



briefing

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The Mental Capacity Act

The Mental Capacity Act received Royal Assent on 7 April 2005. The Act provides a statutory framework for the care and treatment of people who may not be able to make their own decisions – this may be, for example, because of a learning disability, dementia or mental health problems. The Act specifies who can make decisions

for them and how those decisions should be made. Decisions may range from choosing what to wear in the morning to deciding whether the person should move into residential care or undertake major surgery.

The Act sets out legal rules which apply to everyone working with

or caring for adults who lack decision-making capacity. This includes relatives, professionals and other carers. The Act also covers how disputes or difficulties should be resolved.

Key principles

The Act is based on five key principles (see panel overleaf):

- a presumption of capacity
- the right of individuals to be supported to make their own decisions
- the right of individuals to make what might be seen as eccentric or unwise decisions
- 'best interests'
- least restrictive intervention.

Guidance on the Act will be provided in a Code of Practice, a draft of which is already available (see *Further information*, page 4 below). Doctors and social workers, among others, are placed under a duty to have regard to the Code.

Summary

The Mental Capacity Act governs decision-making on behalf of adults who lose mental capacity at some point in their lives or where their incapacitating condition has been present since birth.

The Act:

- is underpinned by five principles which state that a person should be assumed to have the capacity to make decisions unless proved otherwise
- deals with who should make decisions – and how they should be made – if a person cannot make their own decisions
- sets a single test for assessing whether a person lacks capacity to take a particular decision
- provides a checklist on how to judge what is in a person's 'best interests'
- provides protection from liability for actions considered to be in the best interest of someone who lacks capacity
- creates two new public bodies to support the statutory framework.

The five key principles of the Act

A presumption of capacity

Everyone has the right to make choices and decisions for themselves unless it has been shown that they lack the capacity to do so.

The right of individuals to be supported to make their own decisions

Individuals who have an illness or disability that might affect their ability to make decisions for themselves should, nevertheless, be helped and encouraged to take as many decisions for themselves as they can. The aim is to ensure that people such as this are not automatically labelled as incapable of making decisions and not, therefore, subject to unnecessary interventions.

The right of individuals to make what might be seen as eccentric or unwise decisions

Everyone has their own values, beliefs, preferences and attitude to risk, which may not be the same as those of other people. So, even if a person makes a decision which others, including their family and friends, regard as unwise, unusual or irrational, this does not necessarily mean that the person lacks capacity to make that decision.

Best interests

The concept of 'best interests' must guide all actions taken or decisions made on behalf of a person who lacks capacity under the Act. Each time a decision is made on behalf of an individual, the Act sets out certain steps that must be taken to decide what is in that person's best interests.

Least restrictive intervention

Before any action is taken or decision made on behalf of a person, it must be considered whether it is possible to act or decide in a way which would interfere less with that person's rights and freedoms.

Assessing lack of capacity

The Act sets a single test for assessing whether a person lacks capacity to take a particular decision at a particular time. Lack of capacity is determined in relation to specific decisions. In other words, it is not

necessarily a permanent condition – no one can be labelled incapable as a result of a particular medical condition or diagnosis. Lack of capacity cannot be established merely by reference to a person's age, appearance, or any aspect of their behaviour which might lead

others to make unjustified assumptions about their capacity.

Best interests

The Act provides a checklist that decision makers should work through to determine what is in the best interests of the person they represent. A person can make a written statement of their wishes and feelings, which the person making the decision must consider. The Act also gives carers and family members a right to be consulted.

Protection from liability

Legal liability protection is given for actions considered to be in the best interests of someone who lacks capacity. As long as they follow the principles of the Act, people will be protected from liability for committing acts which could otherwise amount to civil crimes. Examples might include trespass or assault where someone has to interfere with the person's body by giving an injection.

Restraint and deprivation of liberty

Restraint is defined by the Act as the use of threat or force where an incapacitated person resists, and any restriction of liberty or movement whether or not the person resists. Restraint is only permitted if the person using it reasonably believes it

is necessary to prevent harm to the incapacitated person, and if the restraint used is proportionate to the likelihood and seriousness of the harm.

Lasting Power of Attorney (LPA)

An LPA is a way of someone appointing an attorney to act on their behalf in the event of them losing mental capacity in the future. It replaces the Enduring Power of Attorney (EPA). It also allows attorneys to make health and welfare decisions. Different attorneys may be appointed to make different types of decisions.

Court-appointed deputies

The Act provides for a system of court-appointed deputies to replace the former system of receivership. Deputies will be able to make decisions on welfare, healthcare and financial matters as authorised by the court, but will not be able to refuse consent to make a life-sustaining treatment. They will only be appointed if the court cannot make a one-off decision to resolve the issues.

Court of Protection

This new court, with its own procedures and judges, has jurisdiction over decision-making for adults who lack capacity. It deals with serious decisions affecting healthcare and personal welfare matters that were previously dealt with by the

High Court. The Court of Protection is supported by the Office of the Public Guardian.

The Public Guardian

The Public Guardian is the registering authority for LPAs and deputies (see above). The Public Guardian and their staff will supervise court-appointed deputies and provide information to help the court make decisions. They will also work closely with other agencies such as the police and social services to respond to any concerns raised about the way in which an attorney or deputy is operating.

Provisions to protect vulnerable people

The Act contains a number of provisions designed to protect vulnerable people.

Independent mental health capacity advocate (IMCA)

An IMCA is someone appointed to support a person who lacks capacity but has no one to speak for them. The IMCA represents the person's wishes, feelings, beliefs and values, and brings to the attention of the decision-maker everything that is relevant to the decision. The IMCA can also challenge the decision-maker.

Advance decisions to refuse treatment

The Act contains rules allowing people to decide in advance to

'The new Court of Protection deals with serious decisions affecting healthcare and personal welfare matters that were previously dealt with by the High Court'

refuse treatment if they should lose capacity in the future. An advance decision will not apply to any treatment which a doctor considers necessary to sustain life unless strict formalities have been complied with – specifically, the decision must be in writing, signed and witnessed and there must be a statement that the decision stands “even if life is at risk”.

A criminal offence of ill-treatment

The Act introduces a new criminal offence of ill-treatment or neglect of a person who lacks capacity. This offence carries a maximum penalty of up to five years in prison.

Research issues

The Act sets out clear parameters for research involving or relating to a person lacking capacity. Such research may be lawfully carried out if an ‘appropriate body’ (normally a research ethics committee) agrees that the research is safe, relates to the person's condition and cannot be done as effectively using people who have mental capacity. The research must produce a benefit to the person and outweigh any risk or burden. Carers or nominated third parties must be consulted and agree that the person would want to join an approved research project.

'The Act successfully builds on the current systems within the NHS for people who lack mental capacity and provides an opportunity for the NHS to be a key player in delivering reforms'

Confederation viewpoint

The Mental Capacity Act empowers people who lack capacity, provides protection and clarifies the statutory framework for them, their carers and other professional and organisations involved in their care. The Act's provision to encourage planning for incapacity through Lasting Power of Attorney and advance decision-making will avoid ambiguity and disputes for individuals, healthcare professionals and providers.

The Confederation welcomes the inclusion of advance decisions within the Act and believes it will provide

clarity for healthcare professionals, carers and those involved in providing treatment. As the decision must be validated and considered applicable, the Act also safeguards the individual and all concerned.

However, we have some concerns that the new Court of Protection will have an impact on the workload of health and social care professionals – it is anticipated that the need to establish capacity for individual decisions will increase the frequency of applications.

We believe that the Act successfully builds on the current systems within

the NHS for people who lack mental capacity – most significantly in the assessing capacity, applying the doctrine of best interests and invoking the Court of Protection. This provides a real opportunity for the NHS to be a key player in delivering the reforms. However, the Act also raises significant staff training implications for both clinicians and managers working in the NHS and social services. It is essential that the Code of Practice addresses this to ensure a smooth implementation.

For further information about the issues covered in this *Briefing*, please contact claire.mallett@nhsconfed.org

Further information

The Mental Capacity Act 2005 can be downloaded at: www.hmsso.gov.uk/acts/acts2005/20050009.htm

The draft Code of Practice for the Mental Capacity Act can be viewed at: www.dca.gov.uk/menincap/mcbdraftcode.pdf

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