**Mental Capacity Practice Guidance**

**Things you need to know or ask yourself (please refer to the Mental Capacity Act 2005 and the Code of Practice)**

All aspects of the work need to be recorded and evidenced relating to the law and practice evidence/examples. Anything you do (including a mental capacity assessment or best interest decision) must start from the five statutory principles of the MCA 2005 s.1:

1. A person (P) must be assumed to have capacity unless it is established that he lacks capacity

Why do you think the individual needs a capacity assessment, what evidence leads you to believe this assumption of capacity is wrong and how have you recorded this to support your actions? Remember that the burden of proof lies on the person asserting a lack of capacity.

1. P 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

What have you done to help the person? What would they as an individual need to assist them? Which method of communication is the individual most comfortable with; can you use communication tools, assisted technology or someone to help you; do they have a sensory impairment and, if so, are they using their hearing aid/glasses ; are they shy or do they fear strangers or people they see as having authority? If so who should ask the questions; what can you or others do to support them? What is the best time of day and best location, should you go make a return visit, should any one else be there to help them express their views or make choices?

1. P is not to be treated as unable to make a decision merely because he makes an unwise decision

How can you be sure that the person cannot make the decision because they lack the mental capacity to do so rather than them making a lifestyle choice? You need to focus on the mental process being followed by the person to arrive at their decision. What is your evidence?

1. An act carried out, or decision made, under this Act for or on behalf of a person who lacks capacity must be carried out, or made, in his best interests

How is this in the person’s best interests? What is or was important to them, who are they, what are their past and present wishes, values and beliefs? What other options have you considered? **You should also refer to Best Interest practice issues**

1. Before the act is carried out, or the decision is made, regard must be given to whether the purpose for which the act or decision needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedoms of action

This does not need to be the least restrictive option as this may not be in their best interests; for example leaving a residential establishment whenever they want may be least restrictive but due to evidenced issues they could walk into the road or get lost etc. You do however need to ensure and evidence that you have looked at all possible options even if you eventually discount them. What could be done differently? How can you evidence there is no other less restrictive way to meet the person’s needs and wellbeing?

The presumption that P has capacity is fundamental to the Act. It is important to remember that P has to prove nothing – the burden of proving lack of capacity to take a specific decision, or decisions, always lies upon the person who considers that it may be necessary to take a decision on their behalf.

Defining a lack of capacity

Capacity is assessed around specific decisions at a particular time. You therefore need to be clear what the specific decision is and how you are going to present the information to someone around this decision so that you can assess capacity.

Functional and diagnostic:

The individual lacks capacity if they are unable to make a decision for themselves in relation to a specific matter (functional) because of an impairment of or disturbance in the functioning of their mind or brain (diagnostic).

The impairment or disturbance is usually diagnosed by a clinician; although a formal diagnosis is not necessary, it is important that the question is asked whether you need to seek a formal diagnosis if the decision is complex or there are any issues. If someone made the diagnosis, who were they and when? Is it temporary or permanent; if temporary why does the decision need to be taken now?

Functional test

s.3 (1) MCA 2005

P is unable to make a decision for himself if unable:

* To understand the information relevant to the decision; OR
* To retain the information; OR
* To use or weigh that information as part of the process of making the decision; OR
* To communicate the decision whether by talking, sign language or other means

Understand information

The individual does not need to understand everything that is explained to them. They only need to understand the salient factors: ie **the information relevant to the decision**

It is up to the worker not only to identify the specific decision but also to identify the information which is relevant to that decision and what options the person has to choose from. How did you present the information (words, pictures)? How do you know they can not understand? What questions did you ask? What was the person’s response? All of this information needs to be recorded so that you can evidence your decision.

Retain the information

What information did you give the individual relevant to the decision? How did you assess that they could not retain it? The MCA says that the person only has to retain the information for a sufficient amount of time to make the decision. How have you evidenced that they could not do this?

Use or weigh the relevant information

What information would the person need to use or weigh? Could they see the various parts of the argument and relate them to each other? Could they understand the reasonably foreseeable consequences of reaching a decision or failing to do so? What help did you give them to do this? What questions/information did you give them? How did they reply? It is important here not to confuse being unable to make a decision with someone who in your eyes makes irrational or unwise choices, or someone who may have applied their own values or outlook to the relevant information and chosen to attach no weight to that information. For example: if you continue to drink alcohol you may die. Yes, I know my health is failing and the Doctor has explained that if I continue to drink I will die, but I choose to drink.

Unable to communicate their decision

Why could they not do this: what help did you or others give them to do this?

Causative nexus

The person can only be proven to lack capacity if their inability to do one or more of the functional elements is “because of” the impairment or disturbance. There must be a causal connection to prove incapacity. You must state why you believe this impairment or disturbance is the reason the person lacks the mental capacity to make this specific decision and record your evidence.