



Llywodraeth Cynulliad Cymru
Welsh Assembly Government



Department
of Health

Mental Capacity Act 2005 – information about the transitional provisions for existing advance decisions to refuse life-sustaining treatment

Summary

- Article 5 of the Mental Capacity Act 2005 (Transitional and Consequential Provisions) Order 2007¹ relates to advance decisions to refuse life-sustaining treatment.
- Prior to the Mental Capacity Act (MCA) coming into force, some people will have made advance decisions that were valid under common law, but which will not comply with the new requirements in the MCA that apply to life-sustaining treatment. Where a person has made an advance decision in accordance with the common law, they will have an expectation that it will be acted upon. However, if that person has lacked the capacity to amend their advance decision since the Act came into force the advance decision may not comply with the new requirements in the Act.
- The transitional provision gives effect to such an advance decision even though it does not comply with all the provisions relating to life-sustaining treatment in the MCA (i.e. signed in front of a witness and including a statement that the decision applies even if life is at risk) provided that it meets the particular conditions set out in article 5 of the transitional order.
- The particular conditions are that there is a reasonable belief that the advance decision was made before 1 October 2007, a reasonable belief that the person has lacked capacity to amend their advance decision since 1 October 2007 and the advance decision is in writing.
- More information on the MCA provisions that relate to advance decisions to refuse treatment can be found in chapter 9 of the MCA Code of Practice²

Why are these transitional provisions needed?

1. Advance decisions to refuse treatment could previously be made under common law. The Mental Capacity Act puts advance decisions to refuse treatment on a statutory footing; it sets out what is required for an advance decision to be valid and applicable and introduces new safeguards. The MCA introduces new conditions for advance decisions that deal with the refusal of life-sustaining treatment, namely that they must be written, signed and witnessed and include a statement that the decision applies even if the person's life is at risk.

¹ 2007/1898 (www.opsi.gov.uk/si/si2007/20071898.htm)

² Mental Capacity Act 2005 Code of Practice
(www.opsi.gov.uk/acts/acts2005/related/ukpgacop_20050009_en.pdf)

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2. Advance decisions made before the Act came into force may still be valid if they meet the provisions of the Act; the broad intention behind the MCA provision on advance decisions is to reflect the common law in statute (apart from those decisions that refuse life-sustaining treatment). However, some people will have made advance decisions that were valid under common law but will not be under the MCA. It is likely that existing advance decisions that refuse life-sustaining treatment will not meet all of the specific provisions set out on the face of the Act.

3. People with capacity can consider revising or remaking their advance decision so that it meets the requirements of the MCA, particularly if it deals with life-sustaining treatment. But people who have lacked capacity since the Act came into force do not have this option.

4. The transitional order laid in Parliament in July 2007 includes arrangements for limited transitional protection for some existing advance decisions to ensure a smooth transition from the previous to the new arrangements. The aim of the transitional provisions is to protect a person who made a valid and applicable written advance decision refusing life-sustaining treatment before the MCA came into force but has since lost capacity to amend the decision in order to comply with the new requirements.

Are existing advance decisions that were made before the Act came into force still valid?

5. Before the Act came into force the courts recognised that adults have the right to say in advance that they want to refuse treatment if they lose capacity in the future – even if this results in their death. People can only make advance decisions to *refuse* treatment. Nobody has the legal right to demand specific treatment, either at the time or in advance (but under the MCA people can make a request or state their wishes and preferences in advance). Nobody can ask for and receive procedures that are against the law (for example, help with committing suicide).

6. Advance decisions (sometimes also previously known as ‘living wills’ or advance directives) made before the Act came into force may still be valid and applicable. When it was made or whether it is called for example, a living will, does not in itself affect the validity or applicability of the decision. Healthcare professionals should apply the rules in the Act to all advance decisions, including those made before the Act came into force, subject to the transitional provisions that apply to advance decisions that refuse life-sustaining treatment.

What is the effect of the transitional order?

7. Article 5 of the transitional order gives effect to a written advance decision refusing life-sustaining treatment although it does not comply with all the requirements in the MCA, provided that it does meet the conditions in article 5. The requirements that do not have to be met are (i) the requirement that the advance decision be verified by a statement that the decision is to apply even if life is at risk and (ii) the requirement that it be signed and witnessed. The conditions that have to be met are set out in paragraphs 9 and 10 below.

8. An existing advance decision has to be otherwise valid and applicable under s24-26 of the MCA³ and if it meets the particular conditions specified (see paragraphs 9 and 10), the requirements for a statement and for a signature and witness do not apply (see paragraph 18), and the advance decision must be followed.

³ Mental Capacity Act 2005 (www.opsi.gov.uk/acts/acts2005/ukpga_20050009_en_1)

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What are the conditions for existing advance decisions to refuse life-sustaining treatment?

9. The particular conditions are that a healthcare professional reasonably believes that:

- the person made the advance decision refusing life-sustaining treatment before 1 October 2007, and
- the person has lacked the capacity to comply with the provisions of the MCA that relate to life-sustaining treatment since 1 October 2007.

10. The advance decision must also meet the other conditions in article 5(2) namely:

- the advance decision is in writing
- the person has not
 - withdrawn the decision at a time when they had capacity to do so, or
 - done anything else clearly inconsistent with the advance decision remaining their fixed decision
- the person does not have the capacity to give or refuse consent to the treatment in question
- the treatment in question is the treatment specified in the advance decision
- any circumstances they choose to specify in the advance decision are present, and
- there are no reasonable grounds for believing that circumstances exist which the person did not anticipate at the time of the advance decision and which would have affected their decision had they anticipated them.

11. Healthcare professionals must follow advance decisions that meet these conditions even if they do not comply with section 25(5)(a) and (6)(b) of the Act.

What is a 'reasonable belief'?

12. A healthcare professional must have a reasonable belief that the person made the advance decision refusing life-sustaining treatment before 1 October 2007. This may be established if the advance decision is a dated document or its existence is recorded in a way that indicates the date it was made. It could also be established if the healthcare professional themselves or another care professional discussed treatment options with the person in the past and the person indicated that they had or intended to make an advance decision. The person's relatives or friends may also be able to provide information about when the advance decision was made.

13. A healthcare professional must have a reasonable belief that the person has lacked the capacity to comply with the provisions of the MCA that relate to life-sustaining treatment since 1 October 2007. The MCA sets out how to assess a person's capacity to make a specific decision, more information is given in chapter 4 of the MCA Code of Practice. There is a two-stage test of capacity – the person has an impairment of the mind or brain or disturbance affecting the way their mind or brain works and that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made.

14. A lack of capacity since 1 October could be established through a person's health records or discussions with health and social care professionals. The person's relatives or friends may also be able to provide relevant information. It does not matter how long the person has lacked capacity before 1 October, the important aspect is that the person lacked the capacity to meet the new requirements of the MCA when the new requirements came into force – ie on 1 October 2007.

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15. If the healthcare professional forms a reasonable belief that the person had the capacity to amend their advance decision since 1 October 2007 then the transitional provisions will not apply to that advance decision. This will be the case even if the person has lacked capacity since a date shortly after 1 October.

16. Situations where a person has had a degree of fluctuating capacity may need particularly careful consideration. A healthcare professional must consider whether a person has been unable, due to the fluctuating nature of the lack of capacity, to comply with the requirements in the MCA since 1 October.

17. If the healthcare professional has a reasonable belief that the advance decision was made before 1 October and that the person has lacked capacity since 1 October then the transitional provisions apply. There may be times when a healthcare professional does not believe that one or both of these conditions has been met and this is dealt with below (paragraph 23).

Which requirements in the Act do not have to be satisfied?

18. If an advance decision to refuse life-sustaining treatment meets the conditions specified above (paragraphs 9 and 10) the following requirements of the MCA do not apply:

- the requirement for the decision to be verified by a statement by the person to the effect that the advance decision is to apply to that treatment even if life is at risk (section 25(5)(a)), and
- the requirement for a signed and witnessed advance decision (section 25(6)(b) to (d)).

19. The advance decision does not, therefore, need to meet the requirements to have a statement and for a signature and witness and it must be followed.

Advance decisions regarding treatment for mental disorder

20. Advance decisions can refuse any kind of treatment, whether for a physical or mental disorder. But generally an advance decision to refuse treatment for mental disorder can be overruled if the person is detained in hospital under the Mental Health Act 1983, and the treatment could be given without consent under Part 4 of that Act. Advance decisions to refuse treatment for other illnesses or conditions are not affected by the fact that the person is detained in hospital under the Mental Health Act. For further information see chapter 13 of the MCA Code of Practice.

How do existing advance decisions relate to other rules about decision-making?

21. An advance decision to refuse treatment made before 1 October that meets the conditions set out in the transitional order (or under the MCA) is as effective as a contemporaneous refusal made when a person has capacity. Therefore, an advance decision overrules:

- the decision of any court-appointed deputy (so a deputy cannot give consent to treatment that has been refused in an advance decision which meets the conditions set out in the transitional order)
- the provisions of section 5 of the MCA, which would otherwise allow healthcare professionals to give treatment that they believe is in a person's best interests.

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22. Lasting Powers of Attorney will not be able to be made before 1 October 2007

What should healthcare professionals do if an existing advance decision does not meet the conditions set out in the transitional order?

23. If a healthcare professional feels that an advance decision made before 1 October 2007 does not meet the qualifying conditions set out in the transitional order, but has reasonable grounds to think it is a true expression of the person's wishes, then they must consider the advance decision as part of their assessment of the person's best interests (see chapter 5 of the MCA Code of Practice). A healthcare professional must not assume that because an advance decision does not meet the qualifying conditions set out in the transitional order, they should always provide the specified treatment (including life-sustaining treatment) – they must base this decision on what is in the person's best interests.

How do the transitional provisions affect a healthcare professional's liability?

24. Healthcare professionals must follow an advance decision that meets the conditions specified in the transitional order as set out in paragraphs 9 and 10. As with advance decisions made under the MCA, failure to follow an advance decision in this situation could lead to a claim for damages for battery or a criminal charge of assault.

25. Under the transitional order, healthcare professionals will be protected from liability if they:

- stop or withhold treatment because they reasonably believe that an advance decision to refuse life-sustaining treatment meets the qualifying conditions set out in the transitional order
- treat a person because, having taken all practical and appropriate steps they are not satisfied that an advance decision exists or meets the qualifying conditions set out in the transitional order and the treatment is in the person's best interests.

26. In cases where serious doubt remains about whether an advance decision meets conditions specified in the transitional order, which cannot be resolved in any other way, it will be possible to seek a declaration from the court (see paragraphs 30-33).

What if a healthcare professional has a conscientious objection to stopping or providing life-sustaining treatment?

27. Some healthcare professionals may disagree in principle with patients' rights to refuse life-sustaining treatment. Neither the Act nor the transitional order changes the current legal situation. They do not have to act in a way that goes against their beliefs. But they must not simply abandon patients or cause their care to suffer. Further information is given in chapter 9 of the MCA Code of Practice and may be available from professional bodies.

What happens if healthcare professionals are following an advance decision (made before 1 October 2007) when the Act came into force?

28. A healthcare professional may have made treatment decisions based on a person's advance decision made under common law and withheld particular treatment(s) prior to the Act coming into force on 1 October 2007 and there would be no reason to change those treatment decisions in such a situation.

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What is the position for someone who had capacity on 1 October 2007, when the Act came into force?

29. If a healthcare professional has formed a reasonable belief that a person had the capacity to make decisions about their advance decision since 1 October 2007, when the MCA came into force, then the transitional provisions will not apply. The person would need to consider their advance decision to see if it meets the provisions of the MCA particularly if it deals with life-sustaining treatment and amend it as necessary.

What happens if there is a disagreement about whether an advance decision meets the conditions of the transitional order?

30. 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 whether an existing advance decision meets the conditions set out in the transitional order. As with advance decisions made under the MCA, if there is disagreement about this between healthcare professionals, or between healthcare professionals and family members or others close to the person, the senior clinician must consider all the available evidence. The senior clinician may need to consult with relevant colleagues and others who are close to or familiar with the patient. All relevant staff involved in the person's care should be given the opportunity to express their views. If the person is in hospital, their GP may also have relevant information.

31. The point of such discussions should not be to try to overrule the person's advance decision but rather to seek information to help in determining if it meets the conditions. Details of these discussions should be recorded in the person's healthcare records. Where the senior clinician has a reasonable belief that an advance decision meets the conditions the person's advance decision should be complied with.

32. The Court of Protection can make a decision where there is genuine doubt or disagreement about whether an advance decision meets the conditions in the transitional order. It has no power to overrule a valid and applicable advance decision to refuse treatment.

While the court decides, healthcare professionals can provide life-sustaining treatment or treatment to stop a serious deterioration in their condition. The court has emergency procedures which operate 24 hours a day to deal with urgent cases quickly. See chapter 8 of the MCA Code of Practice for guidance on applying to the court.