

## The Mental Incapacity Act 2005

### Background

- Provides a comprehensive framework for decision making on behalf of adults aged over 16 who lack the capacity to make decisions.
- Applies in England and Wales only.
- Implemented in 2007.
- Covers all decisions including those related to medical treatment.

### Capacity

Refers to a persons ability to make decisions which may have legal or personal consequences for the person themselves or for others.

### Lack of Capacity

- Exists when a person is unable to make a decision because of an 'impairment of or a disturbance in the functioning of the mind or brain'
- Impairment or disturbance needs to be sufficient to render the person incapable of making that decision.
- Assessment of capacity is 'task specific'
- If it is clear the incapacity is temporary, reassessment should be made at a time when capacity is restored.

### Basic Principles

- There is a presumption of capacity
- Maximising decision making capacity
- Freedom to make unwise decisions.
- When decisions are made on behalf of patients
  - Act in patients best interests
  - Choose least restrictive alternative

### Assessment of Capacity

- The person who wishes to make the decision on behalf of the person is responsible for assessing capacity
- Careful records should be kept
- Reasons why capacity is in doubt are recorded
- Advisable to include/refer to psychiatrist or psychologist for second opinion

### How is Capacity Assessed?

- Act adopts a 'functional' test of capacity
- A person is regarded as unable to make a decision if they fail
  - To understand the information relevant to the decision
  - To retain the information relevant to the decision
  - To use or weight the information, or
  - To communicate the decision (by any means)
- Decision based on a 'reasonable belief' backed by objective reasons
- There is recourse to the Court of Protection for an independent judgement.

### Best Interests

- The Act requires that the patients best interests form the basis of any decision made
  - Must take into account possibility of regaining capacity
  - Must include past and present wishes and feelings
  - Must include beliefs or values previously expressed

### Exceptions to the Act

- Certain situations are advised to go to a Court for decision
  - Withdrawal of nutrition and hydration
  - Cases involving organ donation
  - Non therapeutic sterilisation
  - Termination of pregnancy
  - Doubt where the patients best interests are being served
  - Untested areas

### Advance Directives

- Broad statements not binding
- Specific refusal of treatments only binding if
  - Person was over 18 when decision made
  - It specifies the specific treatment to be refused and the specific circumstances
  - The decision has not been withdrawn
  - The person has not done anything clearly inconsistent with the directive

### Independent Mental Capacity Advocates

- Supports vulnerable adults in making certain decisions
- Used when there is no one close to the person to provide advice or guidance