

Why was this Act needed?

Making the right decisions on behalf of those unable to do so for themselves is vitally important. All of us are at risk of losing our mental capacity or decision making ability, perhaps because of a traffic accident or due to a stroke or some other catastrophic illness.

For some people episodes of mental illness may mean that they lose their ability to make decisions in the way that they would when well. The old law on this subject was complicated, out of date, full of gaps and provided too little protection either for people lacking capacity or their carers. The new Act was passed in 2005 but so far has only been partly implemented. It relates only to England and Wales. Scotland has its own legislation: the Adults with Incapacity (Scotland) Act 2000. The approach in Northern Ireland is currently governed by common law.

How does the Act affect me?

These are the main provisions:

- All of us will be able to appoint someone to make decisions on our behalf if we lose capacity in the future. This will be called a 'Lasting Power of Attorney' (LPA). This is like the old Enduring Power of Attorney (EPA)* but the Act allows people to let an attorney make health and welfare decisions as well as financial. People with fluctuating conditions like schizophrenia might find it particularly useful.
- A new Court of protection will be able to appoint someone to make these decisions if there is no LPA.
- Independent **M**ental **C**apacity **A**dvocates (IMCAs) will be able to speak on behalf of someone who has nobody else to speak for them if there are important decisions to be made about medical treatment or moving into residential care.
- All of us (provided we have the necessary capacity) will be able to make an advance decision to refuse treatment (but this will not apply if treatment is being given under the Mental Health Act).
- It will be an imprisonable offence to ill-treat or neglect someone who lacks capacity.
- Informal carers or professionals will generally be protected from possible legal action for providing care and treatment within reason. This means that giving a necessary injection to someone who is unable to consent would not be regarded as assault.

How has the law changed?

Until recently the law covering England & Wales did not define who does and who does not have the capacity to make decisions. Also it was not at all clear who had the legal right to take day-to-day decisions about the health care, general welfare and sometimes the finances, of those lacking mental capacity. The old legal provisions on mental incapacity were limited mainly to financial matters like receivership under the Court of protection for people with capital or property, or appointeeship for people receiving benefits. Elsewhere countries like Scotland, Canada and Australia have had incapacity legislation for some time.

What changes does the new Act make?

The Mental Capacity Act 2005 makes it clear who can take decisions in which situations and how they should go about this. It also enables people to plan ahead for a time when they may lose capacity. It's based on 5 principles:

- 1) 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.
- 2) 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.
- 3) Individuals must retain the right to make what might be seen as eccentric or unwise decisions.
- 4) Best interests – anything done for or on behalf of people without capacity must be in their best interests; and
- 5) Least restrictive intervention – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

How is mental capacity assessed?

The Act sets out a test for assessing whether a person has the capacity to take a particular decision at a particular time. It is a 'decision-specific' test, concerned only with the decision which has to be made and not whether the person's judgment has been affected in other matters. For example someone may be quite capable of making some decisions about some matters like buying their weekly groceries but unable to deal with large sums of money or consent to a necessary operation. The test is in 2 stages; firstly it has to be determined whether the person's ability to make decisions is impaired or disturbed and then whether the impairment or disturbance is so great that they lack the necessary judgment to make a particular decision. No one can be labelled 'incapable' as a result of a particular medical condition or diagnosis e.g manic depression. But someone who is mentally ill but unable to understand their condition and accept treatment might be regarded as lacking capacity in this respect.

How are best interests decided

Everything that is done for or on behalf of a person who lacks capacity must be in that person's best interests. This is likely to have to be determined according to individual circumstances. If the person has put his/her wishes and feelings into a written statement in advance, the person making the determination must take it into consideration. Also carers and family members gain a right to be consulted.

Providing care

Where a person is providing care for someone who lacks capacity, then the carer can do so without incurring legal liability. For example they could not be sued for using the person's money within reason to buy necessary items.

Restraint/depriving someone of their liberty

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 & seriousness of the harm.

How does the new legislation fit with the Mental Health Act?

The Mental Health Act 1983 can be used to treat someone with medication even if an advance refusal is in place.

The Government has used the amending legislation to the 1983 Act to change the Mental Capacity Act in order to deal with the 'Bournewood' problem. This arose when the European Court of human rights ruled that it was illegal to detain incapacitated patients who were not objecting without using the Mental Health Act. The case concerned a man with severe learning difficulties who was being held in Bournewood hospital under the common law, which does not allow any right of appeal against detention. In cases like this, the hospital or care home will have to ask a supervisory authority (the local PCT in England) to authorise the detention.

New powers and roles

The Act introduces:

- **Lasting Powers of Attorney (LPAs)** which allow a person to appoint an attorney to act on their behalf if they should lose capacity in the future.
- **Court appointed deputies** - The Court of protection will be able to appoint deputies if there is no LPA in place. The deputies, usually relatives or close friends, will replace the receivers appointed under the old system. Unlike receivers, they will be able to take decisions on welfare and healthcare as well as financial matters.
- **A new Court of protection with regional offices** which, as well as appointing deputies, will have the final decision where there are disputes and will supervise implementation of the new legislation.
- **A new Public Guardian** – The Public Guardian and his/her staff will register LPAs 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.
- **Independent Mental Capacity Advocate (IMCAs)** - an IMCA is someone appointed to support a person who lacks capacity but has no one, like a friend or relative, to speak for them. The IMCA makes 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.
- **Advance decisions to refuse treatment** – people may make a decision in advance to refuse treatment if they should lose capacity in the future. But if the person is detained under the Mental Health Act, doctors will be able to overrule the advance directive if they think it's clinically necessary to do so.

Because some people thought that the new legislation might legalise euthanasia, it is made clear in the Act that an advance decision will not apply to any treatment which a doctor considers necessary to sustain life, unless the decision is in writing, signed, witnessed and makes clear that the decision is to apply even if there is a risk of death.

- **New criminal offence** - The Bill introduces a new criminal offence of ill-treatment or neglect of a person who lacks capacity. A person found guilty may be liable to imprisonment for a term of up to 5 years.
- **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.

A Code of Practice has been published to explain how the Act should work in practice.

The Office of the Public Guardian (OPG) is responsible for introducing the new arrangements and supports the work of the Court of Protection.

What's missing from the new arrangements?

Rethink would like to have seen improvements to the system of appointeeship run by the Department of Work and Pensions. This allows someone to deal with the benefits of a person who cannot manage to do so. But this is not covered in the new law. Neither is there anything to help with the very difficult problems which arise when someone, whose judgment has been affected by mental illness, borrows a lot of money which they are unable to repay.

Further information about the new Act

This is available at <http://www.dca.gov.uk/menincap/legis.htm> together with regulations and the Code of Practice.

* Existing EPAs will continue and will not need to be replaced with LPAs.