

Mental Capacity Act

The Mental Capacity Act 2005 provides a statutory framework to empower and protect vulnerable people who are not able to make their own 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 lose capacity. The Act replaces previous statutory schemes for Enduring Powers of Attorney and Court of Protection Receivers with reformed and updated schemes.

Principles of the Act

The Act is underpinned by 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.

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.

That individuals must retain the right to make what might be seen as eccentric or unwise decisions.

Best interests: anything done for or on behalf of people without capacity must be in their best interests.

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

Purposes of the Act

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' test. No one can be labelled 'incapable' as a result of a particular medical condition or diagnosis.

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.

To test if the person has capacity:

Does the person have an impairment of the mind or brain, or a disturbance of mental function?

If so does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

To have capacity to make a decision someone must be able to:

Understand the information relevant to the decision.

Retain the information.

Use that information as part of the process of making the decision.

Communicate his/her decision either by talking, signing, or any other means.

Best Interests

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 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, carers and family members gain a right to be consulted.

All decisions must be made in the best interest of that person:

- Involve the person who lacks capacity.

- Be aware of the person's wishes and feelings.

- Consult with others who are involved in the care of the person.

- Do not make assumptions based solely on the person's age, appearance, condition or behaviour.

- Consider whether the person likely to regain capacity to make the decision in the future.

Acts in connection with care or treatment

Section 5 clarifies that, where a person is providing care or treatment for someone who lacks capacity, then the person can provide the care without incurring legal liability. The key will be proper assessment of capacity and best interests.

This covers actions that would otherwise result in a civil wrong or crime if someone has to interfere with the person's body or property in the ordinary course of caring. For example, by giving an injection or by using the person's money to buy items for them.

The Bill 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.

Restraint/deprivation of liberty

Section 6 of the Act defines restraint as the use or threat of 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.

Section 6(5) makes it clear that an act depriving a person of his or her liberty cannot be an act to which section 5 provides any protection.

Lasting powers of attorney

The Act allows a person to appoint an attorney to act on their behalf if they should lose capacity in the future. The Act also allows people to let an attorney make health and welfare decisions.

An advance decision has no application to any treatment which a doctor considers necessary to sustain life unless the decision is in writing, signed and witnessed. There must also be an express statement that the decision stands 'even if life is at risk'.

Independent Mental 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 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.

An IMCA must be involved in the following situations and where the person you are representing lacks capacity and has no relative, friend or unpaid carer:

An NHS body is proposing:

Serious medical treatment

A stay of more than 28 days in hospital or 8 weeks in a care home

Change to a person's accommodation to another hospital for more than 28 days or more than 8 weeks in a care home

A local authority is proposing:

To change or to provide residential or supported accommodation for more than 8 weeks

An IMCA may also be involved in:

Accommodation reviews where there are concerns about the suitability of the placement, where the Local Authority or NHS has arranged the original accommodation, the person lacks capacity, and there is no other person appropriate to consult.

Adult protection cases where protective measures are being put in place in relation to the protection of a vulnerable adult from abuse, and where the person lacks capacity

Where the person who lacks capacity is abusing another person.

Involvement of an IMCA is not necessary:

If any treatment needs to be provided as a matter of urgency.

If the person lacking capacity would be made homeless unless they were admitted to a care home.

In accommodation reviews or adult protection cases where there is already appropriate family support or where an advocate is currently involved.

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.

Transitional regulations will cover research started before the Act where the person originally had capacity to consent, but later lost capacity before the end of the project.

Court appointed deputies

The Act provides for a system of court appointed deputies to replace the previous system of receivership in the Court of Protection.

Deputies will be able to take decisions on welfare, healthcare and financial matters as authorised by the Court 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.

The Act creates two new public bodies 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 and will be the final arbiter for capacity matters. It will have its own procedures and nominated judges.

A new Public Guardian: the Public Guardian and his/her staff supervise deputies appointed by the Court and provide information to help the Court make decisions. They 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 scrutinises and reviews the way in which the Public Guardian discharges his/her functions. The Public Guardian is required to produce an Annual Report about the discharge of his/her functions.