

# Mental Capacity

The Mental Capacity Act 2005 (MCA) significantly alters the way in which healthcare decisions relating to patients without capacity can be made.

**For the first time, there is a statutory definition of adult incapacity. Under the Act, an adult is unable to make a decision for themselves if they cannot:**

- understand the information relevant to that decision;
- retain that information;
- use or weigh the information as part of the process of making the decision; or
- communicate their decision.

## Best interests

Previously, where an individual could not give consent, then he or she could be treated under the common law doctrine of necessity, according to which treatment necessary to preserve life or prevent serious deterioration in the patient's condition could be given in accordance with the individual's best interests. However, it was never entirely clear what constituted 'best interests'.

Under the new Act, several questions have to be resolved in arriving at a decision about what is in a person's best interests:

- Will the individual in future have capacity regarding the matter in question?
- If yes, when is that likely to be?
- What are the individual's past and present wishes and feelings?
- What directions are contained in any advance decision (see further below)?
- What beliefs and values might influence the individual's decision, if they had capacity to consent to treatment?
- Are there any other factors that the individual would consider if they were able to do so?

For the first time, the Act now requires consultation, if practicable, with the following:

- anyone named by the person lacking capacity as someone who should be consulted on the issue(s) in question;
- anyone caring for – or who is interested in the welfare of – the person without capacity;
- any donee of a lasting power of attorney (see below) granted by the person lacking capacity; and
- any deputy appointed under the Mental Capacity Act.

The MCA now provides two routes to obtaining consent to treatment in cases where the adult does not have capacity:

- (1) via a lasting power of attorney; or
- (2) via a court-appointed deputy.

## Lasting powers of attorney

The Mental Capacity Act has repealed the Enduring Power of Attorney Act 1985 and introduced the concept of a lasting power of attorney. The two powers are similar, but

the range of a lasting power of attorney is greater than that of an enduring power. Lasting powers, like enduring powers, need registration with the Court of Protection before they are valid.

The lasting power of attorney allows the donee (the person to whom the power has been granted) to make decisions relating to the healthcare treatment of the donor (the individual granting the lasting power) if the donor lacks capacity. This is new. However, if the donor wants the donee to make life-or-death decisions in the event that the donor becomes incapable of making such decisions for himself or herself, this must be specified in the lasting power.

### **Advance decisions**

The Act also formalises the position in relation to what are now known as 'advance decisions' (previously 'advance directives'). Advance decisions can only be made by individuals with capacity who are 18 or over. They must be in writing, signed by the individual making the advance decision and witnessed by at least one other person. An advanced decision is defined in the MCA as:

'a decision that if

- (a) at a later time and in such circumstances as [the individual] specifies, a specified treatment is proposed to be carried out or continued by a person providing healthcare for [that individual], and
- (b) at that time, [the individual] lacks capacity to consent to the carrying out or continuation of that treatment,

the specified treatment is not to be carried out or continued'.

However, the advance decision will not apply in certain circumstances. For example, it will not apply to life-sustaining treatment unless the advance decision is backed up by a statement from the individual that, even if life is at risk, the decision does indeed exclude the particular treatment being considered.

Anyone treating the donor who is ignorant of an advance decision will not incur any liability. Nor will they be liable if they withhold or withdraw treatment in the reasonable belief that an advance decision exists which is valid and applies to the treatment in question.

### **Greater freedom of choice**

We have yet to see how the Mental Capacity Act will work in practice, but the statutory definition of incapacity is to be welcomed. For some time, the law regarding individuals without capacity has been complicated, and responsibility for treatment has traditionally rested with the doctors. The Act now gives patients a sound legal basis for appointing another individual to make medical care decisions in the event that they become incapable of consenting to such treatment themselves.

This Act has not yet come into power.

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