

The Mental Capacity Act 2005

This leaflet is for relatives, carers and healthcare professionals who are involved in the care of individuals who lack mental capacity and who may need to assist or take part in decision-making for those individuals.

What is mental capacity?

Mental capacity is the ability to make decisions for yourself. People who cannot do this are said to 'lack capacity'. This might be due to illness, injury, a learning disability, or mental health problems that affect the way their brain works. It can be a temporary or permanent loss of capacity. To have **capacity** a person must be able to:

- understand the information that is relevant to the decision they want to make;
- retain the information long enough to be able to make the decision;
- weigh up the information available to make the decision;
- communicate their decision by any possible means, including talking, using sign language, or through simple muscle movements such as blinking an eye or squeezing a hand.

People should be assessed on whether they have the ability to **make a particular decision at a particular time**. The mental capacity of some people will fluctuate, e.g. there might be times when they are able to think more clearly and so make a valid decision about the particular options being put to them.

What is the Mental Capacity Act 2005?

The Mental Capacity Act 2005 is a law that protects and supports people who lack capacity. The Act applies to people aged 16 and over in England and Wales. It also provides guidance to support people who need to make decisions on behalf of someone else.

The Act covers important decisions relating to an individual's property, finances and health/social care. It also applies to everyday decisions, such as personal care, what to eat and what to wear. It can help support vulnerable people, their unpaid carers and healthcare professionals to make decisions, both now and in the future.

The 5 main principles of the Act

People who support or make decisions on behalf of someone who may lack mental capacity must follow five main principles:

1. Every adult has the right to make decisions for themselves. **It must be assumed that they are able to make their own decisions, unless it has been shown otherwise.**
2. Every adult has the right to be supported to make their own decisions – help and support should be provided to assist a person to make their own decisions and to communicate those decisions, before it can be assumed that they have lost capacity.
3. Every adult has the right to make decisions that may appear to be unwise or strange to others.

4. If a person lacks capacity, any decisions taken on their behalf must be in their best interests.
5. If a person lacks capacity, any decisions taken on their behalf must be the option least restrictive to the person's rights and freedoms.

Making decisions in a person's 'best interests'

Anyone making a decision on behalf of a person they believe to lack mental capacity must do so in that person's best interests. To do this, the decision maker must:

- not assume a lack of capacity or otherwise based on the person's age, appearance, condition or behaviour;
- consider if the decision can be postponed until the person has sufficient mental capacity to make the decision themselves;
- involve the person who lacks mental capacity in the decision as much as possible;
- find out the person's views (current or past), if possible, and take these into account;
- consider the views of others, such as unpaid carers and people interested in the person's welfare (this could include for example those who are involved in the individual's daily life), where appropriate, and take these into account;
- not be motivated by a wish to bring about the person's death if the decision relates to life-sustaining treatment.

Once the decision maker has considered the relevant information, they should weigh up all the points and make a decision they believe to be in the person's best interests. When the decision is related to medical care, the final decision rests with the clinician caring for the individual having taken into account the views of those interested in the person's welfare.

Planning for the future

Lasting Power of Attorney: The Mental Capacity Act 2005 introduced a new type of Power of Attorney that replaced the Enduring Power of Attorney (EPA). It is a legal document known as a Lasting Power of Attorney (LPA) and allows people to choose someone (the 'attorney') who can make decisions about their health and welfare, as well as their finances and property, if they become unable to do so for themselves. This is not to be used until the person has become unable to make decisions for themselves.

There are two types of LPA:

- **Property and affairs LPA** – this gives the attorney(s) the power to make decisions about the person's financial and property matters, such as selling a house or managing a bank account.
- **Personal welfare LPA** – this gives the attorney(s) the power to make decisions about the person's health and personal welfare, such as day-to-day care, medical treatment, or where they should live. Such Powers of Attorney must be registered at the Office of the Public Guardian to be valid. Visit www.gov.uk/office-of-public-guardian or email customerservices@publicguardian.gsi.gov.uk

Advance Decisions: An Advance Decision allows someone to specify the types of treatment that they do not want, should they lack the mental capacity to decide this for themselves in the future. This may include refusal of life-sustaining treatment. Valid advance decisions are legally

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binding and must be followed by health professionals, provided the treatment and circumstances set out by the Advance Decision apply to the situation.

Before the implementation of the Mental Capacity Act 2005, people could already make Advance Decisions (more commonly known as advance directives or living wills). However, the Act introduced a number of conditions that must be followed when making an Advance Decision in order for it to be valid. If someone has an advance directive from before 1 October 2007, they should check that it meets these more recent conditions if they want it to remain legally binding – particularly if it relates to refusing life-sustaining treatment. There are strict conditions that must be met for such an Advance Decision due to its importance. You can find out more about Advance Decisions by visiting <https://www.nhs.uk/Planners/end-of-life-care/Pages/advance-decision-to-refuse-treatment.aspx>

Deputies and the Court of Protection: Deputies are appointed to make decisions for people who lack the capacity to do so themselves. This applies particularly in situations where formal arrangements have not been made – for example, if a person loses capacity and has not set up a Lasting Power of Attorney or an Advance Decision. A Deputy is usually a friend or relative of the person who lacks capacity, but could also be a professional. To become a Deputy you must apply to the Court of Protection. Deputies must make decisions in the best interests of the person lacking capacity. These might be about property or finances, such as redeeming an insurance policy or selling a house.

The Court of Protection also has authority to make official decisions (called Orders) about any healthcare, welfare or financial matters.

For complex or ongoing financial decisions – or where a series of steps may be needed over a long period – the Court can appoint a deputy to make decisions. Again, the Deputy must always act in the best interests of the person who lacks capacity.

The Court of Protection does not usually appoint Deputies to make ongoing decisions about someone's health and welfare. These decisions can usually be made in the person's best interests by those providing care and/or treatment. If there is a disagreement as to what is in the person's best interests or the decision relates to specified serious medical treatment, it may be necessary to ask the Court to intervene. You do this by applying for what is known as a Court Order.

Safety measures

The Mental Capacity Act 2005 established some significant safety measures:

- **Court of Protection** – a Court that can make declarations about whether someone lacks capacity, and can make Orders or appoint Deputies who can act on behalf of someone who lacks capacity. The Court has the final say on most decisions.
- **Public Guardian** – a public official whose duties include registering Lasting and Enduring Powers of Attorney (LPAs/EPAs), supervising Deputies appointed by the Court of Protection and investigating concerns about the operation of a Registered Power of Attorney or Deputy. The Public Guardian is supported by the Office of the Public Guardian.

- **Independent Mental Capacity Advocates (IMCAs)** – professionals who help people without capacity to express their views and wishes and, if needed, speak for them about the decisions that are being taken on their behalf. IMCAs mainly become involved in decisions about serious medical treatment that is not urgent to save life, avoid serious deterioration/further damage (when the care is urgent, the medical profession will act in the patient’s best interests) or the person’s long-term accommodation where it is provided by the NHS or a local authority, and the person lacking capacity has no family or friend (or an unpaid carer) to be included in decision making. Local authorities and the NHS can also ask IMCAs to be appointed to help represent the person’s views and wishes on decisions that are based on safeguarding the person without capacity, if it would benefit them and be in their best interests.
- **Deprivation of Liberties Safeguards (DoLS)** – an amendment to the Mental Capacity Act 2005, DoLS has been introduced to ensure legal protection of a vulnerable person who is lacking in mental capacity. There is no single definition of ‘deprivation of liberty’ but in practice it will be the degree and intensity that the interventions such as use of restraint, giving medication forcibly, exercising complete control over an individual’s care and movements for a long time, making all choices and decisions on the person’s behalf are applied that will amount to an individual being deprived of their liberty.
- **Criminal offence of ill treatment or willful neglect of a person who lacks capacity** – a person found guilty of this offence may be liable for up to five years in prison.

The Code of Practice for the Mental Capacity Act 2005

The Code of Practice for the Act gives guidance on how the Act should work on a day-to-day basis. It provides case studies and explains in detail the key features of the law.

The following people have a formal duty to follow the Code of Practice:

- those working in a professional capacity;
- people receiving payment for work dealing with people who lack capacity;
- anyone appointed as an attorney under an LPA;
- a Deputy appointed by the Court of Protection;
- someone doing research covered by the Act.

Family, friends and other unpaid carers will find it helpful to use the Code for guidance when involved in making significant decisions for a person, e.g. about where they live.

Organisations who can provide further information

Alzheimer's Society 0300 222 1122 (helpline 9am–5pm weekdays, 10am–4pm Sat & Sun) info@alzheimers.org.uk alzheimers.org.uk	Office of the Public Guardian (OPG) 0300 456 0300 (customer services) customerservices@publicguardian.gsi.gov.uk www.gov.uk/office-of-public-guardian
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Court of Protection 0300 456 4600 (Textphone 020 7664 7755) www.gov.uk/court-of-protection	The Advocacy People 0330 440 9000 www.theadvocacypeople.org.uk/ info@theadvocacypeople.org.uk
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Please ask if you need this information in another language or format.

RBFT, Safeguarding Team, June 2013

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