

IMPLEMENTING THE MENTAL CAPACITY ACT

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THE MENTAL CAPACITY ACT (2008)

The Mental Capacity Act (MCA) is a new law passed by Parliament on 15 September 2008. It covers the expected actions and decisions to be made by those who care for as well as those who are entrusted with authority to act and make decisions on behalf of people who are incapable of making decisions for themselves or looking after their own affairs. The MCA has 48 sections in all¹.

Why do we need this Act?

We need an Act that takes care of issues related to mental capacity in a comprehensive way. Until this Act is set up, the Mental Disorders and Treatment Act (MDTA) provides for assistance and support to be given to persons with unsound mind who are incapable of managing their own affairs. Under that Act, the Court can appoint individuals to be the Committee of the Persons or Committee of Estate (COP/E) to make decisions on behalf of a person who suffers from mental disorder and is unable to manage himself or his affairs. The Committee of the Person manages the personal welfare aspects while the Committee of Estate manages the property and financial affairs of the person.

Besides this function, the MCA deals comprehensively with matters related to mental capacity than the preceding legislature. MCA:

- Defines the determination (the 5 principles spelt out in Section 3), what is inability to make decisions (4 things spelt out in Section 5) and what is acting in the best interests in caring for the person without mental capacity (8 points spelt out in Section 6)¹
- Has a mechanism for persons to plan ahead in case they cannot make their own decisions for their personal welfare and their affairs some day in the future. Before that happens, they can now voluntarily choose someone they trust (known as a donee) to act and make decisions on their behalf if and

when they lack mental capacity in the future. This is done by creating a Lasting Power of Attorney. (Sections 12 – 15)².

- Enables parents of a child with intellectual disabilities and who will continually require someone to make decisions for him or her, to make provisions for the child's welfare. Parents or guardians of a child (minor, below the age of 21) who has intellectual or developmental disabilities and will continue to need someone to make for him/her decisions about health, care, welfare or finances after he / she turns 21 may apply to the court to appoint themselves as the child's deputies. They may also ask the court to appoint successor deputies for the future when the parents or guardians can no longer act as deputies for their child. The responsibilities of the court appointed deputies are largely similar to those of donees (authorised through the Lasting Power of Attorney made). However, the deputies' powers are defined by the court order by which they are appointed or further orders that the court may make. (Section 21(1), (2))
- Creates a new officer known as the Public Guardian (Section 30) to perform a wide set of duties spelt out in Section 31, related to the care of people without capacity.
- Provides safeguards to protect persons lacking capacity by giving the Public Guardian, who is supported by the Office of the Public Guardian, powers to supervise and investigate complaints of abuse or ill-treatment.
- Provides provisions to apply to the Court to revoke the power of a deputy or donor if the Public Guardian finds that that deputy or donee has not behaved in the best interests of the person lacking in capacity.
- Deals with ill-treatment of persons who lack mental capacity as a criminal offence under the Act. The Act also prohibits certain decisions (ie. excluded decisions) from being made on behalf of such persons. Whistle-blowing protection is also given to those who report instances of suspected abuse.
- Provides protection against liabilities for people who care for or medically treat a person who lack capacity, so long as it is done in the best interests of that person and it is without negligence.

Repealing of the Mental Disorders and Treatment Act

The MDTA would be repealed when the MCA comes into effect. For members of an existing COP/E appointed under the MDTA, they would be deemed as deputies appointed by the Court to act jointly to make decisions on behalf of the person who is unable to manage himself or his affairs. They would have the same powers and functions that were previously accorded to

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them before the MCA comes into force. At the same time, any pending application to court to appoint a COP/E will be treated as an application to appoint the members of the Committee as deputies to act jointly when making decisions for the person who lacks capacity.

IMPLEMENTATION

Codes of practice

Under the MCA, provision is made for the Minister to issue one or more codes of practice (Section 41(1)): (Reference 1)

- (a) for the guidance of persons assessing whether a person has capacity in relation to any matter;
- (b) for the guidance of persons acting in connection with the care or treatment of another person;
- (c) for the guidance of donees of lasting powers of attorney;
- (d) for the guidance of deputies appointed by the court; and
- (e) with respect to such other matters concerned with this Act as he thinks fit.

It is the duty of a person to have regard to any relevant code if he is acting in relation to a person who lacks capacity and is doing so in one or more of the following ways (Section 41(5))¹:

- (a) as the donee of a lasting power of attorney;
- (b) as a deputy appointed by the court;
- (c) in a professional capacity; or
- (d) for remuneration.

Although the codes of practice do not have the force of law, it nevertheless require those related to its practice a regard for

them. If it appears to a court conducting any civil or criminal proceedings that (a) a provision of a code of practice; or (b) a failure to comply with a code of practice, is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question. (Section 41(6)). Medical practitioners are included as persons who must show regard to the codes of practice¹.

Role of Medical Practitioners

In the MCA, an accredited General Practitioner may be called upon to be a certificate provider, a role which has several legal implications that he must be aware of. The accreditation process is conducted for the Ministry of Community Development, Youth and Sports (MCYS) by the College of Family Physicians, Singapore. Also, under section 43, as a “health care worker” if he knows or has reason to suspect that a person who lacks capacity is in need of care or protection he may to make a notification to the Public Guardian of the facts and circumstances on which his knowledge or suspicion is based.

REFERENCES

1. Mental Health Capacity Act 2008. Accessed 2 Sep 2009. URL: http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_legdisp.pl?actno=2008-ACT-22-N&doctype=MENTAL%20CAPACITY%20ACT%202008%0A&date=latest&method=part&sl=1. Accessed 2 Sep 2009
2. About the Mental Health Act. MCYS Website. URL: http://app.mcys.gov.sg/web/indv_MCA_main.asp. Accessed 2 Sep 2009