# Manual for Mental Capacity Act

During this module you will be asked some questions to simply provoke thought and test your current knowledge please have a note pad or supervision workbook to hand to make notes. Your performance will only be measured on the answers you select when completing the knowledge test at the end of the module.

Contents

# Chapter one

***Introduction to Mental Capacity Act***

The Mental Capacity Act 2005 was designed to protect the rights of potentially vulnerable adults who might otherwise be prevented from making their own choices and decisions. By the end of this manual you should understand how the Act will affect your working practices, how by complying with it you are protecting the best interests of your clients and what you will need to do to demonstrate your compliance to the Care Quality Commission.

It is now law that ALL adults must be assumed to have the capacity to make decisions and take actions for themselves unless after being provided with appropriate support and information it can be shown that they do not.

If it is decided that a person lacks capacity then decisions must be taken in their best interests and they must be involved in the process as far as possible.

**Take a moment to consider some of the reasons why you think people might experience difficulty in making their own decisions. (Make a note of them on a pad to help further in the manual)**

Consider your answers and think about the following questions in relation to the difficulties you have identified.

a. Will the person be completely unable to make any decisions?
b. Is there any way in which the person can be helped to overcome their difficulty?
c. Is the problem permanent or temporary?

Before the Mental Capacity Act was introduced there was no way of ensuring that people who required care and support were being treated as competent adults. It is all too easy to make assumptions based on a person's behavior or medical history and to believe that it will be in their best interests for you to act or make decisions on their behalf.

The Act is based on five key principles which together ensure that individuals are respected as competent adults; given every opportunity to make their own decisions and choices; treated fairly without prejudice or discrimination and supported to be as independent as possible.

***The statutory principles***

1. A person must be assumed to have capacity unless it is established that he lacks capacity
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision

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 best interests
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
   (Mental Capacity Act 2005 Code of Practice)

In this manual we will look at each of these principles and explain what they mean and how you can apply them in practice.

The Mental Capacity Act is accompanied by a code of practice which you and other paid care givers and health professionals must 'have regard' to when assessing capacity and making decisions. The Care Quality Commission (CQC) produced a summary of these 'The Mental Capacity Act 2005 Guidance for Providers'. The CQC's document does not have legal standing but it does detail exactly how they will assess care providers' compliance with the Act.

***CQC expected evidences***

- That your employer has copies of the code of practice (available from www.guardianship.gov.uk)
- That your induction and training include learning about how the Act and Deprivation of Liberty codes of practice affect your work
- That you and your colleagues are aware of the code of practice and when assessments of capacity are needed
- That assessments of capacity have been made and recorded wherever needed (The CQC guidance can be obtained at www.cqc.org.uk)

***Decisions derived from Mental Capacity Act?***

The Act covers all types of decisions that clients may need to make from what to eat for breakfast to whether to have major surgery; however, not all decisions have to be treated the same, the requirements for assessing and recording will depend on the significance of the decision and the nature of the client's difficulty making it.

Be aware that significance must be judged on an individual basis and that while you can never assume that a client lacks capacity care records may include general advice about their 'normal' decision making abilities and preferences. For example 'Mrs. Jones prefers her coffee strong and without sugar, always ask if she wants a drink but don't ask how she takes it as she gets confused.'

***Certain decisions can never be made on another person's behalf either because they are personal or because other laws apply. These include:***

- Sexual consent
- Consent to marriage / civil partnership
- Consent to divorce / dissolution

• Consent to put a child up for adoption.
• Discharging parental responsibility
• Voting

On page 3 there are details of the outcomes that the CQC are looking for evidence of when they inspect and assess care providers. These are their way of ensuring that providers are complying with the terms of the Health and Social Care Act 2008 but these examples overlap with the legal duties imposed by the Mental Capacity Act. The CQC document 'Essential Standards of Quality and Safety' is available from their website; by accurately and appropriately recording assessments of competence and details of decisions made you will support your employer in providing the evidence that CQC require.

***Related Acts***

- Mental Health Act 2007
- Human Rights Act 1998
- General Data Protection Regulation (GDPR)
- The Equality Act 2010

# Chapter Two

***Capacity assessment***

**A person must be assumed to have capacity unless it is established that he lacks capacity.**

Whenever the term 'a person who lacks capacity' is used it means a person who lacks the ability to make a particular decision or take a particular action for themselves at the time that it needs to be taken.

If you believe that a person may lack capacity to make a decision you should carry out a two-stage assessment. Stage one is known as the diagnostic test, stage two is a functional test.

***Diagnostic exam***

For the Mental Capacity Act to apply to an individual they must have a disturbance of their mind or brain which is affecting their ability to make a decision. This could be permanent or temporary and may be one condition or a combination of factors acting together. Following factors could be identified:

- Conditions associated with forms of mental illness
- Dementia
- Significant learning disabilities
- Long term effects of brain damage
- Physical / medical conditions that cause confusion, drowsiness or lack of consciousness
- Delirium
- Concussion following head injury
- Symptoms of alcohol / drug use
- Inability to communicate:
- Coma
- Unconsciousness
- 'locked in' syndrome

When recording your assessment you would write down what you believed to be causing the disturbance; this will be enough to comply with the code of practice. You are not expected to make a formal diagnosis.

***Functional exam***

If you believe that a client has a disturbance of the mind or brain which may affect their ability to make decisions you must then assess whether they actually lack competence by deciding whether they are unable to do one or more of the following:

1. Understand information given to them about the decision
2. Retain the information for long enough to make the decision
3. Weigh up the information i.e. consider the pros and cons
4. Communicate their decision

Competence must be assessed properly according to the specific requirements of the diagnostic and functional tests in order to ensure that you are not acting on prejudices or assumptions. The code of practice accompanying the Act states that 'A person's capacity must not be judged simply on the basis of their age, appearance, condition or an aspect of their behavior.'

The terms used are carefully chosen to cover a wide range of different interpretations; 'appearance' could mean the facial characteristics associated with Down's syndrome or the presence of multiple facial piercings; 'condition' could relate to physical disability, mental health, illness or drunkenness; and 'aspects of behavior' could range from making obscene gestures to refusing to speak.

Bear in mind that the way a person looks or acts may make them seem more competent, not less. If a person is smartly dressed and speaks politely and correctly we may believe they are talking sense even if they are not.

***Common assumptions and prejudices***

Miss Stevens is physically disabled and uses a wheelchair; she is a civil servant and enjoys pub quizzes. When she gets tired while out shopping her husband pushes her wheelchair to let her rest, she gets frustrated when shop assistants feel they have to talk very slowly to her or speak only to her husband as if she has hearing problems or would be unable to understand them.

George is 89 and in very good health both physically and mentally; one day, while out walking, he pauses at a junction while he considers which way he would like to go. He is extremely surprised when a young man grabs his elbow and insists on escorting him across the road without waiting to hear whether George would appreciate help.

***Competence assessment***

**Competence must be assessed 'at the time the decision needs to be made'; if the condition affecting the individual's ability to make a decision is temporary (e.g. they are unconscious) or if their abilities fluctuate (e.g. they are better at sometimes of day than others) then the decision should be put off until the person can make it themselves. This is of course not possible if immediate action is required; for example to provide medical treatment in an emergency.**

We have been talking about you assessing people's competence but we haven't yet discussed when 'you' should do this. Bearing in mind that all adults should be assumed competent you will only carry out an assessment when you have reason to believe that they are not.

In general terms, where there is doubt about an individual's competence, it should be formally assessed every time a decision needs making or action needs taking. The person who carries out the assessment will be whoever is suggesting a choice or proposing an action and, if they assess the individual as lacking competence they will become the 'decision maker'.

The decision maker could be you, or any other person involved with the individual in a professional capacity.

***Capacity assessment example:***

- Does the client want a bath
- What will they wear
- What are they going to eat
- Choice between activities
- When they will go to bed

***Who can assess?***

- Doctors re medical treatment
- District nurses about dressing change consent
- Social worker about place to live

Decision makers receive legal protection (see Chapter 4) as long as they base their decisions on the best interests of the client. For acts of care / treatment you must have 'reasonable belief' that the client lacks capacity to agree to an action or decision. 'Reasonable' steps must have been taken to establish that the person lacks capacity and must also establish that any action being taken is in their best interests.

Clients' care plans may include information about their ability to make their own choices and decisions and should have details of any support they need to understand, process and communicate information. However, this does not mean that they do not need any further assessments; reviews should be carried out regularly and formal assessments should be completed and recorded in any of the following circumstances:

- When planning care and support
- When any significant decision needs to be made (significance must be judged on an individual basis)
- When the consequences of the decision will have a significant impact on the client's life (e.g. what medical treatment to have, money management)
- When a decision maker's choice or course of action may be challenged

When you are considering whether or not to carry out and record an assessment consider whether your actions / lack of actions may be questioned at a later date. The following scenarios may help you to understand the importance of written records:

1. Mr Barros comes to you and tells you that he is going to walk to the local park; you are aware that he has become confused in similar situations recently but when you discuss this with him you are satisfied that he is competent to make his own decision. He goes out but, when he has not returned several hours later, the manager contacts his family and the local police. Mr Barros is discovered in the early hours of the morning, cold and tired but otherwise unharmed. In this situation accurate and complete records will support your reasons for not preventing him from leaving the home.

2. Parveen has severe learning disabilities and also experiences regular bouts of depression. Her care plans document the fact that when she is depressed she self-neglects and ignores her care givers. It is noted that she will eat meals if given them but will not make menu choices. One morning you ask Parveen what she would like for breakfast but receive no response; after several attempts you decide to give Parveen the option she chooses most regularly. It will probably be adequate to simply note in Parveen's care notes that you offered choices but she would not respond and that you gave her what you thought she would be most likely to choose for herself.

3. Mrs Smart is due to attend an appointment with her diabetes consultant but she tells you that she isn't going to go. You are concerned and inform your manager who carries out an assessment of capacity and finds that Mrs Smart is unaffected by any condition which would disturb her mind or brain and is, therefore, free to choose not to attend her appointment. Although it would probably be in Mrs Smart's best interests to see her consultant it is her right not to. Because this decision could have serious consequences for Mrs Smart your manager should record that she carried out an assessment and her reasons for finding Mrs Smart to be competent.

Remember that the purpose of the Mental Capacity Act is to protect people's rights to make decisions for themselves. A person who cannot manage their finances may still be able to express preferences about food choices and a client whose medication makes them confused in the early evening may be completely competent for the rest of the day. Every situation must be judged individually according to your knowledge of the client and your assessment of them as they are at the point in time that the decision needs to be made.

# Chapter Three

***Decision Making Guide***

**A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success**

When assessing an individual's competence to make a decision it will not be enough to just say 'well I asked him what he wanted, and he didn't seem able to tell me, so I went ahead and decided for him.' You must be able to show that you have done everything possible to help the client understand their choices and to make a decision for themselves.

***When assessing a client's capacity, you may need to:***

- Understand the nature and effect of the decision to be made – this may require access to documents and background information
- Access relevant information to support your assessment e.g. medical records
- Get professional advice regarding an individual's medical condition or method of communication

The functional stage of the capacity assessment requires you to judge whether clients are capable of doing four separate things which we will now look at in order.

***1. Decision related information***

Care plans should include details of any barriers to communication and the type of support that the individual might need to understand information and to communicate their feelings and responses.

***Communication guideline***

- Ask people close to the individual how best to communicate with them
- If necessary use simple language or pictures / signs
- Use the right volume and speed – avoid jargon and words that the person may have difficulty understanding
- Break down information into short sentences – allow time for the person to process one instruction / idea at a time
- Repeat information whenever necessary
- Be aware of cultural / ethical / religious factors that shape thinking / behaviour / communication
- Consider using a professional interpreter who will faithfully translate what the client says. A family member might censor complaints or say what they think the person means
- Consider whether an advocate might improve communication

Good communication is essential for explaining relevant information in an appropriate way and for ensuring that the steps being taken meet individuals' needs.

***Communication improvements rules***

- Be relaxed, open and friendly, and speak calmly and clearly
- Position yourself in front of your client and at the same level, maintain regular, not constant, eye contact
- If it's acceptable to your client and appropriate for the situation use physical contact such as a hand on their arm.
- Background noise, such as a television or other people talking, should be kept to a minimum; this is especially necessary if your client wears a hearing aid.
- If you have important information to give talk to the client away from all noise and distraction.
- Where appropriate use a physical prompt such as a leaflet as a focus, if your client's mind does wander onto a different subject you can use your prompt to get back to your original discussion.

When supporting a client to make a decision take time to explain anything that might help; make sure you give them all the information they need to make an informed decision. Don't give too much detail as you may cause confusion but don't miss out anything that will be vital to the client's understanding of the decision to be made.

You should know what the risks and benefits are of the options available to the client and be able to describe to them the possible consequences of their decision and those of not making it. You may need to explain the effects their choice will have on them and on those close to them.

If there is a choice available you must give balanced information that is unaffected by your own personal opinions or feelings. Sometimes it may be important to give access to advice from elsewhere; for example by involving a financial consultant or doctor.

***2. Information retention for making decision***

When you have done all you can to make sure that your client understands the decision they are making you must then decide whether or not their understanding lasts long enough to make their choice. To find out if they have retained what they have been told you could ask them questions or ask them to put the information into their own words.
The actual length of time the information needs to be retained for will depend on the significance of the decision and the likely consequences if the decision has been forgotten before it has taken effect. For example, if a client is choosing their lunch they don't have to retain the information for long to make their selection but, if by the time food is served they have forgotten they may decide they want something else and become upset if this isn't possible. In this situation it would be best to either shorten the time between choosing and serving or to provide the client with a memory aid such as a card with their choice printed on it.

### *3. Information scrutinizing focusing on the consequences*

As well as being able to understand the information they are given individuals must also be able to understand what the consequences of a choice or action will be. The client must have been given all relevant information in an unbiased way in order to choose the course of action that is right for them. They may also want to consider the way that their decision or action may affect those close to them. Although your focus as a care giver must always be on what is best for the client, they will be influenced by their relationships with other people. For example, they may want to do something because it will make their parents happy and it is their right to do this as long as it has been their own free choice.

### *4. Decision Communication*

Care givers and other health professionals are expected to make every effort to interpret clients' speech, gestures and, if necessary, behavior. If a person is capable of communicating in any way whatsoever they must be given every opportunity to do so.

Alternatives to speech as methods of communication include:

- sounds
- behavior including challenging
- pointing
- signs
- drawings
- blinking
- facial expression

### *Records*

To meet the Care Quality Commission's requirements (Mental Capacity Act 2005 Guidance for Providers) your records of assessments and decision making should show the following:

- How the client was helped to make a decision for themselves, and how effective this was
- How much the person is able to understand information relevant to the decision
- Whether the person can remember information for long enough to make the decision
- How well the person can weigh up the pros and cons
- How the person can let others know what their decisions are and how well they can do this

Carrying out and recording assessments may require you to access, discuss and write down personal information about clients. To ensure that you comply with both the Data Protection Act 1998 and your duty of confidentiality ensure you do the following:

- Protect information from being accessed by people who have no need or right to know it – lock written information in filing cabinets, use passwords on computers and only discuss personal information in private areas

- Think carefully before passing on information to others, for example when involving family members. Get the client's consent to discuss their personal business, or, if this is not possible, only communicate what is necessary to people who need to know
- Only record accurate, relevant information

***Result challenge: assessment of capacity***

If the person assessed, or their friends, family or supporters wish to challenge the findings of an assessment of capacity they should first raise the issue with the assessor and ask for their reasons for believing that the person lacks capacity and the evidence they have for this.

The assessor must show that they have applied the principles of the Mental Capacity Act.

A second opinion may be sought from an independent professional or an expert in assessing capacity.

If the disagreement cannot be resolved, it may need to be referred to the Court of Protection (see Chapter 5).

# Chapter Four

***Taking Decision***

**A person is not to be treated as unable to make a decision merely because he makes an unwise decision**

Nobody makes the right decision every time; when we balance pros and cons we often give added weight to considerations such as pleasure and sensation at the expense of what is healthy or safe. People who smoke do so knowing that it is harming them; people who do extreme sports derive enjoyment from the element of danger involved.

Think about this, have you ever disagreed with a decision that somebody close to you was making? How does it feel to watch someone doing something that you feel to be wrong or harmful? If you have tried to get someone to change their behaviour or not do something how successful have you been?

Has anyone ever told you something that they felt you should be aware of 'for your own good'? How does it feel to be asked to stop doing something because another person feels it is wrong? Have you ever changed your mind or stopped doing something for the sake of someone else? Your clients have the same rights and freedoms as any other person. Just because they rely on others doesn't mean that they have to act according to the wishes, morals or beliefs of their care givers. At times it may be very hard to allow your clients to do things that you believe, or even know, are harmful. However, you must balance your duty of care with your clients' rights to take risks and live their lives as they want.

If you become concerned that a client may lack the capacity to make their own decisions you can carry out an assessment. If this confirms that they lack capacity then you may take action in their 'best interests' (see below). This does not automatically mean that you can prevent them from doing anything harmful but you may be able to limit their risk.

***Case analysis***

**Mrs Simpson** has epilepsy and experiences frequent seizures; her family want her to move into a care home 'for her own safety' but she refuses to consider leaving her own home. For as long as she is competent to make her own decisions Mrs Simpson must be supported to live independently; she cannot be forced to move into residential care. If she is assessed to lack capacity her living arrangements should be reviewed taking into account all relevant information including her stated desire to remain at home.

**Santosh** has been having intensive treatment for pancreatic cancer; the treatment is painful and exhausting and Santosh has decided that he doesn't want to continue with it. He is aware that his choice is likely to mean that he will not have long left to live but he is sure about his decision and completes an advance decision to refuse treatment to ensure that his wishes are respected if at any point in the future he is found to lack capacity to make decisions.

**Celeste** has Down's syndrome, her grandfather leaves her a substantial sum of money and she immediately goes on a shopping spree to buy clothes and shoes; she also buys gifts for

two of her close friends who care givers believe may be taking advantage of her generosity. Celeste's social worker carries out an assessment of her ability to decide how to spend her money as he believes that she should be saving money to cover her future living costs.

**Celeste** talks to a financial advisor and tells her that she intends to save 90% of her inheritance but that she wants to blow the other 10% on anything that takes her fancy as she enjoys treating herself and other people. She understands that once the spending money is gone she will be living on a tight budget but she wants to enjoy it when she can. Celeste's social worker decides that she is competent to decide how to use her money even if her current spending habits are not sensible.

**Note: 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 best interests**

If it is determined that a person lacks the capacity to make a decision or take an action the decision maker will have to make it on their behalf. When this has to be done they must make sure that they decide or act in the best interests of the person.

Chapter 5 of the Mental Capacity Act code of practice sets out how you can best decide whether something is in a person's best interests. 'Best interests' cannot be fully legally defined as there are so many separate factors involved; the code of practice includes a 9 point checklist to help you apply best interest principles and the Care Quality Commission will look for the following evidence that this is being followed by your employer:

- Written records of assessments and decisions
- Whether staff are aware of the best interests checklist
- Whether clients and their supporters confirm that their past and / or present wishes have been taken into account

***Checklist: best interests***

***1. Promoting participation***

Everything should be done to encourage the client's active participation in the decision to be made even if they can't make it for themselves. All the good communication techniques we discussed in Chapter 3 should be used to decide what the client's feelings are about the decision to be made. For example, a client whose changing care needs require support that is not available where they currently live may be asked about what is important to them in a home; they may be taken to potential new homes and observed interacting with the environment and the people in it; and they may be asked which visit they enjoyed most. Although they may be unable to decide which home would meet their needs most appropriately they can indicate preferences which should be taken into account.

***2. Circumstances Identification***

You must consider all the things that the client would take into account if they were making their own decision. This may include (but is not limited to) ethical factors, religious or

cultural considerations, the feelings of those close to them, and the effect on their relationships with others,

***3. Personal view identification***

Look for evidence of their past and present wishes and feelings, beliefs, values and other factors they may consider. These may be expressed verbally or through behaviour or they may have been written down.

***4. Discrimination avoiding***

You must not make assumptions based on the client's appearance, age, condition or behaviour.

***5. Assessing the possibility of regaining capacity***

Remember that decisions are time specific and if the client may be expected to regain or develop capacity in future it may be possible to put the decision off until they can make it themselves. If this is not possible consider whether temporary, and reversible, solutions may be used until the client can decide for themselves.

***6. Special condition***

Decisions must not be motivated by a desire to end life for any reason (even on compassionate grounds). No-one can make assumptions about quality of life. Best interest doesn't apply if an advance decision to refuse treatment exists; it will be up to doctors to decide whether the advance decision is valid and relevant to the treatment under consideration.

***7. Relevant Person Consultation***

The following people may need to be consulted when making a best interests decision:

- Anyone the person has previously named to be consulted
- Anyone involved in the person's care
- Anyone with an interest in the person's welfare
- An attorney appointed under a Lasting Power of Attorney or an Enduring Power of Attorney (even if not directly related to a matter they have power over)
- A deputy appointed by the Court of Protection
- An Independent Mental Capacity Advocate (IMCA; see box below)

When consulting others take care to protect confidentiality; if the matter is of a personal nature only pass on information to those who need to know it in order for appropriate decisions to be made. In all cases you should record who was consulted and also note who was not consulted and the reasons why this was so.

***8. Avoiding personal rights restriction***

Always look for the least restrictive option available (this will fulfil the requirements of the 5$^{th}$ statutory principle as shown in Chapter 5)

***9. Taking all these into consideration***

In order to make a decision in the best interests of the individual you must take into account all of the separate factors on this checklist plus any other factors which seem to be relevant at the time the decision needs to be made.

As long as decisions are made in a person's best interests the decision maker has legal protection from liability. Chapter 6 of the code of practice gives details of the way in which people who make decisions on another person's behalf are protected from liability if there are negative consequences. It is important that you can show that you carried out the two-stage assessment and followed the checklist.

***Independent Mental Capacity Advocate (IMCA)***

**An IMCA may be appointed by a local authority or NHS organisation to protect the interests of an individual who has no one else that can be consulted about their welfare (i.e. they have no family or friends). An IMCA must be appointed when:**

- **An NHS body is proposing to provide serious medical treatment**
- **An NHS body or local authority are proposing to arrange accommodation (or a change of accommodation) in hospital or a care home for longer than 28 days (hospital) or 8 weeks (care home)**

***An IMCA may be appointed when:***

- **Care reviews take place**
- **In adult protection cases (even if family / friends are available)**

***Case analysis***

Mr O'Shea has had a stroke which has affected his brain function enough to mean that he is unable to make decisions for himself. He has a dedicated therapist who believes that his mental capacity will improve with treatment. Mr O'Shea is 45 years old, a practising Catholic who lives with his wife and 3 children in a small village. Mrs O'Shea cares for her husband at home but is finding it difficult to cope; she is looking for a suitable place for her husband to live for a few weeks, or months, until she feels more able to meet his needs at home.

**Using the best interest's checklist think about and make a note on a pad of some of the factors that would need to be considered when deciding where Mr O'Shea will live.**

# Chapter Five

***Protections***

**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**

As well as following the best interests checklist when making a decision on another's behalf you must also consider the impact of the available options on the individual's rights and freedoms. You should go for the least restrictive course of action that is also in the person's best interests.

***Example:***

Caspar is alcohol dependent; he visits the pub every day and regularly becomes extremely intoxicated. When under the influence of alcohol Caspar can be aggressive, he often gets verbally abusive and has been physically violent. His behaviour has led to him being taken into police custody on more than one occasion. Caspar's family are worried about the effects of his drinking on his physical and mental health and his financial wellbeing. They are also concerned that he will seriously harm somebody else and as a consequence end up in prison. They would like Caspar's care givers to prevent him from leaving the home.

Caspar is showing signs of dementia, commonly associated with people who abuse alcohol, and he lacks the self-control necessary to limit himself to 2 or 3 drinks. Having assessed that Caspar lacks the capacity to make decisions for himself regarding alcohol consumption his care team look at the options available. They come up with 3 alternatives:

1. Caspar will be prevented from leaving the home
2. Caspar will follow a treatment plan developed by his GP and be taken out weekly by a member of his family
3. Caspar's care givers and family will work together to take him out daily, including supervised trips to the pub

Option 1 is inappropriate as it would require an unacceptable level of physical restraint. Option 2 would be better; however, Caspar makes it clear that he does not wish to follow his doctor's advice. The option which is less restrictive of his rights and which is also in his best interests is for a rota to be worked out allowing Caspar to go to the pub regularly with someone who will limit the amount of drinks he consumes.

***Restraint***

Restraint use may be justified if it is a proportionate response to potential harm; for example, the use of bed rails or wheelchair lap belts to prevent clients from falling.

If an individual lacks capacity and requires a significant level of restraint to allow care or treatment to be provided it may be necessary to apply for them to be detained under the Mental Health Act. Alternatively, if they are likely to be deprived of liberty the deprivation of liberty safeguards must be applied (see below).

***Debates***

There are various ways in which disputes arising from capacity assessments and decisions made can be dealt with.

In the first instance, to avoid future problems it may be appropriate to involve professionals in the assessment and decision making process. The following situations may benefit from the involvement of other agencies including social workers and advocacy services:

- When there is a conflict of interest between the assessor and the person being assessed – for example if the assessor could benefit financially
- If the client has given different views to different people
- If the client's capacity may be challenged now or later
- When there is an accusation of abuse of a vulnerable adult
- When the client repeatedly makes decisions which put them at risk

**Advocates may be employed to support individuals who have communication difficulties and require help in making their feelings known. Advocates may have specialist knowledge and experience of conditions which make people vulnerable to being overlooked or treated unfairly.**

Disagreements may arise about a person's capacity; best interests; decisions made; or actions taken on the person's behalf. Ideally these will be dealt with as informally as possible and at an early stage to reduce stress and cost to all involved.

For full details of how disputes may be dealt with you could read chapter 15 of the Mental Capacity Act code of practice; courses of action may include:

- Involving family, care givers and relevant experts in 'best interests' meetings
- Using mediation services – where an experienced and independent mediator facilitates communication between people with different points of view
- Following your home's formal complaints procedure
- Taking the matter to the Court of Protection (see below)

***The Court of Protection***

The Mental Capacity Act set up the Court of Protection to deal with decision-making for people who lack capacity to make decisions for themselves. The court deals with disputes that cannot be settled otherwise and with complicated and serious decisions involving medical treatment, financial matters and property.

The court also have the power to appoint deputies to make decisions on behalf of people who lack capacity; these deputies may be the person's family member or friend or they may be independent. Deputies are expected to apply the principles of the Mental Capacity Act and may be limited to certain types of decision that they have the knowledge and experience to deal with. The Court of Protection may also remove deputies or attorneys who fail to carry out their duties appropriately.

***Safeguarding***

The Mental Capacity Act introduced two new criminal offences of ill treatment and wilful neglect of a person who lacks capacity. As well as covering financial, sexual, physical and emotional abuse the act may also be used to prosecute those who use unreasonable restraint or fail to provide adequate care.

If you have any concerns regarding the welfare of a vulnerable individual you must report them according to local policies and procedures.

***Deprivation of Liberty Safeguards***

(For in depth information refer to the separate Deprivation of Liberty manual)

The Deprivation of Liberty Safeguards (DoLS) were introduced to protect the rights of vulnerable people and to make sure that any steps taken to deprive people of liberty are lawful. The safeguards do not apply to people detained under the Mental Health Act.

The safeguards didn't come into effect until 2009 as they were a late addition to the Mental Capacity Act. They were needed to avoid situations when people who lacked capacity to decide about treatment or care were dealt with in a way which breached some of their human rights. Their need was identified by the so called 'Bournewood judgement' when the European Court of Human Rights found that Bournewood Hospital had treated a man in such a way that he was deprived of liberty.

The Bournewood case was about a man we will call 'B'. B has learning disabilities and cannot speak; one day, while at his day care centre he became frustrated and upset and began hurting himself. B was taken to Bournewood hospital and kept there. His care givers were told they shouldn't visit him.

The Doctors were worried that B would want to go home with his care givers, but they thought he should be kept in hospital and treated. Because B could not say no to his treatment there were no rules to say what the doctors had to do; they treated him as if he had agreed to be in hospital. His care givers thought it was wrong that B could be kept in hospital in this way so they took the case to the European Court of Human Rights.

The court said it was right for the doctors to try and treat B, but it was wrong that there were no clear rules about keeping him in hospital. This is because the law says there are very few times you can stop an adult from coming and going as they please.

There will always be times when people who lack capacity to make their own decisions need to be cared for in ways which may deprive them of liberty. This may be necessary if:

- It is in their own best interests to protect them from harm
- It is a proportionate response to the likelihood and / or seriousness of the harm that may be caused
- There is no less restrictive alternative

It is likely that in most cases it will be enough to restrict a person's freedom of movement instead of acting in a way which deprives them of liberty. The distinction between deprivation of liberty and restriction of liberty of movement is in the degree or intensity of measures used.

Factors that may indicate that a person is being deprived of liberty include:

- Restraint is used (inc sedation) to admit them to care
- Staff exercise complete control over their care and movement for significant periods of time
- A decision is made not to release the person into the care of others
- The person is unable to maintain social contacts
- The person is under continuous supervision and control

The use of things like keypads and alarms to protect the safety of individuals is unlikely to amount to deprivation of liberty unless clients are also prevented from having social contact outside the home and are otherwise physically prevented from leaving the premises when they wish to do so.

If you believe that a person is being, or will need to be, deprived of liberty in order to be cared for appropriately your manager will need to apply for authority. (See Deprivation of Liberty manual for details)

**Glossary**

***Advance Decision to Refuse Treatment*** **-** a legally binding document for a person to record details of specific treatment they do not wish to receive while they have the capacity to express their feelings.

**Advocate –** an individual who may be employed to support a client who has communication difficulties and requires help in making their feelings known.

**Court of Protection –** a court set up by the Mental Capacity Act to deal with decision making for people who may lack capacity to make their own decisions. It has the same powers as the High Court.

**Deputy –** an individual appointed by the Court of Protection to make decision's on behalf of a person who lacks capacity.

**Independent Mental capacity Advocate (IMCA) –** an independent individual appointed by the NHS or local authority to support an individual who may lack capacity and has no friends or family to protect their interests.

**Lasting Power of Attorney (LPA) –** power given by an individual to a person (or people) they trust to make decisions for them about matters such as finances or medical treatment. Powers may be limited to certain areas e.g. finances, or may give general authority to make decisions at a time when the individual lacks the capacity to do so.

**Enduring Power of Attorney (EPA) –** although LPA's have now replaced EPA's those who which were already created retain legal standing.

**References**

**The Mental Capacity Act 2005 Guidance for Providers** Care Quality Commission December 2011 available from www.cqc.org.uk

**Mental Capacity Act 2005 Code of Practice** Issued by the Lord Chancellor 2007 available from www.guardianship.gov.uk

**Care Quality Commission: Guidance about compliance. Essential standards of Quality and Safety** Issued March 2010 available from www.cqc.org.uk

**Making Decisions: A guide for people who are working in health and social care.** Issued 2009 available from www.guardinaship.gov.uk