

Summary The Mental Capacity Act

The Mental Capacity Act is underpinned by five key principles:

- Every adult has right to make his or her own decisions, and everyone should be assumed to be capable of doing this unless actually proved otherwise
- Everyone should be given all the support they need to make their own decisions, before they are judged incapable of doing this
- People should have the right to make 'eccentric' or 'unwise' decisions – it is their capacity to make decisions, not the decisions themselves, that may be in question
- Anything done for or on behalf of people without capacity must be in their best interests
- Anything done for or on behalf of people without capacity should restrict their rights and freedoms as little as possible.

The new Mental Capacity Act

The Mental Capacity Act 2005 for England and Wales applies to everyone over the age of 16 who does not have mental capacity. The new Act aims to protect the rights of people whose mental capacity is in doubt, and people without capacity and to clear up the confusion about who is entitled to make decisions on behalf of the latter.

Mental capacity

'Mental capacity' means a person's ability to make a decision about some aspect of their lives. It does not matter if other people would not agree with the decision but it does require the person to understand a situation and understand what will happen if they take a particular decision about it. This could range from the day to day choices of what to wear or eat to more difficult choices about housing, medical treatment or personal finances.

Mental capacity can be affected by learning disabilities, mental health problems, dementia, strokes or other conditions. Some people have the capacity to make day to day decisions, but not more complex ones, such as agreeing to a medical operation. Other people's ability to make decisions varies at different times.

Up till now, carers and professionals have frequently been in a very difficult position when it is necessary to make a decision for someone without capacity because

they are not clear on the law. For example, medical professionals have not been clear about whether they should stick to decisions patients made about their treatment before they lost capacity.

Save for clearly unlawful acts, it has also been very difficult to challenge people who are suspected of abusing someone by making decisions on their behalf, for example when in fact the person does have capacity; or when the person does not have capacity, making decisions that are not in the person's best interests.

The new legislation

The new Act will become law in 2007 in England and Wales (Scotland has its own Adults with Incapacity (Scotland) Act 2000). New information and guidance will be produced before it comes into force. All professionals, and other paid carers, must follow guidance in the 'Codes of Practice' unless there is a good reason for not doing so, and any failure to do so would be considered by the courts in any relevant legal proceedings. Although this legal duty does not apply to families and other unpaid carers, they are also expected to follow the Codes.

Assessing capacity

Under the new Act, everyone is presumed to have the capacity to make decisions for themselves unless the contrary is shown. If it is not clear whether someone has the

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capacity to make a decision concerning a specific issue an assessment of their capacity should be carried out. The professionals, carers and families involved in assessing someone's capacity will do this on a 'decision-specific' basis, which looks at the person's ability to make a particular decision at a particular time, and their ability to understand the relevant information as well as the consequences of their decisions. They have to reasonably believe that a person does not have capacity, having taken reasonable steps to assess whether the person does have capacity. They cannot decide that someone does not have capacity just because of the way they look or behave, or because they have difficulties communicating – although the person does need to be able to communicate their decision in some way, with help if necessary.

If the person's capacity to make decisions varies at different times, this should be taken into account as well. For example, if it is thought that the person will have capacity to make the decision in the future, then, if it can be delayed, the decision should be put off until the person can make it for him/herself.

Making decisions for people who lack capacity

Families, professionals, and other carers will be able to take decisions for people without capacity as long as these decisions are in the person's 'best interests'. If necessary, they can make decisions which involve actions like providing personal care, or going into somebody's home to carry out essential domestic tasks. However, decisions about marriage, sexual relationships, adoption or voting can never be made on behalf of another person.

Even if a person lacks capacity they must be given the opportunity to take part as fully as possible in any decision that affects them. In considering what is in the person's best interests the decision-maker must consider everything known about the person's feelings, beliefs and values, and consult everyone concerned with the person's welfare. Professionals must, so far as possible, consult carers and family members and take their views into account. If the person had made a statement before they lost capacity, in which they set out how they would like to be cared for, this must also be considered (an 'advance statement').

Adults with capacity can also make an advance decision about medical treatment in which they specify that they do not want to be given certain treatment(s) in the future (known as 'advance refusals' or 'advance directives') which would be legally binding. However, any decision against 'life-sustaining' treatment must be made in writing, must include the statement 'even if life is at risk', and must be signed and witnessed.

Advocates and attorneys

People who have capacity can appoint someone under a 'Lasting Power of Attorney' to take decisions about property, financial affairs, health and welfare (including decisions about life-sustaining treatment) if they should they lose capacity in the future. This will replace the existing system of 'Enduring Power of Attorney' (except for those who have already made one), which do not cover health or welfare issues.

People without capacity who do not have friends or family to support them, will be appointed an Independent Mental Capacity Advocate to represent them in any decision over serious medical treatment, or about NHS or local authority accommodation.

Research

Any proposed research involving the person without capacity must either benefit them personally or cause them as little risk and intrusion as possible. Carers or nominated third parties must be consulted, and a research ethics committee must discuss it as well. If the person shows any reluctance to take part, the research must be stopped immediately.

Legal Safeguards

A new 'Court of Protection' will oversee the way the Act works in law, and will have the final say on any disputes. The Court can appoint 'deputies' to act and make decisions on behalf of people who lack capacity. There is a penalty of imprisonment for up to five years for anyone found guilty of ill-treating or neglecting a person without capacity who is in their care. Threatening or using force to restrain someone without capacity is only permitted if this is to prevent harm.