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## Introduction

What is the *Mental Capacity Act 2005*?

It is a piece of legislation which has been introduced to reform the existing law.

It created a new statutory framework and its aim is to overcome inconsistencies in the current common law tests and rules which are very muddled.

The *Act* does not introduce something that is totally unfamiliar to practitioners because it is based on common law principles and best practice.

BUT: You need to know the main principles of the *Act* if you are dealing with people where questions of capacity arise.

## Section 1 - Five statutory principles which underpin the new law

1. Everyone is assumed to have mental capacity.
2. You mustn't treat someone as if they do not have capacity unless you have done everything you can to help without success. You must take all practicable steps to help: make them feel comfortable; involve an expert to help them express themselves.
3. Unwise does not = incapable
4. You must act in someone's best interests
5. Before you do something see if you can do it another way to get to the same outcome but in a less restrictive manner.

All of this is best practice so there is nothing new but it is now enshrined in legislation.

## **Section 2 - Sets out the definition of a person who lacks capacity**

A person lacks capacity if there is an impairment of, or disturbance in the functioning of their mind or brain and the impairment or disturbance is sufficient to render the person incapable of making that particular decision.

Note that the test is diagnostic and is applied to the decision in question.

## **Section 3 - Test to establish whether someone lacks capacity**

The fundamental test that must be applied to establish whether someone lacks capacity is a very objective test and anyone's preconception or assumption may not have any input into the assessment.

You need to consider:

1. If the person can understand the information relevant to the decision.
2. Can they retain the information.
3. Can they use or weigh up that information as part of the making of the decision.
4. Can they communicate the decision.

So, the fact that someone has a learning difficulty and may not be able to do some things does not mean they cannot make a decision about where they live.

The *Act* goes on to set out provisions for making decisions for people who lack capacity. So assessing whether someone has capacity is a very fundamental step in the process.

In legal proceedings the burden of proof will fall on any person who asserts that capacity is lacking and they have to show on a balance of probabilities that the individual lacks capacity.

To assess capacity for purposes of care/treatment then a reasonable belief someone lacks capacity is ok providing reasonable steps have been taken to establish that.

There are two stages in determining capacity:-

- a. is there impairment
- b. is the impairment sufficient to render them incapable of making that decision

The presence of an impairment is important. It introduces a diagnostic test to stop people taking over others' decision making rights unnecessarily. Every effort must be made to provide all information relevant to a decision in a way an individual can understand.

The fact that someone can only retain information for a short time should not disqualify them from making a decision. You may need to involve professionals with specialist skills in verbal and non-verbal communication to help them communicate. Decision specific assessment may pose

problems where a series of 'unwise' decisions place person at risk. There may come a point where they lack capacity or need proper assessment.

### **Practical Steps**

All practicable steps to enable decision making must be shown to be unsuccessful before someone can be assessed as lacking capacity. The help given will depend upon:

- The decision to be made
- Timescale
- Individual circumstances

Providing relevant information is essential:

- Take time to explain relevant information.
- Try not to burden someone with too much information.
- Describe foreseeable consequences.
- Explain effects of decision.
- If there is a choice, explain the options.

Communication - people

- Consult family members/advocates on best method to use
- Simple language
- Speak right volume/speed use gestures
- Enlist help of others social workers; GP; advocates
- Be aware of cultural ethnic factors

Communication - aids

- Pictures visual
- Language speech translator professionals
- Hearing difficulties visual/sign language
- Mechanical help

Communication - best time and place

- e.g. decision to have treatment in hospital or move home – go to the place
- be aware of medication perhaps delay decision until effects have subsided

If you are assessing capacity :

1. be clear about what you are being asked to judge
2. be prepared to justify your findings

## Who should assess capacity?

This will depend largely on the decision to be made. For day to day decisions it's the carer most directly involved.

- Consent to medical treatment - doctor assess and record.
- Legal Transaction e.g. will or Power of Attorney contact a solicitor
- Tenancy - housing manager, support worker or advocate

If a doctor or other expert witness is witnessing a document that someone is signing and you know their capacity would be challenged you should carry out a formal assessment of capacity – the golden rule established in the case of a Will: *Re: Simpson (Deceased), [Schaniel] v Simpson (1977) 121 SJ 224*

Alongside the *Act* there is Draft Code of Practice which explains the Statutory framework. It says that any of the following might suggest formal assessment is needed:

- Gravity of decision
- Disagreement between carers/family members
- Expressing different views to different people
- Where capacity may be subject to challenge e.g. testamentary for a Will
- Legal proceedings

There may be cases where a person refuses to undergo an assessment of capacity. It will usually be possible to persuade them if the consequences of refusal are explained.

Having assessed someone lacks capacity you can then use the *Mental Capacity Act* and Code of Practice for guidance in how you should act for someone who lacks capacity.

In the matter of a 'contract for a tenancy' there appear to be a number of options

1. If the person is thought to have the capacity to understand the essentials of the tenancy and care has been taken to use the sort of **practical steps** listed above then they can sign the tenancy. The tenancy will continue to be valid even if at a later date the person should lose capacity.
2. If the housing provider/landlord having carried out an assessment concludes the prospective tenant lacks capacity to enter a tenancy then the prospective tenant should not sign the tenancy and the housing provider will need to consider whether a third party has authority to sign the tenancy on behalf of the incapacitated person. If the incapacitated person does sign the tenancy the presumption is the tenancy is valid until it is 'avoided'. If the tenancy is avoided it will be undone meaning the person then has no tenancy. Avoidance could be by the tenant when he/she gains capacity or an attorney or a litigation friend or by a receiver or court-appointed deputy.
3. The housing provider/landlord should not sign the tenancy on behalf of the incapacitated person. That will not create a valid tenancy.

4. If the prospective tenant is incapacitated in that they cannot understand the tenancy at all they are unlikely to have the capacity to appoint someone as their agent to sign the tenancy on their behalf. In such circumstances the housing provider will need to see if there is anyone else who has authority to sign. A person who has already been appointed under a lasting power of attorney with financial or property authority could sign on the individual's behalf; a receiver or court-appointed deputy can.

Alternatively a single order can be obtained from the Court of Protection covering the issue of decision making in relation to the taking of the tenancy. If the order is granted the tenancy will be the occupant's tenancy even though the tenant does not understand it. In situations where the tenancy is signed by an attorney the attorney does not take on the liability of the tenancy personally without expressly agreeing to do so. So they cannot be made liable for any rent arrears arising. If there is a risk that the incapacitated tenant may not be able to meet their obligations under the tenancy the housing provider should consider asking the attorney or person authorised to act on behalf of the tenant if they would guarantee the rent or indemnify the landlord against damages or other breaches of the tenancy.

5. A local authority does not have a general power to sign tenancies on behalf of an incapacitated tenant unless it can demonstrate that it has specific authorisation.

#### **Section 4 - Protection for those acting in the 'Best Interests' of others**

*Section 5* of the *Act* gives protection to people who make a decision or do something on behalf of someone who is incapacitated in connection with their care or treatment providing the person reasonably believes what he does or decides is in the best interests of the person concerned.

The *Act* does not define the Term 'best interest' but it gives a helpful checklist of factors in *Section 4*, which must be considered. The key factors are:

- The person who lacks capacity must be involved as much as possible.
- The person's past and present wishes and feelings must be considered.
- Other people who are involved in the care of the person must be consulted.
- The person making the determination must not make it simply on the basis of the person's age or appearance or the condition of their behaviour.
- You must consider whether the person is likely to have capacity in relation to the matter in question at some time and if so when that it likely to be.

#### **Section 7 - Payments for necessary goods and services**

This Section provides a statutory guidance on the situation where somebody who lacks capacity has entered into a Contract. It revises and extends the statutory rule in *Section 3(2) of the Sale of Goods Act 1979* in so far as it applies to people who lack capacity to contract. The general rule is that if someone sells somebody something essential for payment and the recipient lacks the capacity to contract for the item the seller will still be able to claim a reasonable sum for the thing supplied regardless of whether the actual contract can be enforced or not.

*Section 7* goes wider than the current law and makes someone pay wherever goods and services are supplied.

The section defines 'necessary' as meaning 'suitable to a person's condition in life and to the person's actual requirements at the time when the goods or services are supplied'. The Code of Practice which has been published alongside the *Act* provides some guidance on what can be considered as necessities, but there is some uncertainty whether housing can be held as either goods or services. Under the broader legal

framework it has been held that housing is neither goods nor services so until it is held that it does *Section 7* is a possible but not certain route for a landlord to recover a reasonable amount of rent from an incapacitated tenant.

Notwithstanding the position under *Section 7* at common law anyone occupying premises not owned by them owes compensation to the landowner for use and occupation. Therefore if a tenancy is arranged without a signature the landlord could continue to claim some compensation for use of the property, but this is against a situation where the landlord will have taken on an someone as a tenant who does not understand the nature of a tenancy or his/her obligations and could be faced with the prospect of having to use a court procedure to recover any sums claimed for use of the accommodation.

What is clear is that if the tenancy agreement contains any obligation to pay for support or care services or there is a separate contract dealing with that the landlord will be able to recover a reasonable charge for these services under *Section 7*.

If the supply of accommodation is connected with the care or treatment of the incapacitated person it might be possible for a carer to pledge the incapacitated person's credit under *Section 8* of the *Act* and insofar as that is a promise to pay the rent for the accommodation that will impose a legal liability on the incapacitated person to pay whatever the charge is. If payment is not made that the landlord may ultimately have to use the court process to get the money.

### **Signing on someone's behalf**

*Section 5* provides protection for someone if they have done something on behalf of an incapacitated person in connection with their care and treatment and they reasonably believe it is in the person's best interests to do so. The question arises whether this section gives that person protection if they have signed a tenancy agreement on behalf of someone so that the signatory is not personally liable for the tenancy which would otherwise be the case.

It would appear that *Section 5* does not give this protection unless the signatory has a specific authority to sign (eg through a lasting power of attorney or deputyship).

If there is an argument as to whether or not the tenancy agreement should be signed by the tenant the best course would be to apply to the Court for a decision to be taken by the Court that the tenancy should be signed on the prospective tenant's behalf.

### **Sections 9 to 14 of the Mental Capacity Act 2005 - Planning for incapacity**

There is a new statutory form of Power of Attorney, the 'Lasting Power of Attorney' (or LPA). This will replace the Enduring Power of Attorney or (EPA) provided for by the *Enduring Powers of Attorney Act 1985*. *Section 66(1)(b) of the Mental Capacity Act 2005* will repeal the *1985 Act*, but the legal effect of an EPA already made under the current law is preserved and integrated into the scheme of the *Act*.

Unlike the Enduring Power of Attorney a Lasting Power of Attorney can extend to personal welfare matters as well as property and financial affairs. An Attorney will not be able to act under an LPA until it has been registered with the Public Guardian. It provides a way someone can be formally appointed to act on someone's behalf eg to make a tenancy

Other matters introduced under the *Mental Capacity Act*:

1. *Part 2* of the *Act* establishes a new Superior Court of Records, to be known as the Court of Protection and provides its judges and procedures. It also establishes a new statutory official, the Public Guardian, to support the work of the Court.
2. The Court sets out the jurisdiction of the new Court of Protection to make declarations and orders and to appoint substitute decision makers ('deputies') where a person lacks capacity. This can provide a means for someone to act on a resident's behalf to make a tenancy.
3. The *Act* introduces a new service for particularly vulnerable people, which is providing an Independent Mental Capacity Advocate (IMCA). When a person who lacks capacity has to make a serious decision about the treatment they receive or where they live, an IMCA can be appointed to support and represent them. The IMCA voices the person's wishes feelings beliefs and values and they make the decision maker aware of all information. They can also challenge the decision maker.
4. The Secretary of State is obliged under the *Act* to arrangements as it considers reasonable to enable IMCA's to be available to represent and support people who are very vulnerable. The Secretary of State can make regulations as to the appointment of IMCA's. Central Government has carried out a consultation on this service and details of how it is to operate. The consultation procedure has concluded, but we await fuller details of how the IMCA's are going to operate in the field.

### Further Reading

You may also want to look at *Choice, Contracts and Mental Capacity Act 2005* - Maurice Harker, VPST 2010

[www.housingoptions.org.uk/general\\_information/gi\\_publications\\_docs/valuing\\_people\\_now\\_publications/Choice-Contracts-MCA.pdf](http://www.housingoptions.org.uk/general_information/gi_publications_docs/valuing_people_now_publications/Choice-Contracts-MCA.pdf)

More and more people with learning disabilities are living in their own home. Local authority social care and housing staff, housing and support providers, and families are often faced with practical issues concerning decisions and capacity. *Choice, Contracts and Mental Capacity Act 2005* looks at three areas of understanding for the person with a learning disability: choice, contracts and agreements and support for the owner or tenant in managing in their own home

Although we try to ensure that statements as to the law and other facts are accurate this factsheet gives general guidance and does not aim to cater for individual cases. Housing Options and our sponsors cannot accept responsibility for any loss incurred as a result of relying on such statements, specific advice should always be obtained on individual cases.

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Registered Charity Number 1092587

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