

MAKING DECISIONS FOR PEOPLE WHO LACK CAPACITY

Mental Capacity Act 2005

OVERVIEW OF THE ACT

This is one of a series of resource materials for clinical ethics committees providing explanation and discussion of the sections of the Mental Capacity Act which are particularly relevant to their work. This overview highlights the areas of the Act relevant to clinical ethics committees. Each area is covered in more depth in a separate web page or pdf document.

Introduction

The Mental Capacity Act 2005, which came fully into force in October 2007, provides the legal framework for acting and making decisions on behalf of individuals who lack the capacity to make specific decisions for themselves in relation to personal welfare, healthcare and financial matters. It applies to persons age 16 and over. The Act draws on common law principles that have been established through judicial decisions in individual legal cases and clarifies and develops these principles in addition to introducing several new roles, bodies and powers to support the Act's provisions (see chapter one of the code of practice for further explanation of the Act).

The Mental Capacity Act (MCA) applies to England and Wales. The relevant legislation in Scotland dealing with making decisions for people who lack capacity is the [Adults with Incapacity \(Scotland\) Act 2000](#)

Principles of the Act

The Act sets out five principles which guide the legislation. These are:

- *'A person must be assumed to have capacity unless it is established that he lacks capacity.*
- *(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
- *(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
- *(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.*
- *(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.'*

The main regulatory framework is set out in Part 1 of the Act. Part 2 deals with the establishment of a new court to deal with matters arising from the Act (the Court of Protection), and a new

office of the Public Guardian. Part 3 deals with a range of miscellaneous issues relating to the Act.

Key sections of the Act

Determining capacity

[Sections 2 and 3](#) of the Act set out the legal requirement for assessing capacity. This builds on the common law test for capacity as set out in *Re C* (1990).

The best interests principle

[Section 4](#) sets expands on the principle that any act or decision on behalf of a person who lacks capacity should be made in that person's best interests. This again follows common law principles but the Act is much more specific about the process that must be followed to determine what is in the person's best interests (the best interests checklist).

Restraining a person who lacks capacity

[Section 5](#) sets out the additional conditions that must be fulfilled if a person who lacks capacity is to be restrained. These relate to the degree of harm that is likely to be suffered by the person if he is not restrained.

Lasting powers of attorney

[Section 9](#) creates a new power, Lasting Power of Attorney, by which a person who has capacity can confer authority on another person (the donee) to make decisions about her personal welfare, property or affairs at a future date when she no longer has capacity to make decisions for herself. This is a new power in England and Wales and was not legally possible under common law.

Advance decisions to refuse treatment

[Sections 24-26](#) set out the legal framework within which a person with capacity can make an advance decision to refuse treatment, including life sustaining treatment, that is applicable when that person no longer has capacity to make such a decision for himself. This clarifies and sets in statute the legal position on advance refusals of treatment.

Research

[Sections 30 to 34](#) of the Act set out the legal framework within which researchers must act if they are conducting research that involves persons who lack capacity to consent to the research being conducted.

Independent Mental Capacity Advocates

[Sections 35 to 41](#) of the Act introduce and set out the role of Independent Mental Capacity Advocate (IMCA). This is a new service created under the Act and is explained in more detail in section 10 of the Code of Practice to the Act. Its aim is to provide independent safeguards for people who lack capacity when important decisions need to be made and there is no-one other than paid carers to represent the person who lacks capacity or to be consulted on their behalf.

Court of Protection

Part 2 of the Act creates a new superior court of record to be known as the Court of Protection. This court has the same powers, rights, privileges, and authority as the High Court. The powers of the court are set out in Part 1 [sections 15-21](#) of the Act.

In summary the Court has the powers to:

- *‘decide whether a person has capacity to make a particular decision for themselves*
- *make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions*
- *appoint deputies to make decisions for people lacking capacity to make those decisions*
- *decide whether an LPA or EPA is valid, and*
- *remove deputies or attorneys who fail to carry out their duties. ‘*

[Code of Practice section 8](#)

Protection for people providing care or treatment

[Section 5](#) of the Act sets out the conditions under which a person caring for someone who lacks capacity will not incur liability for their actions in caring for that person. Section 6 sets out further conditions. If the person who lacks capacity is to be restrained. Section 26(2) and (3) specifies when a doctor is protected from liability in the context of advance refusals of treatment. See the Code of Practice [section 6](#) for further guidance.

The offence of ill treatment or neglect

[Section 44](#) of the Act creates an offence of ill treatment or neglect. If a carer or donee of a lasting power of attorney is found guilty he or she is liable to imprisonment of up to five years or a fine (or both).

The Code of Practice

[The Code of Practice](#) provides explanatory notes on the Act and examples of how the Act will work in practice. There are no specific sanctions if someone does not comply with the Code, but failure to comply can be used as evidence before a court in civil or criminal proceedings. Therefore everyone caring for a person who lacks capacity is required to be familiar with the Code.