



## Considering the Mental Capacity Act and Us

The Mental Capacity Act came into effect in 2007 and has major implications for a number of different services within and without the care industry. It sets out to empower vulnerable adults who may not be able to make key decisions. In order to focus on how the Act relates to West London Community College with its Autistic Spectrum Disorder student base this article will refer to a report made by The National Autistic Society (NAS).

### *Student's Involvement with the College.*

As a person centred college many of our systems assume the students capacity. There are three main forums in which we actively ask students to be involved in our decision making process.

#### **Student Development Meeting**

At WLCC all students take part in a weekly development meeting. In it, student's views on how the college is run are explored and developed. These opinions have a direct impact on how the college operates. This not only helps us provide a relevant service but it is also further empowers the students.

#### **Counselling**

As part of our holistic approach to working with the students, each student receives a half hour counselling slot a week where they can discuss and resolve issues external to college life.

#### **Key Work Meeting**

Each student is provided a personal Key Worker who meets with them on a weekly basis for half an hour. These meetings are focused around how the individual experiences college. Individual information on how to improve or maintain the service is gained at this point and the care plan is monitored here too. In a one to one environment some students feel more comfortable to share these views.

Primarily within this forum a person centred timetable and care plan is developed. Instead of a traditional situation where students have to conform to the needs of the course we

create courses that conform to the needs of the student. The basis of each session is each student's individual needs and aspirations. They are fed by each student's 'care plan'. A care plan is an assessment document completed by the student that identifies both their current situation and where they wish to be by the end of their time with us. With their Key Worker they develop targets that will enable them to travel between these two points. These targets collectively inform what sessions we run, their content and the approach we take. Each session is tailored to be relevant and individual.

To an extent we rely on students demonstrating capacity to shape and give direction of the service. In sessions noncompliance in a task is a clear, sometimes non verbal means of articulating choice, but it is in these forums which are one step away from the consequences of decisions we need to be sure of capacity. At the same time each of these systems also provides the college with opportunities to monitor and assess a student's capacity to make decisions.

### **Issues Surrounding Capacity and ASD**

Unique to ASD however there are a number of mitigating factors that need to be considered when assessing capacity to make decisions.

We would agree with the NAS when they ask us to consider "the environment – keep noise and distractions to a minimum... Do they need more time to take account of the information and convey their decision?... Use written information or visual supports– brochures and leaflets containing relevant information or visual communication systems... What is that person's usual form of communication? Use alternative communication methods where necessary... Who is the best person to help them communicate?... Think about the language you are using –be direct and clear"... And that... "You may need to be very clear about the outcomes of a potential decision and how it may affect them in the future, to ensure they fully understand the decision they are making."

Failing to consider any one of these factors can mean that a student may not appear to have the mental capacity to make choices. When involving the student in college life we are careful to ensure that we take these as well as personal history, known stressors and personal beliefs when assessing the student's ability to contribute.

Autistic Spectrum Disorder is as the name suggests a spectrum. Each individual experiences the disability in a unique way. As a result three further factors could cloud our ability to assess a student's ability to make decisions. Firstly if we assumed all students had the same capacity to decide issues because they have the same diagnosis and secondly if we assumed that each student will have capacity to make decisions in all areas. ASD creates what is known as a "Spiky profile" someone could be excellent in one area but encounter real difficulties in another. They could for example be able to give speeches in front of thousands of people calmly but experience extreme anxiety if their bus is delayed. As a result as well as considering a student's ability to respond to an issue we must also consider whether they can

respond to *this* issue. Thirdly another aspect to consider is the accuracy prior reports. People with an ASD experience periods of heightened anxiety which can mask actual ability. I have read a report stating a student had severe dyslexia. I have observed this same person displaying far better skills than acknowledged in this report. I have also observed how in *any* situation where this student was being formally tested his anxiety became so profound that he couldn't even speak. The prior assessors work did not reflect the student's abilities rather the effects of his anxiety on his abilities. A similar situation occurred with his decision making process. Such reports could mislead its readers as to their client's capacity. It is important, and WLCC operates in this manner, to assess the person in front of you and not necessarily the person on the page. As the NAS neatly summarises the problem "Without knowing an individual, it is difficult to say exactly which decisions a person is going to be capable or incapable of making"

This is where the real benefit of our discussion forums has for us. These plus feedback from session facilitators and from informal interaction in break times helps us build an accurate understanding of our students, what will enable them to decide and where there limits, and issues with, capacity to decide are. Having this knowledge enables us to know under what circumstances a student would not be able to make an informed choice and when we would have to support a student.

### **Specific Areas to Consider**

Paraphrasing the NAS to have mental capacity a student must be able to;

#### **Retain Information**

Students need to be able to retain information long enough to make a decision. Short term memory issues do not always rule out capacity in this area and memory aids can be used to assist recall.

*At the college we have a number of students who have additional learning disabilities. It is with this group that we more easily see a difficulty in retaining information as these individuals have a processing delay with information. This is not to say that they cannot retain sufficient information in order to give decisions. In these circumstances staff, especially key workers would have explored reducing the amount of information given at any time, increasing time on a subject and offered more visual means of communicating. In most situations these techniques would be an effective means of ensuring a student would be able to retain information. In cases where concepts could not be reduced or the student could not relate to them we would have to question their capacity to choose.*

#### **Use or Weigh the Information**

Students need to be able to make a balanced decision that shows evidence of weighing up the pro's and cons of all the information presented. They should not make impulsive decisions.

*This would be a particular area of concern with our students. Our higher functioning students are able to demonstrate and articulate their decision making process. For our less able students often the only indicator of how much consideration has occurred is the time it takes them to respond to the decisions presented to them. Quick responses tend to be impulsive and we would encourage them to reconsider perhaps rephrasing the information again in a further simplified fashion.*

### **Communicate the Decision**

Students should be able to communicate their choices. This need not be verbal and can use “written information, signing, using pictures as long as your method of communication can be recognised by the assessor.”

*All students are capable of supplying yes or no answers to questions. although not all would be able to articulate their reasoning. In some situations we have encountered before, and are certain to encounter again, students have either stated the answer they feel we want or used a standard response irrespective of the question. In the former cases 1:1 key working sessions where the students are more relaxed and can have more of an opportunity to think are often sufficient to enable students to state their own opinion. In the latter example where a student said “no” irrespective of the question we would retry the methods outlined before questioning the students capacity as they cannot demonstrate for certain their ability. In this way we conform to the Acts guideline that “You should always assume that a person has capacity to make the decision unless it is demonstrated otherwise.”*

### **Acting in best interests and the limits to the decisions the college can make**

The Act states that if a student demonstrates they do not have capacity the college is able to make decisions in the students “best interests”. In doing this we would have to consider means the sensitivities related to a students ASD “taking into account the wishes and feelings of the person, including things they have said or done in the past; their beliefs or values, such as religious beliefs; as well as any other circumstance or information that is relevant to the decision.”

According to the NAS any decision made by the college would have to consider “the least restrictive option ....can the same result is achieved in a way that interferes less with your [students] rights and freedoms?” Another limit the NAS places on areas that others can decide on behalf of their clients is family relationships, marriages and divorces. These three would require additional capacity tests.

The reality of the matter is that WLCC is far more restricted in the nature of decisions it would make on behalf of its students. We could exercise control over the nature, content of their timetable and care plan and length of a student’s placement if they were not in a position to make active choices.

We could not make decisions for any activity conducted by the student outside of college hours. We can advise and encourage them to make decisions but in a situation where they cannot decide for themselves we cannot enforce. We would however advise the relevant family member and carer of any decision outside our purview, that a student had voiced or had voiced for them, that we feel the student could not decide for themselves. We would also refer students to relevant outside bodies that could address issues raised that were outside of our remit.

The Act acknowledges this stating that as a college we may not be best placed to make more complex decisions, especially those of a medical nature but states we should be consulted in the decision making process where appropriate.

### **Challenging Decisions**

The Act states that as a college we would be protected against liability if we “have a reasonable belief that the person lacks capacity and that [we] have taken the action that is in their best interests”. In the event of any dispute then we need to be able to justify our decisions. To aid this they recommend we keep a written record of the decision making process. This is something we would do as part of our key working sessions and or an emergency meeting if required.

There are both formal and informal routes for students to challenge any decisions made on their behalf. Students are reminded frequently that they can approach staff if they have an issue with how their service is run. For those less verbally able staff would monitor their reaction to the tasks set them. Non compliance or distress would immediately lead to the activity being stopped and the cycle of reassessment would begin again.

If you are unhappy with a decision that has been made about your capacity, decisions that have been made on your behalf or the way you are being treated, you can challenge the decision. It is expected that the dispute should be resolved informally wherever possible; however, there are formal routes of complaint if this is unsuccessful. A dispute could be resolved informally by, for example, using an advocate to help the person communicate their point of view or involving a mediation service. Resolving the dispute informally is usually more effective because it can be less stressful for all involved and lead to a quicker result.

Formal routes to resolving disputes will entail following complaints procedures of the organisation involved, for instance those of the local authority that is responsible for the service, or complaining to an ombudsman who can investigate your complaint without going to court. As a final step, the Court of Protection may be involved in the decision.

If you don't agree with the results of a test of your capacity, you need to raise your concerns with the person who made the assessment. The person who made the assessment will need to show that they have followed the principles of the Act and correctly applied the test of

capacity. If the person who made the assessment was a professional, then they will also need to show that they have had regard to the Code of Practice. The Office of the Public Guardian can provide general information about disputes and the Act; they may also address concerns over the actions of an attorney or deputy acting on behalf of someone who lacks capacity.