The Mental Capacity Act 2005 and How It Could Affect You

Information for People who use Health and Social Services

The Gwent Mental Capacity Act Consortium

Introduction

This information booklet is about a new law, the **Mental Capacity Act 2005 (MCA)**, which came into force during 2007. The information relates only to England and Wales and mainly to people aged 16 and over.

1. What is mental capacity?

Mental capacity is the ability of a person to make decisions for himself/herself. This means that the person is able to:-

- understand information given to him/her about particular issues;
- retain that information long enough to be able to make a decision;
- weigh up the information available to make a decision;
- communicate that decision. This could be by any possible means, such as talking, writing, using sign language or even simple muscle movement such as blinking an eye or squeezing a hand.

2. What is the *Mental Capacity Act 2005?*

The Act aims to protect people who do not have the mental capacity to make decisions for themselves. This could be because they have a learning disability or a mental health condition, for example Alzheimer's disease, or a brain injury or stroke, or for any other reason such as a physical condition or illness which affects the way the mind or brain functions. Even if you have been diagnosed with Alzheimer's/dementia you will still be considered to have capacity to make decisions unless it is concluded that you cannot make your own decision, despite all possible help. Then someone else will act on your behalf. The Mental Capacity Act gives clear guidelines for carers and professionals about who can take decisions in these situations.

There are five principles that need to be followed by anyone who is supporting or working with a person who lacks capacity:-

1. Every adult has the right to make decisions for themselves, unless it is shown that they are unable to make them.

2. People should be supported as much as possible to enable them to make their own decisions before concluding that they cannot make them.
3. People may make decisions even though such decisions may appear unwise.
4. Decisions taken on behalf of people lacking capacity must be in their best interests.
5. The rights and freedom of people who lack capacity must not be restricted unnecessarily.

3. How can the *Mental Capacity Act* help me?

The MCA:-

- strengthens your right to make your own decisions and supports you to do so, whilst you remain mentally capacitated:
- protects you when you lack capacity to make a particular decision;
- sets out in which situations other people can make decisions and act on your behalf if you are unable to do so, giving them some legal protection;
- ensures that you are involved in decisions that affect you, and
- helps resolve disputes.

4. How could I be supported in making decisions if my capacity changes or fluctuates?

Your ability to make decisions may change or fluctuate from time to time. However, the law expects you to be supported as far as possible to make your own decisions. This could be through people providing information in a more simple way, such as using easier words or pictures, trying at different times of the day or when you are in better health, or encouraging you to have a friend or independent person to help you express your choice.

5. How would someone decide whether or not I lack capacity?

Any assessment of capacity will look at the legal definition of mental capacity, which is outlined in question 1. The Act says that before anyone can act on your behalf, s/he must have a reasonable belief that you lack capacity. No one can assume that you lack capacity because of your age, appearance, behaviour or disability.

6. Who decides whether or not I lack capacity?

In many everyday cases that decision will be the responsibility of your family or carers, because they will be the ones needing to get on with doing things. However, where the decision you face is complex, and the NHS or local authority is involved, a more formal assessment of your capacity may be needed. This may involve doctors or other professionals. In legal decisions, such as making a will, the solicitor concerned will decide whether you have capacity to make that decision.

7. Who will be consulted if I lack capacity to make decisions?

If you are unable to make a particular decision and you have not made plans about this in advance, then someone else, such as a carer or professional will be consulted. In these circumstances, you should still be involved in the decision-making process as much as possible. All actions and decisions must be taken in your best interests otherwise those concerned may be outside the protection given to them by the Act.

8. What happens if there is nobody that can be consulted to make decisions on my behalf?

If there is no one else appropriate who can be consulted, an **Independent Mental Capacity Advocate (IMCA)** will represent you if you lack capacity to make certain important decisions.
(You can contact your local Health Board for more information.)

9. How does the Act ensure that decisions taken on my behalf are in my best interests?

The Act provides a checklist of factors that must be considered in deciding what is in your best interests once it has been decided that you lack mental capacity. You and your family will be involved as much as possible in making decisions. If you wish, you can also put your wishes and feelings into a written statement which any person making the best interests decision(s) must consider.

10. How does the Act ensure that professionals are supporting me properly when I lack capacity?

The Act is accompanied by a **Code of Practice**. All professionals, such as GPs, doctors, social workers and paid carers must follow the guidance in the **Code of Practice**. If they don't they risk professional disciplinary action or even legal liability.

11. Would I still receive care or treatment if I lack capacity?

The Act allows people to carry out certain actions to do with your care or treatment, provided that they have assessed that you lack capacity and that these actions are in your best interests. It does not guarantee any particular level or quality of services, but other parts of the country's law may be relied on for enforcement of one's rights.

12. How can I plan ahead in case I lack capacity in the future?

You can either set out some decisions in advance or let other people know what you would like to happen to you if you lose the capacity to make decisions. The Act also allows you to appoint someone else to make decisions for you in the future. This is called a **Lasting Power of Attorney (LPA)**. There are two types of LPAs. One deals with property and finance and the second deals with personal issues if you want someone to make decisions regarding your future care and treatment. The person you choose is known as an Attorney, and can be a friend, relative or professional.

13. How do I make an LPA?

To make an LPA you will need to complete a form which you will be able to get from the **Office of the Public Guardian (OPG)**. It has to be witnessed and certified as having been freely made.

14. What if I have already made an Enduring Power of Attorney (EPA)?

If you have an existing EPA, either registered or unregistered, it can still continue to be used. However, if you are no longer able to make financial decisions for yourself, then the EPA will need to be registered before it can continue to be used.

15. How will the Act protect me from ill-treatment or wilful neglect if I lack capacity?

The Act provides new protection to keep you safe and prevent you from being harmed. This will apply to anyone who works with or supports you in making your decisions including Attorneys. Since April 2007 it became a criminal offence to ill-treat or wilfully neglect a person who lacks capacity.

16. Does the Act allow me to make an Advance Decision to refuse treatment?

People were already able to make **Advance Decisions**, then known as 'living wills'. The Act introduces a number of rules as to form and content that must followed when making an Advance Decision for them to be valid and applicable. If you have already made an advance decision you should check that it complies with the new rules, particularly if it deals with life-sustaining treatment.

17. Will this change the law on euthanasia?

No. The Act makes it clear that it will not change the law regarding assisted suicide; neither does it change the law regarding murder or manslaughter.

18. What will happen if I have not planned ahead and I lose mental capacity?

If this happens, then someone else has to decide for you and their decisions must be made in your best interests. As a safeguard, there is the new **Court of Protection**. It is a court which will make orders in specific cases, having considered the evidence, or appoint **Deputies** to act and make decisions on your behalf. The Court of Protection is assisted by the **Public Guardian**.

19. Does the Act allow research to take place involving people who lack capacity?

The Act allows this but sets out strict rules to protect people who lack capacity to consent to take part in research. The Act also makes sure the person's previous wishes are taken into account.

20. Where can I obtain further information about the *Mental Capacity Act?*

More detailed guidance is available from:-

- **Office of the Public Guardian:**

For all matters relating to the Mental Capacity Act
www.publicguardian.gov.uk/mca/mca.htm
Email: customerservices@publicguardian.gsi.gov.uk
Customer contact centre: 0845 330 2900

- **NHS Website:**

www.mentalcapacityact.wales.nhs.uk

- **Community Legal Advice:**

For confidential and independent legal advice:
www.communitylegaladvice.org.uk
Helpline: 0845 345 4345

- **The Alzheimer's Society:**

For advice for people with Alzheimer's and their carers.
Email: nportalzheimers@btconnect.com
Tel: 01633 665110

This leaflet is also available in large print and Braille. Leaflets are also available in other languages and easy read formats. Please contact your Local Health Board or Local Authority for further information.

Blaenau-Gwent Local Health Board:	01495 325400
Blaenau-Gwent County Borough Council:	01495 315700
Caerphilly Local Health Board:	01495 241200
Caerphilly County Borough Council:	01443 815588
Monmouthshire Local Health Board:	01600 710000
Monmouthshire County Council:	01633 644644
Newport Local Health Board:	01633 261430
Newport City Council:	01633 656656
Torfaen Local Health Board:	01495 332200
Torfaen County Borough Council:	01495 762200
Gwent Healthcare NHS Trust:	01633 238027

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