



What is the Mental Capacity Act?

The Mental Health Act 2007, which received Royal Assent in July 2007, as well as amending the Mental Health Act 1983, was used as the vehicle for introducing safeguards into the Mental Capacity Act 2005.

The Mental Capacity Act provides a statutory framework to empower and protect vulnerable people who may not be able to make their own decisions (e.g. people with dementia, learning disabilities, mental health issues, strokes, head injuries, substance abuse etc). 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 lose capacity.

The Act was implemented from 1st October 2007 and it:

- Ensures that people are helped to make their own decisions where possible
- Makes it clear who can make decisions for someone else, in what circumstances and how that person should go about making the decision in the best interests of the person who lacks capacity
- Enables people to plan ahead for a time when they might lack capacity to make some decisions
- Provides systems to help in the decision-making process and ensure vulnerable people are protected

The Act covers major decisions (about property, financial affairs, healthcare and support) as well as everyday decisions (e.g. what a person eats or wears).

Underpinning Principles

The Mental Capacity Act is underpinned by a set of five key principles:

1. 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;
2. The right for individuals to be supported to make their own decisions - people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
3. That individuals must retain the right to make what might be seen as eccentric or unwise decisions;
4. Best interests - anything done for or on behalf of people without capacity must be in their best interests; and

5. Least restrictive intervention - anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

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.

Assessing a person's lack of capacity

The Act deals with the assessment of a person's capacity and acts by carers of those who lack capacity and provides a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. No one can be labelled 'incapable' simply as a result of a particular medical condition or diagnosis.

To lack capacity a person must have an impairment or disturbance in the functioning of the mind or brain (this is based upon what is known or observed, rather than being a purely clinical decision) and because of this impairment be unable to:

- ❖ Understand the information relevant to the decision, *or*
- ❖ Retain that information long enough to make the decision, *or*
- ❖ Use that information in the decision-making process, *or*
- ❖ Communicate their decision (by any means)

What the Act says about making decisions for someone lacking capacity

Everything that is done for or on behalf of a person who lacks capacity must be in that person's best interests. The act provides a checklist for decision makers to go through and an opportunity for the person to put his/her wishes and feelings into writing (which must be considered).

Factors the Act says should be considered in making a decision include:

- Whether the person is likely to regain capacity to make the decision (and if so whether the decision can wait until then).
- Any participation the person can make in the decision (which should be encouraged).
- The person's past and present wishes and feelings, past beliefs, values etc. (A person also has the right to put these in a written statement which must be considered.)
- The views of other people interested in the welfare of the person (other professionals, carers, friends and family).

The Act makes it clear that although the wishes and feelings of the person and their carers must be considered, the final decision should be what is felt to be in the person's best interests.

Acts in connection with Care or Treatment

Section 5 clarifies that where a person is providing care or treatment for someone who lacks capacity the person can provide the care without incurring legal liability.

To be protected under section 5:

- Before performing the act all reasonable steps have been taken to assess whether the person had capacity *and*;
- At the time the act was performed it was believed that:
 - ☑ The person lacked capacity in relation to the matter, *and*
 - ☑ That it was in the person's best interests for the act to be done

Restraint

The Act says that restraint of a person who lacks capacity is only allowed if:

- ❖ It is necessary to prevent harm to the person who lacks capacity, *and*
- ❖ The restraint is proportionate to the likelihood and seriousness of the harm

Court of Protection

The Mental Capacity Act put into place a new Court of Protection (from October 2007) having jurisdiction over the whole Act (replacing the role of the High Court).

The new Court of Protection has its own procedures and Judges and is able to:

- ☑ Decide whether a person has capacity to make a decision.
- ☑ Decide what is in a person's best interests.
- ☑ Appoint Deputies to take welfare, healthcare and/or financial decisions if the Court cannot make a one-off decision to resolve the issues.

Lasting Powers of Attorney (LPA)

The Act allows a person to appoint an attorney (or attorneys) to act on their behalf if they should lose capacity in the future. This is similar to the preceding Enduring Power of Attorney (EPA) in relation to finance except that an LPA can be empowered to make health and welfare decisions.

A lasting Power of Attorney (LPA) must be registered with the Office of the Public Guardian (see below) before any acts can be performed.

Enduring Power of Attorneys (EPA's) created before October 2007 can remain but only Lasting Power of Attorneys (LPA's) can be appointed from October 2007.

Court Appointed Deputies

The Act provides for a system of court appointed deputies to replace the preceding system of receivership in the 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 but will not be able to refuse consent to life-sustaining treatment (only the Court can authorise this).

Deputies will only be appointed if the Court cannot make a one-off decision to resolve the issues. People appointed as receivers before October 2007 retain their existing powers after October 2007 (they will be treated as deputies).

Advance Decisions

The Act created statutory rules so that people can make a decision (verbally or in writing) in advance to refuse treatment if they lack capacity in future.

Key factors:

- ❖ The decision must be valid and applicable.
- ❖ The decision must be in writing, signed and witnessed if relating to life-sustaining treatment.
- ❖ The decision must contain the express statement that the decision stands 'even if life is at risk' if relating to life-sustaining treatment.

Independent Mental Capacity Advocate (IMCA)

The Act placed a duty to instruct an IMCA for people who:

- Lack capacity to make the decision for themselves, and;
- Have nobody to speak for them, *and*;
- Need a decision made regarding serious medical treatment or long-term residential care (if provided by the Local Authority or NHS).

The IMCA will (by accessing all relevant health/social care records and working with the person) make a recommendation of what is in a person's best interests and what factors need to be considered in this decision.

The IMCA can also challenge a decision-maker on behalf of the person lacking capacity if necessary.

Criminal Offence

The Act created a new criminal offence of ill-treatment or wilful neglect of a person who lacks capacity.

The offences apply to:

- ❖ Carers (formal or informal)
- ❖ LPAs
- ❖ Court Appointed Deputies

Ill-treatment is either:

- ❖ Deliberately ill-treating the person, *or*;
- ❖ Not taking the proper care in their treatment of the person.

Wilful neglect is when a person deliberately fails to carry out an act they knew they had a duty to do. Penalties for these offences can range up to a large fine and imprisonment for up to 5 years.

Public Guardian

Roles of the Public Guardian and staff:

- The registering authority for LPAs and Deputies.
- Supervising Court Appointed Deputies.
- Providing information to help the Court make decisions.
- Working with other agencies to respond to any concerns about how a Deputy or LPA is operating.

Safeguards - the **Public Guardian Board** will scrutinise and review the operation of the Public Guardian.