

MINDED *to* make DECISIONS

PENNY LETTS *summarises the key elements of the Mental Capacity Act, explains the concepts it is based on and suggests ways in which these may have implications for the work of some tribunals.*

The Mental Capacity Act 2005 (MCA), due to be implemented in two stages during 2007, creates a comprehensive statutory framework setting out when and how decisions can be made on behalf of people aged 16 and over who may lack capacity to make specific decisions for themselves. It also clarifies what actions can be taken by others involved in the care or medical treatment of people lacking capacity to consent to those actions. In addition, the MCA extends the arrangements available for adults who currently have capacity and want to make preparations for a time when they may lack capacity to make certain decisions in the future.

Why is new legislation needed?

Reform of the law relating to mental capacity has been a long and protracted process, starting in 1989 with a five-year inquiry by the Law Commission, which published its report in 1995.¹

The Government undertook further consultation², leading to a policy statement³ and eventual publication in 2003 of a Draft Mental Incapacity Bill.⁴ The draft Bill was subject to pre-legislative scrutiny by a Joint Select Committee, which made a number of recommendations for improvements.⁵

The MCA will affect a huge number of people. The Department for Constitutional Affairs, which has responsibility for the MCA, has estimated that up to two million people may be affected by a lack of capacity to make some or all decisions for themselves. It is also estimated that around six million people are involved in caring or providing services for those who lack decision-making capacity, for whom the existing law offers no

guidance on what actions or decisions they may lawfully take on behalf of those they care for.

Key provisions

The MCA sets out a new integrated jurisdiction for the making of personal welfare decisions, health care decisions and financial decisions on behalf of people without the capacity to make such decisions for themselves. It also includes provisions to ensure that people are given all appropriate help and support to

enable them to make their own decisions or to maximise their participation in the decision-making process.

The statutory framework is based on two fundamental concepts: lack of capacity and best interests. For those who lack capacity to make particular decisions, the Act provides a range of processes, extending from informal arrangements, to decision-making requiring formal powers and ultimately to court decisions, governing the circumstances in which

necessary decisions can be taken on their behalf and in their best interests.

The Act's key provisions are designed to:

- Set out five guiding principles to underpin the Act's core values and to govern its implementation.
- Ensure that people are given appropriate help and support to enable them to make their own decisions.
- Provide a definition of a person who lacks capacity to make a decision and set out a single clear test for assessing capacity.

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- Establish a checklist for determining what is in the ‘best interests’ of a person lacking capacity to make a particular decision, as the criterion for taking action or making a decision on that person’s behalf.
- Clarify the law when acts in connection with the care or treatment of people lacking capacity to consent are carried out in their best interests, without formal procedures or court intervention, but with clear restrictions and limitations.
- Provide for a decision to be made, or a decision-maker (called a deputy) to be appointed, by a new specialist Court of Protection in cases where there is no other way of resolving a matter affecting a person lacking capacity to make the decision in question.
- Provide for the appointment of Independent Mental Capacity Advocates (IMCAs) to support and represent particularly vulnerable people who lack capacity to make certain significant decisions about serious medical treatment or a move into long-term care.
- Set out specific parameters, safeguards and controls for research involving people lacking capacity to consent to their participation.
- Provide mechanisms to protect people lacking capacity by creating a new public office – the Public Guardian – to oversee attorneys and deputies and to act as a single point of contact for referring allegations of abuse to other relevant agencies.
- Introduce new criminal offences of ill-treatment or wilful neglect of a person lacking capacity in relation to matters affecting their care.

The MCA is accompanied by a statutory Code of Practice⁶ providing guidance to anyone using the Act’s provisions, including anyone involved in caring for or working with people who may lack capacity to make particular decisions.

The statutory principles

Section 1 of the MCA sets out five statutory principles to emphasise the underlying values of the Act and to govern how it is to be interpreted and implemented:

- 1 A person must be assumed to have capacity unless it is established that he lacks capacity.
- 2 A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- 3 A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- 4 An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

- 5 Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.

These principles confirm that the Act is intended to be enabling and supportive of people lacking capacity, not restrictive or controlling of their lives. The aim is to protect people who lack capacity to make particular decisions, but also to maximise

their ability to make decisions, or to participate in decision-making, as far as they are able to do so.

The Act’s starting point is to enshrine in statute the existing presumption at common law that an adult has full legal capacity unless it is shown that they do not. It then goes on to define what it means to lack capacity to make a decision and how to determine whether a particular decision or action is in the best interests of a person lacking capacity to make the decision in question.

Lack of capacity

The Act adopts the common law notion that capacity is a functional concept, requiring capacity to be assessed

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in relation to each particular decision at the time the decision needs to be made, and not the person's ability to make decisions generally. This means that individuals should not be labelled 'incapable' simply on the basis that they have been diagnosed with a particular condition, or because of any preconceived ideas or assumptions about their abilities due, for example, to their age, appearance or behaviour. Rather it must be shown that they lack capacity for each specific decision at the time that decision needs to be made. Individuals retain the legal right to make those decisions for which they continue to have capacity.

Section 2(1) of the Act sets out the definition of a person who lacks capacity:

'For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

This definition imposes a two-stage test in order to decide whether a person lacks capacity to make a decision. It must be established that:

- There is an impairment of, or disturbance in the functioning of, the person's mind or brain, and
- The impairment or disturbance is sufficient to render the person unable to make that particular decision.

Section 3 sets out the test for assessing whether a person is unable to make a decision for themselves. A person is unable to make a decision if they are unable to:

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

An explanation of information relevant to a decision must be provided in ways that are appropriate to the person's circumstances, using the best form of communication to help the person understand.

Best interests

Once it has been established that someone lacks capacity to make a particular decision, any action taken or decision made on that person's behalf must be in their best interests. In view of the wide range of decisions and actions covered by the Act and the varied circumstances of the people affected by its provisions, the concept of best interests is not defined in the Act. Instead, section 4 sets out a checklist of factors that must be considered

in determining what is in a person's best interests. Anyone determining best interests must:

- Avoid making unjustified assumptions about the person's best interests on the basis of their age, appearance, condition or behaviour.
- Consider all relevant circumstances.
- Consider whether the person may regain capacity, and if so when.

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- Permit and encourage the person to participate in the decision.
- Take account of the person's wishes and feelings, beliefs and values.
- Consider the views of other people, such as carers and anyone interested in the person's welfare.

There are special considerations where the decision concerns the provision or withdrawal of life-sustaining treatment. Not all the factors in the checklist will be relevant to all types of decisions or actions, but they must still be considered if only to be disregarded as irrelevant to that particular situation. Any option that is less restrictive of the person's rights or freedom of action must also be considered, so long it is in the person's best interests.

Implications of the MCA for tribunals

People who lack capacity to make particular decisions face considerable obstacles in enforcing their rights and entitlements, not least because they rely on others to pursue these matters for them. This may not be a problem where there is ready access to legal representation⁷, but this is rarely available for most tribunals.

It is hoped that the increased publicity and awareness-raising leading up to implementation of the MCA will reinforce the fact that people lacking capacity have the same rights of access to justice as anyone else and will therefore encourage family members, carers, advocates and legal advisers to help people with impaired capacity to pursue applications to tribunals where this may be relevant.

In civil and family proceedings before the courts, special procedures apply in any case involving a ‘person under a disability’ including those who lack capacity to instruct a solicitor or take part in the proceedings.⁸ However, there are no such rules or procedures to assist tribunals where the application may relate to a person who lacks capacity to make relevant decisions or take part in the appeal. Tribunals should therefore be guided by the provisions of the MCA, in particular the statutory principles and the requirement to make a decision in the best interests of the person lacking capacity.

There are specific provisions of the MCA of which tribunals may need to be aware.

- The new Lasting Powers of Attorney will allow donors to appoint attorneys to make healthcare or personal welfare decisions, as well as those relating to property and affairs. Some tribunals may see more attorneys making applications on behalf of LPA donors.
- The new Court of Protection is a superior court of record able to establish precedent and build up a body of case law and expertise in all matters affecting people who may lack capacity to make specific decisions for themselves – the court’s decisions and precedents may have a bearing on tribunal proceedings

- A provision of the Code of Practice, or a failure to comply with the guidance set out in the code, can be taken into account by a court or tribunal where it appears relevant to a question arising in any criminal or civil proceedings.

Implementation of the MCA

Only the provisions of the Act relating to the IMCA service and the new criminal offences will be effective from 1 April 2007. The remaining parts of the MCA will be implemented in October 2007. Tribunal members should use the time available to ensure they are familiar with the new jurisdiction by the time it comes into effect.

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¹ Law Commission, *Mental Incapacity* (Law Com No 231) (London: HMSO, 1995).

² Lord Chancellor’s Department, *Who decides? Making decisions on behalf of mentally incapacitated adults*, (London: HMSO, 1997) (Cm 3803).

³ Lord Chancellor’s Department, *Making decisions: the Government’s proposals for making decisions on behalf of mentally incapacitated adults*, (London: TSO, 1999) (Cm 4465).

⁴ Draft Mental Incapacity Bill, (London: TSO, 2003) (Cm 5859-I)

⁵ Report of the Joint Committee on the Draft Mental Incapacity Bill, Vol I (HL Paper 198-I, HC 1083-I) (London: TSO, 2003).

⁶ Available on the DCA website at www.dca.gov.uk/legal-policy/mental-capacity. The final version of the Code will be published in April 2007.

⁷ Patients detained under the Mental Health Act 1983 are entitled to free legal representation for hearings before the Mental Health Review Tribunal.

⁸ Civil Procedure Rules 1998, Part 21; Family Proceedings Rules 1991, Part IX; Insolvency Rules 1986, Part 7, Chapter 7. The new Court of Protection Rules will be published later in 2007.