Mental incapacity: issues in supported housing

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Introduction

The mental capacity of a resident of supported housing may become an issue – for instance, is Jack able to refuse to be assessed for services, or Jill able to choose not to eat? In this briefing we set out the law relating to mental capacity, focusing on 2 important legal tools – the Mental Capacity Act 2005 (MCA) and the Code of Practice to the Mental Capacity Act. We look at how the MCA works, assessing capacity under the MCA, acting in someone’s best interests and under what circumstances a mentally incapacitated person may lawfully be restrained.

Mental Capacity Act

The Mental Capacity Act 2005 sets out (1) the legal rules that are used to determine whether an individual has sufficient mental capacity to make a particular decision; (2) the principles on which decisions should be made when an individual is assessed as lacking capacity; and (3) enables people to make decisions to refuse medical treatment if they lose capacity in the future.

Below we focus on the first 2 points because these are most relevant to supported housing.

Code of Practice

The Code of Practice to the Mental Capacity Act provides guidance on how the MCA works on a day-to-day basis.

Certain people have a legal duty to have regard to the Code. These include professionals and anyone who is paid for the work they do in relation to people who lack capacity. This includes care managers and care workers, paid carers, housing workers who work with people who lack capacity as well as doctors, nurses, solicitors and police officers.

Friends, family and unpaid carers do not have a duty to have regard to the Code. However they will still find the guidance helpful when they are caring for people who may lack capacity.

There are no specific sanctions for failure to comply with the Code. However, a failure to comply can be used in evidence before a court or tribunal, if relevant, in any civil or criminal proceedings.
How the Mental Capacity Act works

5 key principles underpin the MCA, which are set out in section 1:

- *A presumption of capacity*. Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise.
- *Individuals ought to be supported to make their own decisions*. A person must be given all practicable help before anyone treats them as not being able to make their own decisions.
- *Unwise decisions*. The fact that an individual makes what might be seen as an unwise decision should not result in them being treated as lacking capacity to make that decision.
- *Best interests*. An action taken or decision made under the Act for or on behalf of a person who lacks capacity must be done in their best interests.
- *Less restrictive option*. Anything done for or on behalf of a person who lacks capacity should be the least restrictive option; i.e. it is important to consider options that are less restrictive of the person’s basic rights and freedoms if they are as effective as the proposed option.

Assessing capacity

A person lacks capacity if at the material time that person is unable to make their own decision in relation to particular issue because of an impairment of, or a disturbance in the functioning of the mind or brain (section 2(1) MCA).

A test for assessing whether a person lacks capacity to make a particular decision at a particular time is provided in section 3 of the MCA:

“(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable to (a) understand the information relevant to the decision; (b) retain that information; (c) use or weigh that information as part of the process of making the decision; or (d) communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of (a) deciding one way or another; or (b) failing to make the decision.”
People must be helped to make their own decisions. Only after all appropriate help has been
given should anyone conclude that someone cannot make their own decisions.

**Presumption of capacity**

Under the Mental Capacity Act a person must be assumed to have capacity unless it is
established that he or she lacks capacity. This means that you cannot treat someone as if they
lack capacity unless you have proof. The standard of proof is the balance of probabilities, i.e. it’s
more likely than not that the individual lacks capacity. (The test is a legal one and not a medical
one and doctors who make decisions about capacity need to be familiar with the law).

Capacity is tested on the basis of the decision that has to be made. A person may have the
capacity to decide what they want to wear or what they want to eat, but not have the capacity to
buy a house. Consider the implications of the following scenario about assessing a person’s
capacity to make decisions.

**Case study: 'Mrs Arnold'**

When planning for her retirement, Mrs Arnold made and registered a Lasting Power of Attorney
(LPA) – a legal process that would allow her son to manage her property and financial affairs if
she ever lacked the capacity to manage them herself. She has now been diagnosed with
dementia.

Her son is worried that she is becoming confused about money. Nonetheless he must assume that
his mother has the capacity to manage her affairs. Then he must consider each of Mrs Arnold’s
financial decisions as she makes them, giving her any help and support she needs to make these
decisions herself.

Mrs Arnold’s son goes shopping with her, and he sees she is quite capable of finding goods and
making sure she gets the correct change. But when she needs to make decisions about her
investments, Mrs Arnold gets confused, even though she has made such decisions in the past.
She still doesn't understand after her son explains the different options.

Her son concludes that she has the capacity to deal with everyday financial matters but not more
difficult affairs at this time. Therefore, he is able to use the LPA for the difficult financial
decisions his mother can’t make. But Mrs Arnold can continue to deal with her other affairs for
as long as she has capacity to do so.
Best interests

The law requires that decisions made in respect of individuals who lack capacity be made in the ‘best interests’ of that person. The Mental Capacity Act that someone proposing to take a decision on behalf of a person who cannot must consider objectively what is best for that person. It requires asking, what would the person have decided to do for themselves if he or she had capacity? What is important in this process is:

- enhancing the individual’s ability to participate in the decision making process,
- considering what the individual would have done if they had capacity, and
- consulting widely.

Section 4 of the MCA sets out the process for making a decision in detail

- The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
- He must consider (a) whether it is likely that the person will at some time in the future have capacity in relation to the matter in question, and (b) if it appears likely that he will, when that is likely to be.
- He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
- Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.
- He must consider, so far as is reasonably ascertainable (a) the person’s past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity); (b) the beliefs and values that would be likely to influence his decision if he had capacity; and (c) the other factors that he would be likely to consider if he were able to do so.
- He must take into account, if it is practicable and appropriate to consult them, the views of - (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind; (b) anyone engaged in caring for the person or interested in his welfare; (c ) any donee of a lasting power of attorney granted by the person; and (d) any deputy appointed for the person by the court - as to what would be in the person’s best interests and, in particular, as to matters mentioned in preceding paragraph.

None of this is completely straightforward. For instance, if someone made foolish financial decisions when they had capacity, e.g. they gambled their wages away, is someone acting in their best interests if they gamble their benefits away. The Court of Protection in Re P (2009) said not because of the requirement that he or she consider ‘all relevant circumstances’. The following case study (set out in the Code of Practice) illustrates the process.
Case study: 'Martina'

Martina, an elderly woman with dementia, is beginning to neglect her appearance and personal hygiene and has several times been found wandering in the street unable to find her way home. Her care workers are concerned that Martina no longer has capacity to make appropriate decisions relating to her daily care. Her daughter is her personal welfare attorney and believes the time has come to act under the Lasting Power of Attorney (LPA).

She assumes it would be best for Martina to move into a care home, since the staff would be able to help her wash and dress smartly and prevent her from wandering.

However, it cannot be assumed simply on the basis of her age, condition, appearance or behaviour either that Martina lacks capacity to make such a decision or that such a move would be in her best interests.

Instead, steps must be taken to assess her capacity. If it is then agreed that Martina lacks the capacity to make this decision, all the relevant factors in the best interests’ checklist must be considered to try to work out what her best interests would be.

Her daughter must therefore consider (a) Martina’s past and present wishes and feelings; (b) the views of the people involved in her care, and (c) any alternative ways of meeting her care needs effectively, which might be less restrictive of Martina’s rights and freedoms, such as increased provision of home care or attendance at a day centre.

By following this process, Martina’s daughter can then take decisions on behalf of her mother and in her best interests, when her mother lacks the capacity to make them herself, on any matters that fall under the authority of the Lasting Power of Attorney.

Written records should be kept of the decision making process when acting in the individual’s best interests. This helps protect a person from liability for any loss or injury that might result from decisions that are made.

Protection for decision makers

The Mental Capacity Code of Practice (paragraph 6) explains the protections available to those who make decisions on behalf of individuals who lack capacity either about their own care or treatment, or who consent to someone else caring for them.

Such actions range from everyday tasks of caring, for example helping someone to wash, to life-changing events, for example serious medical treatment or arranging for someone to go into a care home.
Many of these actions could, in theory, be against the law. People have the right to stop others from interfering with their body or property unless they give permission. But what happens if someone lacks capacity to give permission? Carers who dress people who cannot dress themselves are potentially interfering with someone’s body without their consent, so could theoretically be prosecuted for assault. A neighbour who enters and cleans the house of a person who lacks capacity could, in theory, be trespassing on the person’s property.

Section 5 of the Mental Capacity Act provides protection from such theoretical liability and protects people who carry out these actions. It stops them being sued or prosecuted for acts that could otherwise be classed as civil wrongs or crimes. By protecting family and other carers from liability, the statute allows necessary caring acts or treatment to take place as if a person who lacks capacity to consent had consented to them. People providing care of this sort do not therefore need to get formal authority to act.

Section 5 does not give people caring for or treating someone the power to make any other decisions on behalf of those who lack capacity to make their own decisions. It does so where they act in connection with the person’s care or treatment. The power to make decisions on behalf of someone who lacks capacity can be granted through other parts of the Act (such as the powers granted to attorneys and deputies).

**Restraint**

Sometimes the decisions that you make on behalf of someone else require that you impose restraints upon them. Everyday acts such as using a seat belt, stopping someone crossing the road or leaving the house when not dressed properly involve restraint.

Decisions to impose restraint on someone who lacks capacity should be founded on reasonable belief that it is necessary to do so to prevent harm to that individual, and that it is a proportionate response to (a) the likelihood of the individual suffering harm and (b) the seriousness of that harm.

Anybody considering using restraint must have objective reasons to justify the restraint as being necessary. They must be able to show that the person being cared for is likely to suffer harm unless proportionate restraint is used. A carer or professional must not use restraint just so that they can do something more easily. If restraint is necessary to prevent harm to the person who lacks capacity, it must be the minimum amount of force for the shortest time possible (Code of Practice, para.6.44)

**What is ‘harm’?**

The Mental Capacity Act does not define ‘harm’, because it will vary depending on the circumstances. The Code of Practice provides some examples to illustrate such situations.
• A person with learning disabilities might run into a busy road without warning, if they do not understand the dangers of cars.
• A person with dementia might wander away from home and get lost, if they cannot remember where they live.
• A person with manic depression might engage in excessive spending during a manic phase, causing them to get into debt.
• A person could also be at risk of harm if they behave in a way that encourages others to assault or exploit them (for example, by behaving in a dangerously provocative way).

The Code of Practice (para. 6.46) states that common sense measures can often help remove the risk of harm (for example, by locking away poisonous chemicals or removing obstacles). Also, care planning should include risk assessments and set out appropriate actions to try to prevent possible risks. But it is impossible to remove all risk, and a proportionate response is needed when the risk of harm does arise.

What is a ‘proportionate response’?

A ‘proportionate response’ means using the least intrusive type and minimum amount of restraint to achieve a specific outcome in the best interests of the person who lacks capacity (Code of Practice, paragraph 6.47). On occasions when the use of force may be necessary, carers and healthcare and social care staff should use the minimum amount of force for the shortest possible time.

A carer may need to hold a person’s arm, for example, while they cross the road if the person does not understand the dangers of roads. But it would not be a proportionate response to stop the person going outdoors at all. It may be appropriate to have a secure lock on a door that faces a busy road, but it would not be a proportionate response to lock someone in a bedroom all the time to prevent them from attempting to cross the road.

Carers and healthcare and social care staff should consider less restrictive options before using restraint. Where possible, they should ask other people involved in the person’s care what action they think is necessary to protect the person from harm. For example, it may be appropriate to get an advocate to work with the person to see if they can avoid or minimise the need for restraint (Code of Practice para 6.48).

If the restraint involves the deprivation of someone’s liberty then the law provides further protections. It can be difficult to tell the difference between restraint and deprivation of liberty. The Code of Practice suggests that the restraint involves a particular degree or intensity. What is relevant is the type of care that is being provided, how long the situation lasts, its effects or the way in which a particular situation came about. Someone lacking capacity can only be lawfully deprived of their liberty in particular circumstances.
The law applies to care homes and mental hospitals and is designed to minimise loss of liberty by insisting on the least restrictive regimes, preventing arbitrary decisions, and providing safeguards including rights of challenge against unlawful detention. As this is a specialist area this section does not elaborate upon the law.

Want more?

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