Legal Frameworks for Hoarding
Mary is a 79 year old person who is frail and has had a number of falls. Mary has been an extreme hoarder for many years, but recently has become more confused and you suspect that she has dementia. You are trying to find out whether Mary can make a decision about her home conditions.

- One person is Mary and the other person is the professional. Look Mary in the eye and have a conversation that will help you to decide whether Mary is capable of making a decision about her home.
- Sit down with your partner and consider what you wanted to know from Mary in order that you could decide whether she is capable of making the decision.
- Who makes the decision Mary or others?
- Could the outcome be different if it was about Mary's ability to make a decision about whether to take a Paracetamol on a regular basis for her aches and pains?
2 stage capacity test

• Stage 1. Is there an impairment of the brain or mind? If not, the person has capacity.

Stage 2.

• If “yes” to stage 1, can the person
  – Take in information yes/no
  – Retain it yes/no
  – Use it, weigh it up, evaluate it yes/no
  – Communicate their decision yes/no
2 stage capacity test

• Any “No” answer means the person lacks capacity to make that decision at that time

• Need to record the capacity test

• Show the evidence that is used

• Seek advice in carrying out the test and consult when necessary
Best Interests Decision making

- Where paid care is involved the carer is the decision maker. If it involves medical treatment the doctor or other member of the healthcare team will be the decision-maker.
Best Interests Decision Making

• The decision maker must take reasonable steps to assess capacity and then believe the decision is in the person’s best interests

• As long as any acts or decisions are made in a person’s best interests the decision maker or carer is protected from liability
Best interest checklist

• Avoid assumptions – Involve the person
• Consider a person’s wishes, feelings, values and beliefs
• Take account of views of family and carers
• Can it be delayed
• Assess conflicting views – provide reasons
• Consider the views of the IMCA
• Take the less restrictive option
MEANING OF CAPACITY

A person who lacks capacity is “a person who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken.”

• It is not a single, absolute state. So the notion of bringing in a psychiatrist to pronounce on somebody’s “capacity” is inappropriate.

• It is decision-specific – so for example someone might well have the capacity to decide what they’d like for breakfast but not to sign a tenancy agreement.

• It is time-specific – people with certain conditions fluctuate in their level of mental functioning, eg. those with a dementia - so whether or not they have capacity to make a particular decision can only be assessed at the time they are being asked to make the decision.

• No one can be labelled incompetent or incapacitated simply because they have a particular diagnosis or medical condition.
Ice breaker - John

John is a retired teacher who was always regarded as an eccentric type of man. John enjoys reading, however, since his retirement John’s collection of books, newspapers and magazine has become problematic, blocking doors, exits and access to many rooms in his large privately owned house.

• One person is John and the other person is the professional. Look John in the eye and have a conversation that will help you to decide whether John is capable of making a decision about his home.

• John – You are adamant that there is no problem and that you are perfectly fine and have a wonderful collection of very valuable books that others do not appreciate. You resent the questioning and intrusion.

• Professional – You must decide what you are able to do and what you are not able to do in assisting John. Offer options to John.

• What do you need to do / consider?
The mould affected her health

https://www.youtube.com/watch?v=w4rD5X3gR9w
Exercise 1 - Caryn

In relation to this case study consider:

• Legally what each agency could do and when they could intervene.

• Consider what you may have to encourage Caryn to consider to improve these conditions

Write on flipchart
Caryn

- Multi agency response
- Public health
- Housing issues – tenancy
- Capacity issues
- Environmental health / Public health
- No legal ability to refer to GP but work with Caryn to get her to consider
- Fire Risk
Others affected

https://www.youtube.com/watch?v=GAgFEDf25c8
Exercise 2 - Others affected

In relation to this case study consider:

• Legally what each agency could do and when they could intervene.
• Identify on flipchart
Others effected

- Children’s services
- Environmental health
- GP referral
- Capacity – has capacity
- Fire risk
What to do?

https://www.youtube.com/watch?v=cx6yOLq_PJU
Exercise 3 – What to do?

In relation to this case study consider:

• Legally what each agency could do and when they could intervene.

• Identify on flipchart
What to do?

• Environmental health / Public health
• Fire
• Capacity
• Social Services / Mental Health
• Housing – tenancy
Jane lives in the above house. Each room has a similar amount of goods. Jane can not use her living room for its intended purpose but has access to most things. Jane spends most of her time in her bed as she can manage to see a small TV from there. Jane was a Sister on a Mental Health Ward and after the death of her mother could no longer cope. Jane describes feeling depressed and has occasionally talked to her GP about this but does not take any medication as yet. Identify roles of different agencies / legal frameworks.
Exercise 4 – Cat hoarding

In relation to this case study consider:

• Legally what each agency could do and when they could intervene.

• Identify on flipchart
Exercise 4 – Cat hoarding

- RSPCA
- Public health
- Housing
- Has capacity
- Choice
Housing Provision and the Mental Capacity Act 2005

For reference
What does the Act do?

• It provides a statutory framework to strengthen the position of - yet also protect - adults who may lack capacity to make some decisions for themselves, for example people with dementia, learning difficulties or mental health problems.
• It enables capacitated people to plan for a time when they may lack capacity and clarifies who can take decisions, in what situations, and how to go about it.
What does the Act apply to?

The Act is relevant to everyone who supports or cares for – whether formally or informally – people who may lack capacity to make decisions for themselves. This includes the housing and housing-related support sectors, so it is important for professionals and managers from these sectors to be familiar with the main provisions of the Act.
FIVE KEY PRINCIPLES

• **A presumption of capacity** – every adult has the right to make his or her own decisions and must be assumed to have capacity to do so, unless it is proved otherwise.

• **Supporting individuals to make their own decisions** – a person must be given all practicable help before anyone treats them as not being able to make their own decisions.

• **Unwise decisions** – just because an individual makes what might be seen as an unwise decision, they should not be assumed to lack capacity to make that decision.

• **Best Interests** – an act done or decision made under the Act for or on behalf of a person who lacks capacity must be done in their best interests.

• **Least restrictive option** – anything done for or on behalf of a person who lacks capacity should only be done after considering if there is another option that is less restrictive of their basic rights and freedoms.
MEANING OF CAPACITY

A person who lacks capacity is “a person who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken.”

• It is not a single, absolute state. So the notion of bringing in a psychiatrist to pronounce on somebody’s “capacity” is inappropriate.

• It is decision-specific – so for example someone might well have the capacity to decide what they’d like for breakfast but not to sign a tenancy agreement.

• It is time-specific – people with certain conditions fluctuate in their level of mental functioning, eg. those with a dementia - so whether or not they have capacity to make a particular decision can only be assessed at the time they are being asked to make the decision.

• No one can be labelled incompetent or incapacitated simply because they have a particular diagnosis or medical condition.
WHO ASSESSES CAPACITY, AT LEAST INITIALLY?

In any given situation, it is the ‘decision maker’ who must decide on a person’s capacity. The ‘decision maker’ is the person who, if the person lacks capacity, would be doing wrong by going ahead, or who would need the cloak of legal protection provided by the Act, to protect them from liability for doing what they propose doing, without the consent of the person in question.

Everybody who works with people who may lack capacity has a responsibility to assess capacity in the given context. Without such an assessment anyone carrying out tasks on behalf of another would be unable to consider whether what they were doing to or for the individual was lawful.
A solicitor, if asked for advice, must decide if someone has capacity to grant Power of Attorney over their affairs to another person or make a will.

A surgeon must decide if someone has sufficient capacity to provide informed consent for an operation.

The local authority is the ‘decision maker’ in relation to mental capacity to participate in care planning and the question of delivery of care plans.

The care provider must decide in the first instance whether someone’s consistent refusal to get out of bed in the morning is a capacitated decision, even if it subsequently becomes an issue for the body which drew up the care plan.
So in what circumstances, for example, might a scheme manager or care assistant need to consider and assess someone’s capacity?

- When asking somebody to sign their needs and risk assessment and support plan – it is not appropriate to press someone who is incapacitated for consent.
- When there is reason to believe that a relative is taking money from someone with dementia for his/her own benefit – is capacitated informed consent being given?
- When someone with deteriorating sight who has driven a buggy outside for years decides to go out on an unfamiliar busy road despite advice to the contrary
So in what circumstances, for example, might a scheme manager or care assistant need to consider and assess someone’s capacity?

- When signing up a new tenant
- When someone’s family says that it’s time for that person to move on and give up the tenancy
- When someone refuses care that they desperately need
- When someone’s behaviour leads them to act in breach of covenant
When do I refer to others and when do I assess?

- Care or housing providers may not have the ultimate responsibility for deciding whether the individual is capacitated in these situations, but have to make an initial assessment in order to determine whether they should refer the situation to a professional for a more in depth capacity assessment or back to the responsible body (Social Services or NHS).

- The example of the person who consistently refuses to get put of bed illustrates this. While the statutory body is likely to be responsible for making a decision about major foreseeable issues over which disputes could arise (because of their responsibility to meet needs), the provider can expect to be responsible for deciding capacity regarding the more unpredictable and minor issues arising.
Best Interest Decisions

• Don’t simply assume on the basis of someone’s age, appearance, medical condition or behaviour
• Try to identify issues and circumstances of relevance to the decision in question
• Is capacity likely to be regained? If so, can decision-making wait until then?
• Do whatever is possible to involve the person in the decision
Best Interest Decision

Try to find out the views of the person who lacks capacity:
• As expressed in the past or currently, or by habits and behaviour
• Any beliefs and values known to be held that would influence the decision
• Any other factors the person would be likely to consider if able to do so
• Consult other relevant people
• Weigh up all the factors to decide what is the person’s best interests
• Remember a best interests decision does not have to be the least restrictive option and can impinge on a person’s human rights, provided this is objectively justified and proportionate and within the explicit qualifications or caveats to the rights (such as the protection of ‘others’ rights and freedoms, which could be relevant in a housing context).
Tenancies (Periodic tenancies and long leases)

A person can be said to have capacity regarding the decision whether to accept a tenancy if they are able to understand the basics to sign the tenancy. Evidence that the individual understood the essentials of the deal might be:

The basic concept of money,

• owning it,
• exchanging it in return for something

The basic concept of promises and rules which need to be abided by (even though they may require help to manage to keep to what they have promised), is likely to satisfy a court that the individual had the required capacity at the time the tenancy commenced, to be held to the contract terms.

Given the nature of social housing provision, where there is any doubt as to the person’s capacity, a landlord is advised to note down any observations or evidence of the individual’s capacity to undertake the tenancy prior to the agreement being entered into, and consider seeking professional advice.
Legal duties

Act imposes a positive obligation on anyone involved in the care and treatment of those lacking capacity, including managers of supported housing projects, to maximise a person’s capacity. A person should therefore be assisted by whatever means are practically available to understand the nature of the tenancy. In particular, it is important that any restrictions on behaviour are carefully explained. Where patient explanation and sufficient support means that the individual understands the nature of the agreement, they will have full capacity to undertake the tenancy.
Where someone with capacity refuses to take on a tenancy, for instance because they do not want to make themselves liable for rent and obligations, this refusal will be valid. A financial or property LPA might have authority to take on a tenancy regardless of the person’s wishes, but this is unlikely. Apart from this, no one else can take over decision making, even if that person firmly believes it is in the person’s best interests – for a capacitated person.

A tenancy signed while someone has capacity remains valid once they lose capacity.
• As capacity is an issue-specific matter it is foreseeable that an individual may have capacity to agree to a move and sign a tenancy, but recognise that handling a tenancy is difficult. A person who has a tenancy might be able to authorise someone to manage it as their agent (assuming they have the required capacity for this decision).

• This could be through an ordinary informal or agency arrangement, an ordinary power of attorney or by granting authority under a property and finance LPA. An ordinary power of attorney ceases to confer any authority however on the agent once the grantor of the power loses capacity in relation to the thing concerned. Of these arrangements, only an agent who has a property and finance LPA or EPA has the legal authority to sign a new tenancy agreement if the person loses capacity to sign it themselves.
A person without capacity to understand the essence of a tenancy cannot be put into one by someone else unless they have special authority. It cannot be done under the doctrine of necessity or best interests because those principles afford defences, but do not convey free standing power.

A person with capacity to understand that the notion of a tenancy is difficult to understand can authorise someone else to sign it for them as their agent. A person who lacks capacity even to understand that they need help in making the decision whether or not to enter into the tenancy, cannot appoint an agent to do it for them.
An Authorised Agent

- An LPA donee with financial or property authority can sign or surrender a tenancy on the individual’s behalf.

- An authorised signatory (LPA, deputy or existing Enduring Power of Attorney holder) signs as the agent of the incapacitated person. S/he does not take on liability, without expressly agreeing to do so, for the defaults of the incapacitated person for whom s/he acts, so should be asked to guarantee the rent or indemnify the landlord against damages or other breaches if the landlord has concerns.

- A receiver, or its replacement - the court-appointed deputy - can also sign or surrender a tenancy.

- A Single Order can be obtained from the Court of Protection covering the single issue of decision making in relation to housing tenure. The tenancy will be the occupant’s own tenancy, for legal purposes, even though it is not understood.
Local authorities do not have the power to sign or surrender tenancies on behalf of incapacitated adults without specific authorisation.

Anyone can ask a landlord informally to release someone from their obligations. The landlord will often be willing to release the tenant so that s/he can re-let the premises to a new tenant. The position of the landlord is not clear, because s/he or he will know that the tenant has not actually asked for the release, and that the person asking does not have authority to manage the person’s legal relationships in this regard, so this is not good practice.

An Authorised Agent
Tenancies signed by a person without capacity

• If a person without capacity to understand the essence of a tenancy actually signs one personally, it is presumptively valid, but may be undone later, by someone taking the view that the landlord must have known of the person’s incapacity. However, it is poor practice and abusive to make someone who lacks capacity sign a tenancy agreement.

• A tenancy signed by an incapacitated person remains valid unless/until “avoided”. This can be done by the incapacitated person if he/she regains capacity, or by a litigation friend, an attorney/LPA finance and property donee or by a receiver/court-appointed deputy. Undoing it, though, means the person then has no tenancy.
Tenancies created in other ways

- Capacitated individuals such as a son or daughter without any form of legal authority to sign a tenancy on behalf of an incapacitated person would in effect be making themselves the tenant, with the resident becoming the sub-tenant or licensee of whoever did sign.

- The incapacitated person would not be in a direct contractual relationship with the landlord. However, if the landlord is happy with this arrangement and Housing Benefit is not needed to pay the resident’s costs this would not be inappropriate. In this situation, the signer of the tenancy is personally liable for rent and contract compliance and the landlord would have to take action against the signatory for breach of the terms of the tenancy by the ultimate occupier, over which s/he may have no control.
Tenancies created in other ways

- Under the Contracts (Rights of Third Parties) Act 1999, a capacitated person could sign a tenancy conferring a right of occupancy on another (incapacitated) person. This would mean the capacitated person was directly liable for rent and any damages or breach by the incapacitated person, but that the occupant had the same rights against the landlord as the person actually signing the agreement.

- Under the 1999 Act, the parties to the contract are able to exclude this right of enforcement but if they do not say so, then the fact that the contract confers a benefit (occupation rights) on the occupant is sufficient to enable the occupant to enforce the terms between the actual parties. The landlord can only take action against the occupant, for instance for breach of covenant, if the occupant - or signatory on the occupant’s behalf - has initiated legal proceedings to enforce contract terms against the landlord. Provided such arrangements were agreeable to the parties this would give the incapacitated person direct rights of occupation, and rights under any covenants for quiet enjoyment, enforceable via the help of a litigation friend.
Tenancies created in other ways

At common law, anyone occupying premises owes compensation to the landowner for use and occupation, and anyone causing negligent damage to property is liable in the law of tort.

Tenancies could be arranged without signature so long as the landlord was happy to take on tenants who could not understand the conditions in the tenancy and would not be able to be held responsible for complying with “good behaviour” covenants or made contractually liable for breakages or other damage.
Landlord’s risks, rights and responsibilities

Capacitated tenants could agree to terms which imposed a measure of restraint upon them and their lifestyles but they would need to understand that this is what they were being asked to do. By contrast, no one can impose restrictive measures on an incapacitated person where such restrictions may amount to restraint (unless further conditions are satisfied) or a deprivation of liberty. Authority from the Court will be needed even if it is believed to be in a person’s best interests.
Landlord’s risks, rights and responsibilities

• Where the tenancy is entered into and the landlord had express or implied knowledge of the tenant’s incapacity a landlord may not be able lawfully to evict for breach of the contract if a tenant cannot help himself or herself causing nuisance or annoyance – that could count as disability discrimination, under the DDA, unless actual physical harm were being threatened.

• Any legal action against an incapacitated occupier of premises for possession, rent arrears or damages for breach of covenant, will require the appointment of someone as a litigation friend, because the court rules require it if the person is incapable of managing their own property and affairs.
Landlord’s risks, rights and responsibilities

- A landlord cannot be made to contract with people who lack capacity.

- The Disability Discrimination Act offers providers of goods and services, including housing providers in the context of letting premises, a justification for refusing to provide where the recipient lacks the capacity to contract and therefore be held to account for payment and other aspects of contract compliance.

- In an Extra Care Housing setting, if the tenancy is potentially invalid or not directly between the resident and the landlord, registration consequences may follow: If the occupant doesn’t have his or her own tenancy and security of tenure, there is the risk that the premises will not be treated as the person’s “own home”, and that the package being provided will be more likely to be seen as providing “care together with accommodation” and hence triggering registration as care home provision under the Care Standards Act.
Payment of Rent

- S8 of the Act may give an informal carer the authority to pledge the incapacitated person’s credit to pay for rent, or to promise to pay for breakages or other damage, but it does not make the carer personally liable.

- Getting the money or possession of the property back will still be subject to the rules on suing an incapacitated person in the courts.

- S7 powers to pay for necessary goods and services would enable an informal carer to use any money of the incapacitated person which is in their possession to pay care and support charges - but not necessarily rent, because occupation rights are neither goods nor services, in legal terms

- Neither a credit pledger nor an authorised signatory takes on personal liability, without expressly so agreeing, for the defaults of the incapacitated person for whom s/he acts, so should be asked to guarantee the rent or indemnify the landlord against damages or other breaches, if the landlord has concerns
CONCLUSION FOR HOUSING PROVIDERS

There is still an important role for housing providers in:
• monitoring the well-being of service users
• advocating on their behalf in cases of suspected abuse

Housing providers need to be aware of capacity issues. They need to be confident that they are able to correctly identify the issue of capacity that needs to be tested, they can correctly apply the test of capacity and decision making and are fully aware of the steps available to them if someone’s capacity is in doubt.

In addition, they must have sufficient knowledge of the Act and the new mechanisms available to ensure that any substitute decision making undertaken on behalf of an incapacitated person is undertaken by the right individual or body and that that person or body fully considered their obligations towards the incapacitated person prior to carrying out any act on behalf of the incapacitated person.
CONCLUSION FOR HOUSING PROVIDERS

When undertaking needs and risk assessments they need to keep in mind all available options provided by the new Act to those with capacity to plan for when they may lose this so as to assist them in planning for the future, including assisting them to consider whether they would wish to make an advance decision notification or appoint someone they trust to take over decision making on their behalf through a property and financial affairs and/or personal welfare Lasting Power of Attorney.
CONCLUSION FOR HOUSING PROVIDERS

Housing support providers have clear duties towards anybody living within their projects. Under the Act, this will include a duty to maximise their capacity and, where necessary, ensure any substitute decision making is made in the tenant’s best interest.

For their own protection and that of the organisations for whom they act, landlords should ensure that any arrangements for accommodation and care are lawful, for example ensuring that the tenant had sufficient capacity to understand the nature of the agreement or else that there is an authorised contractual party. This will protect themselves, their employees and their clients.
How does this relate to hoarding

If you suspect that a person lacks capacity with regard to tenancy issues, it is advisable to assess capacity in relation to:

• Care provision
• Finances
• Property decisions
• Other e.g. safeguarding concerns

If a decision needs to be made then capacity must be considered. There are many decisions to be made in relation to severe hoarding.