

Housing Learning & Improvement Network

Housing Provision and the Mental Capacity Act 2005

This fact sheet and accompanying suite of information sheets are intended to offer information about the law in relation to those likely to lack capacity concerning arrangements for housing. It is meant as a general guide and care should be taken to obtain specific legal advice prior to initiating legal proceedings or taking significant steps.

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Introduction

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1 WHAT THE ACT DOES

- It provides a statutory framework to strengthen the position of - yet also protect - adults who may lack capacity to make some decisions for themselves, for example people with dementia, learning difficulties or mental health problems.
- It enables capacitated people to plan for a time when they may lack capacity and clarifies who can take decisions, in what situations, and how to go about it.
- It is due to come into force in the main in October 2007; however from 1st April 2007 a new independent advocacy service will exist for those who lack capacity, facing proposed long-term state arranged accommodation if they are “unbefriended”. In addition, from April 2007 there will be two new criminal offences of ill treatment or wilful neglect.
- The Code of Practice accompanying it has now been published. The Code provides guidance as to how the Act must be implemented and section 42 of the Act requires that those acting in a professional capacity to have regard to the Code of Practice. It may not always be possible to act as instructed by the Code. Where practitioners feel compelled to depart from the Code, provided that they have considered the advice within it, they will not necessarily get into trouble where they are able to justify taking a different approach.
- The Act is relevant to everyone who supports or cares for – whether formally or informally – people who may lack capacity to make decisions for themselves. This includes the housing and housing-related support sectors, so it is important for professionals and managers from these sectors to be familiar with the main provisions of the Act.

2 FIVE 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
- **Supporting individuals 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 assumed to lack 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 only be done after considering if there is another option that is less restrictive of their basic rights and freedoms

3 MEANING OF CAPACITY

A person who lacks capacity is “a person who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken.”

- It is not a single, absolute state. So the notion of bringing in a psychiatrist to pronounce on somebody’s “capacity” is inappropriate.
- It is decision-specific – so for example someone might well have the capacity to decide what they’d like for breakfast but not to sign a tenancy agreement
- It is time-specific – people with certain conditions fluctuate in their level of mental functioning, eg. those with a dementia - so whether or not they have capacity to make a particular decision can only be assessed at the time they are being asked to make the decision.
- No one can be labelled incompetent or incapacitated simply because they have a particular diagnosis or medical condition.

4 TEST OF CAPACITY

The test for incapacity is two fold. Firstly, whether there is an impairment or a disturbance in the functioning of the mind or brain. There is no requirement for a formal diagnosis and the impairment/ disturbance does not have to be permanent. Second, if there appears to be an impairment or disturbance then it would be necessary to consider whether this impairment or disturbance would prevent the person from making a particular decision. The test for whether a person is incapacitated in relation to making a particular decision is in four stages, namely:

1. Can the person absorb basic information about the pros and cons of an issue, simply communicated?
2. Can the person retain the information for long enough to process it?
3. Can the person be said, objectively, to be weighing up the pros and cons against their own (subjective) value system, and arriving at a decision?
4. Can they communicate their decision somehow?

If there is evidence, on the balance of probabilities (i.e. it is more likely than not) that the person cannot manage one or more of the four stages, then they no longer retain the presumption of capacity on that issue.

In that scenario, their “decision” is merely a preference, and if, in acting upon it, the person comes to harm which could have been anticipated, those with a duty to care could be deemed negligent if they simply went along with the “decision”.

There is a new criminal offence introduced in the Act of ill-treatment or wilful neglect which applies to someone who has care of, is a donee under a Lasting Power of Attorney (LPA) or an Enduring Power, or is a court-appointed deputy for, someone who lacks capacity.

5 WHO ASSESSES CAPACITY, AT LEAST INITIALLY?

In any given situation, it is the 'decision maker' who must decide on a person's capacity. The 'decision maker' is the person who, if the person lacks capacity, would be doing wrong by going ahead, or who would need the cloak of legal protection provided by the Act, to protect them from liability for doing what they propose doing, without the consent of the person in question. Therefore, it depends entirely on the nature and context of the decision. For example:

- A solicitor, if asked for advice, must decide if someone has capacity to grant Power of Attorney over their affairs to another person or make a will.
- A surgeon must decide if someone has sufficient capacity to provide informed consent for an operation.
- The local authority is the 'decision maker' in relation to mental capacity to participate in care planning and the question of delivery of care plans.
- The care provider must decide in the first instance whether someone's consistent refusal to get out of bed in the morning is a capacitated decision, even if it subsequently becomes an issue for the body which drew up the care plan.

Everybody who works with people who may lack capacity has a responsibility to assess capacity in the given context. Without such an assessment anyone carrying out tasks on behalf of another would be unable to consider whether what they were doing to or for the individual was lawful.

If in doubt, it is advisable to refer to a relevant expert for advice in respect of an individual's capacity on a specific issue at the specific time, but it is still for the decision maker, having taken into account all relevant advice, to assess the individual's capacity.

So in what circumstances, for example, might a scheme manager or care assistant need to consider and assess someone's capacity?

- When asking somebody to sign their needs and risk assessment and support plan – it is not appropriate to press someone who is incapacitated for consent.
- When there is reason to believe that a relative is taking money from someone with dementia for his/her own benefit – is capacitated informed consent being given?
- When someone with deteriorating sight who has driven a buggy outside for years decides to go out on an unfamiliar busy road despite advice to the contrary
- When signing up a new tenant
- When someone's family says that it's time for that person to move on and give up the tenancy
- When someone refuses care that they desperately need
- When someone's behaviour leads them to act in breach of covenant

Care or housing providers may not have the ultimate responsibility for deciding whether the individual is capacitated in these situations, but have to make an initial assessment in order to determine whether they should refer the situation to a professional for a more in depth capacity assessment or

back to the responsible body (Social Services or NHS). The example of the person who consistently refuses to get put of bed illustrates this. While the statutory body is likely to be responsible for making a decision about major foreseeable issues over which disputes could arise (because of their responsibility to meet needs), the provider can expect to be responsible for deciding capacity regarding the more unpredictable and minor issues arising.

The more complex or serious the decision, or the greater the potential consequences, the more important being sure about incapacity becomes. If in doubt, it is advisable to seek advice from experts involved in the person's care, e.g. a GP, psychiatrist, or multi-disciplinary approach depending on the issue.

If there is an intractable argument about it, ultimately, the court must decide.

6 WHO CAN ACT FOR A PERSON WHO LACKS CAPACITY?

The Mental Capacity Act 2005 sets out a range of new mechanisms individuals can employ to set out who would have authority to make decisions or carry out actions on their behalf, both before and after they lose capacity.

In addition, the Act provides statutory authority for other individuals and the new Court of Protection to make decisions on behalf of an incapacitated person where this is necessary and the person has not made prior arrangements.

The Court of Protection can also consider decisions made on behalf of an incapacitated person and make a declaration as to whether these decisions are lawful.

Those working or supporting anyone who may lack capacity will need to be aware of the powers and duties imposed by the Act on:

- The Court of Protection
- The donee of a Lasting Power of Attorney or Enduring Power of Attorney
- A Court appointed deputy
- Public authorities
- People who have a duty of care including employed staff such as ambulance crew, housing professionals and care providers, and family or other informal carers who have taken on a responsibility to care.

All of the above can make decisions or act on behalf of an incapacitated person within specified limits which differ from one another. Please see section 10 below and Housing LIN information sheet no.1 for more details.

7 HOW TO DECIDE ON SOMEONE'S BEST INTERESTS

The new Act imposes a duty on the decision maker to act according to the individual's best interests. This applies as much to informal day-to-day decisions and actions as to the decisions taken by those with formal authority. The accompanying Code of Practice makes it clear that ultimate responsibility for working out best interests lies with the decision maker and that the

decision maker will need to consider all relevant factors, having taken into account the incapacitated person's own tastes, belief/value system. It is essential that the decision or act be made in the person's best interests by following a particular process, as follows:

- Don't simply assume on the basis of someone's age, appearance, medical condition or behaviour
- Try to identify issues and circumstances of relevance to the decision in question
- Is capacity likely to be regained? If so, can decision-making wait until then?
- Do whatever is possible to involve the person in the decision
- Try to find out the views of the person who lacks capacity:
 - As expressed in the past or currently, or by habits and behaviour
 - Any beliefs and values known to be held that would influence the decision
 - Any other factors the person would be likely to consider if able to do so
- Consult other relevant people
- Weigh up all the factors to decide what is the person's best interests
- Remember a best interests decision does not *have* to be the least restrictive option and can impinge on a person's human rights, provided this is objectively justified and proportionate and within the explicit qualifications or caveats to the rights (such as the protection of others' rights and freedoms, which could be relevant in a housing context).

Before acting on behalf of someone where it is clear they lack capacity it is therefore important to identify the correct decision maker and also to ensure that the individual has not previously determined how such a decision should be made, e.g. through an advance decision.

Where satisfied that you are obliged to take over the incapacitated person's decision-making, you must make your decision on the basis that any decision or action is in their best interests. Again, the Code of Practice recommends that decision makers seek to act in a way that first looks to protect the position of the incapacitated person, where they are likely to regain capacity. Where this is impractical, then one should go on to consider the incapacitated person's wishes, feelings, values and beliefs as held when they were competent or those they would be likely to have now if they were competent.

Finally, one should consider the incapacitated person's current incompetent wishes etc., and involve them in the decision-making, irrespective of their incapacity, so that any decision made or action required is not imposed on them wholly without explanation.

8 CONSIDERATIONS FOR PEOPLE WHO HAVE A MORAL OR LEGAL DUTY OF CARE

Formal and informal carers (including family and friends) who look after and act on behalf of someone who becomes incapable of giving consent, can continue to fulfil that role without fear of liability, provided that the acts carried out are in connection with the care or treatment of an incapacitated adult, they

reasonably believe the person lacks the capacity on that issue and they have taken all reasonable steps to ascertain that the act is in the incapacitated person's best interests.

The term 'acts in connection with the care or treatment' is not defined; the Code explains that this is left deliberately wide. The Code of Practice details a non-exhaustive list of acts that could theoretically be carried out within this protection, both in respect of personal care and health care of an incapacitated person. (See paragraph 6.5 of the Code of Practice.)

These include:

- Physical assistance with washing, dressing and personal hygiene
- Helping with eating or drinking
- Helping with mobility
- Doing shopping or buying essential goods
- Arranging household services, e.g. repairs
- Arranging domiciliary or other services required for the person's care (e.g. cleaning or meals provision)
- Acts in relation to other community care services
- Acts associated with a change of residence, eg. house moving and clearing
- Moving a person from one address to another (subject to the rules on proportionate restraint)

The position is the same as it was prior to the new Act coming into force: carrying out such actions on someone without their informed consent could constitute an assault, trespass to the person or their property, or the civil law wrong of "conversion of goods". However, informal and formal carers have relied on the doctrine of necessity as protection against liability for carrying out such acts, where someone was unable to give informed consent. The new Act provides a clear statutory defence for the carer (see Section 9 below) whilst at the same time providing protection from abuse for the incapacitated individual through the safeguards imposed by s1-4 of the Act, which bind everybody.

In addition to acts in connection with health and personal care, the new Act makes provisions for others to purchase 'necessaries' on behalf of an incapacitated person. For more detailed discussion as to what will be permissible for others to buy with an incapacitated person's money or how they may 'pledge the credit' of an incapacitated person, please see Housing LIN information sheet no. 3.

9 SECTION 5: PROTECTION IN CONNECTION WITH CARE OR TREATMENT

The Act grants protection from liability to people undertaking acts which would normally require an individual's consent if s/he had the capacity to give it. Whilst the decisions or acts need to relate to "care or treatment", as described above, this term is not narrowly defined.

To be protected, any decision or act made or done on behalf of someone who lacked capacity must comply with the following:

- **Doctrine of necessity/human rights** – the act can be justified as being necessary and proportionate
- **Best interests’ principle** – the act is in the person’s best interests and the correct steps have been taken, eg. consulting a range of relevant people, where appropriate and practical, to ascertain this.
- **Restraint rules** – if the act is intended to restrain the person in any way, the act must be “necessary to prevent harm to the person” and must be proportionate to the likelihood of the harm and its seriousness. (There is a subtle distinction between restraint which is allowed in these circumstances and “depriving someone of their liberty”, which is not - for more details see the Housing LIN information sheet no.2).
- **Least restrictive principle** – subject to lawful resource considerations, the step taken ought to be the least interventionist and least restrictive necessary to prevent the harm or reduce the risk, even if it does not necessarily eliminate it altogether.

Family carers and other informal carers are not expected to be experts in assessing capacity, and it is therefore sufficient for them, amongst others using the Act to hold a reasonable belief that the person lacks capacity in order to receive statutory protection from liability.

You would not be protected from liability by s5 of the Act, if you had a duty of care and failed to act to prevent serious harm – this would be seen as negligence. You have a statutory defence if you DO something which normally requires consent in order to make your action lawful, not if you FAIL to do something.

S5 does not appear to provide protection if something is done which requires specific authority to act on someone’s behalf (e.g. LPA or deputyship) and which would otherwise not be effective in the first place, eg. signing a tenancy for an incapacitated person. You must have specific authority to do that and other things like managing a bank account, to make it legally valid at all.

The Act makes clear that no s5 protection can be claimed where acts are:

- are in contravention of a lawful decision made by a deputy or LPA;
- are negligently performed;
- amount to restraint (unless additional safeguards are met);
- amount to a deprivation of the incapacitated person’s liberty; or
- done even though the person carrying out the act, knew, or ought to have known, the individual had capacity on that issue.

The importance of recording the decision making process is clear. Those acting on behalf of incapacitated persons, particularly where they are doing so in a professional context, have an obligation imposed by the Code of Practice to ensure that the appropriate records are made, detailing who was consulted by the decision maker, what information was considered, how the decision was reached and what actions were taken.

10 **NEW MECHANISMS FOR SUBSTITUTE DECISION MAKING UNDER THE MENTAL CAPACITY ACT 2005**

The MCA establishes new mechanisms for others to take over decision-making functions for those who lack capacity, including - for the first time - personal welfare decisions. The MCA establishes a hierarchy of who must be

consulted and, in some instances, whose opinion/decision should be acted on. This will directly impact on the management of the lives of incapacitated people, including those in independent living projects. It is important to note that those involved in the care of anyone who may lack capacity, and in particular with a statutory duty to provide care or who receive payment for providing care, must ensure that they have a full understanding of the role, obligation and limitations of these new powers as well as how these may restrict their own powers to intervene and provide services.

A **ADVANCE DECISIONS**

Advance decision notifications enable a mentally competent adult to make advance treatment decisions to *refuse* specified medical procedures or treatment in the event of loss of capacity or inability to communicate at some time in the future.

No individual, whether or not s/he has capacity, has the right to *demand* specific forms of medical treatment. However, requests for specific forms of treatment or expressions of wishes or preferences made in advance by a person who subsequently lacks capacity to consent to treatment should be taken into account (in particular those that are expressed in a relevant written statement) in deciding what treatment would be in that person's best interests.

The new Act places an obligation on professionals to comply with a valid and applicable advance decision. Only those 18 and over and with capacity on the issue can make an advance decision. To be valid an advance decision refusing life-sustaining treatment has to be in writing and witnessed. Advance decisions not involving a refusal of life sustaining treatment can be verbal and will be applicable once the circumstances described occur, both in terms of injury/illness and proposed treatment.

A valid and applicable Advance Decision cannot be overridden even by the Court and there is no s.5 protection for anyone who acts in contravention to it, but there are some instances where professionals would be lawfully entitled to ignore it.

The decision of a registered LPA will override an advance decision if the LPA document was made after the decision and gave the attorney the right to consent to or refuse the treatment specified.

There are special rules for people who are detained under the Mental Health Act 1983 – in some circumstances, their advance refusal of treatment for a mental disorder may be overridden.

Advance decisions will also be inapplicable if the individual subsequently does something which is clearly inconsistent with the advance decision.

There are several situations where a medical professional or an administrator of medicine would be safely within the law to ignore an Advance Decision, eg. if someone's Advance Decision is not known about, they would probably be treated anyway, in an emergency. Also, if the health care provider has reason to doubt the validity or coverage

of the Decision, then there is an excuse in the statute for treating the person anyway, to prevent deterioration to a person's condition, pending resolution of the doubts by a court. Thirdly, medical professionals are encouraged by the Code to allow for the fact that advances in medical knowledge may have revealed a cure or a treatment for something, that was not known of at the time the Decision was written, in which case it would not be right to assume that the patient would still make the same decision to refuse treatment, in the light of the updated information. Finally, the Code mentions the possibility that a person might convey through a lifestyle choice that their values had changed, and how it might then be *right* to treat the person, despite the previous Decision, on the footing that he or she had simply omitted to tear it up.

B LASTING POWER OF ATTORNEY

A person with capacity can appoint someone eg. a relative, friend or solicitor, to act on their behalf if they should lose capacity in the future.

- The LPA can cover:
 - Property and Financial Affairs – this can grant the donee power to control and manage the incapacitated person's bank accounts, property, including any sale or acquisition of property, make a contract on the person's behalf and make any gift to a third party of the incapacitated person's money or property. The LPA could cover signing or surrendering a tenancy on the person's behalf, as a tenancy is property.
 - Health and Personal Welfare Decisions – includes things like deciding *where* someone should live, or consenting to or refusing treatment or agreeing a Local Authority care plan.

The donee of an LPA cannot use their power unless this has been registered with the Office of the Public Guardian and thereafter can only act in those areas specified by the donor within the LPA. They must also comply with the principles and duties set out in the new Act.

With a Property and Affairs LPA, the donee acquires the power to act before the donor loses capacity unless the donor directs otherwise.

Where the LPA gives substitute powers to make personal welfare decisions, the donee

- can only act once the donor has lost the capacity to decide/act for themselves on that specific matter
- can only give or refuse consent to health care treatment if specific authority has been given
- a valid and applicable advance decision on the matter made later will override the donee's authority to act.

For full details of the powers of donees, please see Housing LIN information sheet no.1.

C THE COURT OF PROTECTION

The new Court of Protection will consider all serious issues capable of legal consideration which arise from any aspects of the new Act. The Code of Practice focuses on minimising disputes, or where this is not possible, resolving these informally in a quick and cost-effective manner. Alternative solutions to disputes should be considered before any application to the Court is made as the Court will only consider a matter if appropriate alternatives have at least been considered and not pursued for good reason.

Where there is a dispute, or a decision needs to be made relating to someone who lacks, or may lack, capacity to act or decide on a particular matter – this could be property, financial affairs, health or well-being - the Court can:

- Make declarations regarding a person's capacity to make a specific decision, or a decision on a range of issues (for example, the decision to refuse care)
- Make declarations on the lawfulness of acts (including a course of conduct or an omission) done, or to be done, to a person without capacity, for example, the decision to move someone to alternative long-term accommodation in a situation where interested parties cannot agree.
- It can also consider the legality of advance decisions concerning medical treatment; that is, it can declare:
 - Whether a person lacks capacity to consent to or refuse treatment at the time the treatment is proposed;
 - Whether an advance decision is valid and is applicable to the proposed treatment in the specified circumstances which have now arisen.
- Make decisions on behalf of the incapacitated adult. The new Act lists the types of decision that only the Court can make, namely deciding where the person should live if this results in a deprivation of liberty, what contact they should have with specified persons or prohibiting contact with named individuals. The Court may also refuse the continuation of medical treatment where this may lead to the person's death and can order the transfer of the named person from those responsible for the incapacitated person's health care.
- Appoint a deputy to act as decision maker on behalf of the incapacitated adult. Their appointment should be as limited in scope and duration as possible. Where possible a single order should be made about a specific issue, in preference to appointing a deputy.
- Police the conduct of Lasting Powers of Attorneys, for example, it may clarify the terms of an LPA, determine the validity of an LPA and give directions as to how the LPA should be operated. It may also refuse to register a LPA or revoke an LPA if it believes this to be in the best interest of the incapacitated adult.

The Court is assisted by Court of Protection Visitors, including Special Visitors who will be medically qualified, and the Office of Public Guardian, but it may also order an NHS body or Local Authority to provide a report or disclose information to assist it in forming a decision. Providers of accommodation required to be registered under part II of the Care

Standards Act 2000 may also be required by the Court to disclose information held in relation to an incapacitated person.

D COURT APPOINTED DEPUTY

A person/s or the named holder of a specified office can, provided they are over 18, be appointed by the court (jointly or severally) to make decisions on behalf of an incapacitated person. The Act supposes that powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances and that the use of deputyship for substitute personal welfare decision making will be rare.

The Housing LIN information sheet no.1 sets out in detail the role, procedure for appointment and limitations imposed by the Act on deputies. In brief, deputies are obliged to comply with the MCA (s.1-4) and have regard to the Code of Practice; they can be compelled to report to the OPG and, if necessary, the Court can revoke their powers where it determines this to be in the best interest of the incapacitated person.

Deputies who are given power to make personal welfare decisions on behalf of an incapacitated adult's will be entitled to make decisions as to where the person should live. However, where such a decision may result in the restraint of the incapacitated person the deputy must satisfy himself (and possibly the OPG or Court) that the restraint is necessary and proportionate. A deputy can never authorise the deprivation of liberty of an incapacitated person. A personal welfare deputy is explicitly prevented by the Act from refusing life sustaining treatment on behalf of the incapacitated person or from changing the person's health care team responsible for the incapacitated person. In addition, a deputy cannot prevent a named person from having contact with the incapacitated person.

Deputies given powers of substitute decision making on behalf of an incapacitated person in respect of financial and property affairs are expressly forbidden by the Act from creating any settlement of the incapacitated person's property, making a will on his behalf or exercising any power of consent specifically vested in the incapacitated person which would require his (and his alone) capacitated decision making, e.g. signing a will.

A deputy cannot override a lawful decision made by a donee of a LPA.

E THE OFFICE OF PUBLIC GUARDIAN

The MCA creates a new public office - the Office of the Public Guardian - that has a range of functions that contribute to the protection of people who lack capacity, including:

- Keeping a register of Lasting Power of Attorneys
- Keeping a register of orders appointing deputies

- Supervising deputies appointed by the Court
- Directing Court of Protection Visitors
- Receiving reports from attorneys
- Providing reports to the Court
- Dealing with enquiries and complaints about the way deputies or attorneys use their powers

The OPG will have a far more proactive involvement in combating financial abuse arising in relationships with LPAs and Deputies. The OPG will also be responsible to direct Court of Protection Visitors to 'visit' people who lack capacity, and their LPAs and Deputies. The Court of Protection Visitors will have an important part to play in the investigation of possible abuse cases and will act as independent advisers to the Court in this capacity. They will also however, have a more positive role to play in providing help and general advice to LPAs and Deputies in how properly to fulfil their role.

F INDEPENDENT MENTAL CAPACITY ADVOCATES (IMCAS)

From April 2007, the NHS/Local Authority (Responsible Body) where an incapacitated person is residing *must* appoint a suitably experienced IMCA where an 'unbefriended' incapacitated individual may require serious medical treatment or a long-term move into long-term care settings. ('Unbefriended' means having no family or friends to speak for them)

Only housing that is provided by the public sector as a placement under the National Assistance Act (in the sense of being directly contracted for by the local authority or the National Health Services with the provider) triggers an IMCA, and tenancies are almost never in that category. If a local authority grants a tenancy to a person, it normally does so under housing legislation. For further explanation of this point, see the last section of Information sheet 4, Statutory Duties to Accommodate.

The NHS/ local authority *may* appoint an IMCA for a review of a placement or when there is an allegation of abuse and the NHS/LA intend to take protective measures. An IMCA must be independent of the public authority proposing the move or treatment.

IMCAs have the power to

- Interview the person s/he is representing in private
- Examine and take copies of any health record, any social services related record, or any registered provider's record considered relevant to the investigation of the IMCA

IMCAs will

- Provide support so the incapacitated person participates as fully as possible
- Obtain and evaluate relevant information
- Ascertain the likely wishes, feelings and values of the person
- Ascertain any alternative courses of action
- Obtain further medical opinion if IMCA thinks it desirable

- Challenge or provide assistance in challenging any relevant decision

The relevant public authority must take into account the views of the IMCA, but their role is advisory - they are to represent the person's interests and ensure that the proper procedures and principles have been considered in decision-making; they cannot act as a substitute decision maker.

IMCAs will also be able to challenge decisions made by public authorities on behalf of an incapacitated adult, but in practice, any challenge will be likely to be through the complaints procedure rather than the Court of Protection or Administrative Court.

11 THE ROLE OF PUBLIC AUTHORITIES

Local Authorities (Adult Social Services) and the NHS have various duties and powers under a range of legislation in relation to assessment, care provision, treatment and adult protection. They also have residual powers under Section 21 of the National Assistance Act 1948 to provide accommodation to anyone over 18 in need of care and attention as a result of age, illness, disability or any other circumstance. For a full explanation of these, please refer to the Housing LIN information sheet no. 4.

They are also subject to the positive obligations to safeguard individuals' rights imposed by the provisions of the Human Rights Act. They sometimes have to intervene to protect or treat an adult who lacks capacity to consent, but this does not give them complete freedom to do literally *anything* (See Section 5 protection).

In the case of uncertainty or dispute, they can apply to the Court of Protection for a declaration. However, the court has no jurisdiction to consent to welfare matters which are not compellingly necessary in the first place, eg. marriage, sexual relations, or having direct payments instead of services. It is advisable for the responsible authority to go to the Court of Protection for its approval where an act is potentially in breach of the Human Rights Act, eg. moving an incapacitated person, or preventing them from going home, in both cases against the person's apparent wishes, or someone else's.

12 CAPACITY AND DECISION MAKING IN THE CONTEXT OF HOUSING PROVISION

What will the position be once the Act comes in regarding a decision to move to an Extra Care Housing or other supported housing setting, if the person's capacity to agree or to decide is in doubt?

A) Deciding where to live

- This is a personal welfare decision.
- The individual concerned must be able to exercise an informed choice which would require being able to manage the four steps in the test for incapacity.
- If the person cannot manage one of the steps, a welfare decision can be made informally that the person needs to move, and they can be

moved physically under s5, but that does not equate to power to make effective legal arrangements for tenure or occupation of premises.

- A donee under an LPA who has been given a welfare authority can make the decision where the donor should live and can override others in this regard. But in order to make any arrangements for tenure or property acquisition a donee under an LPA would need to have been given authority over the incapacitated person's property and financial affairs.
- The Court of Protection can make this welfare decision under a best interests application.
- A court-appointed deputy could make the decision if such decisions were within the powers specifically given by the Court.
- Where the person lacks capacity to decide where to live and there is no other person with the necessary authority to decide on their behalf or make arrangements, a Public Authority may be obliged to act as decision maker, where they owe the incapacitated person a statutory duty of accommodation, for instance under the National Health or social services legislative framework. For more detailed information as to which public authorities may be compelled to act and in what circumstances please see the Housing LIN information sheet no. 4.

B) Applying to public authorities for housing

- Various legislation imposes obligations on health, housing and social service authorities to provide accommodation where an individual's assessed needs meet the eligibility criteria. In some instances, for example applications under the Housing Act 1985, an individual may be required to have capacity to make an application to the public authority. In most cases, however, a duty will arise regardless of the individual's capacity to understand the nature of their application for assistance or to contract for the provision of services. Where such a duty to accommodate does arise the individual may be provided for by way of the statutory duty and the public authority is likely to have a duty to ensure any provision of accommodation is appropriate to meet the individual's assessed needs. For full details on the duties of public authorities regarding accommodation, please see the Housing LIN information sheet no. 4.
- In order to change a care plan from one which provides a contracted placement in accommodation *for* the individual, contracted for by the local authority, to one where the individual takes on the contract, the authority has to be satisfied that the person no longer needs that form of help, and has the mental capacity to understand the essence of a purchase or rental agreement, and wants to take on that responsibility – or someone who is able and willing to do it for them.
- Where the person is not capable of these things, a local authority can legitimately see if there is a willing, able and authorised person to make that decision in place of the person concerned, if such an individual exists. 'Authorised' here means properly *authorised* to stand in the shoes of the person him or herself, as an agent with authority to sign a tenancy, for example an existing Enduring Power of Attorney or Property and Affairs Lasting Power of Attorney.

C) Tenancies (Periodic tenancies and long leases)

i The person with capacity

- A person can be said to have capacity regarding the decision whether to accept a tenancy if they are able to understand the basics to sign the tenancy. Evidence that the individual understood the essentials of the deal, i.e. the basic concept of money, owning it, exchanging it in return for something, and the basic concept of promises and rules which need to be abided by (even though they may require help to manage to keep to what they have promised), is likely to satisfy a court that the individual had the required capacity at the time the tenancy commenced, to be held to the contract terms. Given the nature of social housing provision, where there is any doubt as to the person's capacity, a landlord is advised to note down any observations or evidence of the individual's capacity to undertake the tenancy prior to the agreement being entered into, and consider seeking professional advice.
- The new Act imposes a positive obligation on anyone involved in the care and treatment of those lacking capacity, including managers of supported housing projects, to maximise a person's capacity. A person should therefore be assisted by whatever means are practically available to understand the nature of the tenancy. In particular, it is important that any restrictions on behaviour are carefully explained. Where patient explanation and sufficient support means that the individual understands the nature of the agreement, they will have full capacity to undertake the tenancy.
- Where someone with capacity refuses to take on a tenancy, for instance because they do not want to make themselves liable for rent and obligations, this refusal will be valid. A financial or property LPA might have authority to take on a tenancy regardless of the person's wishes, but this is unlikely. Apart from this, no one else can take over decision making, even if that person firmly believes it is in the person's best interests – for a capacitated person.
- A tenancy signed while someone has capacity remains valid once they lose capacity.
- As capacity is an issue-specific matter it is foreseeable that an individual may have capacity to agree to a move and sign a tenancy, but recognise that handling a tenancy is difficult. A person who has a tenancy might be able to authorise someone to manage it as their agent (assuming they have the required capacity for this decision). This could be through an ordinary informal or agency arrangement, an ordinary power of attorney or by granting authority under a property and finance LPA. An ordinary power of attorney ceases to confer any authority however on the agent once the grantor of the power loses capacity in relation to the thing concerned. Of these arrangements, only an agent who has a property and finance LPA or EPA has the legal authority to sign a new tenancy agreement if the person loses capacity to sign it themselves. (Please see Housing LIN information sheet no. 1.

ii An Authorised Agent

- A person without capacity to understand the essence of a tenancy cannot be put into one by someone else unless they have special authority. It cannot be done under the doctrine of necessity or best interests because those principles afford defences, but do not convey free standing *power*.
- A person with capacity to understand that the notion of a tenancy is difficult to understand can authorise someone else to sign it for them as their agent. A person who lacks capacity even to understand that they need help in making the decision whether or not to enter into the tenancy, cannot appoint an agent to do it for them.
- An LPA donee with financial or property authority can sign or surrender a tenancy on the individual's behalf.
- An authorised signatory (LPA, deputy or existing Enduring Power of Attorney holder) signs as the agent of the incapacitated person. S/he does not take on liability, without expressly agreeing to do so, for the defaults of the incapacitated person for whom s/he acts, so should be asked to guarantee the rent or indemnify the landlord against damages or other breaches if the landlord has concerns.
- A receiver, or its replacement - the court-appointed deputy - can also sign or surrender a tenancy.
- A Single Order can be obtained from the Court of Protection covering the single issue of decision making in relation to housing tenure. The tenancy will be the occupant's own tenancy, for legal purposes, even though it is not understood.
- Local authorities do not have the power to sign or surrender tenancies on behalf of incapacitated adults without specific authorisation
- Anyone can ask a landlord informally to release someone from their obligations. The landlord will often be willing to release the tenant so that s/he can re-let the premises to a new tenant. The position of the landlord is not clear, because s/he or he will know that the tenant has not actually asked for the release, and that the person asking does not have authority to manage the person's legal relationships in this regard, so this is not good practice.

iii Tenancies signed by a person without capacity

- If a person without capacity to understand the essence of a tenancy actually signs one personally, it is presumptively valid, but may be undone later, by someone taking the view that the landlord must have known of the person's incapacity. However, it is poor practice and abusive to make someone who lacks capacity sign a tenancy agreement.
- A tenancy signed by an incapacitated person remains valid unless/until "avoided". This can be done by the incapacitated person if he/she regains capacity, or by a litigation friend, an attorney/LPA finance and property donee or by a receiver/court-appointed deputy. Undoing it, though, means the person then has no tenancy.

iv Tenancies created in other ways

- Capacitated individuals such as a son or daughter without any form of legal authority to sign a tenancy on behalf of an incapacitated person would in effect be making themselves the tenant, with the resident becoming the sub-tenant or licensee of whoever did sign. The

incapacitated person would not be in a direct contractual relationship with the landlord. However, if the landlord is happy with this arrangement and Housing Benefit is not needed to pay the resident's costs this would not be inappropriate. In this situation, the signer of the tenancy is personally liable for rent and contract compliance and the landlord would have to take action against the signatory for breach of the terms of the tenancy by the ultimate occupier, over which s/he may have no control.

- Under the Contracts (Rights of Third Parties) Act 1999, a capacitated person could sign a tenancy conferring a right of occupancy on another (incapacitated) person. This would mean the capacitated person was directly liable for rent and any damages or breach by the incapacitated person, but that the occupant had the same rights against the landlord as the person actually signing the agreement. Under the 1999 Act, the parties to the contract are able to exclude this right of enforcement but if they do not say so, then the fact that the contract confers a benefit (occupation rights) on the occupant is sufficient to enable the occupant to enforce the terms between the actual parties. The landlord can only take action against the occupant, for instance for breach of covenant, if the occupant - or signatory on the occupant's behalf - has initiated legal proceedings to enforce contract terms against the landlord. Provided such arrangements were agreeable to the parties this would give the incapacitated person direct rights of occupation, and rights under any covenants for quiet enjoyment, enforceable via the help of a litigation friend.
- At common law, anyone occupying premises owes compensation to the landowner for use and occupation, and anyone causing negligent damage to property is liable in the law of tort. Tenancies could be arranged without signature so long as the landlord was happy to take on tenants who could not understand the conditions in the tenancy and would not be able to be held responsible for complying with "good behaviour" covenants or made *contractually* liable for breakages or other damage.

v Landlord's risks, rights and responsibilities

- Capacitated tenants could agree to terms which imposed a measure of restraint upon them and their lifestyles but they would need to understand that this is what they were being asked to do. By contrast, no one can impose restrictive measures on an incapacitated person where such restrictions may amount to restraint (unless further conditions are satisfied) or a deprivation of liberty. Authority from the Court will be needed even if it is believed to be in a person's best interests. Please see Housing LIN information sheet no. 2 for further details
- Where the tenancy is entered into and the landlord had express or implied knowledge of the tenant's incapacity a landlord may not be able lawfully to evict for breach of the contract if a tenant cannot help himself or herself causing nuisance or annoyance – that could count as disability discrimination, under the DDA, unless actual physical harm were being threatened.
- Any legal action against an incapacitated occupier of premises for possession, rent arrears or damages for breach of covenant, will require the appointment of someone as a litigation friend, because the

court rules require it if the person is incapable of managing their own property and affairs.

- A landlord cannot be made to contract with people who lack capacity. The Disability Discrimination Act offers providers of goods and services, including housing providers in the context of letting premises, a justification for refusing to provide where the recipient lacks the capacity to contract and therefore be held to account for payment and other aspects of contract compliance.
- In an Extra Care Housing setting, if the tenancy is potentially invalid or not directly between the resident and the landlord, registration consequences may follow: If the occupant doesn't have his or her own tenancy and security of tenure, there is the risk that the premises will not be treated as the person's "own home", and that the package being provided will be more likely to be seen as providing "care together with accommodation" and hence triggering registration as care home provision under the Care Standards Act.

vi Payment of Rent

- S8 of the new Act may give an informal carer the authority to pledge the incapacitated person's credit to pay for rent, or to promise to pay for breakages or other damage, but it does not make the carer personally liable. Getting the money or possession of the property back will still be subject to the rules on suing an incapacitated person in the courts.
- S7 powers to pay for necessary goods and services would enable an informal carer to use any money of the incapacitated person which is in their possession to pay care and support charges - but not necessarily rent, because occupation rights are neither goods nor services, in legal terms.
- Neither a credit pledger nor an authorised signatory takes on personal liability, without expressly so agreeing, for the defaults of the incapacitated person for whom s/he acts, so should be asked to guarantee the rent or indemnify the landlord against damages or other breaches, if the landlord has concerns.
- For more details, please see the Housing LIN information sheet no. 3.

13 PREVENTING ABUSE

Practitioners and those involved in adult protection have raised concerns that the new Act has not put in place sufficient mechanisms to protect vulnerable adults from abuse, particularly financial abuse. It may appear that the Act could in fact provide increased opportunities for those involved in the care of an incapacitated person to misappropriate the individual's funds due to the statutory powers to spend the incapacitated person's money on necessities embodied in s7 of the Act as well as the legal protection offered under s5 of the MCA.

However, it is worth highlighting that all powers given under the Act are limited to those actions necessary to safeguard or promote an incapacitated person's best interests. Where someone is not able to show that they believed that they were acting in the person's best interests they do not qualify for the protection provided by s5 and may in fact be guilty of either one

of the two new criminal offences created by the Mental Capacity Act, namely ill-treatment or wilful neglect of an incapacitated person.

In addition to the new offence, the Act creates a number of new statutory bodies intended to monitor the actions of anyone appointed as a substitute decision maker under the new Act. Similarly, anyone acting informally must now comply with the principles imposed by s1 of the Mental Capacity Act and with regard to the Code of Practice in order to benefit from s5 immunity.

Where there is suspicion that any substitute decision maker - an LPA, deputy responsible body or informal carer - may be acting outside of their duties or in contravention of the principles set out in s1, then the matter can be referred to the Office of the Public Guardian or the Court of Protection, both of whom have powers to investigate allegations (through the appointment of Visitors). If necessary, the Court of Protection is able to revoke an LPA or deputy's authority to act. Ultimately, any suspected criminal activity should be referred to the police.

The mechanisms in place to monitor arrangements and provide protection for vulnerable adults against financial or physical abuse are unlikely to have sufficient capacity to provide close scrutiny to each and every arrangement for substitute decision making. Protection of this vulnerable group will very much depend on the close scrutiny of arrangements by those involved in the care of individuals. For that reason it is imperative that anyone with a duty of care towards an incapacitated adult fully familiarises themselves with the powers, but also the limitation of those powers, as set out by the Act so that they are confident they are acting within the authority given to them by the Act, and are able to challenge any other would-be substitute decision maker if they have concerns that they may not be acting lawfully or in the individual's best interests.

Where care and housing providers find themselves in direct confrontation over the incapacitated person's best interest with others purporting to act with authority given under the new Act, either because they are donees of a LPA or court appointed deputies, providers must be aware that they are only able to act contrary to the direct instructions of a donee or deputy where it is necessary to prevent a serious deterioration in the person's condition or if it involves giving life sustaining treatment. However, any actions are only permissible whilst direction is sought from the Courts and so it would be necessary to refer the matter immediately to the Court of Protection wherever confrontation or concerns arise.

14 CONCLUSION FOR HOUSING PROVIDERS

There is still an important role for housing providers in:

- monitoring the well-being of service users
- advocating on their behalf in cases of suspected abuse

Housing providers need to be aware of capacity issues. They need to be confident that they are able to correctly identify the issue of capacity that needs to be tested, they can correctly apply the test of capacity and decision-making and are fully aware of the steps available to them if someone's capacity is in doubt. In addition, they must have sufficient knowledge of the Act and the new mechanisms available to ensure that any substitute decision

making undertaken on behalf of an incapacitated person is undertaken by the right individual or body and that that person or body fully considered their obligations towards the incapacitated person prior to carrying out any act on behalf of the incapacitated person.

When undertaking needs and risk assessments they need to keep in mind all available options provided by the new Act to those with capacity to plan for when they may lose this so as to assist them in planning for the future, including assisting them to consider whether they would wish to make an advance decision notification or appoint someone they trust to take over decision making on their behalf through a property and financial affairs and/or personal welfare Lasting Power of Attorney.

Housing support providers have clear duties towards anybody living within their projects. Under the new Act, this will include a duty to maximise their capacity and, where necessary, ensure any substitute decision making is made in the tenant's best interest. For their own protection and that of the organisations for whom they act, landlords should ensure that any arrangements for accommodation and care are lawful, for example ensuring that the tenant had sufficient capacity to understand the nature of the agreement or else that there is an authorised contractual party. This will protect themselves, their employees and their clients.

FURTHER READING

Housing LIN Information Sheets as follows:

- No.1 – The Mental Capacity Act 2005: Substitute Decision-Making and Agency**
– describes in more details powers and limitations of different legal instruments for making decisions on behalf of others
- No.2 – The Mental Capacity Act 2005: Lawful restraint or unlawful deprivation of liberty?** – expands on how to distinguish between the two
- No.3 – The Mental Capacity Act: Paying for Necessaries and Pledging Credit** – goes into more details about payment powers under the Act
- No.4 – The Mental Capacity Act 2005: Statutory Duties to Accommodate** – describes the legislative framework for housing people in the context of the Act

Code of Practice

<http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf>

Formal documents including the Act itself

<http://www.dca.gov.uk/menincap/legis.htm>

Official Training Guides for a range of target groups

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_074491

MCA toolkit for organisations – helps organisations to assess their preparedness for the Act

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4137745

Other Housing LIN publications available in this format:

- Factsheet no.1: **Extra Care Housing - What is it?**
- Factsheet no.2: **Commissioning and Funding Extra Care Housing**
- Factsheet no.3: **New Provisions for Older People with Learning Disabilities**
- Factsheet no.4: **Models of Extra Care Housing and Retirement Communities**
- Factsheet no.5: **Assistive Technology in Extra Care Housing**
- Factsheet no.6: **Design Principles for Extra Care**
- Factsheet no.7: **Private Sector Provision of Extra Care Housing**
- Factsheet no.8: **User Involvement in Extra Care Housing**
- Factsheet no.9: **Workforce Issues in Extra Care Housing**
- Factsheet no.10: **Refurbishing or remodelling sheltered housing: a checklist for developing Extra Care**
- Factsheet no.11: **An Introduction to Extra Care Housing and Intermediate Care**
- Factsheet no.12: **An Introduction to Extra Care Housing in Rural Areas**
- Factsheet no.13: **Eco Housing: Taking Extra Care with environmentally friendly design**
- Factsheet no 14: **Supporting People with Dementia in Extra Care Housing: an introduction to the the issues**
- Factsheet no 15: **Extra Care Housing Options for Older People with Functional Mental Health Problems**
- Factsheet no 16: **Extra Care Housing Models and Older Homeless people**
- Factsheet no 17: **The Potential for Independent Care Home Providers to Develop Extra Care Housing**
- Factsheet no 18: **Delivering End of Life Care in Housing with Care Settings**
- Factsheet no 19: **Charging for Care and Support in Extra Care Housing**
-
- Case Study Report: **Achieving Success in the Development of Extra Care Schemes for Older People**
-
- Technical Brief no.1 **Care in Extra Care Housing**
- Technical Brief no.2 **Funding Extra Care Housing**
- Technical Brief no.3 **Mixed Tenure in Extra Care Housing**