THE MENTAL CAPACITY ACT
Choice & decision-making by, and on behalf of, people with impaired mental capacity

REAL LIVES: REAL CHOICES
ETHICS & DECISION-MAKING
IN PALLIATIVE CARE

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OBJECTIVES

- Support people with impaired capacity so that they can make decisions for themselves
- Where they cannot take decisions, to provide a protective framework for decision-making
- To provide a framework for those who have to take and implement decisions

5 PRINCIPLES

- Presumption of capacity
- Individuals should be supported where possible so that they can make their own decisions
- People have the right to make decisions that may seem eccentric
- Decisions should be in a person's best interests
- Decisions should be as unrestrictive as possible

A NEW CULTURE OF CARE

- Lack of capacity is a determination of last resort
- Maximising capacity is first priority
- New methods of communicating and explaining
- Justify a determination of lack of capacity
- Legal obligation to act in best interests

LACK OF CAPACITY

- On a decision by decision basis
- Diagnostic: an impairment or disturbance of mind or brain…
- Functional: …by reason of which a person cannot understand, retain, use or weigh relevant information, or is unable to communicate by any means
- Cannot be established merely by reference to age, appearance, condition or aspect of behaviour

BEST INTERESTS

Specific process to determine best interests:

- Not merely by reference to age, appearance, condition, or aspect of behaviour, BUT
- Consider all relevant circumstances; AND
- Take the following steps…

BEST INTERESTS 2

- Consider whether and when P might gain capacity
- Permit and encourage P to participate
- Where life-sustaining treatment in issue, NOT be motivated by a desire to bring about death
- Consider, so far as is reasonably ascertainable:
  - P's past & present wishes and feelings (including any written statement by P whilst he had capacity)
  - P's beliefs and values
  - Any other factors P would consider if able to
- Take account, if practicable, of the views of:
  - Anyone named by P as someone to be consulted
  - Anyone engaged in caring for P or interested in his welfare
  - Any holder of an LPA or any Court Appointed Deputy

WRITTEN STATEMENTS

- Legal requirement to consider them when assessing best interests
- Likely to have a significant impact on care:
  - Gold Standards Framework
  - Preferred Place of Care
  - Care Plans
- How to capture & record them?
- To what level of detail?
- What support to people making them?

WHO IS RESPONSIBLE FOR THE DECISIONS THAT ARE MADE?

- Is it the person who:
  - determines capacity?
  - decides what course of action is in the patient's best interests?
  - implements the decision?
- What is the role of multi-disciplinary teams

THIRD PARTY INVOLVEMENT IN DECISION-MAKING

- Lasting Powers of Attorney

  (appointed by P to make decisions on his behalf)
- Court Appointed Deputies

  (appointed to make decisions on P's behalf)
- Independent Mental Capacity Advocates

  (*advocate, not a decision-maker)*

LASTING POWERS OF ATTORNEY

- Welfare and Property
- Formal agency agreement
- Formal: prescribed form; registration
- Can cover different activities, and be given to different people

ADVANCE DECISIONS

- Refusals only
- To be binding must be both valid and applicable
- "Specific" language required as to both treatment and circumstances
- If not binding, must still be considered when assessing best interests
- If binding, patient has taken responsibility for the decision

ADVANCE DECISIONS 2

- Special rules for advance decisions refusing life-sustaining treatment
- Capacity:
  - When advance decision made
  - When a treatment decision needs to be taken
- Status of current advance decisions
- Clarity: living wills; advance directives etc

SUMMARY
ASK YOURSELF THE FOLLOWING

- What decision has to be made?
- Does the patient have capacity to make it?
  - What support is required to help him make it?
- If no capacity:
  - Is there a proxy - LPA or a CAD - to make the decision?
  - If it involves treatment, is there an advance decision refusing it?
- In all cases where the patient doesn't have capacity & there is no valid & applicable advance decision refusing treatment: WHAT ARE THE PATIENT'S BEST INTERESTS?

1 APRIL 2007

- The day the Act comes into force

What do you need to do to get ready?

- Gain an understanding of the Act & the impact that it will have on your organisation & area of practice
- Understand the ethical framework within which you are operating
- Review your practices & procedures
- Brief your colleagues & teams
- Training

FURTHER EDUCATION

Guidance on the Mental Capacity Act 2005, NCPC

2 joint conferences, organised by The National Council for Palliative Care & Help the Hospices:

– 28 November 2006, Bristol

– 11 January 2007, London

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