

# MAKING DECISIONS FOR PEOPLE WHO LACK CAPACITY

## Mental Capacity Act 2005

### RESOLVING DISAGREEMENTS AND DISPUTES

*This is one of a series of resource materials for clinical ethics committees providing explanation and discussion of the sections of the Mental Capacity Act which are particularly relevant to their work*

As the Code of Practice makes clear it is in everybody's interests to settle disagreements and quickly and effectively. Various options are available, which one will be most appropriate will depend on the type of disagreement or dispute and the context in which it has arisen. In general disputes and disagreements involving health professionals can be resolved by either formal or informal procedures.

#### Informal procedures

The various informal procedures outlined below are identified in the [Code of Practice \(15.3\)](#) as the best initial approach when health professionals are in disagreement with a person's family. Thus the Code suggests that it is good idea to start by:

- setting out the different options in a way that is easy to understand
- inviting a colleague to talk to the family and offer a second opinion
- offering to get independent expert advice
- using an advocate to support and represent the person who lacks capacity
- arranging a case conference or meeting to discuss matters in detail
- listening to, acknowledging and addressing worries, and
- where the situation is not urgent, allowing the family time to think it over

Other informal procedures include:

#### Mediation

A mediator helps people to come to an agreement that is acceptable to all parties

#### Patient Advice and Liaison Service (PALS):

PALS provides an informal way of dealing with problems before they reach the complaints stage. PALS provide advice and information to patients (or their relatives or carers).

#### Formal procedures

The range of formal procedures for resolving disputes about issues covered in the Act is more limited and basically consists of two options. These are:

- NHS complaints procedure

This procedure deals with complaints about NHS services provided by NHS organisations (or primary care practitioners).

- Court of Protection

The court deals with all areas of decision-making for adults who lack capacity.

**NB.** The Court has emergency procedures which operate 24 hours a day to deal with urgent cases quickly

**In the next section the options available for resolving specific disputes will be outlined.**

## Disputes about capacity

Disputes about capacity can arise if:

- a person wants to challenge a decision that they lack capacity
- professionals disagree about a person's capacity to make a specific (usually serious) decision
- there is a dispute over whether the person has capacity

If an assessment about capacity has been challenged (e.g. by a patient's family) the Code of Practice ([section 4.63](#)) suggests the following series of steps should be taken:

The person who made the assessment should:

- give reasons why they believe the person lacks capacity to make the decision, and
- provide objective evidence to support that belief
- show he has applied the principles of the Act
- show he has followed the guidance in the Code
- obtain a second opinion (from an independent professional or another expert in assessing capacity)

If the disagreement remains unresolved the following options should be considered:

1. an informal method (outlined above)
2. an application to the Court of Protection –the court can, for example, make a declaration (i.e. ruling) on whether a person has capacity to make a particular decision or give consent for a particular action.

## Disputes about best interests

A patient's family, carers or health professionals may not always agree about whether proposed treatment is in his best interests. A family member (a member of the healthcare treating the patient) may believe, for example, that the treatment;

- does not take into account the person's wishes or feelings, or
- that a carer or other person interested in his welfare has not been consulted, or
- another element in the best interests check-list (in s.4) was ignored, or

- one (or more) of the 5 statutory principles was not followed.

According to the Code (5.68) the following options should be considered to resolve 'best interest' disputes:

1. **Involve an advocate**  
An advocate acts on behalf of the person who lacks capacity to make the decision. This option is particularly useful if family members disagree, there is conflict between those who have been consulted, the proposed course of action may lead to the use of restraint, or the person who lacks capacity has no family or friends to take an interest in their welfare but they do not qualify for an IMCA.
2. **Get a second opinion**
3. **Hold a 'best interests' case conference**
4. **Attempt mediation**
5. **Pursue a complaint through the NHS formal complaints procedure**
6. **Apply to the Court of Protection**

The Court has the power, for example, to make a declaration as to the lawfulness or otherwise of any specific act relating to a patient's care or treatment (either where somebody has carried out the action or is proposing to) This action can include an omission or failure to provide care or treatment that the person needs.

Note that the Court's powers (to make declarations, decisions, or order on health related (and other matters) are subject to the provisions of the Act, i.e. it too must follow best interests checklist and apply the statutory principles.

### **Disputes about advance decisions to refuse treatment (life-sustaining or otherwise)**

The Code makes it clear that it is ultimately the responsibility of the healthcare professional who is in charge of the person's care when the treatment is required to decide about the whether there is an advance decision covering the situation (Code 9.64). Disagreements can nevertheless arise (either between health professionals, or between health professionals and family members or others close to the person, are likely to be about whether an advance decision:

- exists, and/or
- is valid and/or
- is applicable

Whatever the reason for the dispute or disagreement the Code of Practice recommends that the senior clinician must:

Consider all the available evidence

1. Consult with appropriate people: this includes relevant colleagues and others who are close to or familiar with the patient. All staff involved in the patient's care should be given the opportunity to express their views (including the patient's GP).
2. Record the discussion in the patient's healthcare notes
3. Apply to the Court of Protection: the court can decide that the advance decision to refuse treatment does (or does not) exist, is (or is not) valid or is (or is not) applicable to the proposed treatment in the current circumstances.

## Disputes involving attorneys

Disputes involving personal welfare attorneys appointed under a Lasting Power of Attorney (LPA) are most likely to arise when health professionals have concerns about the attorney's:

- assessment of the patient's capacity
- decision as to what is in the person's best interests
- belief that life- sustaining treatment should be refused
- role e.g, that it has been overridden by a subsequent valid and applicable advance decision
- failure to comply with conditions in an LPA
- have doubts about the validity of an LPA

According to the Code of Practice ([section 7.29](#)) when health professionals have concerns about an attorney's assessment of best interests they should:

- discuss the case with other medical experts, and/or
- get a formal second opinion
- discuss the matter further with the attorney
- apply to the Court of Protection: if the dispute cannot be resolved in any other way.

In disputes about the validity of an LPA the Court of Protection it has a wide range of powers. It can decide whether the LPA is **valid** or **invalid** – because it, for example fails to meet the Act's requirements or was made under undue pressure. Alternatively the Court can stop someone registering an LPA. The Court can also clarify the meaning of an LPA.

## Disputes with IMCAs

The IMCA's role is to support and represent their client by- asking questions, raising issues, offering information and writing a report. They will also often be involved in meeting different healthcare staff to work out what is in a patient's best interests. Sometimes an IMCA may want to challenge a decision-maker believing that he has:

- not paid enough attention to their report (and/or other relevant information patient, or
- made a decision that is not in the patient's best interests, or
- assessed a patient (wrongly) as lacking capacity.

According to the Code ([section 10.34](#)) various options are available should an IMCA, who has the same right to challenge a decision as any other person caring for the person or interested in his welfare, have a disagreement about health care or treatment. These options are

### **Informal procedures:**

1. Discuss areas of disagreement with the decision-maker
2. Involve a steering group from the IMCA service and any appropriate representatives from local NHS organisations: these negotiators can sometimes negotiate between different views.
3. Follow any relevant procedures recommended by IMCA service provider.

### **Formal procedures:**

1. Consult the Patient Advice and Liaison Service (England)
2. Consult the Community Health Council (Wales)
3. Use the NHS Complaints Procedure
4. Use the services of the Independent Complaints Advocacy Service (in England) or another advocate.
5. Refer the case to the Court of Protection
6. Apply to the High Court (for judicial review).