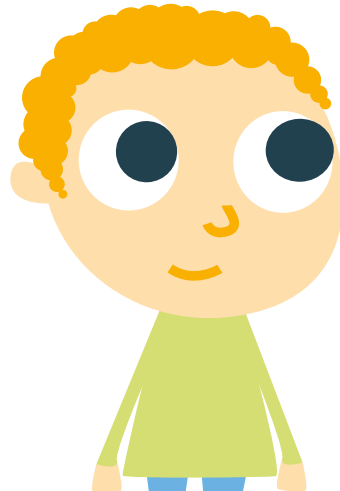


Wills and Trusts

Mencap's guide to the Mental Capacity Act 2005



Mental Capacity Act 2005

The Mental Capacity Act (MCA) is the statutory framework for people who may not be able to make their own decisions because of illness, a learning disability or mental health problems. It places a strong emphasis on supporting and enabling the individual to make their own decisions.

Key facts:

The Act was passed in 2005 and has been implemented in two stages in 2007 (April and October).

The Act will only affect people aged 16 or over.

New measures introduced include:

1. New Lasting Powers of Attorney, to govern financial, health and welfare decisions.
2. A new Independent Mental Capacity Advocate (IMCA).

3. A new Court of Protection.
4. A new public official called the Public Guardian.
5. A new criminal offence of ill-treatment or wilful neglect of a person who lacks capacity.

The 5 principles of the Act are:

1. All adults have the right to make decisions for themselves unless it is shown that they are unable to do so.
2. People should be supported as much as possible to make their own decision before anyone concludes that they cannot make their own decision.
3. People are allowed to make a decision that may seem to others to be an unwise or strange decision.
4. If a person lacks capacity, any decisions or actions taken on their behalf must be taken in their best interests.
5. People who lack capacity should not be restricted unnecessarily (in relation to their freedom and rights as a person).

Frequently asked questions

What is the definition of mental capacity?

The first question is: is there an impairment of, or disturbance in, the functioning of the person's mind or brain?

If so, the second question is: does the impairment or disturbance make the person unable to make the particular decision?

A person will be deemed to be unable to make a particular decision if they cannot do one or more of the following things:

- understand information given to them
- retain that information long enough to be able to make a decision
- weigh up the information available to make a decision
- communicate their decision by any possible means.

Every effort should be made to find ways to communicate with someone before deciding whether or not they have capacity.

What types of decisions are covered by the Act?

The types of decisions range from day-to-day decisions about things such as what to eat or wear, to serious decisions about where to live, finances and deciding to have an operation. It does not cover personal decisions such as marriage/civil partnership, divorce, sexual relationships, adoption and voting.

If a person has the capacity for one decision, does it mean they have capacity for all decisions?

No – the test is whether a person has the capacity to make a particular decision at a particular time. A person with a learning disability may lack the capacity to make complex decisions but this does not mean that they cannot decide what to do each day. People are allowed to make a decision that may seem to other people to be an unwise or strange decision.

Who decides if a person is deemed to lack capacity to make a decision?

The starting point for everyone is that they are assumed to have the capacity to make decisions for themselves. A family member/carer/health or care professional or other professional might need to then decide if a person has the capacity to make a particular decision. That person must have a “reasonable” belief that the person lacks capacity. The word reasonable is important, as capacity can change and a person can have capacity to make one decision and not another. It is for the person who is making the decision to decide what is a reasonable way to take account of this. For more information, please see the Mental Capacity Act Code of Practice, available via www.gov.uk/government/publications/mental-capacity-act-code-of-practice.

What happens if a person is deemed to lack capacity to make a decision?

If a person lacks capacity, actions can be taken or decisions can be made in the person’s best interests on their behalf by a decision-maker

(usually the carer responsible for the day-to-day care, or a professional such as a doctor, nurse or social worker).

The following must be taken into consideration when deciding on this:

- Can the decision be delayed in case the person can regain the ability to make the decision in the future?
- A person’s appearance, age, medical condition or behaviour cannot be an influencing factor
- All relevant information about the person needs to be considered, and this includes as much involvement with the person as possible
- A person’s wishes, feelings, values and beliefs must be taken into consideration the views of the person’s family members, carers and other relevant people who care for the person or are interested in the person should be taken into consideration
- Assumptions about the quality of a person’s life must not be made.

When should family members/carers be expected to be consulted?

Any person making a best-interests assessment will have to consult anyone who is caring for the person or interested in their welfare. However, this will depend on what sort of decision needs to be made and the circumstances as the decision-maker assesses them. For example, in an emergency situation it may not be possible to do so. If there is an Attorney or a Deputy appointed, they will have to be consulted.

What if a person has no-one to support them or act on their behalf?

Where there is no-one appropriate that can be consulted for decisions about serious medical treatment, changes in accommodation, care reviews or adult protection cases, the new Independent Mental Capacity Advocate (IMCA) service will be applicable to protect the rights of the most vulnerable. The advocate is there to represent and support the person who lacks capacity – they are not the decision-maker. It is the decision-

maker's duty to instruct the IMCA before making a decision (unless it is in an emergency, such as a doctor or a care worker).

All councils with social services responsibilities operate an IMCA service. The following link provides a list of IMCA providers in England:

www.scie.org.uk/mca/imca/find/

What are the duties of an IMCA?

The duties of the IMCA are to:

- support the person who lacks capacity and represent their views and interests to the decision-maker
- obtain and evaluate information
- ascertain the person's wishes and feelings, beliefs and values
- ascertain alternative courses of action
- prepare a report for the person who instructed them
- challenge any decisions made by the decision-maker.

What if a person wants to challenge the result of a decision on capacity and/or best interests?

The first port of call is to challenge the person who did the assessment, asking for a second opinion. Following this, involve an advocate who should be independent of all parties. After this, the route to follow will be local complaints procedures, mediation, a case conference and finally an application to the Court of Protection.

If it is decided a person lacks capacity, what actions can be taken on their behalf?

If a person has been assessed to lack capacity and it is deemed that certain actions would be in their best interests, the Act allows people to legally carry out these actions to do with the person's care or treatment.

The Court of Protection can appoint a Deputy to make decisions on a person's behalf on a long-term basis. This can be a relative, friend, carer or a professional such as a solicitor or Director of Social Services. An application will need to be made to the

Court of Protection. If no one is able to be a Deputy, the Court can appoint one from an approved panel. A deputy will be accountable to the Court for any decisions they make. The role is very similar to the role previously known as Receiver appointed by the Court – if a person is already a Receiver, they will be known as a Deputy for property and affairs from October 2007 onwards.

Can a person appoint someone to make their decisions for them in the future, when they lose capacity?

A Lasting Power of Attorney (LPA) is a new legal form which will allow a person to choose someone else (known as an “attorney” and can be a friend/relative or a professional) to manage their affairs on their behalf. A person with capacity over the age of 18 can make a LPA.

There are two types of LPA:

1. A property and affairs LPA, which will allow the attorney to make decisions about financial and property matters

2. A personal welfare LPA, which will allow the attorney to make decisions about health and personal welfare (but this can only take effect when a person lacks capacity to make decisions).

The LPA forms are available from the Office of the Public Guardian. Once completed, the LPA must be registered with the Office of the Public Guardian before it can be used, and a registration fee of £150 will be payable.

For more information, please go to www.gov.uk/government/organisations/office-of-the-public-guardian.

What if a person has already made an Enduring Power of Attorney (EPA)?

The new LPA will replace the EPA, but if a person already has an EPA (registered or not), nothing needs to change. They may wish to sign a new LPA if they still have capacity – this can be a personal welfare LPA, a property and affairs LPA, or both.

What if a person wants to make advance decisions about treatment?

An advance decision to refuse treatment allows a person to set out particular types of treatment they do not want should they lack the capacity to decide this for themselves in the future. An advance decision about life-sustaining treatment (to keep a person alive) may also now be made. This does not allow a person to ask for their life to be ended.

A person can also write down or tell people about their wishes and preferences about future treatment or care. These must be taken into consideration when determining what is in that person's best interests.

What is the Code of Practice?

The Act is supported by guidance in a Code of Practice. Certain people must have regard to it when they act in relation to a person who lacks capacity to make a decision – such as attorneys, deputies at the Court, IMCAs, doctors, social workers, solicitors and paid carers.

What changes are taking place at the Court of Protection?

The old Court has been replaced by a new Court which is a specialist court and will deal with all issues relating to the Act.

- There are new regional Courts all across the country – the Senior Judge will be based in London.
- The Court can make decisions about finances, property and health and welfare decisions and the Court can make one-off orders to deal with one-off decisions.
- The Court can make final decisions on capacity if there is uncertainty whether a person is able to make the decision in question.
- The Court is able to appoint deputies with ongoing authority to make decisions for a person who lacks capacity.
- The Court is able to remove the powers of an attorney or deputy who has not been acting in the person's best interests and put alternative arrangements in place.

Who is the Public Guardian?

The role of the Public Guardian is to protect people who lack capacity from abuse. Its role is to:

- register LPAs and EPAs
- support attorneys and deputies to do their jobs
- supervise the deputies appointed by the Court
- provide information to the Court
- give information and guidance to the public.

I am an appointee for a person who lacks capacity – what do I need to know?

If you are an appointee with the Department of Work and Pensions for someone who lacks capacity to make financial decisions, the appointeeship should be carried out in accordance with the Act. For example, decisions on how the person's money should be spent should be done according to the "best interests" principle.

For more information:

Further information on the Mental Capacity Act (MCA) can be found at **www.gov.uk/government/collections/mental-capacity-act-making-decisions**.