

September 2007

# Mental Capacity Act

Guidance for GPs



# Mental Capacity Act Questions and Answers

## Background information

These questions and answers (Q&As) have been prepared by the General Practitioners Committee (GPC) in liaison with Central Consultants and Specialists Committee (CCSC), Professional Fees Committee (PFC), Ethics and the Psychiatry Subcommittee in advance of the full implementation of the Mental Capacity Act. The Act will affect GPs in a number of ways and the circumstances in which they are likely to be involved are detailed later in this guidance.

## What is the Mental Capacity Act 2005?

The Act provides a comprehensive framework for decision making on behalf of adults aged 16 or over who lack capacity to make decisions on their own behalf. Further information on the Mental Capacity Act has been prepared by the BMA's Medical Ethics Committee secretariat and can be found here:

[www.bma.org.uk/ap.nsf/Content/mencapact05?OpenDocument&Highlight=2,mental,Capacity,Act](http://www.bma.org.uk/ap.nsf/Content/mencapact05?OpenDocument&Highlight=2,mental,Capacity,Act)

## When is it being implemented?

The Act will be implemented in two stages during 2007. In April, the new Independent Mental Capacity Advocacy service became operational in England. All other parts of the Act will come into force in October 2007.

## To whom does the Act apply?

The Act applies to all decisions taken on behalf of people who permanently or temporarily lack capacity, including decisions relating to medical treatment. All doctors working with adults who lack, or may lack, capacity, will need to be familiar with both its underlying principles and its basic provisions. The Act applies to England and Wales. Scotland has its own legislation - the Adults with Incapacity (Scotland) Act 2000, whilst the approach in Northern Ireland is currently governed by common law.

## What changes does the Act introduce?

In general, the Act confirms and reinforces best practice, whilst placing the provisions on a statutory level. Much of it will therefore be familiar to those who work with adults lacking decision-making capacity. The Code of Practice can be found here:

[www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf](http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf)

However, a number of new provisions have been introduced which are detailed later. The Act itself is based on 5 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
- Individuals being supported to make their own decisions – a person must be given all practicable help before anyone treats them as not being able to make their own decisions
- Unwise decisions – just because an individual makes what might be seen as an unwise decision, they should not be treated as lacking capacity to make that decision

- Best interests – an act done or decision made under the Act for or on behalf of a person who lacks capacity must be done in their best interests
- Least restrictive option – anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms.

### **How will capacity be assessed?**

The assessment of capacity is task-specific. A person is regarded as being unable to make a decision if, at the time the decision has to be made, he or she fails:

- To understand the information relevant to the decision
- To retain the information relevant to the decision
- To use or weigh the information or
- To communicate the decision (by any means)

GPs can only act within their competence. If doubt remains regarding a patient's capacity, they should consider referring the patient to a colleague with appropriate expertise such as a psychiatrist or psychologist. Ultimately, the Court of Protection, which is responsible for the proper functioning of the legislation, can be asked for a judgement.

## **Implications for GPs**

### **In what circumstances will GPs be involved under the Act?**

Under the legislation, GPs have legal responsibilities in relation to patients who lack capacity. As part of this, GPs can witness Lasting Powers of Attorney (LPA). Further details about LPAs are given below. In addition, GPs will continue to provide information and advice about advance directives and changes of wills. Where an individual seeks to change a will, the solicitor involved may refer to a GP to verify the patient's capacity to make that decision. In relation to advance directives, this decision will only apply to life-sustaining treatment where it is in writing, is signed and witnessed and contains a statement that it is to apply even where life is at risk.

### **Are there any risks to GPs in being involved in work under the Act?**

Provided that GPs do any work associated with the Act with full understanding and within their capabilities, there should be no risk. Where a GP is concerned that he/she cannot make a definite judgement, the decision should be referred to a psychiatrist or psychologist for a second opinion. GPs should be confident that they could justify any decision made in court and it is therefore extremely important that clear documentation is kept in respect of any decision made in terms of assessment of capacity.

However, following discussions with the Office of the Public Guardian, we understand that it would be extremely unlikely for a GP to be summoned to court. If there is doubt about a clinician's advice, the Court would normally seek a second opinion from another clinician as opposed to calling the GP to give evidence.

### **What fee can be charged for Court of Protection assessment of capacity form?**

Work under the Act is not a contractual responsibility of a GP providing NHS primary medical services unless, exceptionally, this has been included in an enhanced or personal medical service agreement; therefore a fee may be charged for work undertaken in connection with the

Act. The Act introduces a new Court of Protection with extended powers. As part of this, the Court of Protection assessment of capacity form (COP3) will replace the CP3 medical certificate when the new court begins operating under the Act.

Despite efforts by the BMA's Professional Fees Committee, we have been unable to agree fee rates with the Office of the Public Guardian for the completion of the COP3 form and GPs should therefore charge at their own rate. Details to consider when setting fees are outlined in the attached although it should be noted that we are currently revising our generic guidance on the issue:

[www.bma.org.uk/ap.nsf/Content/feesparttimemed~factors](http://www.bma.org.uk/ap.nsf/Content/feesparttimemed~factors)

### **What other fees are relevant to the Mental Capacity Act?**

As before, GPs will still be able to charge for completing 'changes to will' assessments. At present we can only advise that GPs can set their own fees for this work. Similarly, signing for powers of attorney will be at the discretion of the GP.

**It is important to note that practices should not discuss the levels of fees to charge for the completion of these forms due to the Competition Act. The Act also prevents the BMA from publishing suggested fees for this work.**

### **Are PCT training courses mandatory for GPs to attend?**

As registered Medical practitioners, GPs have a responsibility both to keep up to date and undertake appropriate personal professional development.

Within that provided GPs continue to do any work associated with the Act with full understanding and within their capabilities as defined by the General Medical Council (GMC), there should be no need for additional training. Obviously if GPs feel they need training they should pursue this with the primary care trust (PCT).

The Department of Health has produced training materials which can be accessed through this link:

[www.dh.gov.uk/en/Policyandguidance/Healthandsocialcaretopics/Socialcare/IMCA/DH\\_074510](http://www.dh.gov.uk/en/Policyandguidance/Healthandsocialcaretopics/Socialcare/IMCA/DH_074510)

We anticipate that the BMA will be providing a series of seminars on the topic for BMA members. These will be advertised in due course.

### **What are the possible consequences of not complying with the new Act?**

There are serious consequences to breaching the legislation, both in terms of legal challenge by way of judicial review in the civil court or an application to the new Court of Protection, and the new criminal offence of ill-treatment or wilful neglect of a person who lacks mental capacity or is believed to lack mental capacity which has been introduced. As such, comprehensive clinical records and documentation should be kept at all times.

### **What happens if a patient refuses to be assessed or treated?**

Occasionally an individual whose capacity is in doubt may refuse to be assessed. In most cases, a sensitive explanation of the potential consequences of such a refusal, such as the possibility that any decision they may make will be challenged at a later date, will be sufficient for them to agree. However, if the individual flatly refuses, in most cases no one can be required to undergo an assessment.

Treatment can only be given without consent where an adult lacks capacity and the treatment is believed to be in his or her best interests. Any best interests judgement may be influenced by discussion with those close to the individual where this is practical.

### **What are Lasting Powers of Attorney (LPA)?**

Under the Mental Capacity Act, there will be a new system of Lasting Powers of Attorney (LPA) which will replace the current Enduring Powers of Attorney (EPA). This will allow a person (the 'donor') to appoint someone (the 'attorney') to make decisions on their behalf regarding both their property and financial affairs (as can be done currently with an EPA), and/or regarding personal welfare and healthcare decisions (which can't be done with an EPA).

All LPAs must be registered with the Office of the Public Guardian.

A property or financial LPA can be used whether or not the person has lost capacity but only when it has been registered with the Office of the Public Guardian.

A personal welfare/healthcare LPA can only be used once the person has lost capacity. A certificate provider must confirm that the donor had capacity when they made an LPA. A registered healthcare professional including a GP will be able to provide a certificate for an LPA as one of the skills-based certifiers. The form makes it clear that they can charge a fee for this. LPAs will commence from October although if someone has made an EPA prior to October they can still register it and/or use it.

At present doctors undertaking an examination to determine whether a patient is capable of making an enduring power of attorney, or witnessing an enduring power of attorney, or swearing an affidavit, are advised to determine their own fee.

### **What role do independent mental capacity advocates have?**

Independent Mental Capacity Advocates (IMCA) will be appointed for those with no one else to speak for them – who is not a paid carer - regarding decisions about serious medical treatment and long-term residential care.

### **What is the difference between the Mental Capacity Act and the Mental Health Act?**

The Mental Capacity Act governs decision-making on behalf of adults who lack the capacity to make decisions on their own behalf. The Mental Health Act relates to compulsory treatment for mental disorder in specifically defined circumstances, irrespective of the individual's decision-making capacity. Further details about the Mental Health Act can be found here:

[www.bma.org.uk/ap.nsf/Content/MentalHealthBill?OpenDocument&Highlight=2.mental.health.act](http://www.bma.org.uk/ap.nsf/Content/MentalHealthBill?OpenDocument&Highlight=2.mental.health.act)

**For further advice, BMA members should contact askBMA in the first instance**