

## **Mental Capacity Act 2005**

### **How It Could Affect You**

#### **Information for Families & Carers**

## **Introduction**

This information booklet is about the **Mental Capacity Act 2005 (MCA)** which came into force during 2007. The booklet is for anyone who helps to care for someone over 16 who is unable to make some or all decisions.

### **1. What is mental capacity?**

Mental capacity is the ability of a person to make decisions for himself / herself. This means that the person is able to:-

- understand information given to him/her
- retain that information long enough to be able to make a decision.
- weigh up the information available to make a decision.
- communicate that decision. This could be by any possible means, such as talking, writing, using sign language or even simple muscle movement such as blinking an eye or squeezing a hand.

### **2. What is the Mental Capacity Act 2005 (MCA)?**

The Act aims to protect people who cannot make decisions for themselves due, perhaps, to a learning disability or a mental health condition, for example Alzheimer's disease or for any other reason. It also gives clear guidelines for carers and professionals about who can take decisions in these situations.

There are five principles that need to be followed by anyone who is supporting or working with a person who lacks capacity.

- 1 All adults have the right to make decisions for themselves, unless it is shown that they are unable to make them.
- 2 People should be supported as much as possible to enable them to make their own decisions before concluding that they cannot make them.

- 3 People who have capacity may make decisions even though such decisions may appear unwise.
- 4 Decisions taken on behalf of people lacking capacity must be in their best interests.
- 5 The rights and freedom of people who lack capacity must not be restricted unnecessarily.

### **3. Why do I need to know about the Mental Capacity Act?**

You need to know about the Act because it:-

- clarifies the process for caring for your relative who may lack capacity;
- clarifies how decisions should be made on his/her behalf;
- sets out when you should be consulted about decisions made on his/her behalf
- sets out how your relative is protected when others make decisions on his/her behalf.

### **4. How would someone decide whether or not the person lacks capacity?**

Any assessment of capacity will look at the legal definition of mental capacity which is outlined in question 1, (above). The **Act** says that before anyone can act on someone's behalf, there must be a reasonable belief that he/she lacks capacity. No one can assume that a person lacks capacity because of age, appearance, behaviour or disability.

### **5. Who decides whether or not the person I care for lacks capacity?**

In many everyday cases that decision will be your responsibility as a Carer or a family member. However, where the decision is complex, a more formal assessment of the person's capacity may be needed. This may involve doctors or Health & Social Care professionals. In legal decisions, such as making a will, the solicitor concerned will decide whether he/she has capacity to make that decision.

### **6. How could I be involved in assessing capacity of the person I care for?**

You may be consulted by a professional about the person's capacity. You may also need to assess his/her capacity because you need to do something in order to care for him/her. To do this you have to refer the points outlined in question 1.

**7. How can I help the person I care for make decisions for himself / herself?**

You can help him/her by:-

- understanding that capacity is a concept applicable to specific issues and the particular time in question, not a blanket description that you can assume will always or never apply;
- giving more time and patience in explaining things;
- providing communication support, (if appropriate), and/or
- seeking help and support from an independent advocate and other professionals.

**8. Am I obliged to consult other people about things I have always done without discussing them with anyone?**

Yes, the Act is addressed to everyone – private individuals, public sector officers, paid carers, agencies and care homes. The obligation to consult is a wide one, covering anyone interested in the person's welfare and anyone they've asked to be consulted.

**9. Who will be consulted if the person I care for lacks capacity to make decisions?**

If he/she is unable to make a particular decision and has not made plans about this in advance, then someone else, such as you or a professional will be consulted. In these circumstances, he/she should still be involved in the decision-making process as much as possible. All actions and decisions must be taken in his/her best interests once a person is agreed to lack capacity in relation to a particular question.

**10. When should I expect to be consulted?**

The Act requires for any person making a decision for an incapacitated person to consult anyone caring for the person or interested in their welfare so as to inform the person's approach to deciding on best interests. There may be times when it is not practical and appropriate for the decision-maker to consult close family and friends, e.g. in emergency situations. When it is practical and appropriate, family and close friends will be consulted. You should not be asked to give consent on behalf of the person you care for.

**11. What happens if nobody can be consulted to make decisions on a person's best interests?**

If there is no one else who can be consulted, an Independent Mental Capacity Advocate (IMCA) will represent the person if he/she lacks capacity to make certain important decisions.

**12. How does the Act ensure that decisions taken on behalf of the person I care for are in his/her best interest?**

The Act provides a checklist of factors that must be considered in deciding what is in the best interests of a person lacking capacity. Even when you are not the best interests decision-maker for your relative or friend, each of you will be involved as much as possible in making decisions. He/she can also put his/her wishes and feelings into a written statement, which the person making the decision must consider.

**13. How does the Act ensure that the person I care for receives appropriate support from professionals if he/she lacks capacity?**

The Act is accompanied by a **Code of Practice**. All professionals, such as GPs, doctors, social workers, nurses and paid carers must have regard to the guidance in the **Code of Practice**.

**14. Can the person I care for still receive care or treatment if he/she lacks capacity?**

The Act gives people legal protection when they carry out certain types of actions to do with a person's care or treatment when lacking capacity, provided that they have assessed his/her capacity. These actions must be in your relative's or friend's best interests. The Act says nothing about the amount, level or quality of care or treatment services, but judicial review and other legal mechanisms exist for enforcing rights to care.

**15. What does the Act say about the use of restraint on a person who lacks capacity?**

Sometimes it is necessary to physically restrain a person. The Act allows this but only if it is needed to prevent the person coming to harm. However, any restraint has to be reasonable and in proportion to the potential harm. For example, you may prevent a person you are caring for from stepping out into a busy road if that person lacks capacity to understand the danger posed by traffic, but it would not be proportionate to stop them from ever going out into the outside world.

**16. How can the person I care for plan ahead in case he/she loses capacity in the future?**

He/she can either set out some decisions in advance or let other people know what he/she would like to happen if he/she loses mental capacity. The Act also allows the person to appoint someone else to make decisions for him/her in the future. This is called **Lasting Power of Attorney (LPA)**. The person he/she chooses is known as an Attorney, and can be a relative, friend or professional.

**17. What happens if I am already the Enduring Power of Attorney (EPA)?**

If you are already an attorney and the EPA has been registered because the person can no longer make financial decisions, then you just carry on as before. However, if the EPA has not been registered because the person is still able to make his/her own decisions, he/she can:

- destroy the EPA and make a finance and property LPA in its place;
- keep the EPA for finance decisions; and,
- in either case, make a separate LPA for health and welfare decisions.

**18. What happens if the person I care for has not planned ahead and has lost mental capacity?**

If this happens, then someone else has to decide for him/her as long as decisions are made in his/her best interests. Who that is would depend on the nature of the act or decision in question. The **Court of Protection**, can make orders or appoint a deputy to act and make decisions on behalf of a person who has lost capacity.

**19. What is the role of a Deputy?**

A Deputy makes any decisions about matters specified by the court on behalf of the person who lacks capacity. A Deputy will have to follow the principles of the **Act** and the **Code of Practice** and must always act in the person's best interests.

**20. How can I become a Deputy?**

If you wish to become a Deputy for someone you will need to apply to the Court of Protection. You must be 18 or over.

## **21. What is the Office of Public Guardian?**

It is a public office – a Public Guardian, supported by the **Office of the Public Guardian (OPG)**. It is responsible for the register of LPAs, EPAs and deputies. It supervises deputies and can arrange for Court of Protection visitors to visit you if you are a deputy and the person you are a deputy for, from time to time.

## **22. How does the Act protect the person I care for from ill-treatment or wilful neglect if he/she lacks capacity?**

The Act provides protection to keep a person who lacks capacity safe and prevent him/her from being harmed. This applies to anyone who works with or supports the person to make decisions, including attorneys and deputies. Since April 2007 it became a criminal offence to ill-treat or wilfully neglect a person who lacks capacity.

## **23. Does the Act allow a person to make an Advance Decision to refuse treatment?**

The Act has a number of rules as to form and content that must be followed when making an **advance decision** for them to be valid and applicable. If the person you care for has already made an **advance decision**, it must comply with the rules to be valid and applicable, particularly if it deals with life sustaining treatment.

## **24. Does the Act allow research to take place involving people who lack capacity?**

The Act allows this but sets out strict rules to protect people who lack capacity to consent to take part in research. The Act also makes sure the person's previous wishes are taken into account.

## **25. Where can I obtain further information about the Mental Capacity Act?**

More detailed guidance is available from:-

### **Office of the Public Guardian:**

<https://www.gov.uk/government/organisations/office-of-the-public-guardian>

**Tel: 0300 456 0300**

### **Civil Legal Advice**

<https://www.gov.uk/civil-legal-advice>

**Tel: 0345 345 4345**

## **NHS Wales**

<https://gov.wales/splash?orig=/topics/health/nhswales/mental-health-services/law/mentalcapacity>

## **The Alzheimer's Society:**

<https://www.alzheimers.org.uk/>

**Tel: 0300 222 1122**

## **Social Care Institute for Excellence**

<https://www.scie.org.uk/mca/>

This leaflet is also available in large print and Braille. Leaflets are also available in other languages and easy read formats. Please contact Aneurin Bevan University Health Board for further information on:

**Aneurin Bevan University Health Board**  
**Tel: 01633 234234**

**THIS LEAFLET GIVES ONLY BASIC INFORMATION AND  
IS FOR GUIDANCE ONLY**

Produced by the Gwent Mental Capacity Act Consortium in collaboration with the voluntary sector, and updated by Aneurin Bevan University Health Board on the 1 November 2018