



Mental Capacity Act (2005)  
INDEPENDENT SECTOR

## GUIDANCE

The Home  
The Manager  
Date Issued:  
Date to be reviewed

## BACKGROUND

The Mental Capacity Act 2005 for England & Wales came fully into force on 1<sup>st</sup> October 2007. It applies to everyone over the age of 16 who does not have mental capacity. This means the Act applies to an estimated two million people in the UK who are unable to make decisions for themselves because of disability, mental illness, brain injury or dementia.

The Act sets out who can take decisions for people who may not be able to make decisions for themselves, in which situation this can be done and how. It applies to anybody who is paid to provide care, including staff in care homes, nursing homes, domiciliary care and community services.

## SECTION 1

- 1.1 Refer to the Mental Capacity Policy.
- 1.2 It should be used together with the Mental Capacity Code of Practice which explains how the Act works on a day to day basis and provides useful examples.
- 1.3 By law staff must follow the guidance in Code of Practice. If staff decided not to follow the Code in a particular situation, they must be able to explain the reasons for this required.**
- 1.4 The commission for Social Care Inspection is responsible for making sure that adults who lack capacity to make decisions for themselves are protected from abuse and that the Act is followed in practice.

## SECTION 2

### KEY PRINCIPLES

2.1 The Act is based on the following five important principles. These must be followed at all time when staff provides care for a person who lacks mental capacity.

- 1. Every adult has the right to make his or her own decisions, and everyone should be assumed to be capable of doing this unless actually proved otherwise.**

**2. Everyone should be given all the support they need to make their own decisions, before they are judged incapable of doing so.**

**3. 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.**

**4. Anything done for or on behalf of people without capacity should restrict their rights and freedoms as little as possible**

## **SECTION 3**

### **CAPACITY ASSESSMENT and BEST INTERESTS**

#### **3.1 WHAT IS MENTAL CAPACITY?**

3.1.1 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.

3.1.2 Most people are able to make some of their own day-to-day decisions, even if they may lack capacity when it comes to more difficult decisions. A person may for example, be capable of deciding what clothes to wear and what to have for breakfast, but be unable to understand and make decisions on financial matters.

3.1.3 It is important to remember that capacity has to be thought about for each separate decision. Nobody can any longer be labelled “incapable” as a result of a particular medical condition or diagnosis (such as dementia).

3.1.4 It is important that staff do everything possible to help a person make their own decisions. Chapter Three of the Code of Practice gives useful ideas of how to do this and includes:

- Making sure the person has all the information they need to make the decision
- Explaining information in a way that helps the person understand.
- Finding out if there is a time or place in which the person finds it easier to make a decision.
- Involving anyone close to person who can help them understand the information or make a choice.

#### **3.2 HOW DO WE KNOW IF SOME BODY ELSE LACKS CAPACITY?**

3.2.1 If you are concerned about whether a person is able to make a specific decision you should never express an opinion unless you have done an assessment of their capacity.

3.2.2 The Act sets out a single test for doing this it is up to the person who is carrying out the assessment to prove that “on the balance of probabilities”, the person lacks capacity.

3.2.3 The first is to ask the person if they have had some kind of condition which might affect their capacity (this could be dementia, learning disability, stroke or unconsciousness)

3.2.4 The second stage is to ask if this condition affects the person to such an extent that they cannot make this particular decision for themselves. You need to ask if the person is able to:

- Understand the decision that needs to be made
- Retain the information long enough to make the decision
- Use the information to make a decision
- Communicate the decision by any means

3.2.5 The person will be said to lack the capacity to make the decision if, after you have given them all possible help and support, they cannot do any one of these things. Further guidance on using this test can be found in Chapter Four of the Code of Practice.

3.2.6 A for to be complete when a persons capacity is assessed can be found in Section Seven of this document. Staff will need to show how the assessment was done and what evidence was used to show the person lacked capacity to take the action in the question. These notes and the Best interest checklist must be kept in the persons file.

3.2.7 You will not need to use this form for every decision, for very minor thing it will be sufficient to make a note of the decision in the persons file.

### **3.3 WHO SHOULD ASSESS A PERSONS CAPACITY?**

3.3.1 The person who is best placed to assess capacity will be a person who is directly concerned with the individual at the time the decision needs to be made.

3.3.2 Those closest to the person, including care staff will usually assess a persons capacity if the decision is about day-to-day things, such as when a person chooses to get up, what clothes to wear and what to eat.

3.3.3 More difficult and complicated such as changed in the accommodation or medical treatment will rest with the person who proposing the decision of course of action. This could be the registered manager, a Social Worker, GP or Consultant.

3.3.4 If the situation is very serious, or if there are doubts or whether a person lacks capacity, a second opinion may be needed from a Psychologist and Psychiatrist. This decision will often be made by a number of people acting together.

### **3.4 BEST INTEREST DECISIONS**

3.4.1 If a person is found to lack capacity and paid carers are required to make a decision on the person's behalf, they must do so by acting in the persons best interests.

3.4.2 This means that staff must not just make the decision based what they would do if they were the person affected. Instead, they must take into account everything that might be important to the persons including their wishes, feelings beliefs and values. (Including a\any written advanced statement they made when they had capacity) and take account of the views of their friends and family.

3.4.3 The Act gives a "best interests" checklist for you to follow. This is explained in Chapter Five of the Code of Practice and a form for you to complete is given.

3.4.4 It is also important to ask whether the person is likely, at some point in the future to recover their capacity to make the decision and whether the decision can be delayed until that time.

3.4.5 Staff must always make sure that decisions or action taken on behalf of people who lack capacity are made in their best interests. The interests of that person will always prevail, not the views or convenience of people caring for that person.

## **SECTION 4**

### **PROTECTION FOR SOCIAL CARE STAFF**

#### **4.1 IN THE CARE SETTING**

4.1.1 Under common law, if a person has mental capacity, staff must get their consent before carrying out personal care tasks.

4.1.2 The Act gives staff protection from liability when they provide care for someone who is not able to give consent provided that have followed the Acts principles used the test of capacity and can show they are acting in the persons best interests.

4.1.3 Where it is not possible to do an assessment because urgent care or treatment is necessary, staff must act in the persons best interests.

4.1.4 An Attorney or a Court appointed Deputy may be entitled to make a decision about the persons care on their behalf and staff must consult these people first before acting.

#### **4.2 THE USE OF RESTRAINT**

4.2.1 The Act says that restraint is only permitted if the person using it reasonably believes it is necessary to prevent harm to a person who lacks capacity. The restraint must be proportionate to the likelihood and seriousness of the harm.

4.2.2 There is, though, no protection under the Act for someone who deprived a person of their liberty. New procedures and safeguards for people who lack capacity and are deprived of their liberty in care homes and hospitals for their own safety will be introduced from April 2009 and this guidance will be updated to include these changes.

#### **4.3 LINKS WITH the MENTAL HEALTH ACT (1983)**

4.3.1 Detaining someone under the Mental Health Act (1983) must not be taken to mean they lack mental capacity.

4.3.2 The treatment of detained people under the Mental Health Act normally overrides the Mental Capacity Act. But, if a detained person who lacks capacity also needs medical treatment for a physical illness or condition then the Mental Capacity Act will apply.

#### **4.4 RESOLVING DISPUTES**

4.4.1 There will sometimes be a disagreement between staff and a person's family about the person's capacity.

4.4.2 Chapter 15 of the Code suggests ways of dealing with disagreements, such as:

- Involving an advocate who is independent of all parties involved
- Asking a consultant for a second opinion
- Inviting the facility to a case conference
- Seeking mediation
- Making an application to the Court of Protection for a decision ( see section Five)

## **4.5 DECISIONS WHICH CANNOT BE MADE ON A PERSONS BEHALF**

4.5.1 Some decisions can never be made on behalf of another person who lacks capacity. These decisions include:

- Consenting to marriage or civil partnership
- Consenting to sexual relations
- Consenting to a divorce
- Consenting to the dissolution of a civil partnership
- Consenting to a child being placed for adoption
- Consenting to the making of an adoption order
- Discharging parental responsibilities in matters not relating to a Childs property
- Giving a consent order under the Human Fertilisation and Embryology Act 1990
- Voting at an election for any public office or referendum

## **4.6 CHILDREN and YOUNG PEOPLE AGED 16 AND 17**

4.6.1 Most of the Act applied to adults aged 16 or over. For children aged 16 or under the Children Act 1989 will apply.

4.6.2 For young people of 16 and 17 years of age there is an overlap with the Children Act. Some parts of the Mental Capacity Act do not apply to 16 or 17 year olds.

These are:

- Making a Lasting Power of Attorney
- Making an Advance Decision to Refuse Treatment
- Making a Will

## **4.7 CRIMINAL OFFENCES**

4.7.1 Section 44 of the Act creates two new criminal offences of the wilful neglect and ill treatment of an adult lacking capacity by anyone responsible for that persons care. The penalties for this offence range from a fine to a maximum of a five year prison sentence.

4.7.2 Neglect or ill treatment can include physical assault and depriving a person of basic necessities such as food and clothing.

4.7.3 A person will be guilty of ill treatment if they have either deliberately ill-treated someone or been reckless in the way they treated that person. The offence of wilful neglect usually means that a person has deliberately failed to carry out and act they knew they had a duty to do.

4.7.4 In all cases where there is suspicion of such an offence, staff should alert their manager immediately and the Multi Agency Procedure for Safeguarding Adults in Lincolnshire will be used.

## **SECTION 5**

### **SAFEGUARDS FOR PEOPLE WHO LACK CAPACITY**

The Act provides new ways for people to plan ahead for a time when they may lose capacity. These may have an important affect on the way we provide care services.

## LASTING POWER OF ATTORNEY

The Act allows a person to appoint someone to act on their behalf if they should lose capacity in the future. A lasting power of Attorney (LPA) is a legal arrangement which gives the person the authority to make certain decisions on behalf of a person who lacks capacity.

LPAs replace Enduring Powers of Attorney (EPA). Existing EPAs are still valid after 1<sup>st</sup> October 2007 but no new EPAs will be made after that date. Chapter seven of the Code of Practice describes the duties and responsibilities of LPAs.

LPAs can be held by a family member, friend, carer or professional such as a solicitor. A single person or more than one person can be appointed. Staff members cannot become attorneys for a person they have a professional duty of care towards.

The Act introduces two types of LPA:

- **Financial and Property LPAs.** These could cover such things as the payment of bills, managing a person's income or selling their property.
- **Personal Welfare LPAs.** These attorneys will be able to make certain decisions about the care and treatment the person may receive.

Care staff will need to work closely with a Person Welfare LPA. Depending on what decisions are listed in the LPA document, the attorney may be entitled to decide where the person lives or refuse care or treatment on the person's behalf.

Attorneys are asked under the Act to make staff aware that an LPA exists. The LPA should be recorded in the person's notes and where possible a copy kept for reference. To be valid, an LPA must be signed and registered. An identifying hologram on the LPA and unique reference number are intended as proof of validity. If staff are concerned about a person's claim to be an LPA they can check a register of LPAs which is held by the office of the Public Guardian.

If staff have any suspicions regarding improper use of an attorney's power under the LPA they should refer the matter immediately to the office of the Public Guardian which can be contacted on 0845 330 2900.

## COURT OF PROTECTION

A NEW Court of Protection has the final say about all things covered by the Mental Capacity Act. It is able to:

- Decide whether or not a person has capacity to make a particular decision where this is disputed.
- Decide whether certain types of care or treatment are lawful
- Make decisions about the property and financial affairs or the health and welfare of a person who lacks capacity

The Act provides for Court Appointed Deputies to replace the current system of receivership. 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.

## RESPECTING A PERSONS WISHES AND FEELINGS

The Act says that people should always be encouraged to record their wishes and preferences about the care and treatment they receive at a time in the future when they may lack capacity. The Act recommends that these are in writing but this is not a legal requirement.

Whenever possible care staff should make sure that the person's wishes and feelings are known and recorded in their notes. These recorded wishes can be withdrawn or altered while the person still has capacity to do so.

The wishes of a person who lacks capacity should always be taken into account by those providing care and treatment and are a very important source of information when deciding what is in the person's best interest.

## **ADVANCE DECISIONS TO REFUSE TREATMENT**

Under the Act people over 18 years of age may choose to make a decision in advance to refuse treatment ( an ADRT) if they should lack capacity in the future. Chapter 9 of the Code of Practice explains how an ADRT is made and what it is to include. An ADRT must be valid and applicable to the treatment proposed. If it is, it has the same effect as if the decision is made being by a person with capacity. Advance decisions, other than those relating to life sustaining treatment, do not need to be in writing. Advance Decisions or written statement cannot be used to demand certain treatments.

ADRTs are mainly of concern to healthcare professionals who may not be protected from liability if they knowingly act against a valid ADRT, however the Act does provide for staff to conscientiously object if in the circumstances they feel this is appropriate. An ADRT can be overridden by a Lasting Power of Attorney (LPA) if the LPA was set up after the ADRT and specifies that the attorney has authority to refuse treatment the validity and dates of the LPA must be scrutinised on the relevant forms if this issue becomes apparent.

The Act lays down strict rules where an ADRT concerns treatment necessary to sustain life. The ADRT must be in writing signed and witnessed and include a statement that the decisions stand ` even if life is at risk`.

Care staff may be made aware of the existence of an ADRT either verbally or in writing. A service user may carry the DRT with them in case of an emergency, or carry some of their indication that they have made an ADRT. Further guidance for care staff and how ADRTs are to be dealt with will be provided.

## **SPECIALIST MENTAL CAPACITY ADVOCACY (IMCA)**

The Act introduces a special type of advocate known as an Independent Mental Capacity Advocate or `IMCA`

An IMCA can only be involved when a person lacks capacity, has nobody other than paid staff to speak for them and is facing serious medical treatment or changes in accommodation.

The IMCA'S job is to:

- Support the person who lacks capacity and represent their views and interests
- Obtain information
- As far as possible find out the person wishes, feelings and beliefs
- Look at alternative courses of action
- Obtain a further medical opinion if necessary

IMCAs have the right to see and take copies of information about the service user they are representing, including health and social care notes.

Referrals to IMCA are usually made by NHS staff or staff in Adult Social Care ( Social Services ) but, if staff in independent care services feel a person, including someone who self funds their care, needs an IMCA, they should call the IMCA helpline on 0845 650 0081

## **RESEARCH**

The Act sets out new rules for how people without capacity may be involved in clinical research. This may only take place where an `appropriate body` such as the local ethics committee gives approval.

The research must relate to the person's condition, balance risks against the expected benefits and be withdrawn if there is distress or resistance.

Before an incapacitated person can be enrolled in research, somebody close to them who can be consulted about the appropriateness of his or her involvement must be identified.

## Section 6

### References and sources of further advice

The Mental Capacity Act is lead nationally by the Justice Department and the Department of Health. Documents about the Act can be found at:

[www.justice.gov.uk/whatwedo/mentalcapacity.htm](http://www.justice.gov.uk/whatwedo/mentalcapacity.htm) (including the Act, Code of Practice information relating to the court of Protection and Public Guardianship Office.

[www.dh.gov.uk/en/policyandguidance/healthandsocialcaretopics/socialcare/imca/mentalcapacityact2005/index.htm](http://www.dh.gov.uk/en/policyandguidance/healthandsocialcaretopics/socialcare/imca/mentalcapacityact2005/index.htm)

### The Mental Capacity Act Code of Practice

The Code can be found at; [www.dca.gov.uk/menincap/legis.htm#codeofpractice](http://www.dca.gov.uk/menincap/legis.htm#codeofpractice)

#### Training Packages

A range of training packages is available for use in Adult care services. These are free and can be ordered on CD Rom from the Department of Health on 08701 555 455 or downloaded at:

[www.dh.gov.uk/prodxconsumdh/idcplg?ldcservice=ssgetpage&siteId=en&ss\)argetnodeId=6599&ssDocName=DH074510](http://www.dh.gov.uk/prodxconsumdh/idcplg?ldcservice=ssgetpage&siteId=en&ss)argetnodeId=6599&ssDocName=DH074510)

### Information Booklet on the Mental Capacity Act

These booklets provide introductory information on the Mental Capacity Act

- [Booklet 1- For people who may be unable to make some decisions for themselves/who wish to plan ahead for future life](#)
- [Booklet 2- For family, friends and unpaid carers](#)
- [Booklet 3- For people who work in health and social care](#)
- [Booklet 4- For advice workers](#)
- [Booklet 5- Easy Read- coming soon](#)
- [Booklet 6- The independent Mental Capacity Advocate \( IMCA \) service \( PDF5940\)](#)

## CSIP in the East Midlands

The implementation of the Act is being lead regionally by CSIP. Their website is:

[www.eastmidlands.csip.org.uk](http://www.eastmidlands.csip.org.uk)

## CQC

Information about the Act and the Commissions role in monitoring capacity issues can be found at:

[www.cqc.org.uk/](http://www.cqc.org.uk/)

## SECTION 7

### PROCEDURE FORMS

- Capacity Assessment
- Best Interests Checklist

## **PROCEDURE FOR UNDERTAKING A CAPACITY ASSESSMENT**

This procedure should be carried out every time a formal capacity assessment is required. The assessment begins with the recording of some personal information, then moves on to a two stage test for capacity and concludes with some final general questions.

All parts will need to be completed. The form must be signed at the end. If parts 1,4,5 and 12 are incomplete the assessment will not be valid.

Both forms can be accessed through the Community Mental Health Team and hard copies are stored in the office.

Signed:

Date:

Review: