

# KNOW YOUR RIGHTS, OWN YOUR LIFE



Rights exist to protect and guide people. When we know how and when to use them, we gain the clarity to make decisions with confidence and the strength to act when it matters.

Knowing our rights can change our lives. It gives us the tools to make decisions that define our future.

## MENTAL CAPACITY ACT 2005

What You Need to Know and How It Can Help You

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## **OVERVIEW**

The **Mental Capacity Act 2005** (“the Act”) provides a statutory framework governing decision-making on behalf of individuals who lack the capacity to make particular decisions for themselves in England and Wales. It applies primarily to people aged 16 and over and covers decisions relating to personal welfare, healthcare, accommodation and property, and financial affairs.

**The Purpose of the Act:** To protect, empower and ensure individuals are supported to make their own decisions wherever possible before others intervene.

The Act must also be read within the wider legal and human rights framework, particularly in light of principles relating to dignity, autonomy, and proportionality. It interacts with health and social care law, safeguarding law, and human rights obligations. In practice, it governs everyday professional decision-making across health services, local authorities, care providers, families, and the courts. Its scope ranges from **routine care decisions** to **serious medical treatment**, **long-term financial management**, and **authorisation of arrangements that may amount to deprivation of liberty**.

The Act is structured into:

- **Part 1 – Persons Who Lack Capacity**
- **Part 2 – The Court of Protection and the Public Guardian**
- **Part 3 – Miscellaneous and General**
- **Schedules**, including provisions relating to lasting powers of attorney, property and affairs, international protection of adults, deprivation of liberty arrangements, and transitional provisions.

## The Core Principles (Section 1)

**Section 1 sets out the statutory principles that underpin the entire Act.** These principles are **legally binding and must guide any person exercising functions under the Act, including healthcare professionals, social workers, local authorities, attorneys, deputies, and the Court of Protection.** The presumption of capacity is fundamental; it ensures that incapacity is never assumed merely because of age, diagnosis, disability, appearance, or behaviour.

**The Act is built upon five statutory principles:**

- A person must be assumed to have capacity unless it is established that they lack capacity.
- A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because they make an unwise decision.
- An act done, or a decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests.
- Before the act is done, or the decision is made, regard must be had to whether the purpose can be achieved in a way that is less restrictive of the person's rights and freedom of action.

## Determining Capacity (Sections 2-3)

Capacity is **decision-specific and time-specific.** The Act defines a person as lacking capacity in relation to a matter if, at the material time, they are unable to make a decision for themselves because of an impairment of, or a disturbance in the functioning of, the mind or brain.

**A person is unable to make a decision if they cannot:**

- Understand the information relevant to the decision,
- Retain that information,
- Use or weigh that information as part of the process of making the decision, or
- Communicate their decision (whether by talking, using sign language or any other means).

## Best Interests (Section 4)

When a person lacks capacity, any act done or decision made must be in their **best interests**. **Section 4 provides a structured checklist for determining best interests. It requires decision-makers to consider all relevant circumstances and, where practicable, to permit and encourage the person's participation.** The checklist is designed to prevent paternalistic or convenience-based decisions and instead ensure that decisions reflect the individual's values and perspective as far as possible.

In determining best interests:

- All relevant circumstances must be considered.
- The person must be permitted and encouraged to participate as fully as possible.
- Consideration must be given to:
  - The person's past and present wishes and feelings.
  - The beliefs and values that would be likely to influence their decision.
  - The views of anyone engaged in caring for the person or interested in their welfare.
  - Any donee of a lasting power of attorney or court-appointed deputy.

**Life-sustaining treatment decisions must not be motivated by a desire to bring about the person's death.**

## Acts in Connection with Care or Treatment (Sections 5-6)

**The Act provides legal protection for those carrying out acts in connection with care or treatment if:**

- They reasonably believe the person lacks capacity.
- They reasonably believe the act is in the person's best interests.

**Restraint is permitted only if it is necessary to prevent harm and proportionate to the likelihood and seriousness of that harm.**

## Lasting Powers of Attorney (Sections 9-14 and Schedule 1)

**The Act allows individuals with capacity to plan ahead by creating a lasting power of attorney (LPA). An LPA enables a donor to appoint one or more donees to make decisions on their behalf if they later lack capacity.** There are separate instruments for property and affairs and for personal welfare. The statutory framework sets out:

Individuals benefit from:

- Formal requirements for making instruments.
- Registration with the Public Guardian.
- Restrictions on gifts.
- Revocation and cancellation provisions.
- Court powers to determine validity and operation.

The context of these provisions is preventive planning and the preservation of autonomy. LPAs reduce the need for court involvement and allow individuals to choose trusted persons in advance. Schedule 1 contains detailed provisions about registration, objections, cancellation, and notification requirements. The Court of Protection retains jurisdiction to determine disputes about validity, scope, or operation.

### **Advance Decisions to Refuse Treatment (Sections 24–26)**

Sections 24 to 26 provide a statutory basis for advance decisions to refuse specified medical treatment. **An individual with capacity may decide in advance that they do not wish to receive certain treatments in the future if they lack capacity at that time.** If valid and applicable, such decisions are legally binding and must be respected by healthcare professionals.

Where the advance decision relates to life-sustaining treatment, additional formalities apply, including written form and specific statements. The context of these provisions is respect for personal autonomy in medical decision-making. They provide certainty for both individuals and clinicians while ensuring that safeguards prevent ambiguity or misuse

### **The Court of Protection (Part 2)**

Part 2 establishes the Court of Protection as a specialist court with jurisdiction over property, affairs, the appointment of deputies, the validity of LPAs, declarations regarding capacity, and personal welfare matters relating to individuals who lack capacity. The Court serves as a safeguard of last resort when disagreement arises or serious decisions are required. It ensures independent judicial oversight and procedural fairness. The Court also has the power to vary, suspend, or discharge deputy appointments and to address the misuse of authority by attorneys or deputies.

## The Public Guardian (Part 2)

**The Public Guardian oversees the LPAs and the deputyship system.** The office maintains statutory registers, supervises deputies, receives reports, and investigates concerns about how attorneys and deputies exercise their powers. This supervisory role provides accountability and transparency within the framework established by the Act.

**The Public Guardian acts as an administrative safeguard between private decision-making arrangements and the formal court system.** Where concerns arise, matters may be referred to the Court of Protection. This structure ensures that powers granted under the Act are monitored and, where necessary, corrected.

## Independent Mental Capacity Advocate (IMCA)

The Act introduces the Independent Mental Capacity Advocate (IMCA) service to support individuals who lack capacity and have no appropriate person to consult. **The Act provides for Independent Mental Capacity Advocates in specified circumstances, particularly where:**

- Serious medical treatment is proposed.
- Accommodation is arranged by an NHS body or local authority.
- A person is unrepresented.

IMCAs:

- Support and represent the person.
- Provide reports.
- Ensure participation in decision-making.

## Deprivation of Liberty Safeguards/Authorisation of Arrangements

The Act includes provisions (including Schedule AA1) concerning **arrangements enabling care and treatment where a person lacks capacity and restrictions amount to deprivation of liberty.**

**The responsible body must:**

- Determine that authorisation conditions are met.
- Carry out consultation.
- Conduct pre-authorisation review.
- Keep an authorisation record.
- Review, renew, or vary authorisations as required.

## Safeguards include:

- Capacity assessments.
- Medical assessments.
- Determination that arrangements are necessary and proportionate.
- Appointment of appropriate persons or IMCAs.

## **GUIDANCE FOR CHILDREN, YOUNG PEOPLE, ADULTS AND THEIR FAMILIES**

Although the Act primarily applies to individuals aged 16 and over, **its provisions are particularly significant for families supporting children approaching adulthood, adults with fluctuating or impaired capacity, and carers involved in welfare or financial decision-making.** The Act does not lightly remove decision-making rights; rather, it creates a structured legal process that prioritises autonomy, participation, and the least restrictive approach. The sections below interpret the statutory framework in practical terms so that individuals and families can understand how the principles in sections 1–4, alongside provisions relating to lasting powers of attorney, advance decisions, advocacy, and the Court of Protection, operate in everyday life.

### **For Individuals**

Under section 1, **every person must be assumed to have capacity unless it is established that they lack capacity. This presumption is fundamental: no one should be treated as incapable simply because of a diagnosis, disability, age, or an unwise choice.** Sections 2 and 3 clarify that capacity is both decision-specific and time-specific, meaning a person may lack capacity for one decision but retain it for others, or may regain capacity at a later time. Individuals therefore have the right to appropriate support to understand, retain, use or weigh relevant information, and to communicate their decision in any form. Public bodies and professionals must take all practicable steps to assist before concluding that capacity is lacking.

Individuals should understand:

- They are presumed to have capacity.
- They can make unwise decisions.
- They are entitled to support in making decisions.
- They can plan ahead using:
  - Lasting Powers of Attorney.
  - Advance decisions to refuse treatment.

## **Where a person does lack capacity, section 4 requires that:**

- Any decision made on their behalf must be in their best interests, taking into account their past and present wishes, feelings, beliefs, and values.
- Individuals can strengthen their future protection by planning ahead through a lasting power of attorney (sections 9–14) or by making an advance decision to refuse treatment (sections 24–26).

**These legal tools allow a person to retain control over property, affairs, and medical decisions in the event of future incapacity.** The Act therefore provides both protection and empowerment: it safeguards against arbitrary decision-making while enabling individuals to shape how decisions about their lives are made.

## **For Families and Carers**

Families and carers have a recognised role within the statutory best interests' framework. Section 4 requires decision-makers to consider, so far as reasonably practicable, the views of anyone engaged in caring for the person or interested in their welfare. This means:

- **Family members are integral contributors to lawful decision-making processes.**
- **Family members can be appointed as donees under a lasting power of attorney or as deputies by the Court of Protection, giving them formal legal authority to make decisions in relation to property, affairs, or personal welfare.**

The Act also places boundaries and safeguards. Family members must:

- **Act in accordance with the statutory principles**
- **Always apply the least restrictive option**
- **Avoid decisions motivated by convenience or disagreement with lifestyle choices.**

**Where serious medical treatment or accommodation arrangements arise, and the person lacks representation, an Independent Mental Capacity Advocate may be appointed to support and represent the individual's interests.** Families should understand that they can request reviews, raise concerns about authorisations, and apply to the Court of Protection where there is a dispute or uncertainty.

The framework ensures that carers are supported in decision-making while maintaining oversight to protect the rights and dignity of the person lacking capacity.

### For Young People Transitioning to Adulthood

The Act applies from the age of 16, making the transition from childhood to adulthood legally significant. As a young person approaches 16 or 18, questions about the capacity to make decisions about education, healthcare, accommodation, and finances may arise. **The statutory test in sections 2 and 3 must be applied in the same way as for adults, ensuring that the young person is presumed to have capacity and is supported to make their own decisions wherever possible.** Capacity assessments must remain specific to the particular decision in question and must not be based solely on diagnosis or developmental stage.

**For families supporting a young person with additional needs, transition planning should include consideration of future legal arrangements.** This may involve discussing whether a lasting power of attorney will be appropriate once the young person has capacity to grant one, or whether an application to the Court of Protection may become necessary if capacity is lacking in relation to significant decisions. **The Act provides continuity and legal clarity during this transition: it ensures that young people's rights are preserved, that families understand when formal authority is required, and that any intervention is structured, proportionate, and subject to judicial oversight where necessary.**

#### This is how knowing our rights can change lives.

When families and young people understand the protections and entitlements set out in the Mental Capacity Act 2005, decisions are no longer made about people, but with people in making them. Our case studies reflect situations in which capacity assessments were not properly considered, and families were unsure of what they were entitled to. Today, the people we serve are living in their homes and receive support that reflects their wishes, feelings, beliefs, and values, promotes stability instead of crisis management, and balances safety with independence.

**MORE**



## OBLIGATIONS AND DUTIES FOR COMMISSIONERS, PUBLIC BODIES AND LOCAL AUTHORITIES

The Mental Capacity Act 2005 places legally binding duties on public authorities, commissioners of services, NHS bodies, local authorities, and other statutory organisations when exercising functions in relation to people who may lack capacity. These duties arise primarily under **Part 1 (Sections 1–8), Sections 35–41 (IMCA provisions), Part 2 (Court of Protection and Public Guardian), Section 44 (offence provisions), and Schedule AA1 (Authorisation of Arrangements)**. The Act does not merely provide guidance, but it creates enforceable statutory obligations that must be followed whenever decisions are made on behalf of a person who lacks capacity.

Public bodies must ensure that every decision, act, care plan, and commissioning arrangement complies with the statutory principles, the best interests checklist, the least restrictive requirement, and the procedural safeguards set out in the Act. Failure to comply may result in unlawful decision-making, breach of human rights obligations, or criminal liability.

### General Duties

**These provisions establish the legal foundation for all actions taken under the Act. They apply to commissioners, care providers, NHS trusts, local authorities, and professionals involved in care or treatment.**

Public bodies must:

- Apply the five statutory principles in Section 1 in every relevant decision.
- Ensure capacity is assessed in accordance with Sections 2 and 3. Take “all practicable steps” to support decision-making before concluding a lack of capacity.
- Ensure that any act done or decision made is in the person’s best interests (Section 4).
- Consider whether the purpose can be achieved in a less restrictive way.
- Permit and encourage the person’s participation in decision-making.
- Consider the person’s past and present wishes and feelings.
- Consult carers, family members, donees of lasting powers of attorney, and deputies.
- Ensure restraint is only used if:

It is necessary to prevent harm, and

It is proportionate to the likelihood and seriousness of that harm (Section 6).

Where acts are carried out in connection with care or treatment (Section 5), the professional must have a reasonable belief that:

- The person lacks capacity in relation to the matter; and
- The act is in the person's best interests.

Commissioners must ensure services they commission operate within this legal protection framework.

### **Duties in Relation to Authorisation of Arrangements**

Schedule AA1 establishes the statutory framework for authorising arrangements that result in a deprivation of liberty for a person who lacks capacity to consent to them. The responsible body may be an NHS body, local authority, or other prescribed body.

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Responsible bodies must:

- Determine whether the authorisation conditions are met.
- Arrange for:
  - A capacity assessment.
  - A medical assessment.
  - A determination that the arrangements are necessary and proportionate.
- Ensure consultation takes place with:
  - The cared-for person.
  - Those interested in their welfare.
  - Any donee or deputy.
- Ensure a pre-authorisation review is conducted.
- Appoint an Approved Mental Capacity Professional (AMCP) where required.
- Appoint an appropriate person or instruct an IMCA where there is no suitable representative.
- Provide the cared-for person with prescribed information about:
  - The authorisation.
  - Their rights to review and challenge.
- Keep and maintain an authorisation record.
- Conduct reviews:
  - On reasonable request.
  - If circumstances change.
  - At prescribed intervals.
- Determine whether renewal conditions are met before renewing an authorisation.

Local authorities must:

- Make arrangements for the approval and supervision of AMCPs.
- Monitor compliance within their area.

Commissioners must ensure that contracts, placements, and care pathways do not result in unlawful deprivation of liberty.

## IMCA Duties

**The Independent Mental Capacity Advocate (IMCA)** provisions ensure representation for people who lack capacity and have no appropriate person to consult.

**NHS bodies and local authorities must instruct an IMCA where:**

- Serious medical treatment is proposed.
- Accommodation is arranged (or a change of accommodation is proposed).
- The person lacks capacity in relation to the matter.
- There is no appropriate person to consult.

They must:

- Provide the IMCA with access to relevant health and social care records.
- Take into account any information or report provided by the IMCA.
- Permit the IMCA to meet the person in private.

The IMCA's role includes:

- Supporting and representing the person.
- Ascertaining their wishes and feelings.
- Evaluating whether the proposed decision is in their best interests.

Failure to instruct an IMCA when required would constitute non-compliance with statutory duties.

## Court of Protection and Public Guardian Functions

Part 2 establishes oversight, supervision, and enforcement mechanisms. Public authorities must cooperate with these bodies.

**The Court of Protection has jurisdiction to:**

- Make declarations as to capacity.
- Make decisions on personal welfare or property and affairs.
- Appoint deputies.
- Determine the validity and operation of LPAs.
- Make interim and urgent orders.
- Call for reports.
- Vary or discharge orders

**Public bodies must:**

- Comply with court orders.
- Provide evidence and reports when directed.
- Facilitate participation of the person concerned.

**The Public Guardian must:**

- Establish and maintain registers of lasting powers of attorney.
- Supervise deputies.
- Receive security bonds where required.
- Investigate complaints or concerns.
- Apply to the Court where necessary.

**Commissioners and authorities must cooperate with investigations and supervision processes.**

## **Safeguarding and Criminal Liability (Section 44)**

**Section 44 creates a criminal offence of ill-treatment or wilful neglect of a person who lacks capacity.**

**The offence applies to:**

- Any person who has care of the person.
- Attorneys under a lasting power of attorney.
- Deputies appointed by the Court.

**Public bodies must therefore ensure:**

- Robust safeguarding procedures.
- Staff training on the Act and human rights.
- Clear reporting pathways for concerns.
- Proper supervision and governance.
- That policies reflect statutory safeguards.

The offence reinforces that safeguarding under the Act is not discretionary – failure to protect a person who lacks capacity may lead to criminal prosecution.

# HOW INDIVIDUALS AND FAMILIES CAN TAKE PART AND BENEFIT FROM THE ACT

## ↳ People can plan ahead

Individuals can create a lasting power of attorney, make an advance decision to refuse treatment, express wishes and values clearly, and nominate trusted persons. While families can **encourage early planning, ensure instruments are properly registered, and keep copies and records.**

## ↳ Participate in best interests decisions

Individuals and families can **provide evidence of wishes and values, attend meetings, request written explanations, and ask whether less restrictive options have been considered.**

## ↳ Request advocacy or review

Where arrangements are authorised, individuals or appropriate persons can request a review, raise concerns with the responsible body, and make applications to the Court of Protection.

## ↳ Challenge decisions

The Court of Protection provides **Declarations regarding capacity, makes determinations of best interests, reviews deputies and donees, and resolves disputes.** Instead, persons may apply to the court where they believe:

- Capacity has been wrongly assessed.
- Best interests have not been properly determined.
- An authorisation is unlawful or disproportionate.

## ↳ Protect property and affairs

Individuals and families can do this through:

- Deputyship applications
- Court-approved statutory wills
- Vesting and settlement provisions
- Registration and supervision by the Public Guardian

Families can ensure financial security and lawful management of assets.

## ↳ Cross-border and international protection

Schedule 3 provides:

- Recognition of protective measures taken in other countries.
- Jurisdictional rules.
- Co-operation between authorities.
- Protection of adults with incapacity internationally.

This benefits families where residence or assets cross borders.

Original Sources:

<https://www.legislation.gov.uk/ukpga/2005/9/contents/data.pdf>

Introduced by:

**Lord Falconer of Thoroton (then Lord Chancellor and Secretary of State for Constitutional Affairs).**

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