

# Disability Law Service

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Offering free, confidential legal advice and  
representation for disabled people

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## **Mental Capacity**

# Mental Capacity

‘Capacity’ is the ability of a person to make decisions that may have legal consequences for themselves and/or for others affected by the decision.

The **Mental Capacity Act 2005** gives a legal definition of ‘mental capacity’ and is intended to protect and empower people who may not be able to make their own decisions, particularly about their health care, welfare or finances.

Where a person does not have capacity to make decisions, the law provides safeguards and protection, including giving limited powers to third parties to take decisions on their behalf. In cases where there is a real dispute about whether something is in the best interests of a person without capacity then an application can be made to the Court of Protection for it to decide the issue.

The **Mental Capacity Act 2005** provides a statutory framework to empower and protect vulnerable people who may not be able to make their own decisions. It makes it

clear who can take decisions in which situations, and how they should go about this. It also enables people to plan ahead for a time when they may lose capacity.

The Act is written in numbered sections. Here we look at the first six, which look at the principles of the Act, definitions of capacity, protections for people without capacity and for their carers.

## Section 1

### The basic principles underpinning the Act

1. 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;
2. The right for individuals to be supported to make their own decisions: people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
3. That individuals must retain the right to make what might be seen as eccentric or unwise decisions;
4. Anything done for or on behalf of people without capacity must be in their best interests; **and**
5. Anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

## **Sections 2 and 3**

### **The meaning of capacity and assessing someone's capacity**

The Act sets out (in section 2) a definition of a person who lacks capacity. It focuses on the particular matter to which the decision relates, not on any theoretical ability to make decisions generally.

#### **First Stage**

The Act makes it clear that the inability to make a decision must be caused by an impairment of, or disturbance in the functioning of, the mind or brain. This could cover a range of problems, such as psychiatric illness, learning difficulty, dementia, brain damage or even a toxic confusional state.

The Act also makes it clear that a lack of capacity cannot be established merely 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 capacity.

## **Second Stage**

The Act sets out (in section 3) the test for assessing whether a person is 'unable to make a decision' and therefore lacks capacity. Four reasons are given why a person may be unable to make a decision:

If they are unable:

1. To comprehend the information relevant to the decision;
2. To retain this information for long enough to make a decision;
3. To use and weigh it to arrive at a choice;
4. To communicate the decision in any way.

## **Section 4**

### **What is in the best interests of the person who lacks capacity?**

The Act confirms that everything that is done 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 in deciding what is in a person's best interests. A person can put their wishes and feelings into a written statement if they so wish, which the person making the determination must consider. Also, carers and family members have a right to be consulted.

## **Sections 5 and 6**

### **Liability for carers**

The Act makes it clear that, where a person is providing care or treatment for someone who lacks capacity, they can provide the care or treatment without incurring any liability (criminal or civil).

For example, by giving an injection or by throwing away old clothes. A carer will only be able to benefit from this provision if the other person lacked capacity and the carer was acting in that person's best interests. There is however a limitation on the protection provided for carers, as the Act makes it clear that 'restraint' is only permitted if the person using it reasonably believes it is necessary to prevent harm to the incapacitated person, and if the restraint used is proportionate to the likelihood and seriousness of the harm.

So, restraining somebody for a short time to prevent them seriously injuring themselves is covered, but restraining them to prevent them switching channels with the TV remote control is probably not covered.

# **Public bodies supporting the Mental Capacity Act 2005**

The Act created two public bodies to support the statutory framework, designed around the needs of those who lack capacity.

## **The Public Guardian**

The Public Guardian and their staff will be the registering authority for Lasting Powers of Attorney and deputies (see below). They will supervise deputies appointed by the Court and provide information to help the Court make decisions. They will also work together with other agencies, such as the police and social services, to respond to any concerns raised about the way in which an attorney or deputy is operating.

## **The Court of Protection**

The Court of Protection has jurisdiction in relation to the Act and will hear cases about finance, health and welfare matters relating to people who lack capacity to make particular decisions for themselves. So as well as having jurisdiction over the financial affairs of persons without capacity, the Court also deals with health and welfare matters relating to adults who lack capacity.

## **Acting on behalf of someone who lacks capacity**

The Mental Capacity Act 2005 deals with two situations where a designated decision-maker can act on behalf of someone who lacks capacity:

### **Lasting Powers of Attorney (LPA)**

The Act allows a person to appoint an attorney to act on their behalf if they should lose capacity in the future. The Act allows people to let an attorney make health and welfare decisions.

## **What is it?**

Creating a power of attorney is a legal process by which an individual gives another person or persons the power to decide what is done with their financial affairs and property or about particular health and welfare decisions. The person appointed is known as the 'attorney' and the person giving the power is known as the 'donor'.

## **Who can make an LPA?**

Anyone can make an LPA as long as they could, at the time, with the help of such explanation as given, understand the nature and effect of the power. An LPA should be made on a specific LPA form, available from the Court of Protection, or Legal Stationers.

1. The attorney can take authority over the donor's affairs if the donor becomes mentally unable to manage them for themselves.
2. The attorney will, in general, be able to do anything with the donor's property that the donor would be able to do him or herself.
3. The power will continue if the donor is, or becomes, mentally incapable. It can only be brought to an end by the Court of Protection.

## **Registering the LPA**

The attorney must register the LPA as soon as he has reason to believe that the donor is, or is becoming, mentally incapable of handling his or her own affairs. Full powers are not obtained until registration is complete.

## **Attorneys- what they can do and restrictions**

In order to be an attorney an individual must be at least 18 and not bankrupt. Donors can impose restrictions on the scope of the attorney's power or can give a general power. If an attorney is given general authority they are able to do everything the donor could have done e.g. sign cheques, pay bills, deal in shares etc.

## **Court appointed deputies**

The **Mental Capacity Act 2005** provides for a system of court-appointed deputies. Deputies will be able to take decisions on welfare, health care and financial matters as authorised by the Court. They will only be appointed if the

Court cannot make a one-off decision to resolve the issues.

### **Who and when to apply**

The applicant might be a relative, friend or professional, such as a solicitor, an accountant or an officer from a local authority. The person making the application can ask to be appointed themselves, or for someone else to be appointed. An application should be made if an individual ('patient'):

1. Is no longer able to manage their own affairs;
2. Has not made an LPA and is not mentally capable of doing so;
3. Has money or property that needs to be looked after (such as selling a house) or used for their benefit.

# Other Provisions to protect vulnerable people

## **Independent Mental Capacity Advocate**

An IMCA is someone appointed to support a person who lacks capacity but has no one to speak for them in connection with 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 IMCA in such decisions involving people who have no family or friends. The IMCA makes representations about the person's wishes, feelings, beliefs and values.

## **Advance decisions to refuse treatment**

The **Mental Capacity Act 2005** confirms that people may make a decision in advance to refuse treatment if they should lose capacity in the future. The Act makes clear that strict formalities have to be complied with: the decision must be in writing, signed and witnessed. In addition, there must be an express statement that the decision stands 'even if life is at risk'.

## **A criminal offence**

The Act introduces a new criminal offence of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years.

# Other provisions for the protection for those without capacity

## Appointeeship

An appointee is a person who is responsible for managing the benefits of another, if that person (referred to as a 'patient') is incapable of managing their own benefit matters. There is no need for an appointee if an LPA is in existence or the Court of Protection has appointed a deputy.

### How to Apply

Application is made on a prescribed form, available from the local benefits agency. Once the completed form has been received the benefits agency officer may visit the person, or ask for medical or other evidence to satisfy themselves that the person is no longer able to act for himself or herself.

## **Guardianship**

Section Seven of The Mental Health Act 1983 enables a guardianship order to be made where a person over the age of 16 is has a mental illness, severe mental impairment, psychopathic disorder or mental impairment and it is necessary in the interest of the welfare of the patient or for the protection of other persons that an order is made.

### **How is a guardianship order made?**

Guardianship takes effect when an application, based on two medical recommendations, is officially received and accepted by a local social services department. The application can only be made by an approved social worker or the person's nearest relative.

If you would like any further information on the issues discussed in this factsheet, or on any other issues related to mental capacity, please call Disability Law Service on 0207 791 9800.

This factsheet was drawn up with the assistance of the MS Society.

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For further advice on these matters please contact:

### **Disability Law Service**

Telephone: **020 7791 9800**

Minicom: **020 7791 9801**

Fax: **020 7791 9802**

Email: **advice@dls.org.uk**

Website: **www.dls.org.uk**

Or write to us at: 39 – 45 Cavell Street, London E1 2BP

Community  
Legal Service



advice<sup>UK</sup>  
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