

Self-directed support

The Mental Capacity Act 2005

This fact sheet gives a brief introduction to the Mental Capacity Act 2005.

The Mental Capacity Act contains a lot of information and this fact sheet gives a very general overview of what it says. At the end of this fact sheet you will find a list of places where you can find out more detailed information.



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The basic facts

Mental capacity is the ability to make an informed decision based on understanding a given situation, the options available and the consequences of the decision. The law defines someone who lacks capacity to make a particular decision as someone who is unable to do one or more of the following four 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

The Mental Capacity Act 2005 for England and Wales provides the legal framework which allows people to act and make decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. It came into force in October 2007.

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

More information

There are five main beliefs behind the The Mental Capacity Act:

- Everyone is believed to have capacity to make decisions unless it can be proved that they do not.
- All appropriate help and support must be given to a person to help them make a decision before it is decided that they are unable to.
- A person should not be treated as unable to make a decision just because the decision they make is unwise or unusual.
- Any act or decision made on behalf of a person who lacks capacity must be done or made in their best interests.

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- Before any act or decision is made regard must be given as to whether it could be achieved any other way which maintains their basic rights and freedom of action.

The Act covers major decisions such as:

- Someone's property and financial affairs
- Healthcare treatment
- Where the person lives

It also covers everyday decisions such as:

- Personal care
- What the person eats and wears
- What to buy when going shopping

Some decisions are very personal, or are covered by other laws, and the Act does not cover these, for example:

- Decisions about family relationships, such as marriage, civil partnership, sexual relations, divorce or adoption
- Voting rights
- Decisions about treatment relating to mental health which are covered by the Mental Health Act 1983

The law says that a person's capacity must be assessed on a decision by decision basis. So you would never say that someone 'lacks capacity', you would say they 'lack capacity to make a particular decision'.

Before deciding that someone lacks the capacity to make a particular decision all practical and appropriate steps must be taken to help them make the decision themselves. The steps taken must also take into account a person's individual circumstances and needs.

- All the information needed to make a decision should be provided as well as information on all other alternatives.

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- Communicate with the person in a way that the person can understand e.g. simple sign language, visual aids.
- Use the most appropriate person to help communicate with the person e.g. a family member, support worker, interpreter, advocate, speech and language therapist.
- Make the person feel at ease, is there a particular time of day or place where they would feel more at ease?
- Put off making the decision until a time when circumstances are better for them.
- Use someone else to help the person make a decision or express a view once the information has been provided e.g. an advocate.

You can find out a lot more about how to communicate with people at www.mencap.org.uk/communication

You can read more about how to help people to make their own decisions, how capacity is assessed, and how to work out the “best interests” of a person in Mencap’s fact sheet on the Mental Capacity Act available at www.mencap.org.uk/document.asp?id=12726 or by visiting the Direct gov website www.direct.gov.uk/mentalcapacity. There is also lots of information on the SCIE website: www.scie.org.uk/publications/mca/index.asp

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What is a Lasting Power of Attorney (LPA)?

Sometimes one person will want to give another person authority to make a decision on their behalf. A power of attorney is a legal document that allows them to do so, and a decision this person makes is as valid as one made by the person. The person giving the authority is called the donor. The person who is given the authority to make decisions is called the attorney. Since 1985 this was called an Enduring Power of Attorney (EPA) and allowed the attorney to make decisions about property and financial affairs even if the donor lacked capacity to manage their own affairs.

The Mental Capacity Act replaces the EPA with the Lasting Power of Attorney (LPA) and increases the range of different types of decisions that people can allow others to make on their behalf.

An LPA allows you to choose someone now that you trust to make decisions on your behalf about things such as your property and financial affairs or health and welfare at a time in the future when you no longer wish to make those decisions or you may lack the mental capacity to make those decisions yourself.

An LPA can only be used after it is registered with the Office of the Public Guardian.

You can find out a lot more about making a Lasting Power of Attorney by visiting the Direct gov website
www.direct.gov.uk/mentalcapacity

What is the Court of Protection?

The Court of Protection is a specialist court which makes decisions for adults who lack capacity to make specific decisions for themselves. As well as decisions relating to property and affairs they can also deal with serious decisions relating to healthcare and personal welfare matters.

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In most cases decisions for a person who lacks capacity can be made using the basic principles of the Mental Capacity Act, and acting in 'best interests'. However an application to the Court of Protection may be necessary for:

- Particularly difficult decisions
- Disagreements that cannot be resolved in any other way
- Situations where ongoing decisions may need to be made about the personal welfare of a person who lacks capacity.

If there is a need for ongoing decision making powers and there is no relevant EPA or LPA the court may appoint a deputy to make these decisions. It will also state what decisions the deputy has the authority to make.

You can find out more about deputies in a factsheet produced by the Challenging Behaviour Foundation:

www.thecbf.org.uk/pdf/GettingLegalAuthoritytomakedecisionsmoneypropertyandwelfare.pdf

Anyone can apply to the Court for permission to put an application before the Court of Protection, but there may be a charge for making an application.

You can find out more at www.direct.gov.uk/mentalcapacity

What is an Independent Mental Capacity Advocate?

An Independent Mental Capacity Advocate (IMCA) is a service created by the Mental Capacity Act to help people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation and who are unbefriended ('unbefriended' means they have no family or friends, who it would usually be appropriate to consult about these decisions).

An IMCA works with and supports people who lack capacity, and represents their views to those who are working out their best interests.

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New crime of ill-treatment or wilful neglect

The Act has introduced two new criminal offences; ill treatment and wilful neglect of a person who lacks capacity to make relevant decisions. This applies to:

- Anyone caring for a person who lacks capacity e.g. family carers, healthcare and social care staff
- An attorney appointed under LPA or an EPA
- A deputy appointed for the person by the court.

Ill-treatment means deliberately ill-treating the person or being reckless in the way they were treating the person or failed to treat them. It does not matter whether the behaviour was likely to cause or actually caused, harm or damage to the victim's health.

Wilful neglect varies depending on circumstances, but usually means that a person has deliberately failed to carry out an act they knew they had a duty to do.

Concerns about someone who is having difficulties making decisions

If you know a family member, friend, neighbour or anyone who you think is having difficulties in making decisions about their finance and property or their personal welfare, then they may need someone to be appointed to make these decisions on their behalf. Find out more by visiting the Direct gov website www.direct.gov.uk/mentalcapacity

Concerns about abuse

If you know a vulnerable person that you believe is at risk or you feel that you might be being abused then it is very important to let someone know.

You may be worried that you are wrong or worried about the consequences of reporting it; however, it is important that you tell someone what you think is happening.

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A vulnerable person being abused may not be able to report the abuse they are experiencing and may rely upon you to voice your concerns and ensure that someone with the necessary experience and responsibility investigates the alleged abuse and takes steps to stop it happening.

If you think someone is being abused please act now - don't assume that someone else will do it.

See our fact sheet 16 on "Managing risks and safeguarding" or visit www.direct.gov.uk/mentalcapacity

An example

1. Rita and her husband Bill have three grown-up children and made their will about two years ago when Bill turned 60. Their solicitor had advised them each to appoint a Lasting Power of Attorney (LPA) in case either of them lost capacity in the future and they decided to appoint each other initially and their eldest son if something should happen to either one of them. Three months ago, Bill had a stroke and it left him unable to do much for himself. However, as the LPA was already in place it made sorting out Bill's affairs much easier and allowed the family to concentrate on supporting Bill to get better.
2. Read the story about how Sophie's mum and dad became Deputies in factsheet 25 on 'opening a bank account'

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Mencap has written a more detailed fact sheet available at
www.mencap.org.uk/document.asp?id=12726

Mencap have a Frequently Asked Questions (FAQ) about the
Mental Capacity Act: www.mencap.org.uk/document.asp?id=446

About the In Control and Me project

A three-year project to produce accessible information for everyone who wants to direct their own support, funded by the National Lottery through the BIG Lottery Fund. You can find out more at www.mencap.org.uk/incontrol or www.in-control.org.uk/icandme



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