

Mental Capacity Act 2005

Integrated Living Network Briefing

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May 2007



Mental Capacity Act Briefing

This briefing provides an outline of the Mental Capacity Act and highlights some early implications for the housing care and support sectors.

Background

The Mental Capacity Act will come into force during 2007. It provides a statutory framework to empower and protect people who may lack capacity to make some decisions for themselves, such as people with dementia, learning disabilities, mental health problems, stroke or head injuries. It makes clear who can take decisions, in which situations, what should happen and how it should happen. It enshrines current best practice and common law principles and replaces current statutory schemes for Enduring powers of Attorney and Court of Protection receivers with reformed and updated schemes.

It enables people to plan ahead for a time when they may lack capacity and covers the following areas:

- Property and affairs
- Healthcare treatment
- Where someone lives
- Everyday decisions about personal care

Implications for providers of housing care and support

- There is an assumption of capacity – it will be assumed that individuals have the right to make decisions about a tenancy or lease and the right to decide where they live, unless it can be proved otherwise
- Individuals must be supported to make their own decisions including making what are seen as eccentric or unwise decisions (where they have capacity), this would include someone wishing to remain in their own home even though their landlord and care and support services don't feel they can adequately support them or individuals refusing care and support services
- Where a person lacks capacity and has no-one to act for them an Independent Mental Capacity Advocate (IMCA) may be appointed. They will be involved where decisions are required over accommodation such as a move from hospital into institutional care or where decisions are required over medical treatment.
- Decisions on behalf of individuals lacking capacity must be in their best interests – this could include using their resources to purchase accommodation and support
- Lasting Powers of Attorney allow individuals to appoint someone to act on their behalf and this includes making decisions about their health and well-being which could include where they live and the care and support services they receive.

The examples provided in the Act are limited, but the new Court Of Protection will make case law which providers will need to take into account as it develops.

Timetable

There are two distinct phases: April and October 2007

The whole Act is underpinned by a set of five key principles set out in section one 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 decisions they 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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- The new independent Mental Capacity Advocate service (IMCAs) becomes operational in England
- A new criminal offence of ill-treatment or wilful neglect of a person who lacks capacity comes into force in England and Wales. A person found guilty may be liable to imprisonment for a term of up to five years.
- Sections 1 – 4 of the Act (the five key principles, assessing lack of capacity and determining best interests) come into force but **only** in situations where an IMCA is to be involved, and for the criminal offence. These sections do not apply in any other situations until October 2007.
- The Code of Practice to the Act will be issued but **only** for information and guidance

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- 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 decision-specific and time specific test. No one can be labelled 'incapable ' as a result of a particular medical condition or diagnosis or 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 incapacity.
- 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 checklist of factors that decision-makers must work through. A person can put his/her wishes into a statement, which the person making the determination must consider. They should also consider past wishes and feelings as well as present ones. There must also be consideration of the person's beliefs and values and other factors that the person would have considered were they able to do so, such as emotional bonds or

family obligations. Also, people caring for the person lacking capacity gain a right to be consulted about the person's best interests. The decision maker must consider whether the individual may have capacity at some future date and can mean a decision being put off until the person can make their own decision.

- Acts in connection with care or treatment – Section five 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 for instance someone has to interfere with the person's body or property in the course of providing care or treatment.
- Restraint – Section six of the Act set out limitations on Section five. It defines restraint as the use of threat of force where a person who lacks capacity resists, and any restriction of liberty of 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 proportionate to the likelihood and seriousness of harm. 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 judgment in *HL v United Kingdom* (the *Bournewood* case).

The Act includes 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 similar to the current Enduring Power of Attorney but as well as property and personal affairs it includes health and well-being decisions. Before it can be used an LPA must be registered with the Office of the Public Guardian
- Court appointed deputies – This replaces the current system of receivership in the Court of Protection. Deputies will be able to make decisions on welfare, healthcare and financial matters but will not be able to refuse consent to life sustaining treatment. People appointed as receivers before October 2007 will be treated as deputies after this time.

The Act creates a new public body and new official to support the statutory framework both of which are designed around the needs of those lacking capacity.

- A new Court of Protection – it will have jurisdiction over the whole Act and be able to make declarations, decisions and orders affecting people who lack capacity and appoint deputies to make decisions on behalf of those lacking capacity. It will resolve complex and/or disputed cases.
- A new Public Guardian – the Public Guardian and his staff will be the registering authority for Lasting Powers of Attorney and deputies. They will supervise deputies and provide information to help the Court make decisions.

The Act includes three further key provisions:

- Independent Mental Capacity Advocate (IMCA) – they will be appointed when a person lacking capacity has no-one to speak for them. They will only be involved in the following circumstances:
 - where decisions are being made about serious medical treatment
 - changes to the person's accommodation where it is provided by a local authority or the NHS (this includes hospitals and residential and nursing homes).

The IMCA makes representations about the person's wishes, feelings, beliefs and values and can challenge the decision-maker on behalf of the person lacking capacity

- Advance decision to refuse treatment – people can make a decision in advance to refuse treatment if they should lack capacity in future. The Act creates statutory rules and clear safeguards, the decision must be in writing, signed and witnessed, together with 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 – comes into force April 2007

Code of practice

There will be a statutory Code of Practice which will provide guidance to everyone working with and/or caring for adults that lack capacity, including family members, professionals and carers. Attorneys, IMCAs, professionals and paid carers must have regard to the Code.

Further information on the Act is available:

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