care or treatment. The legal test of proof in this context is the balance of probabilities, i.e. being able to show that it is more likely than not that a patient lacks capacity to make the decision in question.

Step 8: Demonstrate ‘reasonable belief’ of lack of capacity (to ensure legal protection)

Section 5 legitimates acts in connection with care and treatment that would otherwise constitute battery or assault. Section 5 essentially confers legal authority on anyone caring or treating a patient without their consent. This means there is no need to obtain any formal legal powers or authority to act. But to gain protection from liability ‘reasonable steps’ must be taken to establish whether the person lacks capacity. In addition when doing the act the person carrying it out (e.g. doctor) must ‘reasonably believe’ that the person lacks capacity (s. 5(1)(a)and (b)).

The Act gives no guidance on what constitutes ‘reasonable’ in this context but it is supplemented by the Code (see Box 6).

**Box 6**

‘Reasonable belief and reasonable steps’

Code 2.44- 54

To have ‘reasonable belief’ carers must have taken ‘reasonable steps’ to establish that the person lacks capacity. What these reasonable steps are will depend on individual circumstances and the urgency of the decision.

Formal processes do not necessarily need to be taken but if an assessment of capacity is challenged a) steps taken is the assessment process must be described and b) objective reasons for believing the person lacks capacity must be given.

Professionals, who are qualified in their particular field are normally expected to undertake a fuller assessment of capacity, reflecting their higher degree of knowledge and experience than family members or other carers who have no qualifications.

Other practical steps include:

- making sure the person understands the nature and effect of the specific decision to be made
- applying all the statutory principles
- ensuring that all relevant documents and background information has been accessed
- ensuring that the two stage test has been applied
- ensuring consultation with family members and close friends to provide background information
- explaining again to the person all the relevant information
- checking the person’s understanding after a few minutes
- avoiding questions that need only a ‘yes’ or ‘no’ answer
- repeating any steps that can help confirm assessment or a review of it.

Code 4.45 sets out other steps that may be helpful in confirming reasonable belief of incapacity (much of which repeats steps that need to be taken to establish incapacity in the first place).
Change: Section 5 provides unambiguous statutory protection to those caring for and treating patients who lack capacity under the Act (providing the reasonable steps criteria are followed). In so doing there is now no doubt that they are in the same legal position as carers and health professionals treating patients from whom valid consent has been obtained.

Furthermore s.5 resolves any doubt (in the absence of clear common law authority covering the situation) that health professionals treating a patient without consent - in the mistaken belief that they lack capacity - will not be liable (assuming, of course, that the mistaken belief is ‘reasonable’).

Step 9: Record the assessment process

The following should be recorded by health professionals in the person’s case notes or file:

- the steps taken in assessing capacity
- the assessment of incapacity
- objective reasons to explain why there is a ‘reasonable belief – that a person lacks capacity

NB: The record should be reviewed regularly.