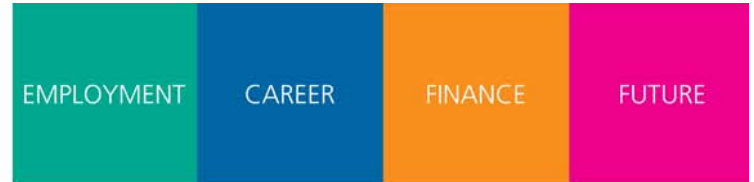


Mental Capacity Act 2005 (England and Wales) An overview

Dr Julian Sheather

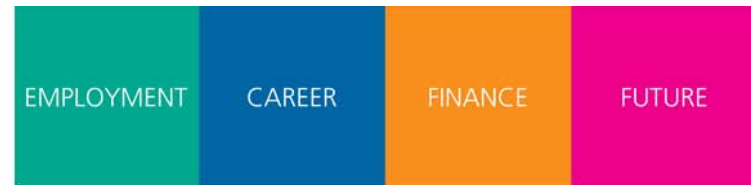
BMA Ethics Department





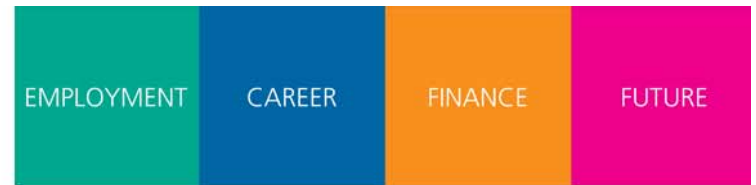
What does the Act do?

- Provides a comprehensive framework for decision-making on behalf of adults aged 16 or over who lack the capacity to make decisions on their own behalf.



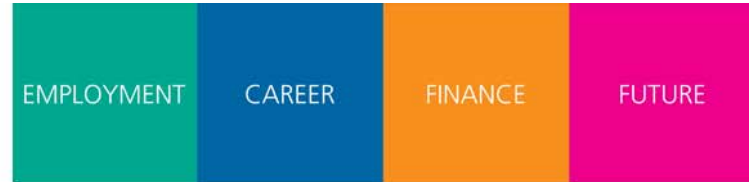
What is capacity?

- Decision-making capacity refers to the everyday ability that individuals possess to make decisions or to take actions that influence their life.
- Legally it refers to a person's ability to do something that, including making a decision, which may have legal consequences for them or others.



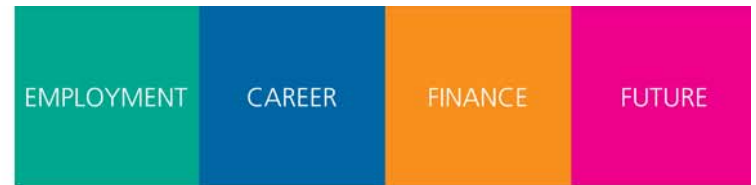
When does a person lack capacity?

If at the time the decision needs to be made, he or she is unable to make or communicate the decision because of an 'impairment of, or a disturbance in the functioning of, the mind or brain'.



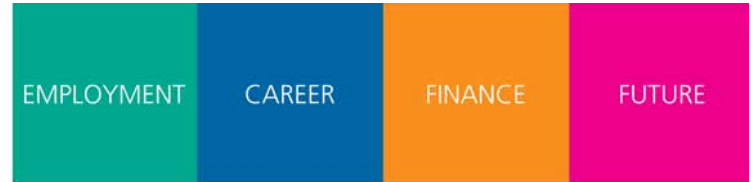
A two-stage test of capacity

- Is there an impairment of or disturbance in the functioning of the person's mind or brain?
- If so, is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?



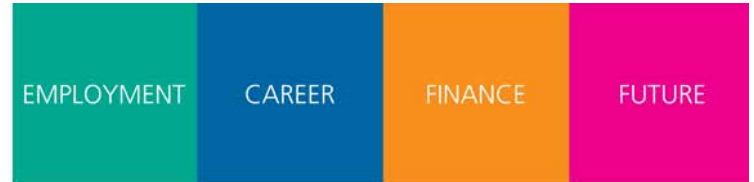
Basic principles

- A presumption of capacity
- Maximising decision-making capacity
- Freedom to make unwise decisions
- Best interests
- Least restrictive alternative



Who should assess capacity?

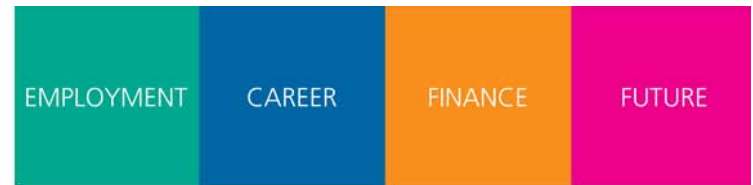
- The person who wishes to make the decision on behalf of the incapacitated person is responsible.
- Where consent to medical treatment is required, responsibility rests with the health professional proposing treatment.
- The more serious the decision the more formal the assessment



How do you assess capacity?

Under the Act a person lacks capacity if, at the time the decision needs to be made, he or she fails:

- To understand the information
- To retain the information
- To use or weigh the information
- To communicate the decision (by any means)



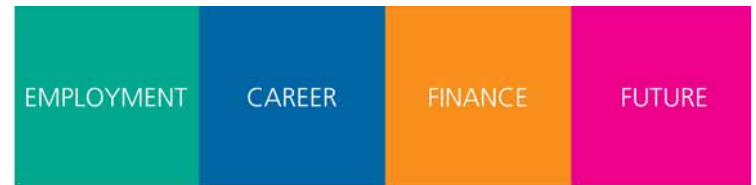
Best interests

- All decisions taken on behalf of someone who lacks capacity must be taken in his or her best interests.
- 'Best interests' is as objective a test as possible of what would be in the person's actual best interests, taking into consideration all relevant factors.



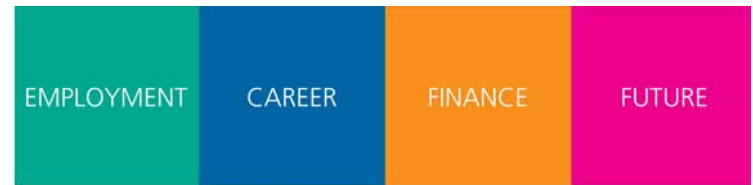
Relevant factors in 'best interests' judgement

- The person's past and present wishes and feelings, including any relevant written statement made when she or he had capacity
- His or her beliefs or values where they would have an impact on the decision
- Discussion with those close to the individual where 'practical or appropriate'



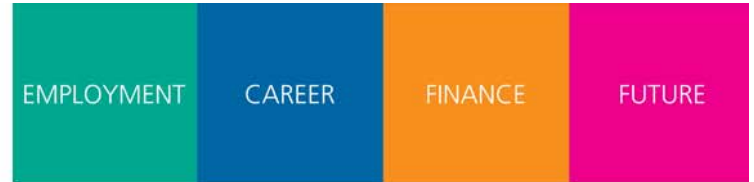
Acts in connection with care and treatment

An action or intervention will be lawful – ie health professionals will enjoy protection from liability – where the decision-maker has a *reasonable belief* both that the individual lacks capacity, and that the action or decision is in his or her best interests.



Limitations

- A valid advance decision
- A decision by an attorney or court appointed deputy
- Any use of restraint must be based upon a 'reasonable belief' that it is necessary to prevent harm to the incapacitated person and in accordance with the Act's underlying principles



Court review required

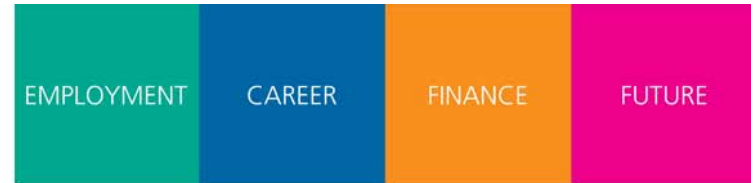
- Withdrawal of ANH from patients in PVS
- Organ or bone marrow donation
- Non-therapeutic sterilization
- Doubts about best interests
- Cases involving ethical dilemmas in untested areas



Advance decisions

An advance refusal of treatment is binding if:

- The person was 18 or older and had capacity
- It specifies the specific treatment and the particular circumstances
- He or she has not withdrawn it
- The person did not subsequently appoint an attorney
- He or she has not done anything clearly inconsistent with the directive



Advance decisions – life sustaining treatment

An advance decision will only apply to life-sustaining treatment where it is in writing, is signed and witnessed, and contains a statement that it is to apply even where life is at risk.

Research – basic principles

- Must be related to the condition from which he or she is suffering
- Must be approved by an appropriate body
- Cannot be conducted involving individuals who can consent
- Risks not excessive in relation to benefits *or* where benefits not anticipated, risk must be negligible and intrusion minimal

Lasting Powers of Attorney

- An individual can nominate another person (an Attorney) to make health care decisions on his or her behalf when he or she loses the capacity to make such decisions
- Doesn't apply to life-sustaining treatment unless stated
- Subject to the basic principles of the Act



Court of Protection

- Act creates a new Court of Protection
- Court is responsible for proper functioning of legislation
- Final arbiter
 - Adjudicates one-off decisions
 - Appoint deputies (replace CoP receivers)

EMPLOYMENT

CAREER

FINANCE

FUTURE

Independent mental capacity advocates

- Service to support particularly vulnerable adults
- Usually those who have no other form of support
- Decisions relating to serious medical treatment or place of residence