

MAKING DECISIONS AND PLANNING FOR THE FUTURE



Image by David Stocks

HOW THE MENTAL CAPACITY ACT 2005 CAN HELP YOU



Produced and published by the Mental Capacity Act Project
Commissioned by Dudley, Walsall and Wolverhampton CCGS



Notes:

PLANNING FOR THE FUTURE

Anyone can lose capacity– it may be due to an injury or ill health whether temporary or permanent

We can all use the Mental Capacity Act to make sure our views and wishes about our care are clear if we are unable to express them ourselves at any point.

This leaflet contains information about-

- **The Mental Capacity Act**
- **Guiding principles**
- **Capacity assessments**
- **Mental Capacity Act Myths**
- **Planning for the future -Lasting power of attorney**
- **Planning for the future -Advance Decisions**
- **Advocacy**

For Further information-

Office of the Public Guardian

PO Box 16185

Birmingham B2 2WH

T 0300 456 0300 (customer services)

E customerservices@publicguardian.gsi.gov.uk

www.gov.uk/opg

SCIE –Mental Capacity Act Information

www.scie.org.uk

www.empowermentmatters.co.uk

Mental Capacity Act code of practice:

www.gov.uk/government/publications/mental-capacity-act-code-of-practice

Contact details for local advocacy services

Voiceability advocacy 01902 255015 email im-ca@voiceability.org

Dudley Advocacy 01384 456877 info@dudleyadvocacy.org

POHWER Tel 0300456 2370 or email at pohwer@pohwer.net

Mental Capacity Act

WHAT IS THE MENTAL CAPACITY ACT?

The Mental Capacity Act is a law that came into force in 2007.

This Act applies to everyone over the age of 16 in England and Wales.

The Act is designed to protect and empower people who lack capacity to make a decision because of an impairment in the functioning of their mind or brain.



WHAT IS CAPACITY?

Mental capacity is the ability to make a specific decision at a specific time.

HOW CAN THE MENTAL CAPACITY ACT HELP?

This law states that any decision made on behalf of a person who lacks capacity to make their own decision- must always be in the person's best interests.

The Act gives adults over 18 years old practical systems that can be used to plan for the future.

This booklet provides information about the Act including common myths and explains how the Act can be used to plan for the future.

The Mental Capacity Act Principles-*Protecting your right to make decisions*

The Mental Capacity Act (MCA) is based on five key principles.



Every adult has the right to make decisions for themselves. It must be assumed that they are able to make their own decisions, unless it has been shown otherwise.



Every adult has the right to be supported to make their own decisions. Help and support should be given to assist a person to make their own decisions.



Every adult has the right to make decisions that may appear to be unwise to others.



If a person lacks capacity, any decisions taken on their behalf must be in their best interests.



Any decisions taken on behalf of a person who lacks capacity must be the least restrictive of their rights and freedoms, while still providing the required treatment and care.

Your rights- their responsibilities

The Act requires everyone using it to stick to these principles when delivering care to someone who lacks capacity. The Act provides protection to those applying it – **only** if they can show that they kept to the principles and assessed capacity/ made decisions in accordance with the Mental Capacity Act Code of Practice.

Independent Mental Capacity Advocate

The Mental Capacity Act 2005 introduced the role of the

Independent Mental Capacity Advocate (IMCA).IMCAs are a legal safeguard for people who lack the capacity to make specific important decisions: including making decisions about where they live and about serious medical treatment options.

IMCAs are mainly instructed to represent people where there is no one independent of services, such as a family member or friend, who is able to represent the person.

Independent Mental Health Advocates

Independent Mental Health Advocates were introduced into the Mental Health Act 2007 as a statutory right for people detained under the Mental Health Act.

Access to an IMHA is a statutory right for people detained under most sections of the Mental Health Act, subject to Guardianship or on a community treatment order (CTO).

IMHAs are independent of mental health services and can help people obtain information about and understand

- Their rights under the Act
- The particular parts of the Act which apply to them
- Any medical treatment that they are receiving or might receive

ADVOCACY



Advocacy means getting support from another person to help you express your views and wishes, and to help make sure your voice is heard. Someone who helps you in this way is called your advocate.

Advocacy services help people – particularly those who are most vulnerable in society to:

- access information and services
- speak out about issues that matter to them
- be involved in decisions about their lives
- explore choices and options

Many local councils fund local advocacy services, to find out if there are any in your area, you can contact your local council.

Statutory Advocacy

In some circumstances, you may be legally entitled to a professional advocate, such as an Independent Mental Health Advocate (IMHA) or an Independent Mental Capacity Advocate (IMCA).

The capacity test is-

1. Is there an Impairment of the brain affecting decision making? **and**
2. Is the Impairment sufficient to Impact on the person's ability to make the decision?

Can the person **Communicate** the decision?

Can the person **Understand** the decision?

Can the person **Retain** what has been discussed?

Can the person **Balance** (weigh up) the information?

If the answer is no to any of the above, the person lacks capacity to make that decision at that time

Any decision made on behalf of someone who lacks capacity must be made in **their** best interests. Section 4 of the Mental Capacity Act 2005 sets out what factors need to be considered when making best interest decisions.

MYTHS AROUND THE MENTAL CAPACITY ACT

Although the Act came into force in 2007 there are still a lot of misconceptions about the Act. Here are some common myths-



MYTH 1

My spouse/family/friend can make decisions on my behalf if I lack capacity

You cannot consent or refuse treatment on behalf of an adult in England and Wales unless you are a valid registered Lasting Power of Attorney (LPA) for health and welfare or are a court appointed deputy for that person. This pack has more information on Lasting Power of Attorneys on page 10.



WHAT AN ADVANCE DECISION CANNOT DO

An advance decision cannot be used:

- To refuse treatment when the person still has the capacity
- To demand specific medical treatment. No one can insist on being given treatment that healthcare professionals consider clinically unnecessary/futile
- To refuse treatment for a mental disorder if detained under the *Mental Health Act 1983*
- To refuse basic care that is essential to keep them comfortable, e.g. washing
- To refuse the offer of food or drink by mouth. They can refuse being given food or fluid by tube, (artificial nutrition and hydration, as this is a form of medical treatment
- To refuse measures such as pain relief that simply aim to keep them comfortable
- To ask for anything that is against the law such as euthanasia

PLANNING FOR THE FUTURE



If you prepare an advance decision according to the requirements of the Mental Capacity Act 2005 and it is found to be **valid** and **applicable** to the current circumstances, medical professionals providing your care are bound to follow your wishes.

Professionals can provide treatment they believe is in your best interests if they are in doubt over the existence, validity or applicability of an advance decision. The Mental Capacity Act 2005 Code of Practice explains in more detail how doctors should decide if an advance decision is valid and applicable.

If you want to make a decision about refusing certain medical treatment in the future, it is advisable to discuss this with your GP. A GP can help you understand the consequences, advantages and disadvantages of what you are proposing. A GP can help you phrase your wishes, so you don't make unclear statements that raise doubts about its applicability in the future.

MYTH 2

Mental Capacity Act only applies to those with a mental illness

The Act applies to anybody who is unable to make a decision and not just to those who have mental health problems. It may be something as simple as losing capacity as a result of a reaction to an infection.

MYTH 3

Enduring powers of attorney are always valid

Enduring Powers of Attorney (EPA) were replaced by the property and financial Lasting Power of Attorney in 2007. An EPA that was signed and witnessed before October 2007 can be used. But if you lose mental capacity, for the EPA to be valid the attorney must register the EPA.



MYTH 4

If I've made an advance decision to refuse treatment it will always apply

An advance decision to refuse treatment should be as recent as possible; there must be evidence that it has been reviewed regularly and consistent with your current lifestyle. At the point of making the decision the doctor in charge of treatment will also consider whether there are any new development in that treatment that the person hadn't anticipated when they made the advance decision to refuse treatment.

There is more information on advance decisions to refuse treatment on page 12 of this guide.



MYTH 5

Only a Doctor can assess capacity

The person assessing capacity will be the person who is directly involved at the time the decision needs to be made, and who is proposing the care intervention. Different people will be involved in assessing someone's capacity at different times. E.g. a care worker might need to assess if the person can agree to be bathed. A district nurse may assess if a person can consent to having a dressing changed.

ADVANCE DECISIONS



An advance decision cannot refuse actions that are needed to keep a person comfortable (sometimes called basic or essential care). Examples include warmth, shelter, actions to keep a person clean and the offer of food and water by mouth.

Anyone who has made an advance decision is advised to regularly review and update it as necessary.

A valid and applicable advance decision to refuse treatment is as effective as a refusal made when a person has capacity-

Valid - this means you must have been over 18 and had mental capacity to make the advance decision at the time you made it. Doctors must be sure that you have not withdrawn it or clearly done something that goes against it and so suggests you've changed your mind.

Applicable - In order for the advance decision to be applicable, the wording has to be specific and relevant to the medical circumstances. If the wording is vague or there is a concern that it does not refer to medical conditions and/or practices that you are actually experiencing, then the advance decision may not influence the doctors' decisions at all.

PLANNING FOR THE FUTURE

The Mental Capacity Act gives us the opportunity to make decisions now about specific treatments that we may not want to receive in the future.

This is called an Advance Decision to Refuse Treatment

The purpose of an advance decision is to ensure that, if you are not able to make treatment decisions yourself in the future, you are not forced to receive treatment that you would not want.

You must be 18 years old or older to make an advance decision and you must have capacity to make the advance decision at the time it was made.

MAKING AN ADVANCE DECISION TO REFUSE TREATMENT

Advance decisions can be verbal or in writing- but if the decision is about refusing life sustaining treatment- it must be in writing ,must be signed dated and witnessed.

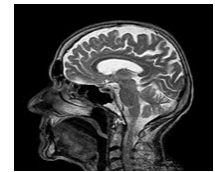
An advance decision must:

- state precisely what treatment is to be refused, a statement giving a general desire not to be treated is not enough
- may set out the circumstances when the refusal should apply, it is helpful to include as much detail as possible
- will only apply at a time when the person lacks capacity to consent to or refuse specific treatment.

MYTH 6

If I make a property and finance Lasting Power of Attorney I will immediately lose control of my finances.

Your Lasting Power of Attorney cannot be used until it has been registered with the Office of Public Guardian. You retain full control and the attorney can only act on your behalf if you specifically authorise them to do so or if you lose capacity. The Lasting Power of Attorney must always act in your best interests and in accordance with the principles of the Mental Capacity Act. There is more information on attorneys on page 10.



MYTH 7

The Mental Capacity Act only applies to people with dementia

There are lots of conditions where capacity to make decisions may be lost, such as serious stroke, brain injury or physical impairment- not just dementia. Everyone should consider appointing an attorney regardless of their age and/or medical conditions. It is not advisable to leave it until a diagnosis of any type has been made as you may not have the capacity to appoint a Lasting Power of Attorney.

In the absence of an attorney your family may be able to apply to the courts for appointment of a court deputy, but this is a lengthy and expensive process.

Planning for the Future- Lasting Powers of Attorney

HOW TO APPOINT A LASTING POWER OF ATTORNEY

Step 1-Choose your attorney-You can choose one or more people to be your attorney. If you appoint more than one, you must decide whether they'll make decisions separately or together.

Step 2- Access the Office of the Public Guardian (OPG) online service to create your LPA or phone them on 0300 456 0300.

The web page for the Office of the Public Guardian is available on the gov.uk website. You can access guidance and all the LPA forms on this website.

Step 3- Complete and sign the required forms and put them in the post.

FEES, REDUCTIONS AND EXEMPTIONS

There is a fee for the registration of each LPA. Information on the current fee plus information on who qualifies for a fee reduction/exemption- can be found at the Office of the Public Guardian website or by phoning 0300 456 0300. The fee can be paid online or by cheque. If you need further help and guidance on the application process contact the office using the number given above or email them at customerservices@publicguardian.gsi.gov.uk.

WHO CAN BE YOUR ATTORNEY?

Your attorney can be anyone 18 or over, such as a relative or a friend, or a professional, e.g. a solicitor. You must appoint someone who has the mental capacity to make their own decisions.

PROTECTING YOUR INTERESTS

Your attorneys must always act in your best interests and follow any instructions you give them about making decisions. If there are any concerns that an attorney is not acting in a person's best interests- these concerns must be reported to the Office of the Public Guardian who will investigate the concerns raised.

In serious cases the Office of the Public Guardian will refer the matter to the court and the court has the power to cancel the Lasting Power of Attorney.

COURT DEPUTIES

Only someone with a legal power can manage another person's finances. If someone loses capacity to make decisions about property and affairs without having made an LPA or EPA, you will need to apply to the Court of Protection to become their deputy in order to be able to manage that person's finances on their behalf.

It is possible to become a person's deputy for health and welfare decisions. The Court of Protection does not usually appoint deputies to make continuing decisions about someone's health and welfare unless regular treatment or supervision is needed, for example with a younger person.

Professionals and family members should work together to make decisions in the person's best interests but if there is a disagreement or the decision relates to specified serious medical treatment, it may be necessary to ask the court to intervene.

Further information on deputies can be found on the gov.uk website.