



## Mental Capacity Act 2005

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### 1. Summary

According to the Act, mental capacity is the ability of a person to:

- understand information,
- retain the information long enough to make a decision,
- weigh up the information to make a decision, and
- communicate the decision.

If someone lacks capacity, then they do not have the ability to do one or all the above. The Mental Capacity Act sets out how people who lack capacity now or may do in the future should be treated and/or protected. In this way, this Act is intended for all people who may be considered to lack capacity at points in their lives, rather than specifically for mental health service users. However, the Act may be relevant for carers of people with mental health problems, learning disabilities or other carers if the person they care for has periods where they lack capacity.

### 2. Key Principles

This Act brings together pre-existing practice around working with individuals who lack capacity. The Act contains a number of **Key Principles**:

- **A presumption of capacity** – every adult (over 16) 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 possible practical help before anyone treats them as not being able to make their own decisions;

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- **Unwise decisions** – just because an individual makes what might be seen as an unwise decision, they should 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.<sup>1</sup>

All decisions made under the Act must adhere to these principles.

### 3. Legal Obligations

The Act makes it a crime to mistreat or neglect someone who lacks capacity. The criminal offences of ill-treatment or wilful neglect may apply to the following:

- people who have the care of a person who lacks capacity (both carers and paid staff)
- an attorney acting under an Lasting Power of Attorney (LPA) or Enduring Power of Attorney (EPA)
- a deputy appointed by the Court

Depending upon your local arrangements, allegations of offences may be made to social services, police or the Office of the Public Guardian. They can also be dealt with under adult protection procedures (via adult services in social services departments). The penalty for these criminal offences may be a fine and/or a sentence of imprisonment for up to five years.

Under the Act, statutory services have a duty to report any allegations of mistreatment or neglect of someone who lacks capacity, from any source (including carers or voluntary sector staff). The allegation will then be investigated by the designated local team, usually from Social Services.

For more information on this issue, see the “What is abuse?” section on the Office of the Public Guardian website: <http://www.publicguardian.gov.uk/concerns/problems-making-decisions.htm>, the “What to do if you suspect abuse or fraud” section <http://www.publicguardian.gov.uk/concerns/suspect-abuse.htm>, and the Mental Capacity Act Code of Practice (particularly Chapter 14 – see 14.5, 14.6, 14.22 and 14.23) at <http://www.publicguardian.gov.uk/mca/code-of-practice.htm>.

### 4. Carers’ role

Carers are explicitly included in the Mental Capacity Act – unlike the Mental Health Act 2007, where the ‘nearest relative’ is the closest equivalent. The Mental Capacity Act sets out roles that carers may play in the assessment of capacity.

Carers will often need to make a decision about whether the person they care for has capacity in keeping with the Key Principles. Carers may be involved in decisions in two ways: (a) **a professional consults the carer**, (b) **the carer needs to assess the person’s capacity**

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**themselves**, given their caring responsibilities. Carers need to think about the mental capacity of the person cared for, and consider questions such as:

- ⊕ Does the person cared for have a general understanding of what decision needs to be made?
- ⊕ Do they have a general understanding of the consequences of the decision?
- ⊕ Can they weigh this information and use it to make a decision?
- ⊕ Is there any way the carer could help them to make the decision for themselves?
- ⊕ Is there any way the carer can help them communicate their decision or their wishes and feelings?<sup>ii</sup>

It is important to remember that certain decisions are excluded from the Act. These include:

- consent to sexual relations
- consent to divorce or dissolution of a civil partnership
- consent to a child being placed for adoption or to making an adoption order
- voting

“Other people can never make these decisions on behalf of another person, regardless of the person’s capacity to make these decisions themselves.”<sup>iii</sup>

## 5. Safeguards for decision-making

People who lack capacity, or may lack capacity in future, have a number of options available to safeguard their rights and wishes. Carers can also help the person cared for to exercise these options. Carers can help the person cared for to:

- **write general statements about their wishes, feelings and requests for treatment and care.** These can be very simple, even saying that person prefers certain types of food, prefers sleeping with a light on or window open, etc. These statements are not legally binding, but must be taken into account when offering care.
- **set up Advance Decisions to refuse treatment** (otherwise known as 'Living Wills') – however, these do NOT allow people to refuse to be detained under the Mental Health Act.
- **apply for a Lasting Power of Attorney (LPA)** – this allows individuals to appoint one or more attorneys to make decisions about their finances and property if they become unable to do this for themselves.

In addition to making decisions about a person’s finances, with an LPA individuals can also entrust their attorney to make important decisions about their personal welfare, including long-term health care and treatment.<sup>iv</sup>

To set up an LPA, individuals (over 18) must apply to the Court of Protection. If a person does not understand what it means to appoint an attorney, carers can apply to the Court of Protection to be granted permission to make decisions on their behalf as a deputy. To become valid, attorneys, deputies and LPAs must be registered with the Public Guardianship Office.

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There are two types of LPA:

- (a) **personal welfare** LPA
- (b) **property and affairs** LPA

Setting up either of these costs £150, and there is a charge of £125 to register as a deputy.

Present Enduring Powers of Attorney (EPA) set up before October 2007 continue to function, but people can no longer set up a new EPA. Individuals will also need to check that pre-existing Advance Decisions meet the revised guidelines under the Mental Capacity Act. This can be facilitated by local statutory or voluntary sector staff.

Finally, the Act has also created a new service – the **Independent Mental Capacity Advocate** (IMCA). This service has been set up in local areas, and run by a variety of different organisations (such as Rethink, Mind, and other advocacy organisations). The IMCA's purpose is to help people who lack capacity who are facing important decisions made by the NHS and local authorities about serious medical treatment and changes of residence – for example, moving to a hospital or care home. NHS bodies and local authorities have a duty to consult the local IMCA in such decisions involving people who have no family or friends.

Most relevantly to carers and professionals working with them, the IMCA service will not be involved if:

- a person who now lacks capacity previously named a person that should be consulted about decisions that affect them, and that person is available and willing to help (this will often be an informal carer, friends or family);
- the person has an Enduring Power of Attorney, a Lasting Power of Attorney or a deputy under the Act.

For more information and a list of IMCA services in your area, please see <http://www.dh.gov.uk/en/Policyandguidance/Healthandsocialcaretopics/Socialcare/IMCA/index.htm> for England and <http://new.wales.gov.uk/topics/health/nhswales/healthservice/mentalhealthservices/mentalcapacityact/?lang=en> for Wales.

## 6. Deprivation of Liberty Safeguards

The Mental Health Act 2007 introduced the Deprivation of Liberty safeguards into the Mental Capacity Act 2005. These respond to the European Court of Human Rights judgment in October 2004 in the case of *H.L. v UK* (commonly referred to as the *Bournemouth* judgment). This case concerned a man lacking the capacity to consent to arrangements being made for his care and treatment, who was admitted to hospital into a care regime. The European Court of Human Rights considered that he had been deprived of his liberty without appropriate safeguards against arbitrary detention being in place.

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In this way, the Deprivation of Liberty safeguards aim to fill this legal gap, for people lacking capacity who either are not, or cannot be, detained under the Mental Health Act 1983 (or 2007 Act, when it comes into power). The safeguards will apply to people in hospitals and care homes who lack capacity to consent to the arrangements made for their care and treatment, and who are necessarily deprived of their liberty in their own best interests and for their own safety. These would include some people with conditions such as advanced dementia or severe autism, and particularly those who do not have families or friends who would otherwise advocate on their behalf. These people may previously have been "detained" under the common law, rather than under the Mental Health Act 1983, and so did not have sufficient legal safeguards or protection.

Therefore, the Deprivation of Liberty safeguards deal with issues such as how deprivation of liberty safeguards assessors should be selected, and how representatives should be appointed for people coming within the scope of the safeguards. The Code of Practice addendum for the safeguards describes the responsibilities of workers or carers when acting or making decisions on behalf of individuals who lack capacity, specifically:

- how to avoid deprivation of liberty,
- how to identify deprivation of liberty, and
- what to do when a person may need to be deprived of their liberty.

While the final Code currently applies equally to England and Wales (and will be separate to the Code for the Mental Capacity Act), the Welsh Assembly is preparing secondary legislation on deprivation of liberty safeguards which apply in Wales only.

## 7. Relationship between Mental Capacity Act and Mental Health Act 2007

Please see the Trust Guidance on the Mental Health Acts 1983 and 2007, available in the Legislation page on [www.carers.org/professionals](http://www.carers.org/professionals).

## 8. What does this mean for professionals working with carers?

In working with carers:

- ☞ Be aware of the Act, and where it applies to carers (as above)
- ☞ Support carers to understand their rights, and the rights of the person cared for – the 'Making Decisions' leaflet below will be helpful to carers
- ☞ Find out the appropriate local social services team to report allegations of abuse or neglect under the Act
- ☞ Support carers to exercise their rights under the Act, including the use of Advance Decisions and Lasting Powers of Attorney
- ☞ Help carers and professional colleagues to record how decisions about a person's mental capacity were made, including details of:

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- what the decision was
- why the decision was made
- how the decision was made
- who was involved
- what information was used<sup>v</sup>

### 9. Further help and guidance

- **Office of the Public Guardian:** for more information and advice on queries, see <http://www.publicguardian.gov.uk/index.htm> or call the Customer Services for advice, forms and booklets on 0845 330 2900.
- **Overview of mental health carers rights (England and Wales) and Mental Health Acts 1983 and 2007 guidance** on [www.carers.org/professionals](http://www.carers.org/professionals)
- **Making Decisions – a guide for family, friends and other unpaid carers:** a long, but clear leaflet which helps carers decide what to do when looking after someone who lacks capacity. See <http://www.carers.org/trustnet/articles/mental-health-carers-legislation,2077,CA.html>
- Local **Independent Mental Capacity Advocate (IMCA)** service: check with your local authority for details.

### Guidance last updated: Feb 09

**Disclaimer:** This document contains information about organisations, people and resources that have not been checked or vetted by The Princess Royal Trust for Carers. Some sources have been summarised. Before using any of the contacts, information or resources in this document, you **must** check it for safety/ reliability/ appropriateness. Advice in this document does not give a full statement of the law. It is intended for guidance only, and is not a substitute for professional advice. The Trust cannot accept any responsibility for loss or liability occasioned as a result of any person acting or refraining from acting on information contained in this document.

<sup>i</sup> From '**Making Decisions – a guide for family, friends and other unpaid carers**', available from the Office of the Public Guardian, [www.publicguardian.co.uk](http://www.publicguardian.co.uk)

<sup>ii</sup> Based on '**Making Decisions – a guide for family, friends and other unpaid carers**', available from the Office of the Public Guardian, [www.publicguardian.co.uk](http://www.publicguardian.co.uk). Carers will not be liable for their action provided they have a reasonable belief that the person lacks capacity and that the action they are taking is in that person's best interests. Carers should be clear about why they have made these decisions or taken these actions. If there is disagreement about what is in the person's best interests, for example between family members, carers should keep a note of their decisions and why they made them. Family, friends and unpaid carers do not have a duty to 'have regard' to the Code of Practice, but will do as Deputies under LPA or EPAs.

<sup>iii</sup> '**Mental Health Training Set for Mental Capacity Act**', p.14, available from the Office of the Public Guardian, [www.publicguardian.co.uk](http://www.publicguardian.co.uk)

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<sup>iv</sup> **‘Making Decisions – a guide for family, friends and other unpaid carers’**, available from the Office of the Public Guardian, [www.publicguardian.co.uk](http://www.publicguardian.co.uk)

<sup>v</sup> **‘Mental Health Training Set for Mental Capacity Act’**, p.41, available from the Office of the Public Guardian, [www.publicguardian.co.uk](http://www.publicguardian.co.uk)