

Mental Capacity Act 2005 - summary

The Mental Capacity Act 2005 for England and Wales received Royal Assent on 7 April 2005 and is expected to come into force in April 2007. The Act will generally only affect people aged 16 or over and provides a statutory framework to empower and protect people who may lack capacity to make some decisions for themselves, for example, people with dementia, learning disabilities, mental health problems, stroke or head injuries who may lack capacity to make certain decisions. It makes it clear who can take decisions in which situations and how they should go about this. It enables people to plan ahead for a time when they may lack capacity. The Act will cover major decisions about someone's property and affairs, healthcare treatment and where the person lives, as well as everyday decisions about personal care (such as what someone eats), where the person lacks capacity to make the decisions themselves.

This summary provides key information about the new Act and sets out some of the changes that will occur as from April 2007.

Five key principles

The whole Act is underpinned by a set of five key principles set out in Section 1 of the Act:

- 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;
 - Individuals being supported 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 treated as lacking 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; and
 - Least restrictive option – anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms.
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What does the Act do?

The Act enshrines in statute current best practice and common law principles concerning people who lack mental capacity and those who take decisions on their

behalf. It replaces current statutory schemes for Enduring Powers of Attorney and Court of Protection receivers with reformed and updated schemes.

The Act deals with the assessment of a person's capacity and acts by carers of those who lack capacity:

- **Assessing lack of capacity** – The Act sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. It is a “decision-specific” and time specific test. No one can be labelled ‘incapable’ simply as a result of a particular medical condition or diagnosis. Section 2 of the Act makes it clear that a lack of capacity cannot be established merely by reference to a person's age, appearance, or any condition or aspect of a person's behaviour which might lead others to make unjustified assumptions about capacity.
- **Best Interests** –An act done or decision made for or on behalf of a person who lacks capacity must be in that person's best interests. The Act provides a non-exhaustive checklist of factors that decision-makers must work through in deciding what is in a person's best interests. A person can put his/her wishes and feelings into a written statement if they so wish, which the person making the determination must consider. Also, people involved in caring for the person lacking capacity gain a right to be consulted concerning a person's best interests.
- **Acts in connection with care or treatment** – Section 5 offers statutory protection from liability where a person is performing an act in connection with the care or treatment of someone who lacks capacity. This could cover actions that might otherwise attract criminal prosecution or civil liability if someone has to interfere with the person's body or property in the course of providing care or treatment.
- **Restraint**– Section 6 of the Act sets out limitations on section 5. It defines restraint as the use or threat of force where a person who lacks capacity 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 person who lacks capacity, and if the restraint used is a proportionate response to the likelihood and seriousness of the harm. This section does not extend to deprivation of liberty within the meaning of Article 5(1) of the European Convention on Human Rights. The Government has announced that there will be additional safeguards for people who lack capacity and are deprived of their liberty but do not receive mental health legislation safeguards, as a result of the European Court of Human Rights judgement in *HL v United Kingdom* (the “Bournemouth” case). The Government has announced that it intends to introduce these safeguards by amending the Mental Capacity Act.

The Act deals with two situations where a designated decision-maker can act on behalf of someone who lacks capacity:

- **Lasting Powers of Attorney (LPAs)** – The Act allows a person to appoint an attorney to act on their behalf if they should lose capacity in the future. This is

like the current Enduring Power of Attorney (EPA) in relation to property and affairs, but the Act also allows people to empower an attorney make health and welfare decisions. Before it can be used an LPA must be registered with the Office of the Public Guardian (see below). EPAs created before April 2007 can be registered after the implementation date but it will not be possible to create EPAs after this time.

- **Court appointed deputies** – The Act provides for a system of court appointed deputies to replace the current system of receivership in the existing Court of Protection. Deputies will be able to be appointed to take decisions on welfare, healthcare and financial matters as authorised by the new Court of Protection (see below) but will not be able to refuse consent to life-sustaining treatment. They will only be appointed if the Court cannot make a one-off decision to resolve the issues. People appointed as receivers before April 2007 will retain their powers concerning property and affairs after the implementation date and will be treated as deputies after this time.

The Act creates a new public body and a new official to support the statutory framework, both of which will be designed around the needs of those who lack capacity:

- **A new Court of Protection** – The new Court will have jurisdiction relating to the whole Act. It will have its own procedures and nominated judges. It will be able to make declarations, decisions and orders affecting people who lack capacity and make decisions for or appoint deputies to make decisions on behalf of people lacking capacity. It will deal with decisions concerning both property and affairs, as well as health and welfare decisions. It will be particularly important in resolving complex or disputed cases involving, for example, about whether someone lacks capacity or what is in their best interests. The Court will be based in venues in a small number of locations across England and Wales and will be supported by a central administration in London. The Senior Judge designate of the Court is the current Master Lush.
- **A new Public Guardian** – The Public Guardian has several duties under the Act and will be supported in carrying these out by an Office of the Public Guardian (OPG). The Public Guardian and his staff will be the registering authority for LPAs and deputies. They will supervise deputies appointed by the Court and provide information to help the Court make decisions. They will also work together 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. A Public Guardian Board will be appointed to scrutinise and review the way in which the Public Guardian discharges his functions. The Public Guardian will be required to produce an Annual Report about the discharge of his functions. Richard Brook is the new Public Guardian designate. He is currently the Chief Executive of the Public Guardianship Office. The Public Guardianship Office (PGO), based in Archway, North London, will become the Office of the Public Guardian (OPG) in April 2007.

The Act also includes three further key provisions to protect vulnerable people:

- **Independent Mental Capacity Advocate (IMCA)** – An IMCA will be someone appointed to support a person who lacks capacity but has no one to speak for them, such as family or friends. They will only be involved where decisions are being made about serious medical treatment or a change in the person's accommodation where it is provided by the National Health Service or a local authority. The IMCA makes representations about the person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge the decision-maker on behalf of the person lacking capacity if necessary.
- **Advance decisions to refuse treatment** – The Act creates statutory rules with clear safeguards so that people may make a decision in advance to refuse treatment if they should lack capacity in the future. The Act sets out two important safeguards of validity and applicability in relation to advance decisions. Where an advance decision concerns treatment that is necessary to sustain life, strict formalities must be complied with in order for the advance decision to be applicable. These formalities are that the decision must be in writing, signed and witnessed. In addition, there must be an express statement that the decision stands "even if life is at risk" which must also be in writing, signed and witnessed.
- **A criminal offence** – The Act introduces a new criminal offence of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years.

The Act also sets out clear parameters for research:

- Research involving, or in relation to, a person lacking capacity 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 that outweighs any risk or burden. Alternatively, if it is to derive new scientific knowledge it must be of minimal risk to the person and be carried out with minimal intrusion or interference with their rights.
- Carers or nominated third parties must be consulted and agree that the person would want to join an approved research project. If the person shows any signs of resistance or indicates in any way that he or she does not wish to take part, the person must be withdrawn from the project immediately.

Code of Practice

- There will be a statutory Code of Practice to accompany the Act. The Code will provide guidance to all those working with and/or caring for adults who lack capacity, including family members, professionals and carers. It describes their responsibilities when acting or making decisions with, or on behalf of, individuals who lack the capacity to do these things themselves. Those who will have a duty of care to a person lacking capacity, such as attorneys, deputies, IMCAs, professionals and paid carers must have regard to the Code.

What happens now?:

Between now and implementation in 2007, the Department for Constitutional Affairs (DCA), the Department of Health (DH), the Public Guardianship Office (PGO) and the Welsh Assembly Government (WAG) are working on new processes and procedures that need to be introduced when the Act comes into effect in April 2007.

Contact details:

If you would like any further information on the Act please contact us.

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