

Mental Capacity: time to get our Act together

The Mental Capacity Act 2005 will become fully operational in England and Wales from 1 October 2007. It enshrines in law several aspects of the mental capacity of individuals and provides clearer guidance to professionals acting on behalf of those who lack capacity. Unlike the Mental Health Act 1983, the Mental Capacity Act affects everyone in England and Wales who is unable to make decisions for themselves. It protects those who lack capacity and places obligations on those who care for them. It also has huge implications for doctors and other health-care professionals who take consent from patients for diagnostic or therapeutic procedures. Since April 2007 the Mental Capacity Act has made it a criminal offence to wilfully neglect or ill-treat a person who lacks capacity to make decisions for themselves.

The Act is underpinned by five key principles. First, every adult is assumed to have the capacity to make decisions unless proved otherwise. Second, individuals must be supported as much as possible to make decisions before concluding that they are unable to do so. Third, the Act recognizes people's right to make a seemingly eccentric or unwise decision. Fourth, if a person is assessed not to have capacity, we must act in their best interests and fifth, any such intervention should be the least restrictive of their basic rights and freedoms.

Assessment of capacity

The assessment of capacity is issue-specific and if there is any doubt, capacity must be assessed each time a decision is to be made. A person can have capacity to make one decision but not have capacity to make a more complex one at the same time. Under the Act, a person is deemed not to have capacity to make a decision if they are unable to satisfy one or more of the following tests of capacity: (1) understand the information relevant to the decision, (2) retain it for long enough to make the decision, (3) weigh up the information to consider alternative courses of action and (4) communicate that decision by any means.

The Mental Capacity Act enables individuals to plan for the time when they lack capacity to make decisions about their health care and welfare. Valid and applicable advance directives allow them to refuse specific treatments under specific circumstances (excluding mental illnesses). Individuals may give lasting power of attorney to someone who can make health-care and welfare decisions on their behalf – a fundamental change to the doctor–patient relationship, introducing a third person in the equation. It is also a significant turnaround from existing English law where no person – apart from the courts – is allowed to make decisions on behalf of another.

From 1 April 2007, it has become mandatory to support unbefriended incapacitated patients in England with an independent mental capacity advocate who can make sure the patient's wishes are heard. The independent mental capacity advocate does not have decision-making powers, but the information he/she provides should be taken into account by the decision-maker.

Are we prepared for 1 October?

Doctors need to be aware of the full implications of the Mental Capacity Act, especially its application to emergency situations, where the time available to ensure compliance with the Act will be limited. For instance, determining the validity and applicability of an advance directive may put significant pressure on doctors working in accident and emergency. Except for refusing life-sustaining treatments, advance directives need not be in writing, creating potential for errors and misuse. If a doctor has reason to believe there is a valid advance directive and then does not abide by it this may result in a legal claim for damages or assault. If a doctor, after having taken 'reasonable' steps, does not know or is not satisfied that a valid advance directive exists, he/she does not incur liability for having provided treatment in the patient's best interests. The common law doctrine of necessity allows doctors to save life or to prevent serious deterioration of health.

The best interests checklist in the Act may be used as a guide but doctors will have to be much more careful about the decisions they make while attempting to diagnose and treat their patients, as they can easily do something illegal if they do not exercise due care in complying with the Act. It is an additional burden placed on them when they are working in already stressful environments. There is an urgent need for greater awareness of and training in the full implications of the Act for day-to-day medical practice. Psychiatrists seem to be ahead of other doctors in adapting to the new Act and can perhaps help train them. However, assessing patients' capacity is a skill that all doctors need to learn. **BJHM**

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Further reading

- Department for Constitutional Affairs (2005) *The Mental Capacity Act 2005*. The Stationery Office, London
- Department for Constitutional Affairs (2007a) *The Code of Practice for The Mental Capacity Act*. The Stationery Office, London
- Department for Constitutional Affairs (2007b) *The Mental Capacity Act 2005 publications*. The Stationery Office, London

KEY POINTS

- The Mental Capacity Act is due to be fully implemented on 1 October 2007.
- Compliance with the legal obligations of the Act may put doctors in difficult situations, especially when treating emergencies.
- Assessment of mental capacity is a skill all doctors need to learn.
- Doctors need further training about the implications of the Act.