

Who is affected?

1. The Act applies to all persons habitually resident or present in England and Wales and is likely to have the greatest impact on the following groups:
 - 700,000 people in UK with Dementia, projected to rise to 840,000 by 2010
 - 145,000 adults with severe & profound learning disabilities in England
 - 120,000 people in the UK suffering long term effects of severe head injury
 - Mental Illness: at some point in their lives:
 - 1% subject to schizophrenia
 - 1% subject to manic depression
 - 5% clinical depression

It applies to all adults aged 16 years and above (with one exception in relation to children under 16 who lack capacity and will continue to lack capacity in relation to their property and financial affairs when they reach 18 years. This may be referred to the Court of Protection to make a decision before the age of 16 years).

2. The Act is underpinned by a set of five key principles:

- **A presumption of capacity** – 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;
- **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;
- That individuals must retain the **right to make what might be seen as eccentric or unwise decisions**;
- **Best interests** - anything done for or on behalf of people without capacity must be in their best interests;
- Least restrictive intervention – anything done for or on behalf of people without capacity should be the **least restrictive of their basic rights and freedoms**

Two-Fold test: someone lacks capacity if they are unable to make a *particular decision* because of an *impairment of, or a disturbance* in the functioning of, the mind or the brain

What does the Act do?

3. The Act enshrines in statute, current best practice and common law principles concerning people who lack mental capacity and those who take decisions on their behalf. It replaces current statutory schemes for enduring power of attorney and Court of Protection receivers with reformed and updated schemes.

The Act deals with the assessment of a person's capacity and acts by carers of those who lack capacity

- **Assessing lack of capacity** – The Act sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. It is a ‘decision-specific’ test. No one can be labelled ‘incapable’ as a result of a particular medical decision or diagnosis. 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.
- **The fundamentals of the capacity test – the inability to make decisions due to:**
 - Unable to *understand* the information relevant to the decision
 - Unable to *retain* the information
 - Unable to *use* or *weigh* that information as part of the process of making the decision, or
 - Unable to *communicate* the decision
- **Best interests** – 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 his/hers wishes and feelings into a written statement of they so wish, which the person making the determination must consider. Also, carers and family gain a right to be consulted.
- **The fundamentals of best interests** – Consider all relevant circumstances including:
 - Possibility of future capacity
 - Permit participation or encourage improvement in ability to participate of person concerned in decision making about them
 - Take into account past and present feelings, beliefs and values likely to influence decision if had capacity
 - Take into account and if practicable consult with a range of identified persons
 - Consider any relevant statement made when the person had capacity
 - Not be motivated by a desire to bring about the person’s death when the decision relates to life-sustaining treatment
- **Acts in connection with care or treatment** – Where a person is providing care or treatment for someone who lacks capacity, and then the person can provide the care *without incurring legal liability*. The key will be proper assessment of capacity and best interests. This will cover actions that would otherwise result in a civil wrong or crime if someone has to interfere with the person’s body or property in the ordinary course of caring. For example, by giving an injection or by using the person’s money to buy items for them.
- **Restraint/deprivation of liberty**. The Act defines restraint as the use or threat of force where an incapacitated person resists and any restriction of liberty or movement whether or not the person resists. 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.
- However, restraint does **NOT** permit any act that *deprives* a person of *their liberty* within the meaning of Article 5(1) of the European Convention on Human Rights.
- The Department of Health and National Assembly for Wales have each issued interim advice to the NHS and local authorities on the implications of

the European Court of Human Rights judgement in HL v United Kingdom (the ‘ Bournemouth ‘ case), pending the development of proposals for new procedural safeguards for the protection of those people falling within the ‘ Bournemouth gap’. It is envisaged that a protective framework will be introduced within the impending new Mental Health Bill.

4. The Act creates two new public bodies to support the statutory framework, both of which will be designed around the needs of those who lack capacity
 - **A new Court of Protection** – The new Court replaces the previous Court of Protection and will have jurisdiction relating to the whole Act and will be the final arbiter for capacity matters. It will have its own procedures and nominated judges. In addition to dealing with decisions relating to property and finance as before, it will now also cover personal welfare (care and treatment) decisions, previously made in the High Court. The Court will make decisions in disputed or complex circumstances regarding:
 - a. whether a person has capacity or lacks capacity to make a specific decision or series of decisions
 - b. the lawfulness of acts done or proposed in relation to that person, including the failure to act
 - c. the validity of any lasting power of attorney or advance decision
 - d. the Court can appoint a deputy to make decisions regarding personal welfare and financial matters in relation to a person lacking capacity

Personal welfare decisions could include: where a person should live, prohibit contact with a named person and give or refuse consent to treatment etc. Financial decisions could include: control and management of property, execution of a will, discharge of debts and sale/acquisition of property. Neither of these lists is exhaustive.

- **A new Public Guardian** – The Public Guardian (PG) and his/her staff will be the registering authority for Lasting Powers of Attorney and deputies. 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. A Public Guardian Board will be appointed to scrutinise and review the way in which the PG discharges his/her functions. The PG will be required to produce an Annual Report about the discharge of his/her functions.
5. The Act deals with two situations where a designated decision-maker can act on behalf of someone who lacks capacity:
 - **Lasting Powers of Attorney (LPAs)**- The Act allows a person to appoint an attorney to act on their behalf if they should lose capacity in the future. This replaces the current Enduring Power of Attorney (EPA), and the Act also allows people to let an attorney make health and welfare decisions.
 - **Court Appointed Deputies** – The Act provides for a system of court appointed deputies to replace the current system of receivership and receivers in the Court of Protection. Deputies will be able to take decisions on

welfare, healthcare and financial matters as authorised by the Court but will not be able to refuse consent to life-sustaining treatment. They will only be appointed if the Court cannot make a one-off decision to resolve the issues.

6. The Act also includes three further key provisions to protect vulnerable people:

- **Independent Mental Capacity Advocate (IMCA).** An IMCA is someone appointed to support a person who lacks capacity but has no one to speak for him or her – and is therefore ‘unbefriended’. They need to be instructed by a decision maker to represent the person – they make representations about the person’s wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge the decision-maker on behalf of the person lacking capacity if necessary, including in extremis going to the Court of Protection. National minimum standards and regulations are to be circulated by the Department of Health (DoH), which has sent some initial guidance to local authorities in respect of commissioning the IMCA service at a local level by local authorities and health trusts. Some authorities may commission existing providers of advocacy services. Central Government has allocated £18,975 to City of York Council for the commissioning of an IMCA service.

The Local Authority is responsible for commissioning & implementing the establishment of an Independent Mental capacity Advocate service.

The IMCA has a clear role in supporting a person lacking capacity and legal authority to examine records (NHS, local authority, care home etc), obtain second medical opinions for treatment decisions, amongst a range of powers.

- The Local Authority is responsible for commissioning & implementing the IMCA service. The government grant for York is £18975 and is to provide a service covering City of York Council boundaries. This Authority will jointly commission this generic service with North Yorkshire County Council, given its 24/7 remit
- The regulations (MCA) requires advocates to have both advocacy & IMCA training.
 - A wide range of staff will be required to assess people for capacity from home care/care assistants to care managers etc etc
 - Independent Mental Capacity Advocacy (IMCA) services will be locally commissioned by local authorities with PCT partners and must be in place by 1 April 2007
 - The Government has estimated that the demand for IMCA services in each LA area per week will be 1.5 x care home decisions, 1 x serious medical treatment review plus care review & adult abuse situations. The York IMCA will need to provide a service for patients & residents within the 3 local independent hospitals and for residents in nursing & residential care homes, including those people who do not originate from York.
 - A legal duty is placed upon social services to refer cases to the new Independent Mental Capacity Advocacy service in certain situations: this will include for example those people who have no relative to speak for them: the unbefriended lacking capacity see p5 IMCA

- Local authorities and NHS bodies are placed under a **legal duty to instruct an IMCA** under certain circumstances, where the person concerned has been assessed as lacking capacity. These include:
- A local authority proposing to **provide** or to **change** a person's **residential accommodation for more than 8 weeks continuously** (under specifically named legislation: Section 21 or 29 National Assistance Act 1948 or section 117 of the Mental Health Act 1983 and as a result of the local authority acting under Section 47 of the NHS & Community Care Act 1990. Obligations imposed by the Mental Health Act to provide accommodation is excluded) AND the person has no relative, friend, nominated individual, LPA etc who is appropriate to consult in determining the person's best interest.
- NHS bodies are under the same duty in respect of proposing **serious medical treatment** or to proposing to provide **accommodation in hospital for more than 28 days or in a care home for more than 8 weeks etc.** (There are some exceptions listed in the Act)
- The role of the IMCA has been recently extended to include attending reviews of unbefriended and incapacitated people who have been in **a care home or hospital for longer than 12 weeks.**
- **Advance Decisions to refuse treatment** – Statutory rules with clear safeguards confirm that people may make a decision in advance to refuse treatment if they should lose capacity in the future. It is made clear in the Act that an advance decision will have no application to any treatment that a doctor considers necessary to sustain life unless strict formalities have been complied with. These formalities are that the decision must be in writing, signed and witnessed. In addition, there must be an expressed statement that the decision stands ' even if life is at risk '.
- **New 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.

7. The Act also sets out clear parameters for research

- Research involving, or in relation to, a person lacking capacity may be lawfully carried out if an ' appropriate body ' (normally a Research Ethics Committee) agrees that the research is safe, relates to the person's condition and cannot be done as effectively using people who have mental capacity. The research must produce a benefit to the person that outweighs any risk or burden. Alternatively, if it is to derive new scientific knowledge it must be of minimal risk to the person and be carried out with minimal intrusion or interference with their rights
- Carers or nominated third parties must be consulted and agree that the person would want to join an approved research project. If the person shows any signs of resistance or indicates in any way that he or she does not wish to take part, the person must be withdrawn from the project immediately. Transitional regulations will cover research started before the Act where the person originally had capacity to consent but later lost capacity before the end of the project.

Code of Practice

8. Whilst the Act sets out the legal framework, the Code of Practice provides guidance and information for those acting under its terms and applying its provisions on a daily basis. It incorporates good practice around the situations that can arise when caring or working with those who lack capacity, including family members, professionals and carers. It describes their responsibilities and focuses on those who will have a legal duty of care to a person lacking capacity and explains how the legal rules set out in legislation will work in practice.

The following categories of people are under a **duty** to have regard to the Code:

- People working in a professional capacity e.g.: doctor or social worker
- People who are receiving payment for work in acting in relation to the person without capacity e.g.: care assistant working in a residential care home for people with learning disabilities
- Anyone who has Lasting Power of Attorney
- Deputy appointed by the Court of Protection
- Independent Mental Health Advocate
- Anyone carrying out approved research

The draft Code is available on the DCA website at <http://www.dca.gov.uk/menincap/legis.htm> (under ' Mental Capacity Bill and supporting documents '). *It should be noted that the Code is **180 pages**.*

9. Interaction with Other Legislation

- **Children Act 1989**

The Mental Capacity Act and the Children Act have an overlap for the 16 – 18 age range and the Court will decide which is the most appropriate Act to use. The Mental Capacity Act is particularly appropriate in cases where there is an expectation that capacity in an individual will not be regained or attained on reaching 18 years of age and The Lord Chancellor has the power to transfer the proceedings to the most appropriate court.

- **Mental Health Act 1983**

An individual may be affected by both the Mental Capacity Act 2005 and the Mental Health Act 1983 simultaneously in some circumstances. This will more likely affect those people with dementia or severe learning disability who are detained in hospital under the Mental Health Act. If decisions about someone's medical care or treatment (not treatment for mental disorder) and the person is assessed as lacking capacity under the Mental Capacity Act (MCA), then the MCA could be applied to them to make a best interests decision. However, the Mental Health Act will override the MCA on decisions concerning treatment for mental disorder.

- **Enduring Powers of Attorney Act 1985**

This Act will be repealed and *lasting powers of attorney* will replace *enduring powers of attorney*. Any enduring powers of attorney made under the 1985 Act will continue to have effect.

- **New Mental Health Bill**

It is anticipated that a clause will be included regarding the Bournemouth case (see p3 restraint), which will provide a protective framework and in effect, act as an amendment to the Mental Capacity Act 2005

10 Limitations of the ACT

The Act does **not** allow decisions to be made for a person lacking capacity in any of the following areas:

- Consent to marriage or civil partnership
- Consent to sexual relations
- Consent to divorce or dissolution of marriage or civil partnership (following 2 years separation)
- Consent under the Human Fertilisation & Embryology Act 1990
- Consent to a child being placed for adoption or consent to making an adoption order
- Discharge of parental responsibilities in areas not connected to a child's property
- The Act does **not** allow another person to vote on behalf of someone who lacks capacity