

## Countdown to the Mental Capacity Act I

Everyone involved in healthcare should now be aware that the Mental Capacity Act 2005 is due to come into force in April 2007. This is the first of a series of “countdown” Briefings that we will be publishing prior to the Act coming into force, although the Government have announced that some parts will not come into force until later in 2007.

### Capacity

- The Mental Capacity Act 2005 gives statutory force to a range of principles dealing with mental capacity that will already be familiar to those working in the mental health field. Nevertheless, the Act does herald some changes in the way people who are suspected of lacking mental capacity are to be dealt with and it also introduces a statutory test for capacity for the first time.
  - A person is to be assumed to have capacity unless it is established that he lacks capacity. Accordingly, it would be important for healthcare practitioners to be familiar with the need to put forward positive evidence of a lack of capacity and be familiar with the capacity test in order to properly record capacity assessments.
  - 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. Consideration should therefore be given, particularly where a person is regarded as having borderline capacity, to what might assist that person in reaching a decision, for example would visual aids assist? Clearly, the sort of aids that might assist will depend on the individual circumstances of each case and the patient’s mental condition.
- A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
  - The impairment or disturbance in the functioning of the mind or brain can be either permanent or temporary.
  - Where a person suffers from fluctuating capacity, it will be essential for that person to undergo regular capacity assessments before any action is taken to treat the patient.
  - The Act makes it clear that a lack of capacity cannot be established merely by reference to:
    - (a) a person’s age or appearance, or
    - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

## Test for Capacity

The statutory test for capacity establishes that a person is unable to make a decision for himself if he is unable:

- (a) To understand the information relevant to the decision,
- (b) To retain that information,
- (c) To use or weigh that information as part of the process of making the decision, or
- (d) To communicate his decision (whether by talking, using sign language or any other means).

If a person fails to satisfy any one or more of the criteria listed at (a)-(d) above, he is regarded in law as lacking mental capacity.

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