Brief guide: assessing how providers implement the Mental Capacity Act 2005

Context and policy position

The Mental Capacity Act 2005 (MCA) requires health and social care professionals to assess capacity, and determine best interests for an individual who lacks capacity to make a specific decision. Mental illness that is severe enough to need support from mental health services may mean that a person lacks capacity as defined by the Act. If health providers fail to follow the law (and guidance provided by the associated code of practice) patients may be at risk of inappropriate, or unlawful, treatment and care, and providers may be at risk of legal action.[1]

Evidence required

The MCA requires that, unless there is evidence to the contrary, health and social care professionals presume individuals have the capacity to consent. There is no expectation that detailed capacity assessments are made for every individual in a service. Where we find capacity assessments for all patients we may discuss the reasons with the provider, but would not consider this to be a blanket restriction; this may be considered necessary in some settings such as continuing care units. How the interface between the Mental Health Act, MCA and Deprivation of Liberty Safeguards for inpatients is managed may vary between services but inspectors should ensure incapacitous patients who are de facto detained are held lawfully. Inspectors should look for evidence of the following good practice.

General

a) Staff training on principles of MCA and how to assess capacity.
b) The organisation's relevant policies (check that there is a policy, regularly updated and that staff know how to access it).
c) Staff think about capacity in the course of their work (speak to staff to assess how they consider and implement capacity issues in planning and delivering care).
d) Capacity assessments are considered carefully. Look at the records of patients who probably lack capacity and those who probably have capacity. Look for quality and scope of capacity assessments which are proportionate to patients' needs (see below).
e) Capacity assessments are time and issue specific. A generic mental capacity assessment would not meet with the requirements of the MCA.

Key questions to ask during inspection

- Ward manager: can I see your staff training records on MCA?
- Ward manager: can I see your organisation's policy on MCA?
- All clinical staff: how do you decide whether to overturn presumption of capacity?
- Medical staff: can I see how you record a mental capacity assessment for treatment?
- Medical staff: can I see how you record some best interests decisions?

[1] Note: This brief guide does not cover Deprivation of Liberty Safeguards

- Nursing staff: can you show me how you record a mental capacity assessment for personal care?

Where a capacity assessment is required

a) Where there is clear reason for overturning presumption, look in the notes to see that there is evidence of:
   - Attempts to maximise capacity, for example using interpreters and delaying assessments if capacity could be regained and it is safe to delay.
   - Who should assess capacity (usually the person proposing the action).

b) Where capacity assessments are made (i.e. presumption overturned), look to see that there is enough detail in the notes. This should include specifying the decision to be made and the domains of capacity lacking (understanding, retaining, weighing and/or communicating) and details of attempts to maximise capacity (for example a translator).

Please refer to the appendix for examples of common issues requiring capacity assessment, and examples of best interests considerations.

What NOT to expect

a) Documentation of reasons for not overturning presumption of capacity in every case.
b) Detailed capacity assessments for every patient (for example, where presumption has not been overturned).
c) Multiple assessments over time where capacity is unlikely to change (e.g. dementia).
d) Multiple assessments for similar treatments (for example, an antidepressant and an antipsychotic, unless there are clear reasons to expect this).
e) Detailed best interests decisions for relatively trivial interventions.

Reporting

Questions relating to capacity should be reported under **'effective'** in **'Good Practice in applying the MCA'**. Prompts include:

- X% of staff have had training in the MCA.
- Staff are trained in and have a good understanding of MCA and apply this.
- There is a policy on MCA, including the Deprivation of Liberty Safeguards which staff are aware of and can refer to.
- For people who might have impaired capacity, capacity to consent is assessed and recorded appropriately.
- Assessments are decision-specific and people are given every possible assistance to make a decision
- When capacity is absent, best interests decisions are made recognising the importance of the person's wishes, feelings, culture and history.
- Staff know where to get advice about the MCA, including the Deprivation of Liberty Safeguards, within the trust.
- Deprivation of Liberty Safeguards applications are made when required.
- There are arrangements in place to monitor adherence to the MCA within the trust.

Link to regulations

The following regulations require understanding and appropriate implementation of the MCA: Regulation **11; 12; and 17.**

Appendix: Common issues requiring capacity assessment

Where there are concerns about a patient's **capacity to agree to admission**, a capacity assessment as outlined above should be documented in the patient notes.

Where there are concerns about a patient's **capacity to agree to treatment** a capacity assessment as outlined above should be documented in the patient notes. Note that there are different requirements for patients under the Mental Health Act that should be reviewed with a Mental Health Act reviewer.

Best interests decisions

Where best interests decisions are made look to see that they consider:

- The patient's wishes, if known
- Opinions of Lasting Power of Attorney or relatives/friends.
- The involvement of an Independent Mental Capacity Advocate, if appropriate.

As a general rule, the more complex or important the best interests decision the wider the involvement and the more detailed the recording.