**MENTAL CAPACITY ACT**

The Mental Capacity Act (2005) provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make specific decisions for their selves. Everyone working with or caring for an adult who may lack capacity must comply with the Mental Capacity Act (2005) and the Code of Practice (2007).

**Principles**

The Mental Capacity Act (2005) applies to individuals aged 16 and over and sets out five principles as below:

1. A person (aged 16 and over) must be assumed to have capacity unless it is established that he/she lacks capacity S.1(2)

2. A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success S.1(3)

3. A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision S.1(3)

4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his/her best interests S.1(5)

5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action S.1(6).

This means:

Every person(aged 16 and over) capable of making decisions, has an absolute right to accept or refuse care, treatment or other intervention regardless of the wisdom or consequences of the decision. The decision does not have to be justified to anyone. Without consent, any invasion of the body, however well‐meaning or therapeutic, will be a criminal assault.

**Where there is an issue about mental capacity**

Where there are doubts about an individual’s capacity to consent to an action that concerns them, a formal assessment of their capacity to make this specific decision must be carried out in line with the five statutory principles, and the Guidance of the MCA 2005 Code of Practice and the following sections of the Mental Capacity Act (2005).

* A person must be assumed to have capacity unless it is established that he/she lacks capacity S.1(2)2.
* A person lacks capacity in relation to a matter, if at the material time, he/she is unable to make a decision for him/herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain S.2(1).
* The question of whether a person lacks capacity must be decided on the balance of probabilities S.2(4).
* A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success S.1(3)
* A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision S.1(4).
* Where a person is unable to make a decision for him/herself, there is an obligation to act in his/her best interests S.1(5).
* Where a decision relates to life‐sustaining treatment, the person making the decision must not be motivated by a desire to bring about death S.4(5).
* When determining what is in a person's best interests, consideration must be given to all relevant circumstances, to the person’s past and present wishes and feelings, to the beliefs and values that would be likely to influence his/her decision if he/she had capacity, and to the other factors that he/she would be likely to consider if he/she were able to do so S.4(6).
* The presumption that the adult has capacity is fundamental to the Act. It is important to remember that the adult has to ‘prove’ nothing. The burden of proving a 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 (or will invite a court to take such a decision). The standard of proof which must be achieved is on the balance of probabilities (S.2(4)). Accordingly, it will always be for the decision-maker to prove that it is more likely than not that the adult lacks capacity.

It is our policy to comply with the Mental Capacity Act, its Code of Practice and any other relevant national guidance, and leading judgements when making decisions about a person’s capacity or deprivation of liberty.

**Decisions not covered by the Mental Capacity Act and therefore outside the scope of this policy**

Mental Capacity Act (2005) (s27) excludes;

* consenting to marriage or a civil partnership
* consenting to have sexual relations
* consenting to a decree of divorce on the basis of two years’ separation
* consenting to the dissolution of a civil partnership
* consenting to a child being placed for adoption or the making of an adoption order
* discharging parental responsibility for a child in matters not relating to the child’s property, or
* giving consent under the Human Fertilisation and Embryology Act 1990.