

**OVERVIEW OF THE MENTAL CAPACITY ACT (2008)**

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**ABSTRACT**

**Singapore's population is ageing rapidly. As our society ages, we expect a corresponding rise in dementia. At the age of 65 years, one in 20 may have dementia and the incidence could be as high as one in 10 by the age of 75 years. We would feel much safer if we knew that the person whom we were going to depend on at that point in time was someone whom we had chosen when we had the capacity to choose - someone whom we could trust and rely on and someone who was willing to undertake that burden.**

**Today, under the Mental Disorders and Treatment Act (MDTA), a Committee of the Persons or Estate may only be appointed by the Court to manage the personal welfare and finances of an individual of "unsound mind". This Act has no provisions to allow individuals to plan ahead in appointing someone to tend to their affairs, should they lose capacity.**

**The Mental Capacity Act (MCA) on the other hand gives individuals that choice. Passed by Parliament in September 2008, the MCA empowers individuals while they still have capacity, to plan in advance for a time when they may lack the capacity to make decisions for themselves, with respect to the areas of personal welfare and financial matters. Even if the individual does not choose to elect a proxy decision maker in advance, applications can be made to the Court to appoint a deputy to make decisions on an individual's behalf, when he loses his capacity. The MCA also enables parents of a child with intellectual disabilities to appoint a deputy to oversee the child's welfare and financial matters.**

**Under the Act, individuals who wish to make advance plans for themselves can do so through a new statutory document known as the Lasting Power of Attorney (LPA). In the LPA, the individual (donor) can appoint a proxy (donee) to act or make decisions on his behalf for matters relating to his personal welfare and/or property and finances.**

SFP2009; 35(3): 8-11

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**INTRODUCTION**

This article provides an overview of the MCA framework. Starting out with the fundamental notion of choice, we delve deeper by exploring the key principles in practicing mental capacity assessment and the concept of best interests. With a good understanding of the basic principles underlying the MCA, we will cover some of the more practical issues and safeguards to protect the vulnerable individuals.

The MCA applies to a wide range of people, from family members to healthcare providers to formal and informal caregivers to third parties with whom transactions are made.

**CHOICE**

One of the key ideas underpinning the MCA is that of choice. The MCA provides an individual (donor) with the choice to appoint a trusted person (donee) in advance, to manage his affairs should he lose his capacity in the future.

**Lasting Power of Attorney**

A new statutory document, the Lasting Power of Attorney (LPA) gives legal authority to donee(s) to carry out matters on behalf of the donor. There are two types of LPA:

- 1) Personal Welfare LPA.
 

Some examples of personal welfare decisions include:

  - a. Deciding where the donor is to live;
  - b. Deciding issues pertinent to day-to-day care;
  - c. Deciding the level of contact the donor can have with any particular person(s);
  - d. Prohibiting particular person(s) from coming into contact with the donor;
  - e. Refusing consent to treatment (including conduct of clinical trials) by a healthcare provider for the donor.
- 2) Property and Affairs LPA.
 

Some examples of property and affairs decisions include:

  - a. Control and management of property;
  - b. Acquire or disposal of property;
  - c. Make business decisions;
  - d. Conduct banking transactions;
  - e. Investment management.

The LPA is a flexible instrument that allows a donor to appoint more than one donee. It also allows for the donor to appoint replacement donee(s) if the original donee(s) can no longer discharge their duty towards the donor.

Anyone who is above the age of 21 can qualify as a donee. However, an undischarged bankrupt cannot be appointed as a donee for the donor's property and affairs.

Parents of intellectually disabled children will also be able to make advance arrangements for their care. These parents can apply to the Court to appoint themselves as the child's deputies and a successor deputy to make decisions on behalf of their children when the parents should themselves lose mental capacity or pass on.

**Cancellation of LPA**

An LPA can be revoked under certain circumstances:

- 1) The donor, while he still has mental capacity, decides to revoke the LPA;
- 2) Death of the donor or donee;
- 3) The donee loses mental capacity;
- 4) Bankruptcy of the donor or donee terminates any powers granted by the LPA in respect of property and affairs;
- 5) Dissolution or annulment of the marriage between the donor and donee, unless the donor specified in the LPA that such an event will not cause the LPA to be revoked.

**GUIDING PRINCIPLES**

**Definition of Incapacity**

Under the MCA, a person is defined to lack capacity if he is unable to make a decision or take an action for himself at the time the decision or action needs to be made. This can be caused by the impairment of, or a disturbance in the functioning of the mind or brain. The impairment or disturbance could be permanent or temporary.

A person lacks mental capacity if he or she cannot do one or more of the following things:

- Understand the information relevant to that decision
- Remember that information
- Use or weigh that information as part of the decision-making process
- Communicate that decision by any means; e.g. talking, using sign language, drawing, etc.

**Assessment of Capacity**

The Act provides a two-step test in assessing capacity:

- Step 1 - Is the person suffering from an impairment of, or a disturbance in the functioning of the mind or brain?
- Step 2 - If yes, does that impairment or disturbance impede the person from making the decision when it is required?

**TABLE 1 : 5 Key Principles**

<p><i>Principle One:</i> The MCA assumes that every individual possesses the capacity to make a decision, unless proven otherwise.</p> <p><i>Principle Two:</i> A person cannot be assumed to lack capacity, unless all practicable steps taken to help him make the decision were unsuccessful.</p> <p><i>Principle Three:</i> A person cannot be assumed to lack capacity, merely because he makes an unwise decision.</p> <p><i>Principle Four:</i> Any decision made on the behalf of an individual who lacks capacity must be made in the person's best interests.</p> <p><i>Principle Five:</i> There must be consideration, as to how a decision or action, made on behalf of an incapacitated person, can be achieved in a way that is less restrictive to his rights.</p>
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**The Key Principles**

The Act sets out 5 key principles that should be borne in mind when making decisions for someone who appears to lack capacity. Please see Table 1.

**SAFEGUARDS**

With the powers conferred on the donees and deputies and there is also a need to balance them with safeguards to protect the person who lacks capacity. The Act sets limits and restrictions as to what the donees and deputies can or cannot do. Some of the key safeguards are highlighted below.

**Ill-Treatment and Willful Neglect**

Under the MCA, acts of ill-treatment and/or willful neglect towards the person who lacks capacity will be treated as criminal offences. Any caregiver, donee or deputy found guilty of such an offence can be imprisoned, fined or both.

Ill-treatment of an incapacitated person is defined in the MCA to consist of acts that will cause the victim to experience:

- 1) Unnecessary physical pain, suffering or injury;
- 2) Emotional injury;
- 3) Injury to health and/or development.

Ill-treatment can be carried out in the following ways:

- 1) Physical abuse, for example hitting or other forms of violence;
- 2) Sexual abuse, for example rape or molestation;
- 3) Financial abuse, for example financial fraud;
- 4) Psychological abuse, for example verbal abuse or threats of harm;
- 5) Willful and unreasonable neglect, for example ignoring the basic health and physical care needs.

**TABLE 2 : List of Excluded Decisions by Proxy Decision Maker (Donee) Under the Mental Capacity Act**

Consenting to marriage
Consenting to touching of a sexual nature
Consenting to divorce being granted on the basis of 3 years separation
Consenting to adoption
Adopting or renouncing a religion
Receiving treatment for change of gender
Decisions relating to sexual sterilization
Decisions relating to abortion
Registering or withdrawing an objection under Human Organ Transplant Act
Making or revoking an advance medical directive under the Advance Medical Directive Act
Making or revoking a gift of a body or any part thereof under Medical (Therapy, Education and Research) Act
Making or revoking a nomination under the Central Provident Fund Act

**Excluded Decisions**

There are some decisions that are so sensitive or sacred that no proxy decision maker would be able to make on behalf of the person who lacks mental capacity. These are known as “Excluded Decisions” and as shown in Table 2.

**Office of the Public Guardian**

The Office of the Public Guardian (OPG), headed by the Public Guardian, is set up under the MCA to provide a range of functions that contribute towards the protection of persons who lack capacity. Such functions include:

- 1) Providing information to help potential donors understand the importance of planning in advance and making an LPA;
- 2) Setting up and maintaining of a register of LPA and court orders appointing deputies;
- 3) Supervising court-appointed deputies;
- 4) Receiving reports from donees and deputies;
- 5) Dealing and investigating complaints relating to how a donee or a deputy is discharging his duty.

The OPG is supported by a Board of Visitors (BOV), who looks into the well being of the person who lacks capacity as well as provides independent advice on matters relating to donees and deputies, as requested by the Court or the Public Guardian. Included in the BOV are Special Visitors who are approved and registered healthcare professionals with special knowledge and experience in cases of impairment or disturbance of the mind or brain.

**CAREGIVERS**

The MCA also provides statutory protection for formal and informal caregivers who have discharged their duties without negligence and in the best interests of the mentally incapacitated. This protection covers both civil and criminal liability.

The protection is especially important for informal caregivers, who are most likely family members of the person who lack capacity. This allows them to confidently discharge their duty of care, without fear of being criminalised, as long as they are acting in the best interests of the person.

**Whistleblower Protection**

The MCA grants immunity to healthcare service professionals from civil or criminal liability when they alert the Public Guardian to cases of ill-treatment or willful neglect of a mentally incapacitated person. This immunity applies as long as such disclosure was made in good faith.

**WHAT DOES THIS MEAN TO THE MEDICAL PRACTITIONER?**

- 1) In order to conduct a formal assessment on mental capacity, medical practitioners would need to attend a training course organised by the College of Family Physicians Singapore, and pass a test to qualify to be on the panel list maintained by the OPG.
- 2) Registered medical practitioners would need to apply the two-stage capacity assessment framework (see subsection “Assessment of Capacity” under section “Guiding Principles”) and the principles of the Act (see Table 1) in carrying out mental capacity assessments.
- 3) There are statutory protections for healthcare workers, including medical practitioners as long as they act in the best interests of the person lacking mental capacity.

**CONCLUSION**

At the heart of the MCA lie three basic tenets: choice, dignity and the social safety net. This legislation is a small piece of safety net for people as they age, to ensure that the people can age with dignity and also have access to the property and assets they have built up to maintain them during their life.

**REFERENCES**

1. Mental Capacity Act 2008 < <http://statutes.agc.gov.sg> >
2. Ministry of Community Development, Youth and Sports – Mental Capacity Act 2008 < <http://www.mcys.gov.sg/mca2008> >

## ANNEX A

## GLOSSARY OF TERMS

S/N	TERM	DEFINITION
1.	Donor	A person who makes a Lasting Power of Attorney.
2.	Donee	A person who receives authority under a Lasting Power of Attorney to make decisions about the donor's personal welfare and/or property and affairs or specified matters concerning those areas, when the donor no longer has capacity to make such decisions.
3.	Court-appointed Deputy	In the absence of a donee, where on-going decisions have to be made on behalf of the person who lacks capacity, the Court may appoint a deputy to act or make decisions on behalf of the individual.
4.	Lasting Power of Attorney	A power of attorney created under the Mental Capacity Act, in which the donor confers on the donee authority to make decisions about the donor's personal welfare and/or property and affairs or specified matters concerning those areas, when the donor no longer has capacity to make such decisions.
5.	Office of the Public Guardian	This Office supports the Public Guardian in carrying out his function, which includes keeping a register of Lasting Powers of Attorney & court orders appointing deputies, supervising deputies, investigating any complaints about donees or deputies and public education.
6.	Board of Visitors	The Board of Visitors supports the Public Guardian to check on the general well-being of person who lacks capacity. When requested by the Court or the Public Guardian, submits a report on how the donee or deputy has discharge his duties. The Board comprises Special Visitors (medical professionals with specialized knowledge) and General Visitors.
7.	Persons who lack capacity	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, due to an impairment of, or a disturbance in the functioning of the mind or brain.

## LEARNING POINTS

- **MCA empowers individuals while they still have capacity, to plan in advance for a time when they may lack the capacity to make decisions for themselves, with respect to the areas of personal welfare and financial matters.**
- **Under the Act, a person is defined to lack capacity if he is unable to make a decision or take an action for himself at the time the decision or action needs to be made.**
- **Three basic tenets of Mental Capacity Act: choice, dignity and the social safety net.**
- **Under the Act, individuals who wish to make advance plans for themselves can do so through a new statutory document known as the Lasting Power of Attorney (LPA).**
- **The Lasting Power of Attorney (LPA) gives legal authority to donee(s) to carry out matters on behalf of the donor.**