

Mental capacity and safeguarding

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Why is mental capacity relevant in safeguarding adults at risk?

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Clear about mental capacity?

If professionals are not clear about a person's mental capacity in a specific matter it is not possible to know what their role is

- Is this person making their own decision without my help? or
- Am I assisting this person to make their own decision? or
- Am I making a decision in their best interests?

What do we know?

‘Reviews continue to uncover missed opportunities for mental capacity assessment and best interests meetings and decision-making. Assumptions are made about individuals having capacity. Reviews also continue to express concern that an individual’s autonomy and self-determination is privileged to the exclusion of a duty of care, expressed in respectful challenge, curiosity and discussion regarding that individual’s choices and the potential consequences of their decision-making. The evidence suggests that practitioners continue to find the Mental Capacity Act 2005 difficult to understand and implement’

Braye and Preston-Shoot (2017) Learning from SARs: A report for the London Safeguarding Adults Board

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And more locally...

‘An ill-informed assumption of capacity and a failure to implement formal tests of mental capacity in relation to specific and serious decisions’

Ms C (Somerset SCR, 2016)

<http://ssab.safeguardingsomerset.org.uk/wp-content/uploads/2016/02/Ms-C-Practice-Briefing-Note-FINAL.pdf>

‘Tom’s circumstances highlight the fraught boundaries between personal responsibility, public obligation and the assumption of mental capacity...An assumption of mental capacity is risky because a person’s severe brain injury usually results in a degree of cognitive impairment’

Tom (Somerset SCR, 2016)

<http://ssab.safeguardingsomerset.org.uk/wp-content/uploads/Tom-Practice-Briefing-Note-FV.pdf>

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MCA protective measures

- Lasting Powers of Attorney
- Advance decisions to refuse treatment
- Court of Protection and Office of the Public Guardian
- CoP welfare decisions
- CoP appointment of a financial deputies
- Deprivation of Liberty Safeguards – qualified
- Criminal offences of wilful neglect or ill-treatment of a person who lacks capacity (s.44) (few successful prosecutions)

Powers of attorney

- Potentially a protection for a person who want to choose who will make decisions for them in the future
- But only if the person who holds the authority exercises it appropriately
- If you manage P's financial affairs you make decisions which promote **their** interests. This does involve paying their care bills!
- LPA cannot be given once P has lost capacity
- Many people with LPAs do not fully understand what authority it confers upon them or how to go about making decisions. Some see it as being in control!
- How can we assist people with this?
- Important for care providers to know if there are any LPAs – H+W LPA has to give consent to care and treatment proposed. Not lawful if they don't!

Vulnerability arising from impaired mental capacity

- Scamming
- Sexual exploitation
- Financial exploitation
- Discrimination

All involve taking advantage of a perceived vulnerability – playing on the emotions – getting people to make poor decisions

Often not a lack of capacity!!!

Identifying mental incapacity

The onus is on the person who wishes to take an action in a person's best interests to evidence why they lack capacity.

The person does not have to prove anything – their capacity is assumed

SAR Tom

- Presence of an acquired brain injury
- Essential that those working with Tom were able to understand the nature of his brain injury.
- It might affect him in one of the following ways:
 - Poor memory
 - Poor concentration
 - Slower information processing
 - Difficulty writing and reading
 - Impaired comprehension
 - Impaired ability to sequence thoughts, to think logically
 - Impulsive behaviour

Any of these factors might affect mental capacity

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How is mental capacity defined in the Act?

A functional inability to make a decision as a consequence of an impairment of the functioning of the mind or brain

= Medically diagnosable conditions which affect P's ability to do one or more of the following

- Understand relevant information
- Retain this information long enough to think about it
- Use or weigh the information to reach a decision
- Communicate the decision

A word of caution

- Many vulnerability situations where adults are at risk of abuse or neglect are not easily resolvable by the use of the MCA
- Many involve people who are practically or emotionally vulnerable being groomed or coerced into making poor decisions
- Sexual consent is one of a range of relationship decisions which cannot be made on someone else's behalf - MCA s.27
- It may be necessary to identify if a person has mental capacity for sexual consent but the threshold is low.

Mental capacity to make decisions about how to keep safe

- Protective actions proposed
- Can P consent?
- Communication about what the actions involve and likely consequences needs to be clear and relevant
 - Does staying safe mean seeing less of a family member?
 - Does staying safe mean moving from my home?
- With capacity I can choose to take any level of risk
- Unwise decisions – domestic violence

Understanding human rights

European Convention on Human Rights (ECHR)

- Right to liberty and security (Art. 5)
- Right to respect for private and family life and correspondence (Art. 8)

In the MCA

- Assumption of capacity (Principle 1) = right to make own decisions unless there is evidence that you can't
- Any provision of care and support for a person whose capacity may be impaired involves sensitivity to where this line is.

Discussion

1. How confident is your service or organisation in using the MCA to protect?
2. How do you protect a person's right to make their own decisions while being alert to the possibility that their capacity may be impaired?
3. What approach should be taken where a person appears to have mental capacity but also seems to be making decisions under another's influence?
4. When would an apparently unwise decision trigger you to question a person's mental capacity?

Recommendations

- Starting point is always helping a person to understand their situation and make a decision
 - What has happened?
 - How do you wish to sort things out?
- Be alert to signs of the person struggling mentally with this
- Whenever there is reason to believe a person may have a brain injury/learning disability/ dementia/ mental illness, actively consider the person's decision-making abilities and make a record
- If P is making a risky/unwise decision – record why you think this is or isn't capacitated

Further sources of information

- Link to SSAB MCA microsite – Mental Capacity Act Competency Framework
- Safeguarding and MCA training and guidance resources on the Social Care Institute for Excellence website
 - <https://www.scie.org.uk/mca>
 - <https://www.scie.org.uk/adults/safeguarding>