

The Mental Capacity Act 2005

The Mental Capacity Act received Royal Assent in 2005. However, it will not be brought into force until a statutory instrument is made bringing it into effect. It is currently anticipated that this will be April 2007.

The Act codifies much of the existing common-law and provides both a statutory definition for incapacity, a test for assessment of this and principles by which capacity issues are to be assessed.

As at present, where a person lacks capacity, care may be provided in accordance with their best interests. The Act provides statutory codification of the principles to be followed when caring for individuals in their best interests and addresses certain more complex care issues (on which see further below).

The Act also provides statutory authority for Advance Directives (also known as Living Wills and Advance Decisions). The Court of Protection is re-organised and a new form of Attorney (a Lasting Power of Attorney) is to replace the current Enduring Power of Attorney.

These notes are intended to provide a quick reference to the provisions of the Act and summary of its primary effects.

However, this document is only intended to be a summary and proper legal advice should be obtained before taking any actions based upon it.

Incapacity

- A person is assumed to have capacity unless it is established that he lacks capacity;

- Positive evidence is required that a person is unable to make a decision, so as to be regarded as incapable;
- There is a positive obligation to take steps to assist the person to make a decision:
“A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.”

Definition of Incapacity

- *“A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain”;*
- Capacity can fluctuate and a person can therefore lack capacity in relation to one matter but not in relation to another;
- Lack of capacity can not be established on the basis only of:
 - o Person’s age or appearance;
 - o A condition of his or aspect of his behaviour which might lead others to make unjustified assumptions about his capacity.
- Generally the Act only provides powers if the incapacitated individual is aged 16 or over.

The Act provides a Statutory Test for Capacity

- A person is incompetent if he is unable:
 - o To understand the information relevant to the decision;
 - o To retain that information;

- o To use or weigh that information as part of the process of making the decision; or
- o To communicate his decision (whether by talking, using sign language or any other means).
- No determination of capacity is to be made without the relevant information having been presented in an appropriate way to the individual concerned .
- The information relevant to a decision includes information about the reasonably foreseeable consequences of:
 - o Deciding one way or another; or
 - o Failing to make a decision.

Principles Regarding Persons who Lack Capacity

- A person is presumed to have capacity; S.1(2)
- A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success; S.1(3)
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision; S.1(4)
- An act done, or decision made, on behalf of a person who lacks capacity must be done, or made, in his best interests; s.2(5) (see also S. 4)
- Before any such act or decision is made, the person making or taking it must consider whether the purpose for which it is needed can be effectively achieved in a way that is less restrictive of the person's rights and freedom of action. S.1(6)

Best Interests

The English Common Law has recognised for many years that those who lack capacity may be treated in accordance with their best interests. The Mental Capacity Act now provides a statutory framework for that approach:

- Any determination of best interests should not be made merely on the basis of:
 - o A person's age or appearance; or
 - o A condition of his or an aspect of his behaviour which might lead others to make unjustified assumptions about what might be in his best interests.

Consideration must be given to:

- Whether the person is likely at some time in the future to have capacity in relation to the matter in question;
- If so, when that is likely to be;

- The person for whom the decision is to be made should be encouraged to be involved and participate as fully as possible in any decision or act done for him;
- Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death;
- Consideration should be given to the person's past and present wishes and feelings and the beliefs, values and any other factors that would be likely to be taken into account if the person had capacity;
- Take into account written statements made while the patient had capacity;
- Take into account if practicable and appropriate views of:
 - o Anyone named by the person as someone to be consulted;
 - o Anyone engaged in caring for the person or interested in his welfare;
 - o Any donee of a LPA.
- Any deputy appointed for the person by the court;
- Will have complied with the law if you reasonably believe that what you are doing is in the patient's best interests.

Care or Treatment of Incompetent Patients

When the Act comes into force the questions to be considered by those treating patients lacking capacity are:

- Is it clear whether patient lacks capacity? If not, what further steps need to be taken to ascertain the position?
- If patient lacks capacity, is it in patient's best interests for treatment to be undertaken taking account of, amongst other things, the patient's past and present wishes and feelings, and the beliefs and values that would have been taken into account if he had had capacity ?
- Is there a LPA, Advance Decision or Court Deputy involved?

Lasting Power or Attorney ("LPA")

The Act will bring into force the new Lasting Power of Attorney which is intended to replace the existing Enduring Power of Attorney. As now, the Lasting Power of Attorney is intended to continue to have an effect once the donor of the power loses the capacity to make his own decisions. However, the new LPA Power of Attorney has wider ramifications as it enables the power to make care decisions to be delegated (in addition to financial decisions as is the current position). It can thus act as a healthcare proxy.

Under a Lasting Power of Attorney:

- The donee will be able to make decisions about the donor's health and welfare should the donor become incompetent, if such a power is conferred;
- The donee will not be able to authorise the giving or refusing of consent to life sustaining treatment unless the LPA makes express provision;
- The donor of an LPA can revoke the powers provided by the authority at any time whilst he has capacity;
- The Bankruptcy of a patient revokes the power so far as it relates to the patient's property and affairs.

Advance Decisions

English Common Law has recognised advance directives for many years. Although the Lord Chancellor's Department had previously said that it was not necessary to enable legislation to confirm this, the Act has now broadly codified the common-law position in legislation.

Living Wills, advance directives or advance decisions (which are all terms for the same thing) are therefore now to be considered in the context of the statutory principles set out in the Mental Capacity Act, namely:

- Advance decisions can be made by someone of 18 years or over;
- Advance decisions can be withdrawn or altered at any time when the maker has capacity to do so;
- Advance decision need not be in writing to be valid;
- Withdrawal of an advance decision including partial withdrawal need not be in writing;
- Alteration of advance decision need not be in writing except relating to life sustaining treatment.

NOTE: - Where it is clear that an advance decision exists in writing, this should be attached to a patient's file.

When considering an advance directive and whether it governs a particular situation, it will be important to consider certain key questions, namely:

1. Did the maker of the AD have capacity at the time?
2. Has the maker of the AD done anything clearly inconsistent with the AD?
3. Has the maker of AD withdrawn the decision at a time when he had capacity to do so?
4. If patient has, under a LPA created after the AD was made, conferred authority on the donee to give or refuse consent to which the AD relates. If yes AD is not valid.
5. Is the AD applicable to the treatment concerned?

In some circumstances an advance decision will not be applicable to the treatment:

- If the treatment is not specified in AD;
- If any circumstances specified in AD absent;
- If there are reasonable grounds for believing that circumstances exist which the person lacking capacity did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them;
- Where the compulsory treatment sections of the Mental Health Act applies.

AD is not applicable to Life Sustaining Treatment unless:

- The decision is verified by a statement by the patient to the effect that it is to apply to that treatment even if life is at risk;
- The decision is in writing;
- It is signed by a patient or by another person in the patient's presence and by the patient's direction;
- The signature is made and acknowledged by the patient in the presence of a witness;
- The witness signs it or acknowledges his signature in the patient's presence.

Effect of Valid Advance Decision:

- If a patient has made a decision which is both valid and applicable to the treatment – the decision has effect as if it were made at the time the question arises;
- If there is doubt about the validity of the advance decision then the Court of Protection can determine issue;
- If there is doubt about the validity of an apparent refusal of treatment, life sustaining treatment can be provided while a decision is being sought from the Court.

Court of Protection Powers

- Welfare matters previously sent to High Court now to Court of Protection;
- The Court will have same powers as High Court;
- The Court will have power to request report from various bodies including local authorities and NHS bodies;
- The Powers of the Court will include:
 - o The making of declarations about a patient's capacity and the lawfulness of any act done, or yet to be done in relation to that person;
 - o Decisions about where an incapable adult is to live and what contact he may have with specified individuals;

- o Prohibition of contact with specified individuals;
- o Giving or refusing consent to, carrying out or continuing medical treatment;
- o Directions that someone else takes over responsibility for the person's health care.

General

The Act also deals with various general miscellaneous matters relating to individuals who lack capacity. These include:

A. Family Relationships

- Some decisions can never be made on behalf of patients:
 - o Consenting to marriage or a civil partnership;
 - o Consenting to have sexual relations;
 - o Consenting to a decree of divorce being granted on the basis of two years separation;
 - o Consenting to a dissolution order of a civil partnership being made on basis of two years separation;
 - o Consenting to a child being placed for adoption by an adoption agency;
 - o Consenting to the making of an adoption order;
 - o Discharging parental responsibilities and matters not relating to a child's property;
 - o Giving consent under the Human Fertilisation and Embryology Act 1990 S.27(1).

B. Research

- Intrusive research carried out on, or in relation to patients who lack capacity is unlawful unless it is carried out as a part of a research project approved by the appropriate body or appointed by the Secretary of State.

C. Independent Mental Capacity Advocates (IMCA)

- The Secretary of State is to make such arrangements so as to enable IMCA to be available to represent and support persons who do not have capacity and have no other appropriate person to consult concerning what would be in their best interests.
- The appointment of IMCA's only relates to the provision of:
 - o Serious medical treatment by NHS (regulations will define what type of treatment);
 - o The provision or change of accommodation in hospital or care home for patients by the NHS;
 - o The provision or change of residential accommodation by the Local Authority;
- Further Regulations (not yet published) will set out the exact functions of IMCAs but they will provide that the advocate will:
 - o Provide support to patients ensure that patients participates as fully as possible in any relevant decision;
 - o Obtain and evaluate relevant information in health records;
 - o Ascertain what patient's wishes would be likely to be;
 - o Ascertain if alternative courses of action are available to patients;
 - o Obtain alternative medical opinion where treatment is proposed and the advocate thinks one is required.

Guidance on the implementation of the Act is to be set out in the Code of Practice issued by the Lord Chancellor's Department which expands and illustrates the application of several of the issues dealt with by the Act.

RadcliffesLeBrasseur
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Legal Advice on issues relating to capacity and the implementation of this Act may be obtained from the company's solicitors, RadcliffesLeBrasseur on tel: 0207 222 7040.

Advice may also be obtained out of office hours on 07802 506306.