

Mental Capacity Act 2005

A brief guide for providers of Shared Lives
and other community services



Contents

Introduction	4
Part 1 – Why the Mental Capacity Act matters	5
The Mental Capacity Act	5
The five key principles	5
Why care providers need to know about the Act	5
The key points of the Act for care and treatment	6
Part 2 – Mental capacity	7
Lacking capacity to make a decision – what it means	7
Can the person understand the information relevant to the decision?	7
Can the person retain the information long enough to take the decision?	8
Can the person use or weigh the information in order to make the decision?	8
Can the person communicate their decision?	8
Deciding whether someone lacks capacity to make a decision	9
People must be assumed to have capacity to make their own decisions	9
Giving people help and support to take their own decisions	9
Everyone is allowed to make unwise decisions	10
Part 3 – Acting in someone’s best interests	11
The best interests checklist	11
Is the person likely to have capacity to make the decision themselves later? If so, can the decision wait until the person can take it themselves ?	11
How can the person be helped and encouraged to take part in the decision?	12
What are the person’s wishes and feelings about the decision? What values, beliefs and other factors would they take into account if they were taking the decision themselves ?	12
What do family, friends and other people say about these things and what do they think is in the person’s best interests?	13

Is there a less restrictive alternative?	15
The purpose of the best interests checklist	15
Relying on existing care plans	15
Keeping records of capacity and best interests decisions	16
Part 4 – Limits on what can be done in someone’s best interests	17
Restraint	17
Deprivation of liberty	18
People who can give and refuse permission on behalf of someone who lacks capacity	18
Lasting powers of attorney	19
The Court of Protection	19
Court-appointed deputies	20
Advance decisions to refuse treatment	20
Part 5 – Other things care providers need to know about the Act	21
Independent mental capacity advocates	21
Public Guardian’s Office	21
Money and contracts	21
Offences	22
Code of Practice	22
Further information	23

Winterbourne View Joint Improvement Programme

The Winterbourne View Joint Improvement Programme (JIP) was established to help local areas develop health and care services that enable people with learning disabilities and/or autism who have mental health conditions and / or behaviour that challenges to live locally in community-based settings.

Standards of care for people with learning disabilities and / or autism have received renewed public attention following a number of high profile cases, including those found at Winterbourne View hospital. This guidance was commissioned by the JIP in partnership with the Care Provider Alliance (CPA), to support providers in applying the Mental Capacity Act so that the legal rights of those who may lack capacity are upheld and that the individual is at the heart of decision-making.

While the work of the JIP is focused on people with learning disabilities and / or autism, the Act applies to a wider range of individuals. This guidance is therefore relevant to any provider of community services for individuals who may lack capacity.

Introduction

This is a brief guide to the main points of the Mental Capacity Act 2005 for providers of shared lives, supported living and similar schemes.

As this guide is aimed at the providers of community services, for simplicity it uses “care provider” to mean the people and organisations responsible for organising and managing services and “paid supporters” to mean all the individuals involved in providing support as part of those services. We are using this term to include a range of people, including shared lives carers, as well as support staff working in supported living and similar community-based schemes.

It is important to note that this in no way replaces or minimises the vital role played by family carers - relatives, friends and others who provide unpaid support to people - including the part they play in best interest processes under the Mental Capacity Act.

Part 1 briefly explains what the Mental Capacity Act is, and why care providers need to know about it.

Part 2 explains what mental capacity means, and how to decide if someone lacks capacity to take a particular decision.

Part 3 explains what it means to act in the best interests of someone who cannot make a decision themselves, and how to think through what the person’s best interests are.

Part 4 explains the main limits on what can be done in someone’s best interest.

Part 5 sets out some other important aspects of the Act that care providers need to know about.

Part 1

Why the Mental Capacity Act matters

The Mental Capacity Act

The Mental Capacity Act is the main law in England and Wales about adults¹ who lack mental capacity to make some or all of their own decisions, and how those decisions can be made instead.

The Act is based on the idea that adults, whatever their disability, have the right to take their own decisions about their lives, including decisions about their care and support. Where necessary, they should be helped and supported to make their own decisions.

Only if they genuinely lack the mental capacity to take a decision for themselves, should the decision be made by someone else. And even then they must be involved as much as possible. Any decision made, or action taken, on their behalf must be made in their best interests.

Lacking mental capacity means being unable to make a decision because of a problem with the mind or brain².

The five key principles

The Act has five key principles:

- first, people must be assumed to have capacity to take a decision unless it is shown they do not
- second, people must not be treated as lacking capacity to take a decision unless they have first been given practical support to take the decision themselves

¹ Most of the Mental Capacity Act applies to people aged 16 or over, but some parts only apply to people who are 18 or over. In this guide, “adult” includes young people aged 16 and 17 unless otherwise stated.

² The Act uses the phrase “an impairment of, or disturbance in the functioning of, the mind or brain”.

- third, people must not be treated as lacking capacity just because they make an unwise decision
- fourth, anything done, or any decisions taken, for people who lack capacity must be in their best interests
- fifth, thought must always be given to whether there is a less restrictive way of doing what needs to be done.

Why care providers need to know about the Act

People with disabilities or who are seriously ill may need help and support with their lives, but they still have the right to make their own decisions.

Providing care and support for adults can involve doing many everyday things which need their permission, like:

- washing, dressing or feeding them
- helping them into or out of bed or the bath, or
- brushing their hair, putting on make-up or touching them in any other way.

Other things that need permission include:

- going into their home
- handling their personal possessions (to clean or tidy, for example)
- using their money to buy things they need
- dressing their wounds or giving them medicine
- taking them to the doctor, to a hospital, or anywhere else

- stopping them going somewhere for their own safety, or insisting on going with them
- reading their post or emails
- sharing information about them with their family or friends, or paid supporters.

Paid supporters who do things like these without permission could be breaking the law – because every adult has the right to decide about these things for themselves.

But, by definition, people who lack capacity to decide whether something should be done for them cannot give their paid supporters permission to do it – because giving permission means making a decision.

That is where the Mental Capacity Act comes in. Among other things, it sets out how care and treatment can still be provided without breaking the law.

So legally the Act is central to the way that care is provided for people who cannot make their own decisions. And the law requires care providers registered with the Care Quality Commission to have proper arrangements in place to make sure their services follow the Act.

The key points of the Act for care and treatment

For care providers, the most important parts of the Mental Capacity Act are those about treatment and care.

Most importantly, the Act says that if an adult lacks capacity to give permission, another person can normally still do things to care for them without breaking the law, as long as:

- they have taken reasonable steps to make sure the person lacks capacity to give permission
- they reasonably believe the person does indeed lack capacity to give permission
- they reasonably believe what they are doing is in the person's best interests;
- they do not use too much restraint
- they do not deprive the person of their

liberty without proper approval

- they do not go against the wishes of anyone who is legally allowed to refuse permission on the person's behalf, and
- where medical treatment is involved, they do not go against an advance decision made by the person themselves.

“Reasonably believe” means that the person has good reasons for what they think, based on what they already know or can find out in the time available.

The rest of this guide briefly explains what “lacking capacity”, “best interests”, “restraint”, and “advance decision” mean, who may legally give and refuse permission on another person's behalf, and what steps paid supporters need to take in order to comply with the Act.

It also explains that special steps must be taken where someone has to be “deprived of their liberty” to get the care they need.

Finally, it also briefly explains some other important aspects of the Act which care providers need to know about, including independent mental capacity advocates (IMCAs) and the Code of Practice.

Part 2

Mental capacity

Paid supporters need to know whether the people they are supporting have the mental capacity to make decisions for themselves.

If they have capacity to make decisions about their care, paid supporters may be breaking the law if they do things without their permission. But if they do not have capacity, paid supporters may need to decide themselves what to do in their best interests.

Lacking capacity to make a decision – what it means

The Act is about people who are unable to make a decision because of a problem with their mind or brain which means they lack the capacity to do so.³ This could be because of a disability, an illness, an injury or even the temporary effects of medication, drugs or alcohol. (The Act is not about people who simply find it hard to make decisions, or prefer not to make them.)

The Act says that someone lacks capacity to make a decision if they cannot:

- understand the information they need to make the decision
- retain that information long enough to make the decision
- use or weigh that information in order to reach a decision
- communicate their decision in any way.

It may be obvious that someone lacks capacity to make a decision. A person who is unconscious, for example, clearly cannot make any decisions.

³ The Act uses the phrase “an impairment of, or disturbance in the functioning of, the mind or brain”.

In all other cases, there are four key questions to think about, as follows. If the answer to any of the questions is “no”, the person lacks capacity to take that decision.

Each of the questions must be asked about the specific decision that needs to be taken – because people may have capacity to take one decision, but not another. They must also be asked at the time the decision needs to be made – because people’s capacity to take decisions can change. Even if someone cannot take a decision at one time, they may be able to take it at a different time.

Can the person understand the information relevant to the decision?

To have capacity to make a decision, a person needs to understand, at least in broad terms, what the decision is about and what is at stake.

In particular, they need to understand enough about the likely result of deciding one way or another, or of not taking the decision at all.

For example, someone is deciding how to go to the library to return a book. They need to understand they have two choices – they can walk, or they can take a bus (the decision). They need to understand that if they walk they will get wet, because it is raining, but that if they take the bus it will cost them the bus fare (the likely result of deciding one way or the other). They also need to understand that if they don’t make up their mind, they won’t be able to go to the library and may get a fine for not returning the book on time (the likely result of not taking the decision at all).

People do not need to be able to understand every possible aspect of a decision. They just need to understand enough to be able to take a sensible decision (even if they then take a poor or unwise decision). So a person deciding whether to buy a lottery ticket needs to understand that it is a game of luck and that they may lose their money, but they don't need to understand the exact odds.

It is enough that people can understand an explanation given in an appropriate way – for example, using simple language or visual aids. For example, people do not need to be able to take in all the detail in the information leaflet that comes with their medicine, if they can understand a simple explanation from their doctor of what the medicine is for, why it might help them, and about the possible side-effects.

Can the person retain the information long enough to take the decision?

Some people may be able to understand information briefly but not be able to remember it long enough to use it to make a decision. Or they may not be able to remember enough of the information to make the decision.

For example, someone who has problems with their short-term memory may be able to remember how many tablets to take each day and why it is important not to take too many. But if they immediately forget taking the tablets each time, they do not have all the information they need to decide whether to take some more, unless there is someone who can remind them.

People only need to remember information long enough to make the decision. They don't have to be able to remember it afterwards, and they can use any aids they need to help them remember.

Can the person use or weigh the information in order to make the decision?

Some people may be able to understand all the information that matters, but not be able to weigh up the different pieces of information to make a decision.

This could be because of a problem with the way their brain works. Some types of brain damage can make people act impulsively, for example. In other words, they cannot stop themselves doing things before they have weighed up the information that matters.

Or it could be because of a particular thought or belief. Someone who believes they have super-human powers, for example, may not be able to take a decision about whether to do something risky. Even though they understand what the risks are for anybody else, they cannot weigh up that information because they believe the risks do not apply to them.

It could also be because of a very strong feeling or emotion. Occasionally, for example, people can be so terrified of needles that it stops them being able to take a sensible decision about whether to have an injection, even though they understand why it might be a good idea.

Can the person communicate their decision?

Finally, the person must be able to communicate their decision. This does not need to be in words. Very few people who are able to make a decision cannot communicate it at all. It can be by any means. For some people it may be by the expression on their face, or by giving a thumbs up or thumbs down sign, or by blinking for example. There may be specially trained people who can help where people do not use words to communicate.

Deciding whether someone lacks capacity to make a decision

As long as they can answer the four questions set out above, there is no particular procedure that paid supporters must use to decide whether someone has capacity to take a decision.

For everyday decisions, paid supporters can normally rely on what they themselves know about the person.

But for more important or complicated decisions, or where the paid supporters is not sure, they should think about getting advice from a professional who is skilled at assessing mental capacity.

In all cases, paid supporters need to bear in mind the first three key principles of the Act, as follows.

People must be assumed to have capacity to make their own decisions

The first key principle is that people should always assume someone has the capacity to make a decision, unless they have a good reason to think they don't.

Paid supporters should not assume someone is unable to make a decision just because of their age or appearance, or because they have a particular illness or disability. It is never enough to say things like "he has dementia, so of course he can't make his own decisions", or "this decision is too difficult for someone with her type of learning disability". Everyone is different, and every decision is different.

Remember, too, that the question is always whether the person can take the particular decision in question. Paid supporters should not assume that someone cannot take one decision just because they cannot make another one.

Someone who is unable to make a few big decisions may well still be able to make many smaller decisions. A person with Alzheimer's disease may have reached a point where they can no longer decide for themselves whether they can live on their own without help, for example, but that does not automatically mean they cannot still decide what to eat, whether they want to go out, or whether to buy new clothes.

Nor should paid supporters assume that someone is unable to make a decision just because they could not make a similar decision before. Some people are more lucid at some times of day than at others, for example. Or a person might have been unable to take a decision when they were very ill, but can now they have recovered a bit.

Giving people help and support to take their own decisions

The second key principle is that people cannot be said to lack capacity unless they have first been given help and support to take the decision themselves.

Exactly what kind of help and support is appropriate depends on the person and on the particular decision, including how important or urgent it is. (The Act says that "all practicable steps" must be taken.)

Appropriate help and support includes giving the person information in the way they are most likely to understand.

This may mean explaining things as simply as possible, perhaps more than once or in different ways. It may mean using the person's first language, if it is not English.

For bigger decisions, some people find written information easier to understand and remember, others prefer to be spoken to. Some like both. Some people find pictures and visual aids useful.

Giving information may mean using actions as well as words. Rather than just asking someone which coat they want to wear, for example, it may be more appropriate to show them their two coats, so they can see what they are being asked about.

Some people find it helpful to use systems like Makaton to help them understand and talk about things. Some people have ways of communicating which are special to them and which only the people who know them best understand.

Appropriate help and support may also mean asking a relative, friend or an advocate to help the person make their decision, or letting the person themselves ask for advice from someone else.

It may mean waiting until a better time, or until they are in a place where they feel more secure (their own space, rather than in front of other people, for example). It may involve patiently explaining the decision to them on several different occasions, and perhaps several different ways.

People should never be pressured or rushed into a decision. Wherever possible, they should be helped and supported to decide in their own time. Some people may need longer than others, and some decisions may take longer than others.

If someone lacks capacity to take a decision at the moment, paid supporters should think about whether they can be helped to learn how to take it in future. With time, and the right support, they may be able to take decisions for themselves they could not before. There are adults with learning disabilities who were not at first able to make decisions about having sex, for example, but who have been helped to learn how to do so.

Everyone is allowed to make unwise decisions

The third key principle is that someone cannot be assumed to lack capacity just because they make an unwise decision.

Adults are allowed to make decisions that other people disagree with. They have the right to take risks. They also have the right to decide not to take a decision if they don't want to.

Paid supporters should not assume that someone lacks capacity to take a decision just because they disagree with it, or think it is silly or dangerous.

Sometimes, unwise decisions may be a reason to think about whether the person lacks capacity, because they may suggest the person is having trouble making decisions. But they are not enough on their own to show the person lacks capacity.

Equally, paid supporters should not assume that someone has capacity just because they agree with them.

Part 3

Acting in someone's best interests

If a paid supporter reasonably believes that someone lacks capacity to make a decision about their care they can normally still do things to care for the person without breaking the law, as long as they also reasonably believe it is in their best interests.

The best interests checklist

Best interests can be described as what is best for the person, all things considered.

When thinking about what is in someone's best interests, paid supporters must not base their decision just on the person's age, the way they look, their behaviour or what kind of illness or disability they have.

Paid supporters need to think about all the relevant circumstances. That means everything relevant the paid supporters know about the person and the situation, or can find out in the time available.

In addition, the Act says there are certain things paid supporters have to do and think about in particular. These steps are called the "best interests check-list".

Summary – the best interests checklist:

- is the person likely to have capacity to make the decision themselves later? If so can the decision wait until the person can take it themselves?
- how can the person be helped and encouraged to take part in the decision?
- what are the person's wishes and feelings about the decision? What values, beliefs and other factors would they take into account if they were taking the decision themselves?
- what do other people say about these things and what do they think is in the person's best interests?
- is there a less restrictive alternative?

Is the person likely to have capacity to make the decision themselves later? If so, can the decision wait until the person can take it themselves?

Before deciding what (if anything) to do in another person's best interests, paid supporters must first think about whether the person is likely to be able to make the decision themselves later.

For example, if they are too ill to make a decision, are they likely to recover? If they

are too confused to make a decision, will they be less confused once they have taken their medicine, or had a chance to relax? If they are sedated, can the decision wait until the sedation wears off?

If the decision can wait until the person can make it themselves, it may be in their best interests to let it wait, because that way they will be able to decide for themselves.

Of course, there will be cases where it is better not to wait, for example, if someone needs medical treatment urgently.

But paid supporters should never do something without the other person's permission just because it is more convenient for the paid supporters to do it now rather than wait for them to be able to decide for themselves.

How can the person be helped and encouraged to take part in the decision?

Paid supporters must not decide that someone lacks capacity to make a decision unless they have first been given help and support to make the decision themselves (see Part 2).

But even if they cannot make the decision themselves, the Act says they still have a right to be involved as much as they can be. So paid supporters need to help and encourage them, as far as practical, to take part in the decision.

For example, someone with severe learning disabilities might not be able to understand that they need to wear warm clothes because they are going somewhere cold, but they can still be helped to choose between their different sweaters.

What are the person's wishes and feelings about the decision? What values, beliefs and other factors would they take into account if they were taking the decision themselves?

Paid supporters must think about the person's wishes and feelings, both past and present.

Some people write down their wishes on particular topics in case they later lose capacity to take decisions themselves, or speak to their paid supporters about what they do (and do not) want to happen in future.

More often, paid supporters will need to go by things like:

- what the other person has decided to do in the past when they could make a similar decision for themselves
- how the other person reacted to similar situations in the past – did they seem happy or unhappy with what was done?
- how the other person is reacting now – what are they saying, what are they doing, what is the look on their face?
- what other people can tell them about the other person's wishes and feelings (see below).

It is important to remember that wishes and feelings do not just mean what someone is saying (or has said in the past). Their behaviour can also help understand what they are thinking and what they want (or do not want).

The law says paid supporters also need to think about the person's values and beliefs and anything else that would probably influence their decision if they could make it themselves. For example:

- someone who is a vegetarian is unlikely to want to be fed meat

- someone who is very close to their family would probably think about how any decisions would affect their relatives
- someone who has always believed in saving for the future might be less likely to want to spend money on themselves than someone who believes that money is there to be enjoyed.

What do family, friends and other people say about these things and what do they think is in the person's best interests?

Paid supporters must also think about what other people tell them about the person's wishes and views and what is in their best interests.

In particular, the Act says paid supporters should ask:

- anyone the person says should be asked about the decision
- other people who are involved in caring for the person, and
- anyone else who is interested in the person's well-being.

That will often include the person's close family and friends, as well as other paid supporters. It may also include professionals like the person's doctor or social worker (if they have one), and any advocate who has been helping them.

Paid supporters must also ask anyone the person has given a lasting power of attorney, or who has been appointed as their deputy (see Part 4).

Obviously, paid supporters cannot ask all these people about every decision. The Act says they must involve them as much as "practicable and appropriate".

What is practicable will depend on the situation. If it is an emergency, it may be difficult to ask anyone who is not already present. But if the decision does not need to

be taken immediately, there will be more time to find the relevant people and ask for their views.

What is appropriate depends partly on the decision to be made.

For everyday decisions, it is unlikely to be appropriate to involve lots of people every time, even if it would be practical. But it is likely still to be appropriate to ask people in general terms about when the person likes to get up, what they like to eat, what they like to wear, and so on.

For bigger decisions, like where the person should live, or whether they should enrol at a college, it is more likely to be appropriate to ask all the relevant people about the specific decision before it is made.

What is appropriate may also depend on the relationship between the person who lacks capacity and the person who might be asked for their views. For example, it may not be appropriate to consult even a close family member who has in the past mistreated or abused the person who lacks capacity. Paid supporters also need to think carefully about whether it is appropriate to consult someone if the person who lacks capacity has specifically asked them not to.

Things to remember about involving family and friends

The Act says that appropriate family members and friends should be asked for their views. This is important, because they very often know the person best.

They may be able to tell paid supporters important things that the person themselves cannot about what they have said and done in the past, about how they have lived their life, and about their hopes for the future. They may have cared for and supported the person themselves, sometimes for many years.

They may also be able to help paid supporters understand what the person is thinking and feeling. For people who cannot (or do not) use words, relatives and friends who know them well may be able help interpret what they are communicating through their body language. Or, they may spot changes in their behaviour which are clues to what they are thinking or feeling – that they are anxious or feel unwell, for example, or they want something in particular.

But paid supporters need to remember that the Act does not give friends and relatives the right to take decisions on behalf of the person who lacks capacity. Legally, there is no such thing as getting permission from an adult's family to do things for them which they cannot agree to themselves.⁴ Even husbands and wives do not automatically have the right to take decisions for each other, nor do other “next of kin”.

Family and friends must be involved, but it is the paid supporters who is going to do something without the person's permission who must be confident it is in their best interests.

Remember, too, that everyone has a right to confidentiality. The same principles apply to sharing private information as to doing anything else for someone who lacks capacity to make the decision themselves.

When asking other people for their views, paid supporters may need to give them some private information to help them understand what needs to be decided. For example, if the question is about someone's medical treatment, paid supporters may need to share some information about the person's health. Or if it is about where they should live, they may need to say something about how much rent the person could afford.

If it helps make sure the right decision is taken, it will normally be in the person's best interests to share the information. But sometimes there may be a reason why it would not be in the person's best interests to share a particular piece information, and paid supporters always need to keep that in mind.

If paid supporters think it would not be in the person's best interests to share much, if any, private information with a particular person, then it may not be appropriate to involve that other person in the decision at all.

⁴ For people aged 18 or over, family and friends can only give permission on their behalf if they have a lasting power attorney or have been made the person's Court-appointed deputy (see Part 4). The situation is different if the person who lacks capacity is aged 16 or 17 – as parents can normally give permission for many (but not all) things to do with the care of their children until they are 18.

Is there a less restrictive alternative?

Finally, paid supporters need to also keep in mind the fifth key principle of the Act, which says they must think about whether there is a less restrictive way of doing what needs to be done.

Less restrictive means something which puts fewer restrictions on the person who lacks capacity and gives them more freedom.

For example, a care provider is supporting a young woman who likes to spend time outdoors, but tends to fall over a lot and hurt herself. It is clearly in her best interests to do something to stop her getting hurt. That could be done by stopping her going out, or by making sure she wears protective clothing. Obviously, the protective clothing is the much less restrictive alternative, because it means she can still do what she enjoys.

If there is a less restrictive approach which will still get done what needs to be done, it will normally be the right thing to do.

The purpose of the best interests checklist

Best interests is not necessarily about keeping people physically safe at the expense of everything else. In fact, it is about weighing up different things, which may point in different directions.

Keeping people physically safe is important, but what if it means they cannot live where they want, see the people they like, or do the things they enjoy?

The purpose of the best interests checklist is to help paid supporters think through all the different issues and decide how much weight to give each one.

In particular, it is to help paid supporters look at the decision from the point of view of the person concerned. In other words, it is to help them answer the question, would the person be happy with what I am doing if they could decide for themselves?

This does not mean that paid supporters always have to make the same decision the other person would have made if they could. What they would want is always a very important question, but sometimes it will be in a person's best interests to take a decision which they would not have taken themselves. (For one thing, although people have the right to make unwise decisions for themselves, no-one has the right to make unwise decisions for someone else.)

Relying on existing care plans

Legally, it is the paid supporters who may need to do something without a person's permission who has to decide whether they lack capacity to make the decision themselves and, if so, whether it is in their best interests to do it anyway.

But obviously paid supporters cannot be expected to think about everything from scratch every time.

For example, if someone has been prescribed medicine by their doctor, their paid supporters don't have to decide for themselves each time whether it is the right medicine for the person to take. They can rely on the fact that the doctor should only have prescribed the medicine if it is in the person's best interests to take it. But they do still need to think about whether there is any reason why giving them the medicine might not be in their best interests on this particular occasion – because the medicine seems to be making them sick, for example.

Similarly, paid supporters can normally assume that it is in a person's best interests to follow a personal care plan that has been drawn up for them by the team responsible for their care and support, using the best interest checklist. But again they must still think about whether there is some special reason why it would not be in the person's best interests to follow the care plan on this particular occasion.

Remember, too, that someone's best interests may change over time. Just because something was in their best interests in the past does not mean it still is.

Keeping records of capacity and best interests decisions

Paid supporters who do things in another person's best interests may be asked afterwards to explain why they thought the person lacked capacity and how they decided what was in their best interests. It is a good idea for paid supporters to keep a record of the reasons for their decisions and the steps involved in taking them, including how they decided who else to involve and what they said.

This is particularly important where the stakes are high. For example, where the person themselves is objecting to what has been decided, or where there is a disagreement with the person's family or friends, or where it is a very important decision for the person, like where they are to live, or whether to have an operation.

Part 4

Limits on what can be done in someone's best interests

There are some limits on what paid supporters can do without breaking the law, even when they believe it is in the person's best interests.

In particular:

- they must not use too much restraint
- they must not deprive the person of their liberty without proper approval, and
- they must not go against the wishes of someone who is legally allowed to refuse permission on the person's behalf.

Where medical treatment is concerned, they must also not go against an advance decision to refuse treatment made by the person themselves.

Restraint

The Act is about helping people live as freely and independently as possible. But sometimes it may be necessary to use restraint in their best interests.

The Act says restraint means using any kind of force on another person, or threatening to do so, if they are resisting what is, or is about to be, done to them.

So, for example, holding or threatening to hold someone if they won't sit still to let a nurse give them an injection is restraint (but holding their arm to stop it shaking while they happily let a nurse inject them is not).

Restraint also means restricting a person's freedom of movement, whether or not they are resisting.

That could include things like locking outside

doors so they cannot leave, using rails on the side of their bed so they cannot get out on their own, or putting a seat belt on them when they are in a car.

It would also include standing in someone's way so they cannot get past, or refusing to let them be on their own. It could also include using sedating medicine to control their behaviour.

Restraint is allowed if it is in a person's best interests and is to stop them coming to harm. But the Act says it must be proportionate to the risk of harm.

Proportionate means the restraint is no more than is really necessary. For example, to stop someone wandering into traffic it might be proportionate to take their arm when they are near a road, but it would not be proportionate to hold their arm wherever they are, or to stop them ever leaving the house.

Even if restraint is proportionate on one occasion, it may not be in the person's best interests to rely on using it again in future. For example, if someone who is upset or frustrated lashes out, they may need to be restrained to stop them hurting themselves. But rather than having to restrain them again, it is better to find out what is upsetting them, and find a way to stop them becoming so upset in future.

Remember, too, that the fifth key principle says that paid supporters must always be thinking about whether there is a less restrictive alternative, whether or not restraint is involved (see Part 3).

Deprivation of liberty

If the person lacks the capacity to make decisions about where they receive care and treatment and:

- are subject to both continuous supervision and control and
 - are not free to leave their care setting
- then they are deprived of liberty.

Care should be about helping people have as much independence and control over their own lives as possible. But sometimes the level of care that is in someone's best interests has to involve so much control of their life that they are not just restricted, but actually deprived of their liberty. In other words, they are not really free.

Most people can live safely without being deprived of their liberty, even if they lack capacity to make many of their own decisions. But there are some people who need a level of support that cannot be provided without a deprivation of liberty.

There is nothing wrong with this, so long as it is in their best interests and no more restrictive than it needs to be. But the Act says it must be specially approved in order to check it is right. Depriving someone of their liberty without this approval is against the law.

For people in hospitals and care homes there is a system of approval known as the Mental Capacity Act Deprivation of Liberty Safeguards (MCA DoLS). This involves an independent assessment by a doctor and a Best Interests Assessor appointed by the local authority.

Outside of hospitals and care homes (for example, within a supported living or Shared Lives setting), deprivation of liberty can normally only be authorised by a special court, the Court of Protection.

Care providers must always be careful to check whether any of the people they are supporting are being deprived of their liberty, or need to be. They may want to ask for help with this from their local authority's MCA DoLS team.

If anyone does need to be deprived of their liberty outside a hospital or a care home, an application must be made to the Court of Protection.

The Court of Protection has set out the kind of things it expects to be included in applications (like evidence that the person lacks capacity to decide about their care, a description of the intended care plan for them and an explanation of why it is in their best interests.) It may be best to talk to a lawyer or the local authority's MCA DoLS team about this to get the latest position on this.

If the Court agrees, it will approve the deprivation of liberty. It may include conditions to ensure that the restrictions on the person concerned are no more than are strictly necessary. The Court will also say when and how the approval is to be reviewed.

While the Court is making up its mind, it is not against the law to deprive someone of their liberty temporarily without its approval, if that is necessary to stop their condition getting seriously worse or to give them treatment to keep them alive.

People who can give and refuse permission on behalf of someone who lacks capacity

The Act allows people to do things for someone who lacks capacity without breaking the law. But it does not generally let them give, or refuse, other people permission to do the same things.

Even family members cannot normally agree to things on behalf of a relative (see "Things to remember about involving family and friends" in Part 3).

However, there are some people who can legally agree to, or refuse, things on behalf of someone who lacks capacity to do so themselves.⁵ They are:

- people who hold lasting powers of attorney
- the Court of Protection
- court-appointed deputies.

Lasting powers of attorney

People who are 18 or over can prepare for the chance they lose capacity to take decisions in future, by giving someone else a lasting power of attorney (an LPA).

A lasting power of attorney is a legal document which lets someone else take decisions on their behalf about their health and well-being if they are no longer able to take those decisions themselves. A lasting power of attorney can also let someone else take decisions about their money and property (even while they can still make those decisions themselves).

It is up to the person who gives the lasting power of attorney to decide what it covers, so different lasting powers of attorney cover different types of decision.

For example, someone who thinks they may get so ill that they won't be able to make important decisions for themselves might use a lasting power of attorney to allow a friend or relative to make decisions about all aspects of their care and treatment on their behalf, and perhaps their money as well. Alternatively, they might decide only to allow them to make decisions about particular things, like moving into a care home, or selling their home.

People who hold a lasting power of attorney (sometimes called "donees" or "attorneys") are only allowed to make decisions they believe are in the person's best interests, and they have to follow the best interests checklist (see Part 3).

⁵ There are some decisions that even these people can never take on behalf of a person who lacks capacity, like voting in an election, consenting to sex, getting married or forming a civil partnership.

It is important for care providers to try to find out if the people they are supporting have given anyone a lasting power of attorney, and what it covers.

If the lasting power of attorney covers decisions about care, it means the person who holds it may be able to refuse paid supporters permission to do things they would otherwise be allowed to do. But it also means there is someone paid supporters may be able to ask for permission, rather than having to decide for themselves what is in a person's best interests. Because of this, someone who holds a lasting power of attorney should normally be asked to agree any care plan.

In addition, the best interests checklist says that when paid supporters are working out for themselves what is in someone's best interests they must ask for the views of anyone who holds a lasting power of attorney, if that is practical and appropriate. That applies even if the lasting power of attorney does not cover the particular decision in question.

If care providers cannot find out from the person themselves, from their family or friends, or from other paid supporters, they can check with the Public Guardian's Office to see if there is a lasting power of attorney and who holds it (see Part 5 below). Lasting powers of attorney have to be registered with the Public Guardian before they can be used.

The Court of Protection

The Court of Protection is a special court which deals with mental capacity. It can decide disputes about things like:

- whether someone has capacity to take a particular decision
- what is in someone's best interests if they lack capacity, and
- whether a lasting power of attorney is valid, what it covers and whether it is being misused.

As well as settling disputes, the Court can take decisions itself on behalf of people who lack capacity, or say whether it would be legal for something to be done for them. It can also make an order preventing someone from seeing or contacting a person who lacks capacity to decide for themselves.

Anyone can make an application to the Court asking it to do any of these things (although most people first have to ask the Court for permission to do so).

Most decisions about people who lack capacity can be taken without involving the Court. Normally, the Court only gets involved in the most complex or serious issues⁶, or where different people disagree strongly about what is best for someone, or where the person concerned believes they have capacity to take the decision themselves.

Court-appointed deputies

As well as taking decisions itself, the Court of Protection can appoint people, known as deputies, to take decisions on behalf of people who lack capacity to take those decisions themselves.

For the most part, deputies are like people who have been given a lasting power of attorney, except they have been appointed by the Court rather than by the person who lacks capacity. (But there are a few things that can be included in lasting powers of attorney which deputies can never do, like making decisions about treatment needed to keep someone alive, or forbidding anyone to have contact with the person who lacks capacity.)

Anyone can ask to be made someone's deputy, but the Court will only agree if it thinks it is the best way of making sure the person's interests are well looked after.

If it does appoint someone, the Court will say what types of decision they can make.

It is unusual for the Court to appoint deputies to take decisions about people's care. Most deputies are only appointed to take decisions about money and property.

But it is still important for care providers to know about Court-appointed deputies, for the same reasons they need to know about lasting powers of attorney. And, as with lasting powers of attorney, care providers can ask the Public Guardian's Office to check if someone has a deputy.

Advance decisions to refuse treatment

Another way in which people who are 18 or over⁷ can prepare for the chance they will lose capacity is to make an advance decision to refuse particular types of medical treatment in future. The decision does not have to be in writing, unless it is about treatment needed to keep the person alive.

Unless there are good reasons for thinking the person might now want the treatment, advance decisions to refuse treatment normally have to be respected, even if other people believe the treatment would be in the person's best interests.

Advance decisions only apply to medical treatment. They cannot be used to refuse everyday care.

⁶ Some important medical decisions about people who lack capacity can normally only be taken by the Court, such as whether someone should donate an organ to a relative, or be sterilised when it is not medically necessary.

⁷ Young people aged 16 or 17 may also be able to make advance decisions, but these are not covered by the Mental Capacity Act.

Part 5

Other things care providers need to know about the Act

Independent mental capacity advocates

For some particularly important decisions (like moving into a care home, or having serious medical treatment), people who lack capacity to make the decision themselves may have a legal right to help from an independent mental capacity advocate (IMCA), especially if there are no family members or friends who can be asked about what is in their best interests.

IMCAs are independent advocates, funded by local authorities, who are specially trained to support people who lack capacity. It is either up to the local authority or the local NHS to arrange for someone to get help from an IMCA (depending on what the decision is about).⁸

When they are supporting people, IMCAs have the right to talk to them in private and to look at records of their care and treatment (including records kept by care providers who are registered with the Care Quality Commission).

IMCAs do not make decisions about people's care. They are there to help and support the person who lacks capacity.

Public Guardian's Office

The Public Guardian helps make sure that Court-appointed deputies and people who have been given lasting powers of attorney do not misuse their power.

People who are worried about the way lasting powers of attorney are being used, or the behaviour of a Court-appointed deputy, can raise their concerns with the Public Guardian's Office, which may decide to investigate.⁹ (But if they think that a specific decision of a deputy or the holder of a lasting power of attorney is wrong and needs to be changed, they must ask the Court of Protection to over-rule the decision.)

The Public Guardian's Office keeps a list of registered lasting powers of attorney and Court-appointed deputies. Paid supporters and care providers can ask the Office to check this list to see if there is anyone who may be allowed to take decisions on behalf of one of the people they are supporting.¹⁰

Money and contracts

Normally, if you make a contract with someone you know lacks capacity to make decisions about it, you cannot legally hold them to the contract.

But so that people who lack capacity can still buy (or be bought) what they need, the Act says they must pay a reasonable price for "necessary goods or services". As well as basic things like food, clothing and power, this can cover other things the person would normally buy or pay for, if they were able to take their own decisions.

The law also says that when paid supporters are allowed to do something in the best interests of someone who lacks capacity and it

⁸ Care home providers are sometimes required to let the local authority or NHS know when an IMCA is needed.

⁹ Details of how to contact the Public Guardian's Office are at www.gov.uk/office-of-public-guardian

¹⁰ See www.gov.uk/find-someones-attorney-or-deputy

involves spending money (for example, going shopping for them) they can use the person's money to pay for it. Alternatively, they can take the cost afterwards from the person's money.

But this only applies to money that is actually in the person's possession at the time – like the money in their purse or pocket, or any cash they keep at home. It does not allow paid supporters to access their bank account, or sell their property.

If the money in their possession is not enough, it may be possible to get what is needed from someone who is allowed to manage the person's money for them, like a person who holds a lasting power of attorney over their money, a Court-appointed deputy or someone who has been appointed to receive social security benefits on their behalf.

But if there is no-one else, the Court of Protection must be asked to approve the payment on the person's behalf.

Offences

The Act makes it a criminal offence for anyone caring for a person who lacks capacity to ill-treat or neglect them. This can lead to a fine or a prison sentence.

Code of Practice

The Government has issued a Code of Practice to the Act which explains the law in more detail and gives guidance on how it should be used in practice.¹¹

The Act says that certain people – including professionals and paid supporters who are being paid – must take account of what the Code says when taking decisions for, or about, people who lack capacity to take those decisions themselves.

Paid supporters buying or paying for things for the people they support

Of course, the normal rules apply to spending money for someone else as part of caring for them. If the person can decide for themselves, they must give their permission. If they cannot decide for themselves, the spending must be in their best interests, and the best interests checklist must be followed (see Part 3).

So, for example, before buying clothes they think someone needs, paid supporters first need to be sure they cannot make that decision for themselves. If they cannot go to the shops themselves, can they decide online or use a catalogue? If they cannot decide how much to spend (because they don't understand how much money is worth, for example), can they still decide between what is available at a reasonable price? If they cannot decide for themselves, has the rest of the best interests checklist been followed – for example, have paid supporters asked their relatives or friends about what they do (and do not) need, and what they like and dislike? What is bought does not always have to be only for the person concerned. It might be in someone's best interests to pay for something jointly with other people. For example, if two people are sharing a flat, it might be in the best interests of both of them to buy something like a microwave they will both use and will both pay towards.

¹¹ The Code is at www.gov.uk/government/publications/mental-capacity-act-code-of-practice

Further information

This guide is only a summary of the key points of the Mental Capacity Act and does not cover everything that care providers may need to know about it.

For example, special rules can apply to decisions about medical treatment needed to keep people alive.

There are also special rules about involving people in research when they lack capacity to decide whether or not to take part.

Useful sources of further information include:

Mental Capacity Act Code of Practice

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

Care Quality Commission

www.cqc.org.uk/organisations-we-regulate/registered-services/guidance-about-compliance/how-mental-capacity-act-2005

Social Care Institute for Excellence's Mental Capacity Act e-learning materials at

www.scie.org.uk/publications/elearning/mentalcapacityact

Social Care Institute for Excellence briefing on the Deprivation of Liberty Safeguards (Note: this was written before the Supreme Court judgement mentioned in Part 4 of this guide.)

www.scie.org.uk/publications/atagance/atagance43.asp

Office of the Public Guardian

www.gov.uk/government/organisations/office-of-the-public-guardian

Applying to the Court of Protection

www.gov.uk/apply-to-the-court-of-protection

Ministry of Justice briefing on Making decisions: a guide for People who work in health and social care

<https://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/opg-603-0409.pdf>

Money advice service briefings: Help with managing money – if you or someone you care for lacks capacity

www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/help-managing-money.pdf

Winterbourne View Joint Improvement Programme

This programme is led by the Local Government Association (LGA) and NHS England, and is funded by the Department of Health.

Our vision:

Everyone, with no exception, deserves a place to call home. Person by person, area by area, the number of people with learning disabilities and autism in secure hospitals or assessment and treatment settings will permanently reduce. At the same time local community-based support and early intervention will improve to the point that it will become extremely rare for a person to be excluded from the right to live their life outside of a hospital setting.

Telephone: 020 7664 3122

Email: WVJIP@local.gov.uk

www.local.gov.uk/place-i-call-home



Local Government Association

Local Government House
Smith Square
London SW1P 3HZ

Telephone 020 7664 3000

Fax 020 7664 3030

Email info@local.gov.uk

www.local.gov.uk

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For a copy in Braille, larger print or audio,
please contact us on 020 7664 3000.
We consider requests on an individual basis.