

## A SUMMARY OF THE MENTAL CAPACITY ACT 2005

### Introduction

The Mental Capacity Act 2005 sets out a statutory framework for acting and making decisions on behalf of people aged 16 years and over who lack the mental capacity to act or make such decisions for themselves. It sets out principles and mechanisms for making welfare decisions, health care decisions and financial decisions for people without the capacity to make their own decisions. It also makes it clear as to who can make decisions on their behalf, 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.

The parts of the Act which cover involvement of IMCAs (see below) and criminal offences came into effect on 1 April 2007; the remainder of the Act came into force on 1 October 2007.

### 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 can conclude that they cannot make their own decisions;
- **That individuals must retain the right to make what might seem as eccentric or unwise decisions;**
- **Best interests** – anything done for or on behalf of people without capacity must be in their best interest;
- **Least restrictive intervention** – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedom.

### What acts and decisions are not covered ?

There are certain decisions which can never be made on behalf a person who lacks capacity , either because they are so personal to the individual concerned or because they are governed by other legislation. These include:-

- Decisions concerning family relationships – including consent to marriage or civil partnership, sexual relationships, divorce, placing a child for adoption, taking over parental responsibility for a child or consent to fertility treatment;

- Decisions to give or to consent to treatment for mental disorder of people who are liable for detention and treatment under the Mental Health Act 1983;
- Decisions on voting or casting a vote at an election or a referendum on behalf of a person lacking capacity to vote. Who is affected by the Act ?

### **Who is affected by the Act?**

The provision for decision making or taking action under the Act will affect people over 16 years who lack capacity to make their own decisions as a result of an impairment of, or a disturbance in the functioning of the mind or brain.

The Act also sets out fundamental legal rules that apply to everyone working with and/or caring for people who lack capacity, including family members, professionals and other carers.

The rules also apply to people appointed in a formal capacity to act as an attorney or deputy for a person lacking capacity.

### **What does the Act do?**

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 powers 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 condition or diagnosis. Section 2 of the Act makes it clear that 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.
- **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/her wishes and feelings into a written statement if they so wish, which the person making the determination must consider. Also, carers and family members gain a right to be consulted.
- **Acts in connection with care or treatment** - Section 5 clarifies that, where a person is providing care or treatment for someone who lacks capacity, 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.** Section 6 of 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.

**The Act deals with two situations where a designated decision-maker can act on behalf of someone who lacks capacity. Both LPAs and Court appointed deputies will not begin operating until October 2007.**

- **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 is like the current Enduring Power of Attorney (EPA), but 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 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.

**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. These bodies will come into operation in October 2007.**

- **A new Court of Protection** - The new Court 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.
- **A new Public Guardian** - The Public Guardian and his/her staff will be the registering authority for 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. A Public Guardian Board will be appointed to scrutinise and review the way in which the Public Guardian discharges his/her functions. The Public Guardian will be required to produce an Annual Report about the discharge of his/her functions.

**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 them (i.e. no friends or family). 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 - 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 which 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 express statement that the decision stands "even if life is at risk".

- **A criminal offence** - The Bill 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.

### **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.

### **The Code of Practice**

There is a Code of Practice to accompany the Act, providing guidance to those working in a professional capacity with and/or caring for adults who lack capacity. For example, Attorneys, Deputies, IMCAs, professionals and paid carers all have a duty to follow the Code. The full Code of Practice can be viewed on the Department of Constitutional Affairs website –

[www.dca.gov.uk/menincap/legis.htm#codeofpractice](http://www.dca.gov.uk/menincap/legis.htm#codeofpractice)

### **Implementation in Cambridgeshire**

Operational instructions for relevant staff to use are currently being developed. A comprehensive training programme has been offered to staff since April 2007 and continues to be available.

### **Further Information**

The Mental Capacity Implementation Programme produces regular updates on the Act. You can subscribe at [makingdecisions@dca.gsi.gov.uk](mailto:makingdecisions@dca.gsi.gov.uk)  
The Department for Constitutional Affairs website has a great deal of detailed information about the Act including the Code of Practice and its implementation. The address is [www.dca.gov.uk/menincap/legis.htm](http://www.dca.gov.uk/menincap/legis.htm)

